

GAHC010105452023



THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : Crl.A./167/2023

REKHMAL ALI BARBHUIYA @ MD. REKHMAL ALI AND 5 ORS.
S/O MD. SAMAN ALI,
RESIDENT OF VILLAGE DALIDAHAR GRANT, PS PANCHGRAM, DIST
HAILAKANDI, ASSAM

2: SAMRUN NESSA LASKAR @ MUSST. SAMRUN NESSA
W/O MUJIBUR RAHMAN
RESIDENT OF VILLAGE DALIDAHAR GRANT
PS PANCHGRAM
DIST HAILAKANDI
ASSAM

3: AZMAT ALI BARBHUIYA @ MD. AZMAT ALI
S/O MD. SAMAN ALI

RESIDENT OF VILLAGE DALIDAHAR GRANT
PS PANCHGRAM
DIST HAILAKANDI
ASSAM

4: FATAR ALI BARBHUIYA @ MD. FATAR ALI

S/O MD. SAMAN ALI

RESIDENT OF VILLAGE DALIDAHAR GRANT
PS PANCHGRAM
DIST HAILAKANDI
ASSAM

5: SANGUL ALI CHOUDHURY @ MD. SANGUL @ SARIMUL HAQUE
S/O ABDUL MALIK CHOUDHURY
RESIDENT OF VILLAGE DALIDAHAR GRANT
PS PANCHGRAM
DIST HAILAKANDI

ASSAM

6: ABDUL MALIK CHOUDHURY @ MD. ABDUL MALIK
S/O LATE ARJAD ALI

RESIDENT OF VILLAGE DALIDAHAR GRANT
PS PANCHGRAM
DIST HAILAKANDI
ASSA

VERSUS

THE STATE OF ASSAM AND ANR.
REPRESENTED BY PP ASSAM

2:ABDUL REJAK CHOUDHURY
S/O HAJI IBRAHIM ALI CHOUDHURY

VILLAGE PANCHGRAM
PS AND DIST HAILAKANDI
ASSAM 78880

Advocate for the Petitioner : MR. A M BARBHUIYA

Advocate for the Respondent : PP, ASSAM

BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA
HONOURABLE MR. JUSTICE MRIDUL KUMAR KALITA

For the appellants	: Mr. A.M. Barbhuiya, Advocate
For State respondents	: Ms. B. Bhuyan, Senior Counsel and APP.
Date of hearing	: 21.09.2023.
Date of judgment	: 13.12.2023.

JUDGMENT AND ORDER

(CAV)

(K.R. Surana, J.)

Heard Mr. A.M. Barbhuiya, learned counsel for the appellants.
Also heard Ms. B. Bhuyan, learned Senior Counsel as well as learned Additional
Public Prosecutor appearing for the State of Assam.

2. Aggrieved by the impugned judgment and order of sentence dated 06.05.2023 passed by the learned Additional Sessions Judge, Hailakandi in Sessions Case No. 147/2018 the present appeal has been filed under Section 374 (2) of the Code of Criminal Procedure, 1973.

3. By the impugned judgment, the appellants were convicted of committing offence under Sections 148/447/ 149/302/149 of the Indian Penal Code and sentenced to suffer simple imprisonment for a period of 6 (six) months. For committing of offence under Section 148 of the Indian Penal Code the reference were sentenced to suffer simple imprisonment for a period of 1 (one) month for committing the offence under Sections 447/149 of the Indian Penal Code, the appellants were convicted and sentenced to suffer rigorous imprisonment for a period of 15 (fifteen) years and also to pay a fine of Rs. 2,000/- each with default stipulation for committing the offence under Sections 302/149 of the Indian Penal Code.

4. In brief, the case of the prosecution is that on 15.10.2010, at about 11:00 AM, the appellants, herein along with Mujibur Rahman and Hannan, by forming an unlawful assemble had entered into the farm house of the complainant and they had inflicted one cut injury on the hand and ear of the care taker, namely, Safiqur Rahman and tried to kill him. It was projected that the matter was reported to the police at Panchgram Police Out Post under Algapur Police Station and the victim was taken to Kalinagar Hospital for treatment with the help of police from where he was referred to Silchar Medical College & Hospitals and later, on 18.10.2020, at about 10:00 AM taking advantage of the illness of the victim, the appellants and other two accused entered into the farm house of the complainant, broke open the door of the guard's room which was under lock and key and took away the betel-vine, betel-

nut, bamboo tree etc. therefrom and stolen the articles and occupied the house which is stated to be value added around Rs. 7,000/- to Rs. 8,000/- and the value of the betel-vine, betel-nut and bamboo was about Rs. 50,000/-. The said FIR was received as Panchgram O.P. GD Entry No. 276, dated 19.10.2010 and forwarded to the Officer-In-Charge of Algapur Police Station for registering a case and accordingly, Algapur P.S. Case No. 250/2010 under Sections 147/148/149/447/448/325/326/ 379/380/302 of the Indian Penal Code was registered. It appears that subsequently Panchgram Police Out-post was upgraded to Panchgram Police Station and the said case was re-registered as Panchgram P.S. Case No. 35/2012 dated 15.03.2012 under Sections 147/148/149/447/448/325/326/ 379/380/302 of the Indian Penal Code.

5. It appears that after registration of the case, the victim had expired. After the accused charge for the offence, two accused persons, namely, Hannan Rahman and Mujibur Rahman could not be apprehended and by an order dated 04.10.2018 the case against these two accused persons was filed. In so far as 6 (six) appellants are concerned, furnishing them with the copies as required under Section 207 of the Code of Criminal Procedure, 1973, the learned Judicial Magistrate First Class, Hailakandi, by an order dated 14.11.2018, committed the case to trial before the Court of learned Sessions Judge, Hailakandi and the trial was assigned to the Court of learned Additional Sessions Judge, Hailakandi and the charges under Sections 147/148/149/447/448/325/326/379/380/302 of the Indian Penal Code were framed against all the appellants and charges were read over and explained to them to which they pleaded not guilty and claimed to be tried.

