

GAHC010181182011



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

Case No. : Crl.A./223/2011

1: DIPAK KAKATI @ BHUDHA and 2 ORS
S/O SRI BHARAT KAKATI, VILL. PUB NOHIRA,
P.S. PALASBARI, DIST. KAMRUP, ASSAM.

2: MANTU BORO
S/O SRI AGHONA BORO
VILL. DOKHOLA BORIPARA
P.S. PALASBARI
DIST. KAMRUP
ASSAM.

3: MD. LAKHAN ALI
S/O MD. JAMAL ALI
VILL. DOKHOLA BORIPARA
PS. PALASBARI
DIST. KAMRUP
ASSAM

VERSUS

STATE OF ASSAM

Advocate for the Petitioner : MR.A PARAMANIK

Advocate for the Respondent :

BEFORE
HONOURABLE MR. JUSTICE ROBIN PHUKAN

JUDGMENT (CAV)**Date : 09-01-2023**

Heard Mr. A. Paramanik, learned counsel for the appellants. Also heard Ms. S. Jahan, learned Addl. P.P., Assam, for the State respondent.

2. This appeal is directed against the judgment and order dated 11.08.2011, passed by the learned Addl. Sessions Judge, Fast Track Court (FTC), Kamrup, Guwahati, in Sessions Case No.288(K) of 2005, under sections 341/302/34 IPC. It is to be mentioned here that vide impugned judgment and order, dated 11.08.2011, the learned Court below has convicted the appellants – (1) **Shri Dipak Kakati @ Bhudha**, (2) **Shri Mantu Boro**, (3) **Md. Lakhan Ali**, under Section 341/304 –II/34 IPC, and sentenced them to suffer rigorous imprisonment for a period of 7 years and also to pay a fine of Rs.5,000/-, in default S.I. for another one year, and also convicted them under Section 341/34 IPC, and sentenced them to suffer simple imprisonment for a period of six months.

3. The factual background, leading to filing of the present appeal, is adumbrated herein below:-

“On 25.02.2001, one Shri Biren Chandra Medhi, a resident of Village - Nahira, lodged one FIR with the In-Charge of Bijohnagar Police Out Post, to the effect that on 21.02.2001, at about 8.30 pm, his son namely-Romen Medhi was returning home from Dakhala Shiva Temple. On his way, one Dipak Medhi, along with some other boys, restrained him and assaulted him. As a result, his son sustained serious injuries on his person. He was treated at Guwahati Medical College Hospital, where he succumbed to the injuries on 23.02.2001.

Upon the said FIR, the Officer-in-Charge of Palashbari P.S., registered a case, being Palashbari P.S. Case No.31/2001, under Section 341/302/34

IPC, and investigated the same. During investigation, the I.O. had visited the place of occurrence, examined the witnesses and held inquest on the dead body of the deceased and collected the report. Then he has arrested the appellants and forwarded them to the Court. Then on completion of investigation, he laid charge sheet against the appellants, to stand the trial in Court, under sections 341/302/34 IPC.

Thereafter, the appellants appeared before the learned court below. Then the learned Court below, and after hearing learned Advocates of both sides, framed charge against the appellants under Section 341/302/34 IPC and on being read over and explained over, the appellants pleaded not guilty to the same. Thereafter, the learned Court below had examined as many as thirteen witnesses, including the Medical Officer and the Investigating Officer and thereafter, closing the prosecution evidence, the Court below had examined the appellant under Section 313 of the Cr. P.C. Thereafter, hearing arguments of both sides, the learned court below has convicted the appellant under Section 341/304-II/34 IPC and sentenced them, as aforesaid.

4. Being highly aggrieved, the appellant preferred this appeal challenging their conviction and sentence and to set aside the same on the following grounds:-

- (i) That, the learned Court below had erred in law and on facts, in passing the impugned judgment and order dated 11.08.2011;
- (ii) That, the learned Court below has failed to appreciate the evidence in its proper perspective and arrived at an erroneous finding;
- (iii) That, the learned Court below has failed to apply its judicial mind and convicted the appellants ignoring the settled positions of law and

procedure;

