

GAHC010154012018



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

Case No. : CrI.A./23/2019

MUSST ANJUMA BIBI
W/O- LATE. SANOWAR ALI,
R/O- HATIPOTA PART- I (MASKAGURI),
P.O- HATIPOTA,P.S.- CHAPAR, DIST- DHUBRI(ASSAM), PIN-783348.

VERSUS

THE STATE OF ASSAM AND 2 ORS
REPRESENTED BY PP, ASSAM.

2:SURAT ALI
S/O- LATE. MONSER ALI

R/O- VILLAGE- HATIPOTA PART-I

P.O- HATIPOTA
P.S.-CHAPAR
DIST- DHUBRI
ASSAM
PIN-783348.

3:BAHAR ALI
S/O- LATE. MONSER ALI

R/O- VILLAGE- HATIPOTA PART-I

P.O- HATIPOTA
P.S.-CHAPAR
DIST- DHUBRI
ASSAM
PIN-783348

Advocate for the Petitioner : MR. I H LASKAR

Advocate for the Respondent : MR. D DAS, ADDL PP, ASSAM

**BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA
HONOURABLE MRS. JUSTICE MALASRI NANDI**

JUDGMENT

**Date : 01.12.2023
(Malsari Nandi, J)**

Heard Mr. I.H. Laskar, learned counsel for the appellant. Also heard Mr. D. Das, learned Additional Public Prosecutor for the State and Mr. P. Rahman, learned counsel appearing for the respondent Nos.2/3.

2. This appeal has been preferred by the informant in Sessions Case No. 313/2014 under Section 372 r/w Section 378 of Cr.P.C., against the judgment and order dated 23.05.2018 passed by the learned Additional Sessions Judge, Bilasipara, whereby learned Additional Sessions Judge, had acquitted the respondents Nos. 2 and 3 from the charge of the offence under Section 341/326/307/302/34 IPC.

3. The factual matrix leading to the case of the informant is that she lodged an FIR before the officer-in-charge Chapar Police Station on 07.02.2012, stating *inter alia* that on 06.02.2012 at about 10:30 p.m., when her husband Sanowar Ali was returning from his own brick kiln on his motorcycle bearing No. As-17-8741, a gang of miscreants intercepted him on his way and assaulted him with sharp weapons, as a result of which, he died on the spot. It is also stated in the FIR that when there was hue and cry raised by her husband at the time of the incident, co-villager Sahidul Islam came to the place of occurrence and when he tried to restrain the miscreants, they also inflicted serious injuries on the left hand of Sahidul Islam.

4. On receipt of the complaint, a case was registered vide Chapar P.S. Case No. 33/2012 under Section 341/326/302/34 IPC and investigation commenced. During investigation, the

investigating officer visited the place of occurrence and recorded the statement of the witnesses. Inquest was conducted on the dead body of the deceased and subsequently the dead body was forwarded to the hospital for postmortem examination. During investigation, the injured Sahidul and witness Zakir Hussain were produced before the Magistrate, to record their statements under Section 164 Cr.P.C. After completion of the investigation, charge-sheet was submitted against the respondent Nos. 2 and 3 under Section 341/326/302/34 IPC before the court of learned JMFC, Bilasipara. As the offence under Section 302 IPC is exclusively triable by the court of Sessions, the case was committed accordingly.

5. During trial, charge was framed under section 341/326/307/302 IPC which was read over and explained to the respondent Nos. 2 and 3, to which they pleaded not guilty and claimed to be tried. During trial, the prosecution examined 15 witnesses to prove the guilt of the respondents. However, there was no defence witness in the case. After completion of trial, the statement of both the respondent Nos. 2 and 3 were recorded under section 313 Cr.P.C and incriminating materials found in the statement of the witnesses were put to them, to which they stated that they had been falsely implicated in this case and pleaded their innocence. After hearing the arguments advanced by the landed counsel for both the parties, the learned trial court held that after evaluation of the evidence on record, the prosecution failed to bring home the charge against the respondent Nos. 2 and 3 beyond all reasonable doubt and accordingly, they were acquitted.

6. Being aggrieved and dissatisfied with the order of acquittal passed by the learned trial court, the appellant who is the wife of the deceased Sanowar Ali, has preferred this appeal.