6. The prosecution examined 10 (ten) witnesses namely, Md. Abdur Rejak Choudhury (PW-1), Must. Alfatur Nessa (PW-2), Md. Jamal Uddin (PW-3),

Md. Abdul Malik Barbhuiya (PW-4), Sri Karim Uddin Choudhury (PW-5), Sri Nasir Uddin Choudhury (PW-6), Mr. Abul Hashim (PW-7), Sri Haran Acharjee (PW-8), Dr. Partha Pratim Deb (PW-9) and Mr. Subhash Chandra Das (PW-10), and they have exhibited the following 7 (seven) documents, being (i) Ejahar (Ext.P-1 proved by PW-1); (ii) Inquest Report (Ext.P-2 proved by PW-3); (iii) Seizure list (Ext.P-3 proved by PW-4); (iv) Medical report (Ext.P-4 proved by PW-9); (v) Post mortem report (Ext.P-5 proved by PW-9); Sketch-map (Ext.P-6 proved by PW-10); and Charge-sheet (Ext.P-7 proved by PW-10). It may be mentioned that no eye witnesses to the assault made upon the deceased/victim was examined by the prosecution.

7. On conclusion of the evidence of the prosecution's side, the learned Addl. Sessions Judge, Hailakandi had examined all the 6 (six) accused persons/ appellants, namely, (i) Md. Rekhman Ali Borbhuiya (appellant no. 1); (ii) Musstt. Samrun Nessa Laskar (appellant No. 2); (iii) Md. Fatar Ali Borbhuiya (appellant No.4); (iv) Md. Sungul Ali Choudhury (appellant no. 5); (v) Md. Abdul Malik Choudhury (appellant no.6); (vi) Md. Azmat Ali Borbhuiya (appellant No. 3) under Section 313 Cr.P.C. They all took the plea of total denial and stated that they did not want to examine defence witness. Accordingly, the defence did not examine any witness and no exhibits were proved.

8. The learned Trial Court, upon examination of the evidence on record had arrived at a conclusion that on 15.10.2010 at about 11.00 a.m. and on 18.10.2010 at about 10.00 a.m., the appellants had committed trespass over the farm house of Abdul Rejak Choudhury (informant/ complainant); assaulted Shafikur Rehman (the deceased); on the next day, the appellants had committed mischief in respect of the properties of the informant; and that on both the days, they were armed with sharp weapons and therefore, their

assemblage in such manner came within the ambit of 'unlawful assembly' as defined in section 141 of the IPC and as they were armed with deadly weapons and had committed 'rioting', their act comes within the ambit of section 148 of the IPC and their offence under section 147 CrPC would be merged therein. It was further held that the evidence on record revealed that as a result of the assault caused by the appellants Shafikur Rahman (deceased), who had initially sustained injuries had expired of the injuries and therefore, the offence under Section 135/149 would merge under Sections 302/149 of the IPC. The learned Trial Court had also held that the prosecution had failed to prove the charge against the appellants under Section 379/149 of the IPC.

9. Accordingly, the appellants were convicted for committing offence under Section 148 as well as under sections 447/149 and under sections 302/149 of the IPC. After hearing the appellants on sentence, the appellants were sentenced to undergo (i) simple imprisonment for a period of 9 (six) months for the offence under section 148 of the IPC; (ii) rigorous imprisonment for a period of 1 (one) year for offence under Section 447/149 of the IPC; and (iii) rigorous imprisonment for 15 (fifteen) years and also to pay a fine of Rs.2,000/- (Rupees two thousand only) each, in default of which to suffer simple imprisonment for a further period of 15 (fifteen) days for the offence under Section 302/149 of the IPC. The sentences were ordered to run concurrently and the period spent in judicial custody during investigation and trial was ordered to be set off from the period of sentence imposed.

10. The learned counsel for the appellants had submitted that the injury was allegedly caused on 15.10.2010, but the deceased, who was then injured, was not taken to any medical clinic or hospital and he later on died on 20.10.2010. Thereafter, the *ejahar* (FIR) was lodged on 19.10.2010. It was

submitted that there are different version of prosecution witnesses on the date of death of the deceased. It was also submitted that the description of assault on the deceased was not confirmed by post mortem report and inquest report and thus, the FIR was unreliable and the evidence of PW-1 had to be discarded as he was a hearsay witness and his deposition was false. It was submitted that the evidence of PW-2 was also not believable because there is no way that she could have identified all the six appellants from a long distance of another *tilla* (small hillock). Moreover, it was submitted that as per the version of PW-2, she was informed by two boys that the appellants were assaulting the deceased, but the said two boys who were purportedly eye-witness to the alleged assault made by the appellants were not examined by the I.O. and their respective identities were also not disclosed by any of the prosecution witness. The alleged weapon of assault was not seized or sent for forensic and/or serological examination. Hence, it was submitted that the appellants were convicted only on the basis of surmises and conjectures and that neither there was any eye-witness to the alleged incident and nor the chain of circumstances was shown to be complete. Accordingly, the learned counsel for the appellants had prayed for acquittal of the appellants. In support of his contentions, the learned counsel for the appellants had cited the following cases:-

- a. On proposition that unexplained delay in lodging the FIR was fatal for the prosecution – *State of Madhya Pradesh v. Ratan Singh & Ors., Ramji Surjya Padvi & Anr. V. State of Maharashtra, (2020) 12 SCC 630, (1983) 3 SCC 629.*
- b. Delay in lodging of FIR results in embellishment and exaggeration, which is a creature of after-thought – *Satpal Singh v. State of Haryana, (2010) 8 SCC 714.*

- c. FIR is not a substantive piece of evidence; and that statement under section 161 CrPC can be used for proving contradiction – *Baldev Singh v. State of Punjab, (1990) 4 SCC 692.*
- d. FIR can be used for corroboration with the maker of FIR – *C. Magesh v. State of Karnataka, (2010) 5 SCC 645.*
- e. If statement of witnesses under section 161 CrPC is found contradictory with their evidence before the Court, then the accused may be given the benefit of doubt – *Parvat Singh & Ors. v. State of Madhya Pradesh, (2020) 4 SCC 33.*
- f. The common object of unlawful assembly can be gathered from the nature of assembly, arms used by them and the behavior of the accused at or before the scene of occurrence. It is an inference to be deduced from the facts and circumstances of each case – *Roy Fernandes v. State of Goa & Ors., (2012) 3 SCC 221.*
- g. The Hon'ble Court may be pleased to determine as to whether the delay in lodging FIR was explained in the case which is a requirement of law. As per settled principle of law, unnatural and/or unexplained delay in lodging the FIR may cast a doubt over the prosecution case – *State of Madhya Pradesh V. Ratan Singh & Ors., (2020) 12 SCC 630.*
- h. The common intention and/or motive required to be proved to punish more than one accused persons for the same offence – *Suresh Sakharam Nangare V. State of Maharashtra, (2012) 9 SCC 249.*
- i. When there is no eye witness of the occurrence, the motive of the accused to be proved – *judgment and order dated 20.07.2023, passed by the Supreme Court of India in Criminal Appeal No. 437/2026 (Shatrughan V. State of Chattisgarh).*