- (iv) That, the learned Court below has failed to consider the fact that the prosecution witnesses are wholly unreliable and the whole prosecution case is false fabricated one;
- (v) That, the learned trial Court had relied upon the sole testimony of the unreliable witnesses, for convicting the appellant, but, the evidence of the prosecution witnesses cannot be relied upon to convict the appellants;
- (vi) That, the learned Court below had failed to appreciate the fact that the FIR is totally silent about the injuries sustained by the deceased and arrived at an erroneous finding;
- (vii) That, the learned Court below had failed to consider the fact that there is material contradictions in the evidence of prosecution witnesses with their statement under section 164 Cr.P.C.;
- (viii) That, the learned court below has failed to consider the fact that P.W.1, 2 and 4 are interested witness and that the wife of the deceased had given massage upon the stomach of the deceased and as such she is material witness here in this case and that one rikshow pullar has brought the deceased back to his home and non-examination of these two vital witnesses raise suspicion about the veracity of the prosecution version;
- (ix) That there is non-reading and misreading of evidence by the learned court below which lead to gross-miscarriage of justice and therefore, it is contended to allow this appeal by setting aside this judgment and order of conviction;

5. Mr. A. Paramanik, the learned counsel for the appellant, firstly, submits that the prosecution side has failed to examine two vital witnesses i.e. the rikshaw puller who brought the deceased back to his home and also the wife of the deceased, who allegedly provided massage to the deceased, and non examination of this two witnesses raise serious doubt about the prosecution version. Secondly, Mr. Paramanik submits that the learned Court below has failed to consider the fact that there are material contradictions in the versions of the prosecution witnesses. Thirdly, it is submitted by that most of the prosecution witnesses are interested and related witness and as such the learned court below ought not to have place reliance upon the same to convict the appellants. It is further submitted that the impugned judgment and order suffered from manifest illegality and irregularity and therefore, it is contended to allow the appeal by setting aside the same.

6. Per contra, Ms. S. Jahan, the learned Addl. P.P., Assam submits that the learned Court below had rightly convicted the appellant under sections 341/304-II/34 IPC. Taking this court through the evidence of the prosecution witnesses, Ms. Jahan submits that the learned court below has relied upon the evidence of P.W.1 and 4 and as per evidence of P.W.1 there was oral dying declaration and P.W.4 and also P.W.6 has supported the same. Ms. Jahan further submits that the impugned judgment and order suffers from no infirmity or irregularity, and therefore, contended to dismiss the appeal.

7. Having heard the submission of learned Advocates of both sides, I have carefully gone through the petition and the documents placed on record and also perused the record of the learned Court below.

8. That, as to the date, time and place of occurrence, it appears from the record of learned court below, specially from the FIR-Ext-1, and from the

evidence of P.W.1, P.W. 2, P.W., P.W.3, P.W.5, P.W.6 and P.W.12, that the same took place on 21.02.2001, at about 8.30 pm, at Nahira, Karipara village. At the relevant point of time the deceased was returning home from Dakhala Shiva Temple. It is to be noted here that the date, time and place of occurrence has not been disputed by the appellants.

9. It also appears from the evidence on the record that the deceased Ramen Medhi died on 23.02.2001, at about 10-30 am at GMCH, during the course of treatment. His death and time of his death is also not disputed by the appellants. Now, it is to be seen how the death of deceased Ramen Medhi took place.

10. The prosecution side has examined Doctor Kalicharan Basumatary, Asst. Professor, Forensic Deptt. GMCH, who has conducted autopsy upon the dead body of the deceased, as P.W. 13. His evidence also reveals that he found abrasion, measuring - 4.5 cm x 2 cm in left side of the lower lip of the deceased. He also found Peritoneal Cavity contained clotted and liquid blood 150 cc. Right lobe of the liver was contused, dark and brown in colour. He also found all other organs healthy. He opined that the cause of death was due to shock and hemorrhages, resulting from the injuries of the liver and abrasion over lip, and the injuries were ante mortem and caused by blunt and force impact. His report - Ext. 11 is also consistent with his version. The evidence of the Doctor could not be shaken in his cross-examination. He categorically stated that the injury of liver was caused by heavy blunt impact and cannot be caused by simple fall. Thus, it becomes apparent that the deceased died of shock and hemorrhages, suffering from the injuries of the liver, caused by blunt and forced impact and the same is homicidal in nature.

