

GAHC010132802017



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

Case No. : Crl.A./232/2017

AMJAD ALI and 5 ORS
S/O LATE GHOTA SK., R/O PURANDIARA, P.S. MANKACHAR, DIST.
DHUBRI, ASSAM.

VERSUS

THE STATE OF ASSAM and ANR

2:OSMAN ALI (INFORMANT)
S/O- LATE GOLAI MANND

VILLAGE- PURANDIARA
TELIPARA

P.S.- MANKACHAR
DISTRICT- DHUBRI
ASSAM.
PIN- 783131

Advocate for the Petitioner : MR.S P BHATTACHARJEE

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE KAUSHIK GOSWAMI

JUDGEMENT & ORDER (CAV)

Date : 21-12-2023

(Suman Shyam, J)

Heard Mr. H.R.A. Choudhury, learned Sr. counsel assisted by Mr. A. Ahmed, learned counsel for the appellants. We have also heard Ms. B. Bhuyan, learned Addl. P.P. Assam, appearing on behalf of the State. None has appeared for the informant.

2. This appeal has been preferred by the six accused persons, viz. Amjad Ali, Haidar Ali, Nur Bakta, Nur Jamal, Abdul Rezzak and Samsul Bari who were convicted under Sections 148/ 447/ 323/ 324/ 326/ 302/ 149 of the Indian Penal Code (IPC) by the judgment dated 26-05-2017 passed by the Addl. Sessions Judge, Dhubri in connection with Sessions Case No. 91/2001 and each of them were *inter alia* sentenced to undergo rigorous imprisonment for life and also to pay fine with default stipulation.

3. The prosecution case, as unfolded from the materials on record, is to the effect that one Osman Ali had lodged an ejahar dated 11-10-1997 with the Officer-in-Charge of the Mankachar Police Station reporting that at around 06:00 – 07:00 am in the morning, the accused persons, forming an unlawful assembly, armed with deadly weapons such as, spears, lathis, pebbles etc. had launched an attack on his younger brother Rahman Ali causing his instantaneous death. His son Sukur Ali had also suffered grievous injury in the attack and on being referred by the Doctors of the Gajarkandi Primary Health Centre (PHC) Sukur Ali was sent to Dhubri Civil Hospital for treatment. But Sukur Ali died in the afternoon due to the injury suffered by him. As many as 16 (sixteen) accused persons, including the present appellants were named in the ejahar.

4. On receipt of the ejahar, Mankachar P.S. Case No. 159/1997 was registered under

Sections 147/ 148/ 149/ 447/ 324/ 302 of the IPC on 11-10-1997 and the case was taken up for investigation by the police. On completion of the investigation, charge-sheet was submitted against all the 16 (sixteen) accused persons. Based on the materials on record, the learned Addl. Sessions Judge, Dhubri had framed charges under Sections 148/ 447/ 323/ 324/ 326/ 302/ 149 of the IPC against all the accused persons. The charges having been read out and explained to them, all the accused persons pleaded not guilty. Hence, they were subjected to trial.

5. During trial, the prosecution side had examined as many as seventeen witnesses including the Doctor (PW-1) who had examined the injured witnesses; the Doctor (PW-15) who had conducted postmortem examination on the dead bodies and the Investigating Officer (PW-17) who had conducted investigation in connection with the Police case.

6. The case of the accused/ appellants was one of total denial. However, the defense side did not lead any evidence.

7. On conclusion of trial and upon appreciation of the evidence brought on record by the prosecution side, by the judgment and order dated 25-05-2017, the learned Sessions Judge had convicted the six accused/ appellants in the manner as indicated hereinabove. However, the remaining 10 (ten) accused persons were acquitted due to want of evidence against them.