- j. Doctor's evidence also to be appreciated like evidence of any other witness and there is no irrebuttable presumption that a Doctor is always a witness of truth – *Mayur Panabhai Shaj V. State of Gujarat, AIR (1983) SC 66.*
- k. The medical witness is not the last word on the subject. The medical witness needs to be tested by the learned court. Moreover, due to contradiction in FIR, the prosecution case may be doubted. The accused committed the crime, it is not enough, but the case of prosecution sought to be made out must be established – *State of Uttarakhand V. Darshan Singh, (2020) 12 SCC 605.*
- l. The expert opinion is not binding for the Hon'ble Court. The injuries were proved, but due to contradiction, the accused were acquitted – *Awadhesh & Anr. V. State of Madhya Pradesh, (1988) 2 SCC 557.*
- m. In the case of circumstantial evidence, the prosecution is obliged to prove each and every circumstance beyond reasonable doubt – *Jabir & Ors. V. The State of Uttarakhand, (2022) Live Law (SC) 41.*
- n. The burden lies on the prosecution to prove the allegation beyond all reasonable doubt. In contradistinction to the same, the accused has only to create a doubt about the prosecution case and probability of its defence. The accused is not required to establish or prove his defence beyond all reasonable doubt, unlike the prosecution – *judgment and order dated 15.12.2021, passed by the Supreme Court of India in Criminal Appeal No. 434-436/2020 (Jaikam Khan V. The State of Uttar Pradesh).*
- o. Due to contradiction of injured witness with medical evidence, the

accused may be acquitted. The injuries may be proved, but due to contradiction the accused may be acquitted – *Kathi Odhabhai Bhimabhai & Ors. V. State of Gujarat, 1993 Supp (3) SCC 421.*

p. The injuries may be proved, but due to contradiction, the prosecuted accused persons may not be held guilty – *Purshottam & Anr. V. State of Madhya Pradesh, 1980 (Supp) SCC 409.*

q. In appropriate case the Hon'ble higher judiciary may be pleased to alter punishment from 304 Part-I/149 IPC to 326/149 of I.P.C. – *Tukaram & Ors. V. State of Maharashtra, (2011) 14 SCC 250.*

r. In the appropriate case, the Hon'ble higher judiciary may punish the accused under section 323 of IPC instead of 302 IPC - *judgment and order dated 17.05.2022, passed by the Hon'ble High Court of Rajasthan in Criminal Appeal No. 304/2019 (Fula @ Fulchand V. State, through PP).*

11. The learned Addl. P.P. had submitted that the witnesses examined by the prosecution had proved the case beyond reasonable doubt because in after the assault, the wife of the deceased (PW-2) had seen all the 6 (six) appellants returning from the land of the informant and during that time she was informed by two boys that her husband was being attacked by the appellants and thus, when she was running towards the place of occurrence, she was also assaulted by the appellants with a *lathi*. Hence, it was submitted that the chain of circumstances was complete in this case and led to no other hypothesis that none other than the appellants had committed the crime of assaulting on the deceased as a result of which he had died.

12. In support of her submissions, the learned Addl. P.P. had cited the

following cases:-

- a. If a witness is absolutely reliable then conviction based thereupon cannot be said to be infirm in any manner; and that delay in receipt of FIR with concerned Magistrate cannot be a reason to disbelieve prosecution case, *Ravasaheb @ Ravasahebgouda & Ors. V. State of Karnataka, (2023) 3 Supreme 461*.
- b. In case of omission or error in framing a charge, accused has to show failure of justice/prejudice caused thereby; also that mere non-framing of a charge under Section 149 on face of charges framed against appellant would not vitiate conviction in absence of any prejudice caused to them; also that a mere defect in language, or in narration or in form of charge would not render conviction unsustainable, provided accused is not prejudiced thereby; and that if ingredients of section are obvious or implicit in charge framed then conviction in regard thereto can be sustained, irrespective of fact that said section has not been mentioned; also that even if role attributed to respondent -accused was that of hitting deceased by a hockey stick, in that case also for act of other persons, who were part of unlawful assembly of inflicting knife blow, respondent accused can be held guilty of having committed murder of deceased with aid of Section 149 IPC - *State of Uttar Pradesh v. Subhash @ Pappu, (2022) 6 SCC 508*.

13. We have examined the LCR and considered the submissions made by the learned counsel for the appellant as well as the learned Addl. P.P. and have also considered the cases cited by both sides at the Bar.

Evidence of the prosecution:

14. In his examination-in-chief, Abdur Rejak Choudhury (PW-1) has

stated that he was informed on 15.10.2010 at about 11:00 AM by the son of the victim that the appellants herein had come to a group armed with deadly weapons and while trespassing into his farm house assaulted the victim as a result of which he sustained cut injuries on one hand and one ear. He went to the place of occurrence and found the victim lying on the ground in an injured condition with profuse bleeding. He had told the incident to the Panchgram Police Station and through the police the victim was treated at Sarojini Block Public Health Center, Kalinagar and from where, he was referred to Silchar Medical College & Hospital for his treatment. However, the victim had died because of the injuries on 19.10.2010 and thereafter, the appellants again trespassed into his farm house and took away betel nuts, betel trees etc. and thereafter entered into the house of the deceased by breaking the lock door and trespassed into the said room and looted all the articles. In his cross-examination PW-1 had stated that he had not explained the reasons for delay in lodging of the FIR and stated that he was busy in forwarding treatment to the deceased and the victim. He denied the suggestion that no treatment was provided to the victim at Kalinagar, PHC as well as Silchar Medical College & Hospital, Silchar and he has also denied that the victim did not died due to assault on him by the appellants.