7. The first point raised by learned counsel for the appellant is that the statements of P.W. 3 and P.W. 6 recorded under Section 164 Cr.P.C. were found to be consistent and trustworthy. Further, the statements were made before the Magistrate within a short period of time after the incident without any influence and as such, there was no reason to disbelieve the prosecution story. Hence, the impugned judgment and order dated 23/05/2018 was liable to be interfered with.

8. The learned counsel for the appellant has submitted that P.W. 3, who was the eyewitness to the incident, stated before the learned Magistrate mentioning the names of the respondent Nos. 2 and 3 in his statement recorded under section 164 Cr.P.C., but thereafter turned hostile before the trial court while adducing evidence. According to learned counsel, it transpires that the respondent Nos. 2 and 3 might have tutored the prime witness i.e. P.W. 3. The learned trial court has failed to properly appreciate the evidence of the witnesses in true perspective.

9. It is also submitted by learned counsel for the appellant that the learned trial court erred in law as well as on facts in disbelieving the prosecution case and coming to a finding that in the FIR, the names of the respondent Nos. 2 and 3 were not mentioned and P.W.6 who was injured has not disclosed the names of the persons before the informant, who caused injury to her husband before lodging the FIR.

10. It is also the submission of the learned counsel for the appellant that the learned trial court did not bother to discuss the evidence of P.W.3, who turned hostile under the pressure of the respondent Nos. 2 and 3 and further the learned trial court, in spite of, knowing the fact that statement of P.W.3 under Section 164 Cr.P.C. was recorded but did not make any effort to bring on evidence the said statement which reflects that the learned trial court has failed to perform his duties as enumerated under Section 165 of the Evidence Act and which has resulted miscarriage of justice by acquitting the respondent Nos. 2 and 3. As such, the impugned judgment and order is liable to be set aside.

11. In support of his submissions, the learned counsel for the appellant has placed reliance on the following case laws-

(i) (2012) v.11 SCC 196 (Pudhu Raja & Anr. vs. State represented by Inspector of Police).

(ii) AIR 2013 Supreme Court 651 (R. Shaji vs. State of Kerala).

(iii) (2022) v.10 SCC 226 (Malti Sahu vs. Rahul & Anr.).

12. In response, the learned Additional Public Prosecutor has argued that the learned trial court had failed to appreciate the evidence brought on record in the proper perspective and had arrived at an erroneous conclusion acquitting the respondent Nos. 2 and 3. He submits that the impugned judgment is vitiated by perversity and as such, liable to be set aside.

13. Opposing the said submissions, the learned counsel for the respondent Nos. 2 and 3 has submitted that this is a case of no evidence. According to the learned counsel, the trial court had meticulously evaluated the evidence on record and rightly acquitted the respondent Nos. 2 and 3 of the charge framed against them due to lack of evidence. Pointing out the lapses in the investigation, the learner counsel for the respondent Nos. 2 and 3 submits that the statements of P.W.3 and P.W.6 were recorded by the investigating officer twice under Section 161 Cr.P.C. The first time, when the I/O recorded the statements of the P.W.3 and P.W.6, they did not utter a single word regarding involvement of respondent Nos. 2 and 3 in the offence as alleged against them. Subsequently, when the statements of P.W.3 and P.W. 6 were recorded by the investigating officers second time, then they implicated the respondent Nos. 2 and 3 to be involved in the case.

14. It is also submitted that while the statements of P.W.3 and P.W.6 were recorded under section 164 Cr.P.C. by the learned Magistrate, they also differ from their statements earlier recorded under Section 161 Cr.P.C. According to learned counsel for the respondent Nos. 2 and 3, if the evidence led by the prosecution is taken in its face value, then it would be established on the face of the record that the charge brought against the respondent Nos. 2 and 3 was unsustainable in the eye of law.

15. In support of his contentions, the learned counsel for the respondent Nos. 2 and 3 has placed reliance on the following case laws-

(i) (2007) v. 4 SCC 415 (Chandrappa & Ors. vs. State of Karnataka).

(ii) (2018) 5 RCR(Criminal) 518 (Amarsing Rupsing Mahida vs. State of Gujarat).

(iii) (2018) v. 14 SCC 513 (Madathil Narayanan & Ors. vs. State of Kerala & Anr.)