8. Assailing the impugned judgment and order dated 25-05-2017, Mr. H.R.A. Choudhury, learned Sr. counsel appearing for the appellants has argued that there is

unexplained delay in forwarding the FIR lodged on 11-10-1997 to the concerned Magistrate which raises a suspicion about the veracity of the prosecution case. According to the learned Sr. counsel appearing for the appellants, there are material discrepancies between the ocular evidence and medical evidence as regards the nature of injuries sustained by the deceased persons. Contending that the discrepancy between the ocular evidence and medical evidence would be sufficient to punch a hole in the prosecution case, the learned Sr. counsel for the appellants, by relying upon the decisions of the Supreme Court rendered in the case of ***Raj Pal & Anr. Vs. State of Haryana***, reported in ***2007 (AIR) (SCW) 2643*** and ***Ashim Das Vs. State of Assam*** reported in ***1987 CrLJ 1533***, has argued that the medical evidence brought on record does not support the prosecution case. The learned Sr. counsel has also submitted that the incident occurred at around 06:00 – 07:00 am but the injured witnesses, viz. PWs-9, 10 and 11 had reached hospital for their treatment only at around 07:15 p.m. There is also no explanation as to why deceased Rahman Ali was not taken to the hospital. These facts, according to the learned counsel, clearly go to show that there was none present at home when Rahman Ali was allegedly assaulted. It has been further argued that Rahman Ali died due to lack of proper treatment. Therefore, the conviction of the appellants under Sections 302/149 IPC for committing the murder of the deceased is wholly unsustainable in law.

9. By contending that the judgment passed by the learned trial court is entirely based on the evidence adduced by PWs-6, 8, 9, 10 and 11, Mr. Choudhury has argued that there are material discrepancies and/ or contradictions in the testimonies of these witnesses

and therefore, the evidence adduced by these witnesses ought not to have been relied upon by the learned trial court so as to convict the appellants. The learned Sr. counsel has further argued that PW-9 was not an injured eye witness but he has falsely projected himself to be one, which was erroneously accepted by the learned court below by ignoring the material contradictions in his testimony. According to Mr. Choudhury, learned Sr. counsel for the appellants, the evidence adduced by the so called eye witnesses, viz. PWs-9, 10 and 11 are also not free from material contradictions and hence, their testimonies could not have been relied upon by the learned trial court so as to convict the appellants.

10. Ms. B. Bhuyan, learned Addl. P.P. Assam, on the other hand, has argued that the charges brought against the appellants have been duly established on the basis of cogent evidence adduced by the prosecution witnesses which includes the testimony of the eye witnesses, viz. PWs-9, 10 and 11, who have categorically deposed before the trial court, implicating the appellants. Since there is direct evidence available in this case, hence, submits Ms. Bhuyan, there is no scope for this Court to interfere with the judgment and order passed by the learned trial court. The learned Addl. P.P. Assam has also taken us through the evidence adduced by the witnesses, viz. PWs-6, 8, 9, 10 and 11 to submit that although there are some minor variances in the testimonies of these witnesses, yet, such variations do not go to the root of the matter. As such, such minor contradictions in the testimonies of those witnesses ought to be ignored by the Court.

11. We have considered the submissions advanced by the learned counsel appearing for both the sides and have also gone through the materials available on record. It

appears from the record that appellant Amjad Ali died during the pendency of this appeal and therefore, this appeal *qua* Amjad Ali, has abated.

12. From a reading of the impugned judgment passed by the learned trial court, we find that the learned court below has heavily relied upon the oral evidence adduced by PWs-6, 8, 9, 10 and 11, all of whom have been examined as eye witnesses to the occurrence. Out of them, PWs-9, 10 and 11 are the injured eye witnesses. Therefore, at the very outset, we propose to discuss the evidence adduced by these witnesses.

13. PW-6 Aijuddin Sheikh is the brother of deceased Rahman Ali. He has deposed to the effect that the incident took place at around 06:00 - 06:30 am. At that time, he was going to Satirbari along the bank of the river. He saw Haidar Ali, Join Hoque, Nur Bakta, Motiar, Samsul Bari, Nurzamal, Sattar, Kobad Ali, Anser Ali and Munsar Ali armed with lathis and spears coming to Rahman Ali's house. According to PW-6, Rahman was stabbed with a spear and he expired. As there was an uproar, he left for home. During cross-examination, PW-6 had replied that at the time of the occurrence, he was standing some 100 cubits east of the place of occurrence. 'Kohua' (kans grass) and Dhanicha (prickly sesban) plants were there. Since he was alone, he did not give a shout out of fear. He did not see whether the accused persons had entered the house but he saw some 5/6 people outside the house of the Rahman when Sukur and Rahman were being assaulted. PW-6 had denied the suggestion put by the defense counsel that he had not witnessed the incident and that none of the accused had gone there, that neither Rahman nor anybody else had been assaulted and that, he had adduced false evidence in favour of Rahman since Rahman was a co-sharer of his land.