15. Alfatur Begum Choudhury, who is the wife of the victim was examined as PW-2 and she has stated that on the day of occurrence which was Friday at about 11:00 AM her husband was in duty in the house of the informant as *chowkidar* and that she was in her house which are intervened by three numbers of tilla (lock) and at that time two small boys came to her home and informed that the appellants were assaulted her husband and on reaching the nearest tilla at the place of occurrence she saw the appellants coming back

from the house of the complainant (PW-1) and they were armed with *lathi*, *dao*, etc. and when she was reaching to the place of occurrence, two of the appellants, namely, Fatar Ali Barbhuiya and Abdul Malik Choudhury assaulted her with a lathi and on reaching at the place of occurrence, she saw her husband was lying on the ground with injuries and unconscious state with profuse bleeding. She has stated that thereafter, the police came and took her husband to Kalinagar Hospital and thereto, he was shifted to Silchar Medical College & Hospital, Silchar. The doctors of Silchar Medical College & Hospital, Silchar told them to take her husband back to home as no scope of recovery and after four days of the incident her husband had died and thereafter, the police brought the dead body for post-mortem examination and inquest were conducted. In her cross-examination, PW-2 had stated that there are houses of some nearby people in the place of occurrence. She had stated that she was informed by Jakir, her grandson and Nurul Hussain and when she reached the place of occurrence, she had seen accused persons, namely, Abdul Malik Choudhury, Sungul, Rehman Ali, Ajmat Ali, Fatar Ali and Samarun Nessa returning from the place of occurrence armed with *dao*, *lathi*, etc., and that when she was running to the place of occurrence, she was assaulted by accused Fatar and Malik with a *lathi*. She had stated that during her presence, police had arrived at about 12:20 pm. She had denied that she had not told the police that two small boys came to her home and informed about that the accused persons were assaulting her husband in the house of the informant. She had denied that she had falsely stated that her husband was treated at Kalinagar Hospital and SMCH and she had also denied that her husband had died a natural death and that out of personal grudge, the complainant had lodged a false case against the accused persons.

16. Jamal Uddin, who was examined as PW-3, had stated that the deceased, Safiqur Rahman was his own uncle. In his examination-in-chief, he had stated about 10/12 years back at about 12.00 noon, while returning from teak plantation to his home, he heard hue and cry in the newly purchased land of the informant and he went there and found his uncle lying on the floor of his house in unstable condition, who had informed him that Abdul Malik (appellant no. 6) and Mujibur had assaulted him. He had not seen any external injury. Then he saw appellant no. 6 leaving the newly purchased betel nut garden of the informant. He then informed the informant and on his instructions, he had taken his uncle to Panchgram P.S. and then to Kalinagar Hospital and on being discharged, he was taken to his original house and that after a week he died. The police held inquest in his presence and the dead body was taken to S.K. Roy Civil Hospital, Hailakandi. He had proved Inquest report (Ext.2) and his signature [Ext.2(1)] thereon. There was no cross examination of PW-2 to discredit his statement of having seen the appellant no. 6 leaving the place of occurrence. He had stated in his cross-examination that the complainant was also his uncle and he denied that he had deposed falsely on being tutored by the complainant.

17. Abdul Malik Barbhuiya (PW-4) was a seizure witness and had exhibited the seizure list (Ext.3) and his signature [Ext.3(1)] thereon. In his examination-in-chief, although he had stated that the police had taken his signature on a piece of paper, but in his cross-examination, he had stated that something was written on it, but its content was not read over to him. He had also stated that the police had taken the signature of Selim.

18. Karim Uddin Choudhury (PW-5) was the son of the deceased. He had stated in his examination-in-chief that about 4/5 years back one day in the

afternoon he was informed that the appellants had assaulted his father in the betel nut garden of the complainant. Thereafter, he finished his work and went to his home and on his way, he found his father in an ambulance and he was informed that from SMCH, Silchar, he was taken back. He had seen injury marks on the body of his father. The complainant had told him to take his father to SMCH after 2 (two) days, but after one day, at night, his father had died in his house. He had stated that the police came and conducted inquest in respect of the dead body of his father and that he had put his thumb impression on the inquest report. In his cross-examination, he had stated that he cannot say the place where his father had received treatment. He denied that the inquest was conducted 5 (five) days after the incident. He denied the suggestion that the appellants had not assaulted his father and that his father did not die due to assault of the appellants.

19. Nasir Uddin Choudhury (PW-6), who is also the son of the deceased. His statement in his examination-in-chief was similar to that of PW-5. He had exhibited the inquest report (Ext.2) and his signature [Ext.2(2)] thereon. He did not see the incident but stated that his mother Alfatur Nessa, sister Rushna Begum and his neighbouring people including his cousin Sobur and Samir told him that on hearing hue and cry when they had gone to the place of occurrence, they found Mujibur Rahman @ Gurawala, his son namely, Mannan, the wife of Gurawala, Abdul Malik (appellant no.6), Rahman Ali (appellant no.1), Ajmat (appellant no. 3) and Fatar Ali (appellant No.4) armed with dagger, dao, lathi, etc. coming out from the place of occurrence and his mother also told him that his father was lying on the ground in a pool of blood. In his cross-examination, PW-6 had stated that they did not lodge the FIR on the day of occurrence and could not say the place in Silchar where his father

had received treatment. He had stated that on the day of occurrence, case was filed before police and that on the day of occurrence the police had visited the place of occurrence. He had put signature on the inquest report at Hailakandi. He had denied that inquest did not take place 5 (five) days after the date of occurrence. He had denied the suggestion that the appellants had not assaulted his father and that his father did not die due to assault of the appellants or that he had deposed falsely that his mother, sister and neighbouring people reported to him that they found the accused coming out of the place of occurrence after assaulting his father.

20. Abdul Hasim was examined as PW-7. The place of occurrence was in front of his house. He was sitting in a shop in front of his house, when some persons had taken away the deceased by a Van and prior to that the deceased had drank water from the shop where he was sitting and he told that Abdul Hannan and Abdul Malik had physically assaulted him and had not stated the name of any other person. He had stated that the deceased was taken to hospital and he heard that after 3-4 days, the deceased had died in his residence. The police had recorded his statement. In his cross-examination, he had stated that the time was 11:00 or 12:00 noon. He had denied the suggestions that his statement about deceased telling him that Abdul Hannan and Abdul Malik had physically assaulted him was false or that he had deposed falsely.