(iv) (2018) 1 GauLJ 112 (State of Assam vs. Biraj Das).

(v) (2021) 4 GauLT 732 (Director C.B.I. vs. Bhagya Kalita)

16. We have considered the submissions of the learned counsels for the parties. We have also perused the case record as well as the judgment of the trial court. On perusal of the judgment of the learned trial court, it reveals that the learned trial court acquitted the respondent Nos. 2 and 3 on the ground that by observing the fact that the prosecution mainly relied on the evidence of P.W. 6 who is the injured in the case. The learned trial court observed that P.W.6 has changed his version, while giving statement before the investigating officer, as well as in his statement recorded by the Magistrate under section 164 Cr.P.C. In the statement under section 164 Cr.P.C., P.W.6 did not say before the Magistrate that he noticed and saw the incident of assault on Sanowar by the respondent Nos. 2 and 3. He simply stated that hearing hue and cry of Zakir, he came out and at that time he noticed one person wearing black jacket and he shouted 'who was that person' and the said person gave a blow on his left hand and subsequently he identified the person as respondent No. 2 Surat Ali. P.W. 6 did not mention the name of other accused i.e. respondent No. 3 Bahar Ali before the Magistrate and the police.

17. The learned trial court also held that P.W.3 Zakir contradicted the statement of P.W.6 on material point on identification of the accused persons at the place of occurrence and attacking of the deceased by them. P.W.6 in his earlier statement recorded under section 161 and 164 Cr.P.C. did not state that he had noticed accused i.e. respondent Nos. 2 and 3 assaulting the deceased and identified them. For the first time before the court, P.W. 6 stated that respondent Nos. 2 and 3 attacked the deceased on the date of incident. The learned trial court, therefore, held that his evidence was not consistent with his earlier statement and was not cogent and convincing.

18. The learned trial court finally held that a cumulative reading of the statement of P.W. 6 made before the I/O which was his first statement and the second statement made before the Magistrate and his final statement made before the court is not consistent with each other and upon such inconsistent statements in absence of corroboration, it is not judicious to

accept the evidence of P.W.6 beyond all reasonable doubt. The learned trial court, thereafter, on the basis of the statement of P.W. 6 and other witnesses, acquitted the respondent Nos. 2 and 3.

19. In the instant case, the prosecution mainly relied on the evidence of P.W.3 and P.W. 6 and the other witnesses examined by the prosecution are admittedly came to the spot after the incident. P.W.2 who is the informant and the wife of the deceased Sanowar Ali, was also not present at the relevant time of incident According to her, she was informed about the incident by the mother of the injured Sahidul Islam. On coming to know about the incident, she went to Chapar Hospital to see her husband. By that time, her husband succumbed to his injuries. Though, P.W.2 alleged in her examination-in-chief that the respondent Nos. 2 and 3 assaulted her husband by a sharp cutting weapon and also inflicted the injury towards Sahidul Islam, but subsequently, in her cross-examination, P.W.2 admitted that at the initial stage, she stated before the police that some unidentified miscreants had restrained her husband on the way while he was coming from brick factory and had killed her husband by sharp weapon. This witness also admitted that she stated before police that Sahidul was assaulted by some unknown miscreants. P.W.2 also admitted that she did not disclose the name of any accused persons in her FIR.

20. P.W.3 who appears to be the eyewitness in the case, deposed in his evidence that on the date of incident at about 10 to 10:30 p.m., he was in his house. At that time, he heard a big sound near his house. He came out towards the main road and saw that a motorcycle was lying on the road and two persons were running. He also saw some labourers of brick factory. They were also running behind those two persons. Those labourers were shouting and trying to catch those two persons. Thereafter, one, Sahidul Islam was also running along with the labourers. There was hue and cry among those persons. He asked Sahidul Islam to stop to know about the incident. Sahidul Islam told him that he was assaulted on his hands by somebody else. He took Sahidul Islam to his house and again came back to the place of occurrence. Thereafter, he found that some labourers of brick factory were surrounding a person, namely Sanwar Ali. He went ahead and found Sanwara Ali in serious injured condition. Thereafter, he accompanied Sanwar Ali with other labourers to Chapar Hospital. He

noticed deep cut injury on the shoulder of Sanwar Ali. This witness was declared hostile on the request of the prosecution.