14. Ohiton Bewa, i.e. the wife of deceased Rahman Ali was examined as PW-8. This witness has deposed that Rahman Ali was her husband and Sukur Ali was her nephew. Due to the shortage of space in their house, her husband and nephew used to live in another house standing on their land. In the morning of the incident, she was in the old house and had gone to the other house after she heard uproar coming from the house where her husband was. Haidor, Nur Bakta, Joil Hoque, Samsul Bari, Sattar, Baktar, Nurzamal, Fazar Ali, Amjad, Izaz and others were there. They called her husband Rahman but since he did not come out of the house, as ordered by Amjad, the rest of them entered into the house and assaulted her husband. This witness has further deposed that Haidar had assaulted her husband with a spear, Nur Bakta stabbed him with a 'Chulpi' (a weapon with pointed iron end), Fazar stabbed him with a spear. Baktar and his son Nurzamal had also stabbed her husband. Rejjak stabbed him with a spear. As her nephew tried to flee, Nurzamal stabbed him with a 'Hunkal' (a pointed weapon with iron end). Seeing blood, she felt dizzy. Her husband died on the spot. Her nephew Sukur breathed his last on the way to Dhubri. Police came and took the dead body. During her cross-examination, PW-8 has stated that as Sukur tried to flee, he was stabbed for once only. PW-8 has deposed that Rejjak also stabbed Rahman with a spear.

15. PW-9 Ainal Hoque is an injured eye witness. PW-9 has deposed that they have 12 bighas of land on the bank of the river, to the south of Purani Diyara. Along with his paternal uncle they had build two houses on the land at the same time to protect the cultivation from being stolen. Rahman and Sukur used to stay in that house. The houses were built three days prior to the incident. On hearing the hue and cry, he, being

accompanied by Anowar (PW-11), Safiar (PW-13), Saidur Islam, Nur Islam (PW-10) and his father Osman Ali (PW-4), went there. On their arrival, they had seen Amjad ordering Haidar, Jail Hoque, Nur Bakta, Motiar, Samsul Bari, Fazar Ali, Rejjak, Nurzamal, Baktar and others, who assaulted them. Then Haidar stabbed Rahman on his nape with a 'Chulpi', Joil stabbed Rahman on his chest with a spear, Nur Bakta stabbed Rahman with a 'Chulpi', Motiar stabbed Rahman with a 'Chulpi'. There were seven wounds caused to Rahman. This witness has further stated that Samsul Bari felled Sukur by hitting him with a lathi whereupon, Nurzamal stabbed him (Sukur) in his abdomen with a 'Chulpi'. Later on, Joil stabbed him on his head with a spear. He was taken to Kukurmara Hospital. During cross-examination, PW-9 has replied that since there was uproar they had arrived at the place after half an hour. A fight ensued there. Rahman fell down and Sukur also fell. Later, Samijuddin, Fazlul, Firjat, Jaynal and Sadek Ali went there. Seeing the accused persons armed with weapons, they fled towards their home and returned after the accused persons had left and found that Rahman had died and Sukur Ali was in a moribund state. This witness has further deposed that the persons who had accompanied him had also fled but all of them returned again after the accused persons had left the place. The witness has further deposed that he had fled before sustaining injury. PW-9 has, however, denied the suggestion made by the defense counsel that he has adduced false evidence.

16. PW-10 Nur Islam is another injured eye witness in this case. PW-10 has deposed that the incident took place at around 05:30 – 06:00 am. At that time, he was near his house. Rahman and Sukur were in their houses which was standing on cultivable land on the bank of the river Jinjiram. Hearing hue and cry, he had rushed to the place. Anar Ali,

Sabir Ali, Ana Hoque, Kabi Khatun and others also arrived there. He had seen some 10/15 persons including Haidar Ali, Joil Hoque, Nur Bakta, Samsul Bari and Nurzamal had gheraoed the two houses of Rahman and Sukur. As Rahman and Sukur were about to come out of their houses they were assaulted. PW-10 has further deposed that Haidar had assaulted Rahman with a spear, Joil Hoque struck Rahman with a spear, Nur Bakta stabbed Rahman with a spear, Motiar had assaulted Rahman, Nurzamal assaulted Sukur. This witness has further deposed that Nurzamal had assaulted Sukur with a 'Chulpi'. Samsul felled Sukur by assaulting him with a lathi on his legs. As he went forward to resist them, Joil Hoque assaulted him with a spear, as a result of which, he sustained injuries on his right middle finger and head. He became unconscious. He reached Kukurmara Hospital and at 12 O'clock, regained his senses on that very day. Rahman died on the spot. Sukur expired while he was being taken to the Dhubri Hospital. During cross-examination, this witness has remained firm.