21. Haran Acharjee, a deed writer was examined as PW-8, he was the scribe of the *ejahar*. He had exhibited his signature [Ext.P-1(2)] thereon. In his cross-examination, he had stated that he had no personal knowledge of the incident.

22. The Medical Doctor (Ayur) of Sorojini PHC was examined as PW-

9. He had exhibited his medical examination report (Ext.P-4) (under objection) and his signature [Ext.P-4(1)] thereon. He had also exhibited post mortem report (Ext.5), and the signature of Dr. Khairul Zaman Choudhury (since deceased) as [Ext.P-5(1)] and the signature of Joint Director of Health Services, Hailakandi [Ext.P-5(2)], which he knows as a colleague. In his cross-examination, he had stated that Ext.4 was a photocopy, which had no official seal and that he had not mentioned the nature of injury and had stated that abrasion is a superficial injury which can be caused by falling also and that he had not mentioned about any fracture of the patient during that time, but denied that he did not examine the patient nor found any injuries on his person. He had further stated that the injuries in post mortem report may be caused if a person falls from a hill top.

23. Sri Subhash Chandra Das was examined as PW-10. On 15.10.2010, he was working as S.I. cum Officer-in- Charge of Panchgram Police Station. He had stated in his examination-in-chief that on 19.10.2010, an *ejahar* was lodged by Abdul Rejak Choudhury before the Panchgram Police Outpost under Algapur P.S. and the case was registered as Algapur P.S. Case No. 250/2010 under sections 147/148/149/447/448/325/326/379/380 IPC. It was stated that subsequently, Panchgram Police Outpost was designated as Panchgram P.S. and on transfer of the case due to jurisdictional change, he had registered the case as Panchgram P.S. Case No. 35/2012 under sections 147/148/ 149/447/448/325/326/379/380/302 IPC. He had stated that as per the *ejahar*, on 15.10.2010 at about 11.00 am, the accused persons had illegally entered into the farm house of the complainant located at Dalidhar, tied up the watchman, Safiqur Rahman and assaulted him brutally as a result of which he had become unconscious. The accused had cut down one hand and one ear of

Safiqur Rahman. The then I.O. Sri P.K. Rajbongshi (since deceased) had visited the place of occurrence, drew up a rough sketch map of the place of occurrence, recorded the statement of the available witnesses and seized one *jata* (a fishing hook like weapon), one sharp piece of bamboo and one bamboo stick. He had stated that record reveals that the injured Safiqur Rahman had died on 20.10.2010 at about 4.00 am. Subsequently, the I.O. had made arrangement for inquest and for post mortem examination of the dead body and on completion of investigation, the I.O. had submitted charge-sheet against the appellants under sections 147/148/149/447/448/325/ 326/379/380/302 of the IPC. He had exhibited Seizure list (Ext.P-3) and signature of Sri P.K. Rajbongshi [Ext.P-3(2)]; Inquest report (Ext.P-2) and signature of Sri P.K. Rajbongshi [Ext.P-2(3)]; Sketch map (Ext.P-6) and signature of Sri P.K. Rajbongshi [Ext.P-6(1)]; and Charge-sheet (Ext.P-7) and signature of Sri P.K. Rajbongshi [Ext.P-7(1)].

24. In his cross examination, the PW-10 had stated that the FIR was registered in Panchgram Police Outpost vide GDE No. 278 dated 19.10.2010 and thereafter, forwarded to Algapur P.S. on that day. He had stated that the case diary did not reveal any GDE on 15.10.2010 in connection with the said case. He had stated that as per the *ejahar*, one hand and one ear of the deceased was chopped off, but the record does not reveal recovery of the same. He had stated that the seizure list was not got 'seen' by the learned C.J.M. and that the case diary does not disclose any mark of violence in the place of occurrence or recording of statement of Abdul Mannan, which is mentioned in Ext.P-6. He had also stated that the PW-1 had not stated before the I.O. that the son of Safiqur Rahman informed him that the accused persons assaulted Sofiqur in his house and chopped his ear and hand off. PW-1 had also not stated before the I.O. that

after getting information he verbally informed the same to Panchgram Police and along with police he went to his house at Dhalidahar where he saw Safiqur Rahman lying on the ground in injured condition and thereafter he along with police had taken the injured to Kalinagar PHC. He had also stated in his cross-examination that PW-2 had not stated before the I.O. that two small boys came to her house and informed that the accused persons were assaulting her husband in the house of the complainant. Immediately she started proceeding towards the place of occurrence and from the top of the *tilla* (hillock) of the place of occurrence, from top of the *tilla*, she saw the accused persons namely, Abdul Malik Choudhury, Sungul, Rahman Ali, Ajmat Ali, Fatar Ali and Samarun Nessa were returning back from the house of the complainant armed with *dao*, *lathi*, etc. and when she started running towards the place of occurrence, the accused persons, Fatar and Malik assaulted her with a *lathi*. He had also stated that PW-3 did not state before I.O. that his uncle Safiqur was working as a *chowkidar* in the newly purchased land of the complainant. He had also stated that the PW-7 did not state before the I.O. that some people have taken away Safiqur Rahman in an injured condition by a van and prior to that Safiqur Rahman drank water from the shop where he was sitting and at that time Safiqur Rahman stated that Abdul Hannan and Abdul Malik physically assaulted him. He had stated that he had only registered the case after its transfer from Algapur P.S. to Panchgram P.S. and he had denied that charge-sheet was filed against accused persons perfunctorily without proper investigation.

25. On conclusion of evidence of the prosecution, the learned Trial Court had examined all the appellants under section 313 of the Cr.P.C.

Description of injuries on the deceased:

26. The PW-1 saw that the hands and ear of the deceased were cut.

The PW-6 saw his father lying on the ground in a pool of blood and PW-5 saw injuries on his father while he was in ambulance. However, PW-3 did not see any external injuries on the deceased. However, the inquest report.

27. As per inquest report marks of injuries are seen in the left side of the head and back of the ear. A black mark of injury was seen on his back elbow and old marks of injury were seen in his back and waist. Bruises were seen on both his knee.