21. During cross-examination by prosecution, P.W.3 denied the fact that he stated before police that he saw the entire occurrence of killing of deceased Sanowar Ali by both the accused persons. He also denied the fact that he saw both the accused namely Surat Ali and Bahar Ali hitting Sanowar Ali by a dagger. P.W. 3 also denied the fact that he stated before police that he identified both the accused persons.

22. While P.W.3 was cross-examined by the defence, he replied that the night was dark. Many people assembled before his arrival. The labourers of brick factory had not disclosed the name of any accused person.

23. P.W.6 is the injured who deposed in his evidence that the incident occurred around 10 to 10:30 p.m. At that time, he was at home. Then he heard a hue and cry and somebody shouting 'catch' 'catch'. Then he came out and saw the accused namely Surat Ali and Bahar Ali assaulting Sanowar Ali. When he restrained them, the accused persons inflicted injury on his left hand with a dao. When he asked them as to why they made the assault, they assaulted him again. Zakir helped him to go home. Then, he was taken to hospital and there he stated before the police that the accused persons, Surat Ali and Bahar Ali had assaulted Sanowar. Later, he heard that Sanowar had died. After the incident, he was taken to Bongaigaon and then shifted to Guwahati. Subsequently, he had undergone treatment at Patna.

24. In his cross examination, P.W.6 replied that his house and the house of Zakir are adjacent to the place of occurrence. At that time, there was no other person except he and Zakir Hussain. He got injured. He gave statement to police on three occasions. He told Zakir about the occurrence. He witnessed the incident himself. Zakir also raised an alarm and came across him. He tried to catch the accused. Zakir and he ran to a distance of almost 20-30 cubits to catch the accused.

25. P.W.7 and P.W.8 are the labourers who were working in a brick kiln wherein the deceased Sanowar Ali was working as a Manager. P.W.7 deposed in his evidence that on the date of incident, he along with other labourers and the deceased were working in the same brick kiln. After finishing the work, they went back towards their house and Sanowar Ali was going on a motorcycle. Later he heard a sound of falling of the motorcycle. Then they rushed to the place of occurrence and found Sanowar lying along with the motorcycle. Many people gathered there and with the help of 2/3 persons, they took Sanowar to a hospital.

26. In his cross examination, P.W.7 replied that the incident took place at around 10/11 p.m. The motorcycle was lying in a ditch. He knew P.W.6 Sahidul but he did not see him there. They lifted Sanowar and thereafter they went to Sahidul's house. On being asked, Sahidul told that accused persons had injured him and that the accused persons had covered their faces with black clothes.

27. P.W.8 deposed before the Court that on the date of incident at about 9/09-30 p.m., Sanowar and they were doing accounts related works in the brick factory. Thereafter, Sanowar went home on his bike. Later they also came out. After a while, they heard hue and cry and they rushed to the place of occurrence and found that Sanowar along with his bike was lying in the drain beside the road. Sanowar was in injured condition. They all took him to hospital. However, Sanowar died on the way to the hospital.

28. From evidence of P.W.7 and P.W.8, it reveals that they came to the spot immediately after the incident and found Sanowar lying on the ditch near the roadside. But P.W.7 and P.W.8 did not find the injured Sahidul on the spot. According to the injured, P.W.6 except him and Zakir, none was present on the spot when the incident took place and they did not say about the presence of P.W.7 and P.W.8 immediately after the incident.

29. P.W.9, P.W.10 and P.W.13 came to the spot after hearing hue and cry but did not say anything about the incident.

30. P.W.11 is the Medical Officer who conducted post-mortem examination on the dead

body of the deceased on police requisition and on examination, he found the following :-

(a) External appearance:-

An average built male dead body is examined. Rigor mortise is present. The following injuries are noted:

- i) Lacerated injury over the temporal region. Extending from left side to his right temporal region. Size: 25 cm x 2 cm x full depth of the skull. Blood clots are present.
- ii) Lacerated injury over the occipital region extending from the left occipital region to his right side of the occipital bone. Size 25 cm x 2 cm x full depth to the skull. Blood clots are present.
- iii) Lacerated injury over his left side in front of the chest at the level of the 2nd and 3d rib. Placed horizontally. Size 15cm x 2 cm x 8 cm. cutting soft tissues and left lung 2 big vessels. Blood clots are present.
- iv) Lacerated injury over his right forearm and complete fracture of his joint both bones and soft tissues. Blood clots are present.