17. Anwar Ali is another injured eye witness to the occurrence. He was examined as PW-11. This witness has also deposed that the incident took place at around 05:30 – 06:00 am. He woke up and heard a commotion coming from the southern side of his house where Sukur and Rahman had built their houses. PW-11 is the nephew of Rahman and Sukur is his younger brother. He has further deposed that on reaching there, he saw that the accused persons had 'gheraoed' the house belonging to Rahman Ali and Sukur Ali. They were also rebuking Rahman and Sukur and asking them to come out of their houses. When Rahman opened the door of his house, Amjad exhorted the accused persons to attack him, whereupon, Haidar, Joil Hoque and Irzat had stabbed Rahman with

a 'phala' (spear). PW-11 has further deposed that Matior stabbed Rahman with a 'Chulpi', Nur Bakt stabbed Rahman with a 'phala', Samsul Bari felled Sukur Ali by striking the latter in the legs with a lathi and then Nurjamal stabbed Sukur with a 'Chulpi'. This witness has also deposed that when he went forward to save his younger brother, Nurjamal broke a tooth by hitting him with a stone. Doctor removed the remaining portion of the broken tooth. This witness has also stated that Nur Bakt had stabbed him in the portion below the left arm with a 'Chulpi' and Baktar stabbed him in the left side of the abdomen with a 'phala'. He stayed at Gajarikandi Hospital for about three days for receiving treatment and thereafter, he was referred to Dhubri Civil Hospital where he stayed for five days. Rahman Ali died on the spot and Sukur Ali passed away when he was being brought to Dhubri. He has also deposed that Safiur, Ainal and Nur Islam went along with him to the place of occurrence and sister Kabi Khatun was also there.

18. PW-1 Dr. Atowar Rahman was on duty at the Garikandi PHC when Ainal Hoque (PW-9) , Nur Islam (PW-10) and Anowar Ali (PW-11) were brought to the hospital for treatments after they had sustained injuries. From the evidence of PW-1 it appears that the following injuries were found to have been sustained by the three injured witnesses.

“The injuries received by Ainal Hoque (PW-9) is as follows:

- i. Lacerated wound (opposite 1 shaped) 4cm X ½ cm X ½ cm over the medial aspect of the upper 1/3 of the left arm. Contusion around the wound; fresh bleeding present.*
- ii. Lacerated wound (vertical 4 ½ cm X ½ cm X bone depth over the right parietal bone. Contusion around the wound: fresh bleeding present.*
- iii. Lacerated wound 2 cm X ½ cm X scalp depth over the mid portion of the frontal bone. Contusion present around wound. Fresh bleeding present.*

Opinion:

All injuries are fresh caused by blunt weapon simple in nature.

The injuries received by Nur Islam (PW-10) are as follows.

- i. Lacerated wound (vertical) 3 ½ cm X ½ cm X bone depth over the right side of the frontal head bone, fresh bleeding present with contusion around the wound.*
- ii. Lacerated wound 4 ½ cm X ½ cm X ½ cm over the posterior lateral aspect of the proximal & middle phalange of the middle finger of the right hand, fresh bleeding present.*
- iii. Lacerated wound 2 cm X ½ cm X 1/3 cm over the anterior aspect of the middle phalange & first inter phalangid joint of the middle finger of the right hand, fresh bleeding present.*

Injuries sustained by Anowar Malik (PW-11) are as follows.