28. As per the medical examination report dated 17.10.2010 (Ext.4), the deceased (then injured) was referred by Panchgram Police Outpost for medical examination at Sorojini PHC, Kalinagar on 15.10.2010 at 1:15 pm, and there were (1) multiple abrasions of various sizes over the left ear, (2) multiple abrasions of various sizes over the right forearm (both anterior and posterior aspect), and (3) tenderness over the hip joint. After giving first aid treatment, of (i) Injection Tetanus Toxoid, (ii) injection Tramadol 100 mg., and (iii) dressing, the patient was referred to SMCH.

29. As per the post mortem report, the examination was conducted at 12:16 pm to 02:30 pm on 20.10.2010 and rigor mortis was positive on all the limbs. The following wounds were found on the dead body:

“I-EXTRANAL APPERANCE

1. Condition of subject stout emaciated, decomposed etc:

Build average height, 171 cm. Rigor mortis is positive on all the limbs. The external injuries are clean.

2. Wounds-position, and character:

1) One partially healed bruise of size 5.3 cm in diameter is seen on the left temporal region of the scalp just behind and above the left ear.

2) One stitched wound of length 6.4 cm with irregular edges is seen on the middle

of the back of the left forearm. The wound is partially healed.

3) One partially healed bruise of size 7.6 cm x 2.4 cm is seen running transversely from the left nipple on the left chest.

4) One partially healed bruise of size 7.8 cm x 2.5 cm is seen on the left scapular region running vertically.

5) One partially healed bruise of size 8.6 cm x 2.5 cm seen on the lower (illegible) on the left lumba region.

3. **Bruise Position size and nature:**

4. **Mark of ligature on neck dissection, etc.:** NIL

II-CRANIUM AND SPINAL CANAL

1. **Scalp, Skull, Vertebrae:** One bruise as mentioned above. The (illegible) portion of the left temporal bone is found fractured, the fracture line is running vertically. Some clotted blood is seen over the temporal bone.

2. **Membrane:** The membrane over the temporal region of the left cerebral hemisphere is found bruised and covered with 138 grams of clotted blood. The left middle maningeal artery is found ruptured.

3. **Brain and and spinal cord:** The temporal region of the left cerebral hemisphere is found depressed by the extra dural blood clots. The spinal cord is healthy.

III- THORAX

1. **Walis ribs and cartilages:** Healthy

2. **Pleurae:** Healthy

3. **Laryax and trachea:** Healthy

4. **Right lung:** Healthy

5. **Left lung:** Healthy

6. **Pericardium:** Healthy

7. **Heart:** Healthy. The right side is full of dark coloured liquid blood. The left side is found empty.

8. **Vessels**: Healthy

IV-ABDOMEN

1. **Walls**: Healthy

2. **Peritonoum**: Healthy

3. **Mouth, pharyanx, oesophagus**: Healthy

4. **Stomach and its contents**: Healthy and contained partially digested food particles.

5. **Small intestine and its contents**: Healthy

6. **Large intestine and its contents**: Healthy

7. **Liver**: Healthy

8. **Spleen**: Healthy

9. **Kidneys**: Healthy

10. **Bladder**: Healthy and contained 35 ml of straw coloured urine.

11. **Organs of generation external and internal Healthy**: Healthy

V-MUSCLES, BONES AND JOINTS

1. **Injury**: As mentioned above

2. **Disease or deformity**: X

3. **Fracture**: As mentioned above

4. **Dislocation**: X

MORE DETAILED DESCRIPTION OF INJURY OR DISEASE

The findings are ante mortem in nature.

The history of alleged assault on 15/10/10 with the bruise on the left temporal region proves that the injury was grievous in nature as it resulted in fracture of the left temporal bone and rupture of the left middle maningeal artery. The rupture of the left middle maningeal artery resulted in gradual and constant haemorrhage which caused the massive extradural haemorrhage and 138 gms of clotted blood. When the intracranial pressure increased the victim must have lost consciousness and subsequently died due to coma.

OPINION OF ASSISTANT SURGEON AS TO CAUSE OF DEATH
SUB-ASSISTANT SURGEON

In my opinion death was due to coma following massive extradural intracranial haemorrhage following grievous head injury caused by blunt object."

30. In the opinion of the Assistant Surgeon death was due to coma following massive extradural intracranial hemorrhage following grievous head injury caused by blunt weapon.

Nature of treatment provided to the deceased between 15.10.2010 and 20.10.2010:

31. It is seen from the medical examination report dated 15.10.2010 (Ext.4) that the deceased was given two injections and his wounds were dressed. However, the prosecution had not proved any medical or other document showing that any treatment whatsoever was provided to the deceased after his initial treatment on 15.10.2010 till the deceased had died on 20.10.2010.

32. As per the evidence of PW-2, the doctor of SMCH had asked her to take her injured husband home and directed her to provide him food which he liked as there was no scope for recovery. Thus, as per the evidence of PW-2, the deceased was not given any treatment either in SMCH or at home. As per evidence of PW-3, after being discharged from Kalinagar Hospital, the deceased was brought original village home and he died after a week. As per the evidence of PW-5 and 6, after return from SMCH, the PW-5 had brought their father home as per advice of the informant, and their father died after a day. Thus, from the evidence tendered by the PWs, no treatment whatsoever was provided to the deceased notwithstanding the projection made by the PW-2 that the doctors at SMCH had told her that there was no chance of recovery. In the

absence of proof tendered in respect of any medical document from Kalinagar PHC or from SMCH, there is no evidence on record that the doctors at SMCH had given such an advice to the effect that there was no chance for survival of the deceased.

33. As per the medical certificate dated 17.10.2010 (Ext.P-4), the deceased was referred to SMCH, but the prosecution did not prove the referral document, which was purportedly accompanying the deceased (then injured), while he was being taken to SMCH. The arrival of the deceased at SMCH, Silchar on any date between 15.10.2010 and 20.10.2010 is also not proved by the prosecution by exhibiting any money receipt of SMCH and/or any other admission document or prescription or advice-slip from the SMCH.

34. Thus, the deceased was kept at home. As per the post mortem report (Ext.P-5), 138 gram blood got clotted on the membrane over temporal region of the left cerebral hemisphere. Therefore, a general impression is gathered from the post mortem report that despite history of alleged assault on the deceased, and loss of consciousness, with sign of bruises, fracture of left temporal bone, he was not admitted in any PHC, hospital, etc., from 15.10.2010 to 20.10.2020 for reasons which has not been explained by the prosecution. Thus, it appears that the proximal cause of death was not the injuries suffered by the deceased, but it was lack of treatment which appears to have lowered the chance of his survival and that lack of treatment had expedited the death of the deceased.