Cranium and spinal canal:-

- iv) Scalp & Skull: Blood clots are present
- v) Membrane:- There is loss of membrane below his fractured skull bones. Loss of anatomical configuration. Blood clots are present.
- vi) Brain and spinal cord: There is loss of brain tissues with loss of anatomical configuration. Blood clots are present.

Thorax:-

- (b) Pleurae: Rupture of his left upper lobe. Blood clots are present.

- (c) Larynx and trachea: Healthy

(d) Right lung: Healthy

(e) Left lung: Rupture of his left upper lobe. Blood clots are present.

(f) Pericardium:- Healthy

(g) Heart: Healthy

(h) Walls:- Healthy

(i) Peritonum:- Healthy

(j) Mouth Pharynx, oesophagus: Healthy

(k) Stomach and its contents Healthy and contains semisolid food matters.

(l) Small intestine and its contents: Healthy & contains some custom semisolid partially digested food matters.

(m) Large intestine and its contents: healthy and contains semisolid faecal matters and gas.

(n) Liver: Healthy

(o) Spleen: Healthy

(p) Kidneys: Healthy

(q) Bladder: Healthy and empty

The Doctor opined that the cause of death was due to shock and haemorrhage as a result of head injury sustained by the deceased. The injuries were anti-mortem in nature.

31. P.W.12 is another doctor who examined the injured Sahidul Ali and found the following :

(i) cut injuries in muscles in humerus bone of left hand and

(ii) cut injury size (2" X 1" X ½") in below and posturing of left hand.

As per the injury report, the injuries sustained by Sahidul Ali was grievous in nature, caused by sharp object.

32. P.W.14 is the MVI who inspected the motorcycle of the deceased seized in connection with this case.

33. P.W.15 is the Investigating Officer. He deposed in his evidence that on 06.02.2012, he was serving as In-Charge of Salkocha Outpost under Chapar Police Station. On that day at about 11:00 p.m., he got information over phone from one Nur Salam of Village - Baniapara Part II that some miscreants brutally caused severe injury on Sanowar Ali, owner of BTC brick field. After making endorsement in the GD entry book and informing the higher police officials about the incident, he proceeded to the place of occurrence with staff. Though he reached the place of occurrence but due to night, he could not inspect the place of occurrence properly. However, he questioned one Reshma Bibi, wife of Zakir Hussain of Village – Banipara Part II who was present at the place of occurrence. Thereafter, he made search to apprehend the miscreants. On the next day, a written ejahar was lodged by Anjuma Bibi. He came to know that injured Sanowar succumbed to his injuries. One person, Sahidul Islam sustained injury when he went to apprehend the miscreants. The miscreants gave him blow with a weapon. During investigation, he conducted inquest on the dead body of the deceased. Thereafter, the dead body was sent to Dhubri Civil Hospital for post-mortem examination. P.W.15 also stated that during investigation, he inspected the place of occurrence, drew sketch map of the place of occurrence, recorded statement of the witnesses and seized some articles from the spot. During investigation, he also forwarded Zakir Hussain and Sahidul Ali before the Court to record their statements under section 164 Cr.P.C. Witness Zakir Hussein gave his statement three times before him. Subsequently, he arrested the respondent nos. 2 and 3 in connection with the case. After collecting post-mortem report, finding sufficient material against the accused persons and on completion of the investigation, he submitted charge-sheet against the respondent nos. 2 & 3 under Sections 341/326/307/302/34 IPC vide Ext. 10.

34. In his cross-examination, P.W.15 replied that he did not record statement of Zakir on 06.02.2012. He recorded the statement of Zakir on three occasions. First, he examined Zakir on 07.02.2012 then on 15.02.2012 and last was taken on 22.02.2012. When he recorded the statement of Zakir on 07.02.2012, he did not disclose the name of accused but subsequently on 15.02.2012 and 22.02.2012 when the statement of Zakir was recorded by him, he disclosed the name of the accused, that is, respondent nos. 2 & 3. P.W.15 also stated in his cross-examination that witness Sahidul Ali did not state before him the names of the miscreants who assaulted him and Sanowar Ali.