- i. Lacerated wound 2 ½ cm X ½ cm X ½ cm over the inner aspect of the left side of the lower lip. Fresh bleeding present, there was contusion around the wound.*
- ii. Loosing of the lateral incisor & canine teeth of left side, lower jaw, tender swelling present over the gum of both abovementioned teeth, fresh bleeding present.*
- iii. Lateral incisor tooth of the left side of upper jaw was found broken at almost mid portion, tender swelling over the skin of the tooth, fresh bleeding over the gum.*
- iv. Lacerated wound 1 cm X ½ cm X ½ cm over the dorsum of the mid portion of the left arm.*
- v. Lacerated wound 1 cm X ½ cm X 1/3 cm over the left lateral aspect of the abdomen just above 12th rib.*
- vi. Lacerated wound 1 ½ cm X ½ cm X ½ cm over the left parietal bone of the head at almost mid portion. Contusion around the wound fresh, bleeding present.*

Opinion:

All the injuries are fresh caused by blunt weapon & injury No. 1, 4, 5 and 6 are simple and injury No. 3 is grievous to ascertain the second injury patient was referred to Civil Hospital, DBD for further investigation, treatment and expert opinion."

19. From the testimony of PW-1 it is apparent that the witnesses PWs- 9, 10 and 11 had received injuries in the incident. Moreover, these witnesses have also consistently

deposed to have seen the occurrence. It is for this reason that the learned trial court had treated them as injured eye witnesses and placed heavy reliance on their testimonies.

20. The I/O (PW-17) has deposed as regards the steps taken by him for conducting the investigation in connection with the Mankachar P.S. Case No. 159/1997. He has stated that a written ejahar was received at about 02:25 pm on 11-10-1997. On being entrusted with the investigation in connection with the Mankachar P.S. Case No. 159/1997, he went to the place of occurrence, examined the witnesses, prepared sketch map. The I/O (PW-17) has stated that he found the dead body lying in the place of occurrence and held inquest on the dead body of Rahman Ali. Exhibit-2 is the Inquest Report and Exhibit-2(3) is his signature. The dead body was then sent to the Dhubri Civil Hospital for post-mortem examination. He had seized the pebbles and stones from the place of occurrence. On the following day he had received information that Sukur Ali, who had sustained injuries in the incident, had also succumbed to his injuries. He had also received information that the deceased had been kept at the Kathalbari Bus Stand. He held inquest on the dead body of the Sukur Ali and sent the body for post-mortem examination to the Dhubri Civil Hospital.

21. During his cross-examination, the PW-17 had proved the contradictions in the testimonies of some of the prosecution witnesses. The contradictions and omissions in the testimonies of the prosecution witnesses, as brought on record through the I/O, are as follows:

“PW-5 Muktadur Alom said to me in the following manner – “Today morning (11.10.97), I was at home. Then I heard the residents of Teliapara raising hue and cry. I heard that the accused persons namely Nur Bakta, Aamzad, Samsul Bari,

Jahirul, Rejul, Fazar, Sofiul, Anowar, Manser and Matiur had killed Rahman Ali by striking the latter with lathi, 'phala', 'sulpi' etc. and that Sukur Ali had also been grievously injured. He (Sukur Ali) was sent to Dhubri. I also heard that Nur Hussain, Ainal Hoque and Anowar Ali had also been grievously injured. PW-5 did not state that at the time of occurrence, he had gone near the P.O. for fishing; that he had been at a distance from that P.O.; that Rahman had been assaulting by accused Haidar with 'Phala'; that Samsul Bari and Matior had made assault with 'Phala'; that the other accused person had broken Anowar's tooth by striking him with stones; that Nurjamal stabbed Sukur with 'Sulpi'; that Jahirul and Nur Islam stabbed with 'Phala' and that Aamzad had uttered, 'Save me, save me.'

PW-6 Aizuddin Sheikh said that he had gone to cultivation at 6 AM. He did not mention it to be 5.00 AM. Though PW-6 mentioned the names of the accused persons, he did not mention the names of Dowad Ali, Ansar Ali, Joil Hoque, Nur Bakta, Matior and Samsul Bari.

PW-7 Saijuddin did not tell me that before going to the P.O. he had seen the accused persons.

PW-8 Ahiton Bewa told me that Safiur, Nur Islam, Sukur, Anar and Ainal had been in that house on that day.

PW-10 Nur Islam said to me, "At about 6 am on 11.10.97, I was working in the houses belonging to uncle Rahman and Boktar Master at char area (riverrine area) of Teliapara. After offering morning Namaz, uncle Rahman sat down. Just then a large group of people, who came from the eastern side, gheraod uncle Rahman, Ainal Hoque, Sofiur Rahman and Anowar Ali." Nur Islam did not tell me that hearing commotion, Anowar, Anar, Sofiur and he went from home.