11. Now, let it be seen who caused the injuries upon the deceased. It is to be

noted here that the prosecution side has examined altogether 13 witnesses, including the M.O. and I.O. Out of the thirteen witnesses, the prosecution side has declared P.W.-5- Shri Basanta Boro, P.W.-7- Shri Diganta Boro and P.W.-9 - Shri Pabitra Boro as hostile and cross-examined them and confirmed their statements, made under section 161 Cr.P.C. through the I.O. P.W. 12. P.W. 1- Shri Biren Chandra Medhi is the informant and father of the deceased and P.W.-2- Shri Dhiren Medhi is the younger brother of P.W.1, and P.W.3- Shri Maheswar Thakuria is a Teacher and seizure witness and P.W. 4 - Shri Pranab Medhi is brother of the deceased and P.W.6 - Shri Dilip Boro is a student, and P.W.8 - Shri Krishna Boro, none have seen the occurrence.

12. The evidence of the P.W.1 reveals that his deceased son went to attend Shivaratri Puja at Dakhala Pahar and he did not return home on that night. Next day at about 9 am in the morning one rikshaw pullar had taken his son home and he was not in a position to walk. Thereafter, he took his son to Nahira State Dispensary, and thereafter, as per advice of the Doctor he got his son admitted at GMCH and on the next day, at about 10-30 am, his son succumbed to injuries and prior to his death, his son told him and his wife and son-in-law- Shri Haricharan Das that Mantu Boro, Dipak Kakati, Laxman Ali and one Kankata have assaulted him with hand and leg around his '*Navi*' on the night of Shivaratri near the pond. His evidence also reveals that the deceased had a cycle and accused Pradip Boro, Dipak Kakati and Laxman Ali have kept the cycle in the house of Phatik Kumar.

13. The appellants have cross-examined this witness at length, but, nothing tangible could be elicited to discredit his evidence. He denied the suggestion of the appellants that his son sustained injury by falling from the cycle near the pond under the intoxication of Ganja. Thus, it appears that there is oral dying

declaration of the deceased made before the P.W.1. The learned court below has accepted the oral dying declaration made by the deceased before P.W.1 having relied upon a decision of this court in **Bharat Das vs. State of Assam** reported in **1995(1) GLT 350**, to hold that oral dying declaration also can be acted upon. It is to be mentioned here that while holding so this court has relied upon a decision of Hon'ble Supreme Court in **Vishram And Others vs. State Of Madhya Pradesh reported in 1992 (6) SC 146**. Thus, I find no ground to disagree with the finding of the learned court below.

14. P.W.2 - Shri Dhiren Medhi has also not seen the occurrence. His evidence reveals that he came to know from his wife that one rickshaw puller has kept Ramen Medhi in his house. He then went there and found Ramen Medhi in a bed in his house, and he could not speak properly and his wife was massaging over his stomach and when asked Ramen told him that he was assaulted near the pond on the night of 21.02.2001. To the night, the condition of the deceased became serious and seeing the same, he sent him to GMCH and in the morning of 23.02.2001, Ramen succumbed to the injuries. Nothing tangible could be elicited in cross-examination of this witness also. But, this witness has not indicated as to who have assaulted Ramen and as such the evidence of this witness would not advance the case of the prosecution.

15. P.W. 3- Shri Maheswar Thakuria is a neighbor of the deceased and his evidence reveals that the occurrence took place on the night of 21.02.2001, and on the next day morning he had seen assembly of many persons in the house of Ramen, and he also went there and found Ramen in jumping in pain and heard that he was assaulted by the accused persons near the pond. Then they have taken Ramen to Mirza PHC and thereafter, taken him back home and to the night, when the condition of Ramen became serious his father got him admitted

in GMCH and there he succumbed to the injuries. His evidence also reveals that police, during the course of investigation, seized the bicycle of Ramen from the house of Phatik vide seizure list- Ext.2 and he also scribed the FIR - Ext-1. He confirmed Ext. 1(2), his signature over the same.