35. It is no doubt true that due to the alleged incident, one Sanowar died and P.W.6 Sahidul Ali, sustained injuries on his person. P.W.11, Medical Officer who conducted autopsy on the dead body of the deceased, also supported the fact that the deceased sustained several injuries on his head causing his death.

36. P.W.12, that is, another Doctor who examined the injured also stated that on examination of the victim Sahidul, he found cut injuries on his left hand which was grievous in nature and caused by sharp object.

37. Now the question comes who are the perpetrators of the crime. According to learned counsel for the appellant, the respondent nos. 2 & 3 inflicted injury towards the deceased, as a result of which he died on the spot. P.W.3 and P.W.6 also supported the fact while their statements were recorded under Section 164 Cr.P.C. On the basis of the statement recorded under Section 164 Cr.P.C., the respondent nos. 2 & 3 should have been convicted by the trial Court. On the other hand, learned counsel for the respondent nos. 2 & 3 pointed out that P.W.3 was declared hostile by the prosecution as he did not support the case of the prosecution. There was contradictions in the statement of P.W.6 while recorded by the Investigating Officer and his statement before the Magistrate regarding involvement of the respondent nos. 2 & 3. According to learned counsel for the respondent nos. 2 & 3, the statement recorded under Section 164 Cr.P.C. or under Section 161 Cr.P.C cannot be treated as substantive evidence without an opportunity of being given for cross-examination to defence.

38. It hardly needs to be emphasized that one of the main reasons for witnesses to turn hostile is that they are not accorded appropriate protection by the State. It is a harsh reality, particularly in those cases where the accused persons/criminals are tried for heinous offences or where the accused persons are influential persons or in a dominating position that they make attempts to terrorize or intimidate the witnesses because of which these witnesses either avoid coming to Courts or refrain from deposing truthfully. This unfortunate situation prevails because of the reason that the State has not undertaken any protective measure to ensure the safety of these witnesses commonly known as witness protection.

39. The law is well settled that a statement recorded under Section 164 Cr.P.C. is not substantive evidence and it can be used to corroborate the statement of a witness and it can be used to contradict a witness. In ***Ram Kishan Singh vs. Harmit Kaur and another***, reported in ***(1972) 3 SCC 280***, it has been laid down that a statement recorded under section 164 of the Code of Criminal Procedure is not a substantive evidence and it can be used to corroborate the statement of a witness and to contradict a witness, and nothing else.

40. In the case of ***Baij Nath Sah vs. State of Bihar***, reported in ***(2010) 6 SCC 736***, the Hon'ble Apex Court has held that mere statement of the prosecutrix recorded under Section 164 Cr.P.C. is not enough to convict the appellant and it is not substantive evidence and it can be utilised only to corroborate or contradict the witness vis-à-vis statement made in court.

41. Reverting to the instant case, according to P.W.15, that is, the Investigating Officer, he recorded the statement of P.W.3 three times i.e. on 07.02.2012, 15.02.2012 and 22.02.2012. On 07.02.2012, P.W.3 did not disclose the name of any person before the Investigating Officer. Subsequently, on 15.02.2012 and on 22.02.2012, he disclosed the names of the respondent nos. 2 & 3 to be involved in the case. It is not clear from the statement of the Investigating Officer or the case record why the statement of P.W.3 was recorded three times by the Investigating Officer during investigation. The case diary does not indicate that P.W.3 was required to be questioned by the Investigating Officer three times. The Investigating Officer did not mention in the case diary why he recorded the statement of P.W.3 one after another during investigation.

42. The statement of the P.W.3 was recorded by the Magistrate under Section 164 Cr.P.C. wherein he stated that on the date of incident at about 10:00 p.m., he was at his house. Suddenly there was a sound. He came out and saw a motorcycle lying on the road and the accused Bahar Ali and Surat Ali assaulting Sanowar with *Kris*. Surat threatened to kill him if he made any noise. He screamed and ran after the two accused persons. Hearing his scream, his nephew Sahidul came out and he also started running ahead of him. Then in the darkness, someone assaulted Sahidul with sharp weapon. On finding Sahidul in injured condition, he took him to his house. While P.W.3 deposed before the court, he resiled from his earlier statement. According to him, after hearing a big sound near his house on the date of incident, he came out and saw a motorcycle was lying on the road and two persons were running. There were some labourers of brick factory also and they were also running behind those two persons. Though P.W.3 met Sahidul on the spot, Sahidul was found in injured condition but P.W.3 did not ask who had caused injury to Sahidul.