PW-11 Anowar Ali told me that at about 5.30 AM, Rahman, Sukur, Ainal and Nur Islam had been going to that house to do household chores and cut thatching grass and that Rahman offered the morning Namaz in that house itself.

PW-11 Anowar Ali did not tell me that hearing commotion he had gone out of his house; that Joil Hoque had stabbed Rahman with "Phala"; that Izrat had stabbed Rahman with 'Phala' and 'Sulpi'; Nur Bakta had stabbed Rahman with 'Phala'; that Samsul Bari had felled Sukur by striking the latter with lathi in the legs; that Baktar had stabbed Anowar with 'Sulpi' and that his father had gone to the P.O.

PW-13 Sofiur Rahman did not tell me that hearing commotion from the house he went to the P.O. along with his younger and elder brothers. He told me that Rahman, brother Anar alias Anowar, Sukur Ali and Nur Islam had been going in order to plough the land. He did not tell me that stones were being hurdled towards their house. He told me that from the conversation he could recognize five accused persons. He did not tell me that Amzad had said, "assault, assault".

22. Dr. Sashidhar Deka, PW-15 had conducted the postmortem examination on the

dead body of deceased Sukur Ali and has exhibited the postmortem report as Exhibit-5 which contains his signature Exhibit-5(1). PW-15 had also conducted the postmortem examination on the dead body of Rahman Ali and has exhibited Postmortem Report (Exhibit-6). As per the medical evidence available on record there was a penetrating wound found in the dead body of Sukur Ali in the mid-auxiliary line, wound up to 2" deep on the lung tissue injuring pleura, lung tissue and intercostals vessels and blood clotting in the lung with collapse. As per opinion of the PW-15, the death of the deceased Sukur Ali was caused due to shock and haemorrhage as a result of injury sustained by the deceased.

23. As per the evidence of PW-15 the following injuries were found in the dead body of deceased Rahman Ali.

“(i) Sharp cutting wound on left side of bone head 2" X bone deep with formation of sub dural haematoma.

(ii) Sharp cutting wound on Lt. axillary line of throat at the space and 3" in length and lung deep.

(iii) Sharp cutting wound on sternum 2" in length with bone deep at 4th space level.

(iv) Sharp cutting wound on Rt. Axillary line in thorax at 6th space about 2" in length and muscle deep. Walls lips and cartilage as above.

On dissection: Sharp cut injury over Lt. fore-head 2" in length odd bone deep. In side bone matter is present and sub dural in haematoma on frontal region.”

The Doctor has opined that the death of Rahman Ali was caused due to shock and haemorrhage as a result of injuries sustained by him.

24. From the medical evidence available on record, it is clearly established that both Sukur Ali and Rahman Ali had suffered homicidal deaths due to the grievous injuries

sustained by them.

25. The evidence of other witnesses examined by the prosecution in this case is not of much significance as none of those witnesses had seen the occurrence. However, we find that PWs- 8, 9, 10 and 11 are the key prosecution witnesses examined in this case so as to bring home the charge.

26. In their evidence, PWs- 8, 9, 10 and 11 have deposed that Haidar had assaulted Rahman with spear/ chulpi and that Nur Bakta had stabbed Rahman with spear/ chulpi/ phala. According to PWs- 9, 10 and 11 Joil had stabbed Rahman with spear/ phala. PWs- 9 and 11 have also stated that Motiar had stabbed Rahman with chulpi. The aforesaid evidence of PWs- 9 and 11 finds due corroboration from the testimony of PW-10, who has also deposed that Motiar had assaulted Rahman.

27. Insofar as the evidence pertaining to assault made on Sukur Ali is concerned PWs- 9, 10 and 11 have deposed that Samsul had felled Sukur by hitting him with a lathi. PWs- 8, 9 and 11 have deposed that Nurjamal stabbed Sukur with hunkal/ chulpi. PW-10 has also stated that Nurjamal assaulted Sukur with chulpi.

28. The evidence adduced by PWs-6, 8, 9, 10 and 11 as regards the presence of accused Haidar Ali, Joil Hoque, Nur Baktar, Motiar, Samsul Bari and Nurjamal as well as their role in hitting the deceased persons finds due corroboration from the testimony of one another. That apart, from the evidence of PWs-8, 9 and 11 it has clearly come out that the attack on both the deceased persons were made as per the instruction given and on being exhorted by Amjad. The aforesaid evidence also finds due support not only from

the medical evidence but also from the testimony of I/O.