16. The evidence of P.W.4, - Shri Pranab Medhi reveals that his brother Ramen Medhi went to enjoy Shivaratri Puja on 21.02.2001, and on that night he did not return. On the next day morning at about 8.30 am, his brother return home in one rikshow and then his brother told him that accused Mantu Boro, Dipak Kakati and Laxman Ali and some other persons have assaulted him and left him and accused Mantu Boro and some others have kept his bicycle in the house of Phatik and he brought the same home, and thereafter, police seized the same, vide seizure list- Ext-02. Thereafter, on 22.02.2001 they took his brother to Mirza PHC, and thereafter, they took him to GMCH, and on 23.02.2001, at about 11 am, his brother succumbed to the injuries. Nothing tangible could be elicited in cross-examination of this witness to discredit his version.

17. Thus, it appears from the evidence of these four witnesses, especially from the evidence of P.W.1 and 4, that though they have not seen the occurrence, yet, they heard from the deceased that appellants - Mantu Boro, Dipak Kakati and Laxman Ali and some other persons have assaulted him.

18. P.W.5 - Shri Basanta Boro, P.W. 7 Diganta Boro and P.W.9 Pabitra Boro, turned hostile and the prosecution side has cross-examined them and also confirmed their statements given before the police, through the I.O.- P.W.-12. The evidence of P.W. 12 reveals that witness Basanat Boro testified before him that "On 21.02.2001, at about 8-30 pm at night, at Karipara, inside the E&D embankment, Mantu Boro, Dipak Kakati, and Laxman Ali have slapped Ramen Medhi and also assaulted him with fist and leg. Later on, he came to know that

Ramen Medhi succumbed to the injuries and that he had seen the occurrence with his own eyes.” P.W.12 also confirmed that witness Diganta Boro had testified before him that “On 21.02.2001, at about 8/8-30 pm at night, while he was carrying the idol of Shiva with his companion, then at Karipara, inside the E&D embankment, he had seen Mantu Boro, Dipak Kakati, and Laxman Ali have slapped Ramen Medhi and also assaulted him with fist and leg.” P.W.12 also confirmed that witness Prabin Boro stated before him that- “On 21.02.2001, at about 8/8-30 pm at night, while he was carrying the idol of Shiva with his companion, then at Karipara, inside the E&D embankment, he had seen 6/7 persons namely- Mantu Boro, Dipak Kakati, and Laxman Ali slapping and assaulting Ramen Medhi with fist and leg.” Cross-examination P.W.12 also could elicit nothing tangible to demolish his examination-in-chief.

19. Besides, in their examination-in-chief also (un-hostile part) P.W.5 - Shri Basanta Boro and P.W. 7 -Diganta Boro have testified that in the year 2001, he and his friend Diganta Boro, Dilip Boro, Krishna Boro and some others, at about 8 pm in the evening, were carrying Idol to Bijohnagar from Bamunpara, through the embankment, and then they came to know that on the bank of the river, beneath the embankment a ‘mar-pit’ took place and after three days they came to know that Ramen Medhi died. And P.W.9 - Pabitra Boro also testified that in the year 2001, at about 8 pm in the evening, they were carrying Idol of Shiva and on the bridge they have found assembly of many persons and there they came to know that one person was assaulted there.

20. It is worth mentioning here in this context that the evidence of hostile witnesses cannot be brushed aside altogether. The law regarding the value of evidence of hostile witness is well settled by Hon’ble Supreme Court in catena of decisions. In the case of **Kholi Lakhanbhai Chanabhai vs. State of**

Gujarat, reported in **AIR 2000 SC 210**, Hon'ble Supreme Court has held that-

“From the aforesaid evidence on record, in our view, it cannot be said that the High Court erred in relying upon some portion of the evidence of P.W. 7 who was cross-examined by the prosecution. It is settled law that evidence of hostile witness also can be relied upon to the extent to which it supports the prosecution version. Evidence of such witness cannot be treated as washed off the record. It remains admissible in the trial and there is no legal bar to base his conviction upon his testimony if corroborated by other reliable evidence [Re: [Bhagwan Singh v. State of Haryana](#) (1976) 1 SCC 389 and [Sat Paul v. Delhi Administration](#) (1976) 1 SCC 727].”

21. In Haradhan Das Vs. State of West Bengal, (2013) 2 SCC 197 held as under:-

“It is a settled principle of law that the statement of a witness who has been declared hostile by the prosecution is neither inadmissible nor is it of no value in its entirety. The statement, particularly the examination-in-chief, in so far as it supports the case of the prosecution is admissible and can be relied upon by the court.”