43. The Hon'ble Supreme Court has in the cases of ***Krishna Mochi and others vs. State of Bihar***, reported in **(2002) 6 SCC 81**, ***State of U.P. vs. Ramesh Prasad Misra***, reported in **(1996) 10 SCC 360** and ***State of NCT Delhi vs. Sanjeev Nanda***, reported in **(2012) 8 SCC 450**, it was held that it is settled law that the evidence of a hostile witness could not be totally rejected, if spoken in favour of the prosecution or the accused, but it can be subjected to closest scrutiny and that portion of the evidence which is consistent with the case of the prosecution or defence may be accepted.

44. As it appears that P.W.3 has changed his version in various occasions while giving his statement before the Investigating Officer thrice and subsequently before the Magistrate and while giving his evidence before the trial Court, we are of the view that the evidence of P.W.3 cannot be taken into consideration what had exactly done by the learned trial Court.

45. Regarding P.W.6, though he deposed before the trial Court that on the date of incident at about 10/10:30 p.m. after hearing hue and cry while he came out from his house, he saw the accused Bahar Ali and Surat Ali, assaulting Sanowar Ali. He restrained them and the accused persons inflicted injury in his left hand with a *dao*. P.W.6 also stated that when he

was taken to hospital, there he stated before the police that the accused persons i.e. Bahar Ali and Surat Ali had assaulted Sanowar.

46. The statement of P.W.6 was recorded by the learned Magistrate under Section 164 Cr.P.C. wherein he stated before the Magistrate that on the date of incident at about 10/10:30 p.m., he was at his house. In the meantime, he heard Zakir shouting like 'catch catch' 'fled away, fled away'. Then he came out and saw a man, clad in a black jacket, running by the side of their house. Then he shouted who was that. He ran following him. Then the man assaulted him with a sharp weapon and inflicted injury in his right hand. He identified the man as Surat Ali.

47. From the statement of P.W.6 before the Magistrate, it reveals that he did not say anything about presence of another accused Bahar Ali at the time of incident. He was assaulted by only one accused i.e. Surat Ali. The statement recorded under Section 164 Cr.P.C. of P.W.6 is also silent regarding any assault hurled by the respondent nos. 2 & 3 towards Sanowar Ali. P.W.6 did not utter a single word regarding assault of the deceased by the respondent nos. 2 & 3 before the learned Magistrate.

48. As the learned counsel for the appellant raised the point that the statement recorded under Section 164 Cr.P.C. corroborates the medical evidence as well as the post-mortem examination report and thereby found the appellant guilty, it is interesting to note that the statement recorded under Section 164 Cr.P.C. of P.W.3 and P.W.6 were not exhibited in this case. The Magistrate who recorded the statement was also not examined to prove the statement of P.W.3 and P.W.6 recorded under Section 164 Cr.P.C.

49. Now the question as to whether presumption can be taken under Section 80 of Indian Evidence Act, 1872 applicable to the statement recorded by a Magistrate under Section 164 Cr.P.C. which reads as follows-

“Section 80- Presumption as to documents produced as record of evidence- Whenever any document is produced before any Court, purporting to be a record or

memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take such evidence, or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume that the document is genuine; that any statement as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.”

50. The said aspect has elaborately dealt with by a three-Judges Bench in ***Sheo Raj vs. State***, reported in ***(1963) SCC OnLine All 123***, and held that a statement made under Section 164 Cr.P.C. is not ‘evidence’, is not made in a ‘judicial proceeding’ and is not given under oath. It has been held therein as under –

“.....it is open to any person to make a statement or confession before a Magistrate into course of an investigation, or at any time thereafter, but before the commencement of an enquiry or trial and the statement or confession will be recorded by the Magistrate under Section 164 and is not subject to the bar imposed by Section 162. Such a statement, being a previous statement, may be used only to contradict the person when he appears as a witness at the enquiry or trial of the offence or to corroborate him.