29. From a careful analysis of the testimony of PW-4, it is doubtful as to whether this witness had actually seen the occurrence. It appears that he had reached the place of occurrence soon after the incident and heard about the same from others present there. Therefore, PW-4, in our opinion, is not an eye witness to the incident. Being a close relative of the deceased persons, viz. brother of deceased Rahman Ali and father of deceased Sukur Ali, some exaggeration in his testimony was but natural.

30. PW-5, who is the brother of the deceased Rahman Ali and nephew of Sukur Ali also appears to have reached the place of occurrence soon after the incident. It appears that PW-5 had stated before the I/O that he had heard that accused Nur Bakta, Amjad, Samsul Bari, Jahirul, Rejul, Fazar, Sofiul, Anowar, Manser and Matiur had killed Rahman by striking the latter with lathi, phala, chulpi and that Sukur had also been grievously injured. The above contradiction in the evidence of PW-5 has been brought on record by the I/O. We are, therefore, of the opinion that there is significant improvement in the testimony of this witness. Therefore, PW-5 also, in our opinion, is not an eye witness to the occurrence. The same is, however, not true in respect of PWs.-6, 8, 9, 10 and 11. From a careful analysis of their evidence, we find that PWs-6, 8, 9, 10 and 11 had witnessed the occurrence. Not only that, PWs-9, 10 and 11 had sustained injuries in the incident and therefore, the learned trial court, in our opinion, has rightly placed reliance on the testimonies of PWs-6, 8, 9, 10 and 11 so as to convict the accused/ appellants.

31. The learned counsel for the appellants has strenuously argued that the so called eye witnesses are not only the close relatives of the deceased persons but their

testimonies are also full of material contradictions and discrepancies. As such, the evidence of these witnesses ought to be discarded. PWs-6, 8, 9 and 11 are no doubt, related to the deceased persons. However, PW-10 is an independent witness who did not have any relationship with the deceased persons nor is there any evidence of any previous enmity between the PW-10 and the appellants. This witness has corroborated the testimonies of other eye witnesses, viz. PWs-6, 8, 9 and 11 leading sufficient credence to the testimonies of these witnesses.

32. On the question of value to be attached to the testimonies of close relatives of the deceased who are the interested witnesses, law is well settled, through a long line of judicial pronouncements that the testimony of such interested witnesses need not be discarded as a whole but the court must be cautious in appreciating and accepting their evidence. In the case of **Jayabalan Vs. UT of Pondicherry**, reported in **(2010) 1 SCC 199**, the Supreme Court has made the following observations in paragraph 23, which are reproduced here-in-below:-

“ 23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.”

33. Similar view has been expressed in the case of **Dharnidhar Vs. State of UP & Ors.** reported in **(2010) 7 SCC 759**, relied upon by Ms. B. Bhuyan, learned Addl. P.P. Assam.

34. In another recent decision of the Supreme Court rendered in the case of ***Md. Jabbar Ali & Ors. Vs. State of Assam*** reported in ***2022 SCC OnLine SC 1440***, the law has been reiterated on the subject wherein it has been observed that testimony of related witness should be analyzed with caution for its credibility.

35. It is no doubt correct that there are some discrepancies and/ or omissions/ improvements in the evidence adduced by the key prosecution witnesses which have also been brought on record during the cross-examination of the I/O. However, the core question that would arise for consideration of this Court is as to whether, such inconsistencies and contradictions would go into the root of the prosecution case thereby punching a hole in the prosecution story or whether such discrepancies were of minor nature which were bound to be present in the testimonies of witnesses recorded after several years of occurrence.

36. In the present case, it is to be noted herein that the incident took place in the year 1997 and the testimonies of witnesses had been recorded 5 to 6 years thereafter. Therefore, it is not unnatural to see some discrepancies in the version of the witnesses during their deposition before the Court. Moreover, even in the matter of describing a particular incident, different witnesses would have different sense and ability of observations and therefore, it is quite natural that there would be some variance in their testimony. To that extent, this Court finds that there are some discrepancies in the evidence of these witnesses. However, we are also of the opinion that there is no material contradiction in the testimony of the key witnesses, insofar as the evidence to establish formation of "unlawful assembly" and the presence of a "common object" on their part to

commit the murder of the deceased Sukur Ali and Rahman Ali. The evidence to establish the involvement of the accused/ appellants in the incident is also found to be consistent and credible. In other words, we are of the considered opinion that there are cogent and sufficient evidence brought on record by the prosecution side so as to prove the charges brought against the appellants/ accused persons under Sections 302/ 149 of the IPC.