Date and time of death:

35. The time of death is also not conclusive because as per the inquest report (Ext.2), the deceased was being treated in his house and that he had died on 20.10.2010 at 4.00 pm. But as per the entries made in the post

mortem report, the examination of the dead body was conducted at 12:16 pm to 02:30 pm on 20.10.2010. As per PW-1, the deceased had died on 19.10.2010 at 5.00 pm. The PW-2 had stated that 4 (four) days after the incident, her husband had died, which makes the date of death as 19.10.2010. As per the son of the deceased (PW-3), the deceased died after 1 (one) week of the incident, which makes the date of death as 22.10.2010. As per the version of PW-5, he was asked to take his father to SMCH after 2 days, but his father died after one day at night, which makes the date of death as 17.10.2010. The son of the deceased (PW-6) had stated that the complainant told him to take his father to SMCH after 4 (four) days, but after 1 (one) day at night, his father had died, which makes the date of death of deceased on 17.10.2010. Thus, the date of death remains uncertain.

Weapon of assault:

36. As per the evidence of PW-10, a *jata* (a fishing hook like weapon) with bamboo handle (measuring 8 cubits) (at the bar, it was submitted that 8 cubits would be 12 feet); bamboo pole with pointed end measuring 5 cubits (i.e. about 9 feet); and a bamboo stick. The seizure was proved through Seizure list (Ext.3). But the prosecution did not show the alleged weapons of assault to PW-2 for confirmation that those were seen by her. The weapon of assault was also not shown to the doctor (PW-9) to ascertain from him if those weapons could cause the injuries/impact which was noticed in the inquest report and the post mortem report. Moreover, the alleged weapons of assault were not sent to FSL for serological examination. Thus, the prosecution had failed to prove that the alleged weapons seized vide Ext.3 were used in perpetrating the alleged crime.

Lack of any statement of the deceased:

37. The PW no. 1 is the complainant and PW nos. 2, 5 and 6, are the

wife and sons of the deceased. As per their evidence, the police was informed on 15.10.2010. PW-2 had stated that the doctors at SMCH had told that the deceased would not survive. Yet, the prosecution did not make any attempt to have the dying declaration of the deceased recorded. It is not the case of the prosecution that the deceased, while in injured condition could not talk. This is also inferred from the evidence of PW-2, who had stated that the doctors at SMCH had told her to give whatever food the deceased liked as he would not survive and thus, if as per doctor, an injured is able to eat, it cannot be presumed that the deceased was not in a position to speak. The FIR was lodged on 19.10.2010, but the police did not have the statement of the victim recorded by the jurisdictional Magistrate.

Delay in lodging of the FIR:

38. The alleged assault on the deceased took place on 15.10.2010. As per the evidence of PW-1, the appellants committed second set of offence against his estate on 18.10.2010, by trespassing and committing mischief of the properties of the informant. Yet, the FIR was lodged on 19.10.2010 at 8.30 pm as per entries made in the Form of FIR (Ext.1). There was again a third set of offence allegedly committed by the appellants, which was on 15.10.2010, when two of them i.e. appellant no. 4 and 6 had assaulted PW-2. Therefore, as per the evidence of PW-1, PW-2, PW-5 and PW-6, they were well aware of the identity of the accused persons, and there were three distinct and separate offence committed by the accused persons in a span of 4 (four) days, i.e. against the deceased on 15.10.2010; against the PW-2 on 15.10.2010; and against the property of the complainant on 18.10.2010 and yet the FIR was lodged on 19.10.2010. Thus, on all counts, the delay in lodging of the FIR remains not convincingly explained.

Point of determination:

39. In light of the discussions above, the point of determination arise for decision in this appeal is whether the alleged direct evidence of PW-2 inspire confidence of the Court, or whether there exists circumstantial evidence leading to the only view that the crime was committed by the appellants?

40. In this connection, if the evidence of prosecution is examined, the PW-10 had clearly stated that as per the record, no FIR or information to the police was given on 15.10.2010, by anyone regarding the alleged incident of murderous assault on the deceased.

41. Though the PW-2 claims that she was assaulted with *lathi* by Fatar and Malik (i.e. appellant no. 4 and 6) on 15.10.2010, when she was running towards the place of occurrence after being informed by two boys of the accused persons assaulting her husband. Yet, the PW-2 did not make any attempt to contact the police to inform them about the alleged assault on her by the appellant nos. 4 and 6 and she also did not lodge any *ejahar* before the police even after the doctors at SMCH had informed that her husband would not survive. Such a conduct is not natural.

42. It is not the case of the prosecution that the house where the deceased was taken on 15.10.2010, where he remained till he died on 20.10.2010, was at a remote and uninhabited area, for which no independent persons had visited the house of the deceased to enquire about his health and therefore, there was no witness who could come forward to give statement before the police that the deceased, while lying in injured condition, had stated that the appellants were the accused persons who had assaulted him.

43. It is most unlikely that when the deceased was taken to the

doctors at Kalinagar PHC and SMCH, he was unconscious because again it is unlikely that an unconscious victim of murderous assault would be turned out of hospital without treatment. The I.O. did not make any effort to record the statement of the doctors in the said two hospitals if the deceased had told them who had attacked him on 15.10.2010.

44. As per the opinion of the Assistant Surgeon, death was due to coma following massive extradural intracranial hemorrhage following grievous head injury caused by blunt weapon. The nature of injury, by itself, does not to a presumption of a murderous assault, because the doctor (PW-9), examined by the prosecution had stated that injuries mentioned in the post-mortem report may be caused if a person falls from a hilltop.

45. As per the statement by the PW-1 and PW-2 in their respective examination-in-chief, after being allegedly assaulted by the appellants, the deceased was lying on the ground in injured condition and he was profusely bleeding. The I.O. had not collected blood sample from the place of occurrence and thus, there was no occasion to send the blood sample for serological examination. No evidence of alleged assault could be collected from the place of occurrence.