.....When a Magistrate records a statement under Section 164, there are only two proceedings in which it can possibly be said to have been recorded, (1) the investigation by the police and (2) the proceeding of recording the statement itself. The investigation by the police is not a judicial proceeding. ‘Judicial proceeding’ is not defined in the Evidence Act, but since we are concerned with a statement recorded under the Code of Criminal Procedure, the question whether it was recorded in a judicial proceeding or not must be decided in the light of the definition given in the Code. ‘Judicial proceeding’ is defined in Section 4(1)(m) to mean any proceeding in the course of which evidence is or may be legally taken on oath.....”

51. The principles laid down in the above decision makes it clear that the presumption under Section 80 of the Evidence Act cannot be drawn to rely upon the statements of witnesses recorded under Section 164 Cr.P.C. during investigation to render a conviction.

52. Coming to the question of power of the appellate court on appeal against acquittal, We would like to quote the relevant portion of the recent judgment of the Hon'ble Supreme Court in **Jafarudheen and others vs. State of Kerala**, reported in **(2022) SCC Online SC 495**, which reads as follows –

“25. While dealing with an appeal against acquittal by invoking Section 378 of the Cr.P.C., the Appellate Court has to consider whether the Trial Court's view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus, the Appellate Court has to be relatively slow in reversing the order of the Trial Court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened but only strengthened. Such a double presumption that ensures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters.”

53. In another case, **Mohan alias Srinivas alias Seena alias Tailor Seena vs. State of Karnataka**, reported in **(2021) SCC OnLine SC 1233**, it has been held as under –

“20. Section 378 Cr.P.C. enables the State to prefer an appeal against an order of acquittal. Section 384 Cr.P.C. speaks of the powers that can be exercised by the Appellate Court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the Appellate Court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The Appellate Court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are

possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the Appellate Court shall remind itself of the role required to play, while dealing with the case of an acquittal."

54. In the recent decision of **Vijay Mohan Singh vs. State of Karnataka**, reported in **(2019) 5 SCC 436**, the Hon'ble Supreme Court again had an occasion to consider the scope of Section 378 Cr.P.C. and the interference by the High Court in an appeal against acquittal. The Hon'ble Supreme Court considered in a catena of decisions right from 1952 onwards. It was observed and held as under –

*"31. An identical question came to be considered before this Court in **Umedbhai Jadavbhai vs. State of Gujarat**, reported in **(1978) 1 SCC 228**. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on reappreciation of the entire evidence on record. However, the High Court, while reversing the acquittal, did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this court observed and held as under –*

10. Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to reappreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Sessions Judge if the same were arrived at after proper appreciation of the evidence. This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstances of the case."

55. In the case of **N. Vijayakumar vs. State of Tamil Nadu**, reported in **(2021) 3 SCC 687**, it was held that-

"20. Mainly it is contended by Shri Nagamuthu, learned Senior Counsel appearing for

the appellant that the view taken by the trial court is a 'possible view', having regard to the evidence on record. It is submitted that the trial court has recorded cogent and valid reasons in support of its findings for acquittal. Under Section 378 Cr.P.C., no differentiation is made between an appeal against acquittal and the appeal against conviction. By considering the long line of earlier cases, this court in the judgment in Chandrappa vs. State of Karnataka, [(2007) 4 SCC 415] has laid down the general principles regarding the powers of the appellate Court while dealing with an appeal against an order of acquittal, which is relevant reads as under:

42. From the above decisions, in our considered view, the following general principles regarding powers of the Appellate Court while dealing with an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of

his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

56. By applying the aforesaid principles and the evidence on record in the case on hands, we are of the considered view that having regard to material contradictions, which we have already discussed above and also as referred to in the trial court judgment, it can be said that acquittal is a plausible verdict. By applying the ratio as laid down by the Hon'ble Supreme Court in the judgments stated above, even assuming another view is possible, the same is no ground to interfere with the judgment of acquittal and to convict the respondent nos. 2 & 3 for the offence alleged. To conclude, we must say that all the aspects have been considered by the trial court. We do not find any perversity in it and the law presumes double presumption in their favour i.e. respondent Nos. 2 and 3 after a due adjudication by the trial court.

57. In the result, the appeal is dismissed. Send back the LCR.

JUDGE

JUDGE

Comparing Assistant