37. In the above context, it would be relevant to mention herein that the law regarding the application of Section 149 of IPC has been settled in the decision of Supreme Court rendered in the case of **Masalti Vs. State of UP**, reported in **AIR 1965 SC 202**. In the said decision, the Apex Court has held that what is to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly and he entertained, along with other members of the assembly, the common object as defined under Section 141 of the IPC.

38. In the case of **Md. Ankoos Vs. Public Prosecutor, High Court of A.P.** reported in **(2010) 1 SCC 94** the Supreme Court has made the following observations in paragraph 34, which are quoted here-in-below.

“34. Section 149 IPC creates constructive liability i.e. a person who is a member of the unlawful assembly is made guilty of the offence committed by another member of the same assembly in the circumstances mentioned in the Section, although he may have had no intention to commit that offence and had done no overt act except his presence in the assembly and sharing the common object of that assembly. The legal position is also fairly well settled that because of a mere defect in language or in the narration or in form of the charge, the conviction would not be rendered bad if accused has not been affected thereby.”

39. In the case of **Pandurang Chandrakant Mhatre Vs. State of Maharashtra**, reported in **(2009) 10 SCC 773**, it has been held that two ingredients required to be

satisfied to invoke Section 149 IPC would be that there has to be commission of an offence by any member of an unlawful assembly and that such offence must have been committed in prosecution of the common object of that assembly or must be such that the members of that assembly knew it to be likely that the offence would be committed.

40. By analyzing the law laid down in the aforesaid decisions, the Apex Court has made the following observations in ***Dharanidhar (Supra)*** in paragraph 45 which are reproduced here-in-below.

“45. The principles controlling the application of provisions of Section 149 have been quite well settled by now. Years back, the bench of this court in Masalti v. State of U.P. [1964 (8) SCR 133] declared the dictum of law that the prosecution has to prove against a person, who is alleged to be a member of an unlawful assembly, that the person constitutes the assembly and has entertained along with the other members of the assembly, the common object, as defined by Section 141 of the IPC. The crucial question to be determined in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects. For determination of the common object of the unlawful assembly, the conduct of each of the members of the said assembly before the attack, at the time of attack and thereafter, as well as the motive for the crime are some of the relevant considerations. However, the time of forming an unlawful intent is not material because it is possible that in a given case an assembly, which is lawful to begin with, subsequently becomes unlawful. In other words, unlawful intent can develop during the course of the incident at the spot co instant.”

41. Applying the law, as discussed above, to the facts of the present case, we find that evidence available on record is sufficient to establish beyond reasonable doubt that the appellants, who were more than five in number, were in an “unlawful assembly” and had acted in furtherance of the “common object” to commit the murder of the deceased persons. Therefore, we find ourselves in complete agreement with the decisions and conclusions drawn by the learned trial court to the effect that the charges brought against the accused appellants under Sections 148/ 447/ 323/ 324/ 326/ 302 IPC read with Section 149 IPC has been proved by the prosecution beyond reasonable doubt.

42. Mr. H.R.A. Choudhury, learned Sr. counsel for the appellants has made an attempt to impress upon this Court that this is a case where both the deceased persons were murdered in the previous night and due to animosity between the parties, the appellants have been falsely implicated in this case. We are afraid, such submission of the appellants counsel cannot be countenanced for the following reasons:-

(i) Firstly, there is evidence on record to show that one of the deceased, viz. Sukur Ali was alive till 02:00 pm on the date of the occurrence and he died only while he was being taken to the hospital at Dhubri.

(ii) Secondly, the defense side had failed to adduce any evidence or lay the foundation during trial for taking such a plea. Therefore, the aforesaid plea taken by the learned Sr. counsel for the appellants cannot be accepted by the Court at this point of time.

For the reasons stated hereinabove, we are of the view that there is no merit in this appeal. The appeal is accordingly dismissed.

Send back the LCR.

JUDGE

JUDGE

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Comparing Assistant