22. Again in Bhajju @ Karan v. State of Madhya Pradesh (2012) 4 SCC 327 discussed the law in some elaboration, declared the principle as follows:

“35. Now, we shall discuss the effect of hostile witnesses as well as the worth of the defence put forward on behalf of the Appellant-accused. Normally, when a witness deposes contrary to the stand of the prosecution and his own statement recorded under Section 161 Code of Criminal Procedure, the prosecutor, with the permission of the court, can pray to the court for declaring that witness hostile and for granting leave to cross-examine the said witness. If such a permission is granted by the court then the witness is subjected to cross-examination by the prosecutor as well as an opportunity is provided to the defence to cross-examine such witnesses, if he so desires. In other words, there is a

limited examination-in-chief, cross-examination by the prosecutor and cross-examination by the counsel for the accused. It is admissible to use the examination-in-chief as well as the cross-examination of the said witness insofar as it supports the case of the prosecution.

36. It is settled law that the evidence of hostile witnesses can also be relied upon by the prosecution to the extent to which it supports the prosecution version of the incident. The evidence of such witnesses cannot be treated as washed off the records, it remains admissible in trial and there is no legal bar to base the conviction of the accused upon such testimony, if corroborated by other reliable evidence. Section 154 of the Evidence Act enables the court, in its discretion, to permit the person, who calls a witness, to put any question to him which might be put in cross-examination by the adverse party.

37. The view that the evidence of the witness who has been called and cross-examined by the party with the leave of the court, cannot be believed or disbelieved in part and has to be excluded altogether, is not the correct exposition of law. The courts may rely upon so much of the testimony which supports the case of the prosecution and is corroborated by other evidence. It is also now a settled canon of criminal jurisprudence that the part which has been allowed to be cross-examined can also be relied upon by the prosecution."

23. Keeping the aforesaid principles in mind, while the evidence of three hostile witnesses i.e. P.W. 5, 7 and 9 are examined I find that their evidence-in-chief (un-hostile) part, reveals that they were carrying Idol of Shiva, through the place of occurrence, at the relevant point of time. So, their presence at the place of occurrence, at the relevant point of time, is an admitted fact and there cannot be any doubt about it. Moreover, their statements, Ext. 3, 4 and 7, recorded under section 164 Cr.P.C. by P.W. 11-Smti. Latika Baruah, the then Judicial Magistrate 1st Class, Guwahati, also lends support to the hostile part of their evidence. Thus, it becomes apparent that all of them appear to be the eye witness to the occurrence of assault upon the deceased Ramen Medhi by

accused Dipak Kakati, Mantu Boro and Laxman Ali. And therefore, that part of evidence of P.W. 5, 7 and 9, which supported the prosecution version, can be acted upon.

24. Further, it appears from the evidence of P.W.6- Shri Dilip Boro that he heard that Ramen Medhi was assaulted by the accused persons and as a result Ramen Medhi succumbed to the injuries at GMCH. His evidence also reveals that at the relevant time he and some of his friends were carrying Idol of Shiva. Whereas, the evidence of P.W.8- Shri Krishna Boro reveals that at the relevant time, while he was carrying Idol of Shiva and on the way, then they have found assembly of several persons on the road of Bamunpara. Both these witness also confirmed their statement, Ext.-5 and Ext.-6, given before the Magistrate. A perusal of their statements, Ext.-5 and Ext.-6, reveals that they were the eye witness to the occurrence. However, in their cross-examination by defence side, it is elicited that they have testified before the Magistrate as tutored Police, though they have stated in their examination-in-chief that the Magistrate has recorded their statement as deposed by them. However, the I.O. in his cross-examination categorically denied the appellants' suggestion that the P.W. 6 and 8 have deposed before the Magistrate as tutored by him.

25. It also appears from the evidence of P.W.12 that he has seized the Hero Cycle, used by the deceased from the house of the complainant Biren Medhi and given the same in the zimma of the complainant. The seizure list-Ext.-2 and seizure witness Pranab- Medhi - P.W.4 and Maheswar Thakuria- P.W.-3, also lend support to the same. It also appears that the cycle was handed over by accused Dipak Kakati and his associates in the house of one Phatik Kumar of Nahira

Village, and the same was brought home by Pranab Medhi-P.W.4. The evidence of Pranab Medhi also reveals that he was told by his deceased brother that after assaulting him by accused Mantu Boro, Dipak Kakati and Laxman Ali and some others and left him there and accused Mantu Boro and his associates have kept the cycle in the house of Phatik Kumar. The factum of recovery of the bi-cycle from the House of Phatik Kumar by witness Pranab Medhi and subsequent seizure of the same, vide seizure list Ext.2, by the I.O. also lends support to the prosecution versions.