46. As per the statement by the PW-1 in her examination- in-chief, she had been informed by two boys that her husband was being assaulted by the accused persons at the place of occurrence. According to her, she had stated that to the police when she was examined by the I.O., which was however, denied by the PW-10. However, the I.O. did not examine the said two boys. Therefore, as per PW-2, even though there were two eye-witnesses to the alleged assault on her husband, those eye witnesses were not examined either by the I.O., nor they were summoned by the prosecution to depose before the

learned Trial Court. Therefore, best and direct evidence appears to have been foregone by the prosecution, which would lead to a presumption under Illustration (g) of Section 114 of the Evidence Act that the two purported eye-witnesses, if produced and examined before the Trial Court, would have been unfavourable to the prosecution and therefore, withheld.

47. The delay in lodging the FIR on 19.10.2010 for the incident which occurred on 15.10.2010 remains unexplained by PW-1. His projection that he was busy in providing treatment to the deceased, stands "not proved" by the prosecution by withholding of evidence of providing treatment by PW-1 to the deceased from 15.10.2010 to 19.10.2020, the date of lodging of the FIR.

48. Thus, the Court is of the considered opinion that in this case, there are several loose ends in the prosecution case and therefore, the Court is inclined to hold that the chain of circumstances is not complete so as to lead to the only conclusion that the appellants had inflicted grievous assault on the deceased on 15.10.2010. The prosecution had also failed to prove unlawful assembly of the appellants at the place of occurrence.

49. Thus, it is seen that the PW-1 and PW-2 had sufficient time to hatch a plan to implicate the appellants in the offence.

50. The Court is thus, unable to accept that the defects in the prosecution case, as enumerated herein before, can be said to be contradictions, minor discrepancies or trivial matters, as referred to in para-43 of the case of *Raj Kumar Singh v. State of Rajasthan*, (2013) 5 SCC 722, on which reliance has been placed by the learned Trial Court. In the present case in hand, if the evidence of the prosecution is read in its entirety, the unexplained gaps are wide enough to discard the case of the prosecution.

51. In para-17 of the impugned judgment, the learned Trial Court has opined that a witness cannot do anything if the I.O. does not record his statement properly. In this regard, it is nobody's case that the I.O. did not record the statement of witnesses properly and therefore, the said remark cannot help to fill-up the lacuna in the prosecution case. Rather, as per the provisions of Illustration (e) of Section 114 of the Evidence Act, 1872, there is a presumption that the official acts have been regularly performed.

52. In para-18 of the impugned judgment, although the learned Trial Court had recorded that medical documents were not proved, but refused to disbelieve that oral evidence of treatment being given to the deceased cannot go in vain. We are unable to concur to the said opinion expressed by the learned Trial Court because a medical document of Kalinagar PHC and SMCH only would constitute primary evidence within the meaning of section 63 of the Evidence Act, 1872 and the provision of section 64 of the Evidence Act provides that documents must be proved by primary evidence. The medical documents of the deceased are relevant piece of evidence of his injuries and treatment provided. It is not the case of the prosecution that medical documents were not traceable and no attempt was made to prove medical records of Kalinagar PHC and SMCH that the deceased, while in injured condition was taken there for treatment. It is prima facie unbelievable that the doctors and staff of these two State owned medical institutions would refuse to admit an injured patient on the ground that the patient is likely to die soon. The I.O. did not examine the hospital staff in these two State owned medical institutions to record their statement as to whether or not the deceased was taken to their respective medical institutions and whether there was any medical opinion that the injured was not likely to survive.

53. Hence, the Court is inclined to answer the point of determination in the negative and against the prosecution by holding that the evidence of PW-2 fails to inspire the confidence of the Court as to existence of evidence beyond reasonable doubt that the appellants have caused fatal injury to the deceased, which was the proximal cause of his death. Moreover, the Court is also inclined to opine that sufficient circumstantial evidence does not exist in this case which would lead to the only and no other view that the alleged crime was committed by the appellants.

54. Under the facts and circumstances of the present case, the cases of *Ravasaheb @ Ravasahebgouda (supra)*, and *Subhash @ Pappu (supra)*, cited by the learned Addl. P.P. would not come to the aid of the prosecution to save the impugned judgment and sentence.

55. In light of the discussions above, the appellants have been able to make out a case that the chain of events and circumstances remains incomplete and that the prosecution has not been able to prove beyond reasonable doubt that the appellants were the assailants of the deceased, and their assault on the deceased was the proximate cause of his death. Moreover, the circumstantial evidence is not sufficient to lead to a presumption that none other than the appellants could have committed the murderous attack on the deceased on 15.10.2010.

56. It is seen that though the learned trial Court had convicted the appellants under Section 149 of IPC read with Section 302 IPC, it imposed the sentence of rigorous imprisonment for 15 years which is not prescribed under law as the punishment prescribed for offence under Section 302 IPC is either death penalty or life imprisonment. There is no third choice if appellant is found convicted under Sections 302/149 IPC. The trial Court had erred in imposing a

sentence which is not prescribed by law.

Accordingly, the error committed by he learned Additional Sessions Judge, Hailakandi be brought to the notice of the concerned learned Judge by the Registry.

57. Thus, in light of the discussions above, this appeal deserves to be and is accordingly, allowed. The appellants are found entitled to the benefit of doubt. Resultantly, the appellants are all acquitted by giving them the benefit of doubt.

58. It is provided that subject to compliance of the conditions as imposed hereunder, the appellants be released forthwith if not required in any other case.

59. As a condition for being released from jail, where the appellants are presently lodged to undergo their respective sentence, it is provided that the appellants shall furnish a bail bond of Rs.1,00,000/- (Rupees one lakh only) each, which shall be valid for a period of 6 (six) months, which should be in satisfaction of the learned Additional Sessions Judge, Hailakandi, and they shall also submit an undertaking in form of an affidavit that if so ordered by any Court of Law, they would forthwith surrender before the jail, where they are currently lodged immediately on communication of such order. In the said affidavit, the appellants shall provide the proof of their residence and their own mobile phone number and phone number of their bailor, both having messaging apps like Whatsapp or Telegram and shall also undertake that they would not change and/or surrender their said mobile numbers till next 6 (six) months.

60. In order to facilitate swearing of affidavits by the appellants, it is provided that the Jailor and/or Superintendent of the concerned jail, where the

appellants are presently lodged to undergo their sentence shall permit the family members and/or advocates of the appellants to meet the appellants, who shall also authenticate the signatures of the appellants on their respective affidavits.

JUDGE

JUDGE

Comparing Assistant