26. Thus the evidence of P.W.1 and the oral dying declaration made before him by the deceased and the evidence of P.W.-4 and being corroborated by the evidence of hostile witnesses, i.e. P.W.5, 7 and 9, and also the evidence of P.W. 6, and coupled with medical evidence and other facts and circumstances on the record and discussed herein above, goes a long way to establish beyond all reasonable doubt that the appellants, namely-Dipak Kakati, Mantu Boro and Laxman Ali were the persons responsible for the injuries sustained by the deceased Ramen Medhi. And as such the learned court below has rightly arrived at the conclusion that deceased Ramen Medhi died of the injuries caused by the three appellants. I find no just ground to disagree with the same.

27. Now, it is to be seen whether the homicidal death, so caused to the deceased by the appellants, would come under any of the exception under section 300 IPC. It appears from the record of the learned court below that there are no materials on the record to suggest that death of the deceased was caused by the appellants whilst deprived of the power of self-control, by grave and sudden provocation, and as such it would not under exception No.1. Also,

there is nothing on the record to indicate that death of the deceased was caused by the appellants in the exercise in good faith of the right of private defence of their person or property, exceeds the power given to them by law and causes the death of the deceased against whom they were exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence, and as such it would not come under the exception No.2. The appellants are not public servant or aiding a public servant acting for the advancement of public justice, they exceeds the powers given to him by law, and causes death by doing an act which they, in good faith, believes to be lawful and necessary for the due discharge of their duty as such public servant and without ill-will towards the deceased, so it would not come under the exception No.3 also. There is also no material to suggest that being above the age of eighteen years the deceased suffers death or takes the risk of death with his own consent, and as such exception No.5 is not attracted here in this case. But, it appears that there was sudden fight between the deceased and the appellants. And as such it seems that it would come under the exception No.4. It is to be mentioned here that it is immaterial in such cases which party has offers the provocation or commits the first assault as per explanation.

28. The learned court below has held that the act of the appellants falls under the category of culpable homicide not amounting to murder and punishable under section 304 - II of IPC as from the circumstances, under which they have assaulted the decease, as established by the prosecution side, it is clear that they have no intention to cause death of the deceased. The learned court below further held that the act of the appellants falls under the category of culpable

homicide not amounting to murder. The grounds, so assigned by the learned court below appear to be not unjustified in the given facts and circumstances on the record. And this court is inclined to record concurrence with the finding of the learned court below in view of the facts and circumstances on the record.

29. I have considered the submissions of learned counsel for the appellants with the aid all circumspection at my command and in view of my above discussion and finding; I am unable to record my concurrence with the same. It is true that P.W.1 and P.W.4 are father and son and P.W.3 is the brother of P.W.1 and all of them are the near and dear relatives of the deceased and interested in the outcome of the case. But, it now a settled positions of law that interestedness is not a ground to discard the evidence of a witness. Reference in this context can be made to a decision of Hon'ble Supreme Court in the case of **Paresh Kalyandas Bhavsar vs. Sadiq Yakubbbhai Jamadar And Others, AIR 1993 SC 1544, 1993 Cri.L.J. 1857**, where it has been held that:-

“It is needless to say that mere interestedness is not a ground to reject the evidence of the eye witnesses particularly those who were injured. Firstly their presence during the occurrence cannot be doubted. Secondly the injured witnesses would be the last persons to leave out the real culprits and implicate others falsely. However, it becomes necessary to scrutinise their evidence with great care and caution. Normally in a case of this nature the evidence of such witnesses is scrutinised in the light of the medical evidence, their previous statements, the earliest version put forward and other circumstances like the investigation being defective and also the effect of omissions or discrepancies, if any.”

30. It is, however, a fact that some witnesses have not been examined by the

prosecution side here in this case. One such witness was the rickshaw puller who brought the deceased home in the morning on the next day of occurrence, and the other one was the wife of the deceased, who allegedly given massage over the stomach of the deceased. But, none of these two witnesses appears to be material witness to the occurrence. Neither they have seen the occurrence, nor have they heard that the appellants have assaulted the deceased. And as such their non examination caused no dent to the prosecution version.

31. While focusing on the gravity of the crime and the concept of proportionality as regards the punishment, Hon'ble Supreme Court in **Gopal Singh v. State of Uttrakhand (2013) 7 SCC 545**, had observed that :-

“Just punishment is the collective cry of the society. While the collective cry has to be kept uppermost in the mind, simultaneously the principle of proportionality between the crime and punishment cannot be totally brushed aside.

The principle of just punishment is the bedrock of sentencing in respect of a criminal offence. A punishment should not be disproportionately excessive. The concept of proportionality allows a significant discretion to the Judge but the same has to be guided by certain principles. In certain cases, the nature of culpability, the antecedents of the accused, the factum of age, the potentiality of the convict to become a criminal in future, capability of his reformation and to lead an acceptable life in the prevalent milieu, the effect--propensity to become a social threat or nuisance, and sometimes lapse of time in the commission of the crime and his conduct in the interregnum bearing in mind the nature of the offence, the relationship between the parties and attractability of the doctrine of bringing the convict to the value-based social mainstream may be the guiding factors. Needless to emphasize, these are certain illustrative aspects put forth in a condensed manner. We may hasten to add that there can neither be a straitjacket formula nor a solvable theory in mathematical exactitude. It would

be dependent on the facts of the case and rationalized judicial discretion. Neither the personal perception of a Judge nor self-adhered moralistic vision nor hypothetical apprehensions should be allowed to have any play. For every offence, a drastic measure cannot be thought of similarly, an offender cannot be allowed to be treated with leniency solely on the ground of discretion vested in a court. The real requisite is to weigh the circumstances in which the crime has been committed and other concomitant factors which we have indicated hereinbefore and also have been stated in a number of pronouncements by this Court. On such touchstone, the sentences are to be imposed. The discretion should not be in the realm of fancy. It should be embedded in the conceptual essence of just punishment."

32. Again in Raj Bala Vs. State of Haryana and Ors. AIR 2015 SC 3142,

Hon'ble Supreme Court has held that :-

"A Court, while imposing sentence, has a duty to respond to the collective cry of the society. The legislature in its wisdom has conferred discretion on the Court but the duty of the court in such a situation becomes more difficult and complex. It has to exercise the discretion on reasonable and rational parameters. The discretion cannot be allowed to yield to fancy or notion. A Judge has to keep in mind the paramount concept of rule of law and the conscience of the collective and balance it with the principle of proportionality but when the discretion is exercised in a capricious manner, it tantamount to relinquishment of duty and reckless abandonment of responsibility. One cannot remain a total alien to the demand of the socio-cultural milieu regard being had to the command of law and also brush aside the agony of the victim or the survivors of the victim. Society waits with patience to see that justice is done. There is a hope on the part of the society and when the criminal culpability is established and the discretion is irrationally exercised by the court, the said hope is shattered and the patience is wrecked. It is the duty of the court not to exercise the discretion in such a manner as a consequence of which the expectation inherent in patience, which is the "finest part of

fortitude" is destroyed. A Judge should never feel that the individuals who constitute the society as a whole is imperceptible to the exercise of discretion. He should always bear in mind that erroneous and fallacious exercise of discretion is perceived by a visible collective."

33. In the case in hand the learned court below has sentenced the appellants to suffer rigorous imprisonment for a period of 7 years and also to pay a fine of Rs.5,000/-, in default S.I. for another one year, and also convicted under Section 341/34 IPC, and sentenced them to suffer simple imprisonment for a period of six months. The punishment, so handed down, by the learned court below, while tested on the touchstone of the principles laid down in the aforesaid two cases, appears to be just and reasonable and the same requires no interference of this court.

34. In the result, I find no merit in this appeal and accordingly the same stands dismissed. Send down the record of the learned court below immediately, with a copy of this judgment and order. The appellants have to surrender before the learned courts below, immediately to serve out the remaining part of the sentence, if any. Interim order, if any, stands vacated. The parties have to bear their own costs.

JUDGE

Comparing Assistant