

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ajay Kumar Gupta

CRA 812 of 2013

With

CRAN 8 of 2020

Kadam Mallick & Ors.

-Vs-

The State of West Bengal

For the Appellant : Mr. Sekhar Kr. Basu, Id. Sr. Adv.,
Mr. Somnath Banerjee, Adv.

For the State : Mr. Sudip Ghosh, Id. Sr. Govt. Adv.,
Mr. Bitasok Banerjee, Adv.

Heard on : 15.05.2023

Judgment on : 15.05.2023

Joymalya Bagchi, J. :-

1. Appeal is directed against the judgment and order dated 10.09.2013 and 11.09.2013 passed by the learned Additional District and Sessions Judge, Fast Track Court, Kalna, Burdwan in Sessions Trial No. 14 of 2008 arising out of Sessions Case No. 90 of 2004 convicting the appellants for commission of offence punishable under Sections

449/302/34 of the Indian Penal Code and sentencing them to suffer rigorous imprisonment for life on both counts. Both the sentences to run concurrently.

2. Prosecution case as alleged against the appellants is as follows:-

On 21.04.1993 at 10.00 PM Sarbanu Bibi (PW1), wife of Sabur Ali @ Haji Saheb (deceased) and their nine-year old granddaughter, Abida Khatoon (PW4) had dinner and went to bed. Hanai Sk (PW3), nephew of Haji Saheb slept in front of the door. There was a tin door in the house. Around 1.00 AM there was a sound and a number of persons entered the room. Kajal Sk. threatened Sarbanu to keep quiet lest she would be killed. Kuddus Ali Sk. (Master) (since deceased), Kadam Mallick, Daud Ali Sk. (since deceased), Toraf @ Torab Sk (since deceased), Kata Sk. (since deceased), Nizam Sk (since deceased), Habul Sk., Kamu @ Kamrul Sk., Kalo Mallick and Anar @ Anowar Sk. stated that they had found their target. Daud ordered to cut the head of Sabur Ali. Thereupon, Kuddus sat on his chest. Kadam chopped his head with a *ramda*. Kajal and Giyas held his left and right hand respectively. Janga and Anarul held his legs. Baijit stood in front of Sarbanu Bibi. When she asked her granddaughter, Abida to call people, Daud, Torab, Kata, Nizam and Habul threatened and compelled her to sit beside Sarbanu. A lantern was burning in the room. Sarbanu and other witnesses saw the miscreants in the light of the lantern.

3. Police was informed and Sarbanu Bibi lodged written complaint implicating the following accused persons:- 1) Kuddus Ali Sk, 2) Kadam

Mallick, 3) Kajal Sk, 4) Giyas Sk., 5) Janga @ Jangsher Sk., 6) Anarul Sk., 7) Daud Ali Sk. @ Daud Ali, 8) Toraf @ Torab Sk., 9) Kata Sk., 10) Nizam Sk., 11) Habul Sk., 12) Kalo Mallick and 13) Anar @ Anowar Sk. FIR was registered against them being Monteswar P.S. Case No.44 of 1993 dated 22.4.1993 under Sections 449/302/201/34 of the Indian Penal Code. Subsequently, Sections 120B/212 of the Indian Penal Code were also added to the array of offences. Investigation in the case was taken up by SI Mani Mohan Mukherjee (PW15). In course of investigation, he arrested Kajal and Janga. The said appellants made disclosure statements leading to the recovery of the severed head of the deceased.

4. In conclusion of investigation, charge sheet was filed and charges were framed against the appellants and one Nasu Mallick under Sections 449/34 and under Sections 302/34 of the Indian Penal Code. Kata Sk. had expired and the case was filed against him.

5. In course of trial, prosecution examined 21 witnesses and exhibited a number of documents. Defence of the appellants was one of innocence and false implication.

6. In conclusion of trial, trial Judge by the impugned judgment and order dated 10.09.2013 and 11.09.2013 convicted and sentenced the appellants, as aforesaid. One Nasu Mallick was acquitted of the charges levelled against him.

7. At the time of hearing of the appeal, this Court was informed Kuddus Ali Sk., Daud Ali Sk @ Daud Ali, Toraf @ Torab Sk and Nizam Sk.

have expired. Death report on behalf of the State is placed on record. Hence, the appeal abates so far as the said appellants are concerned.

8. Mr. Sekhar Kr. Basu, learned Senior Advocate for the appellants submits the motive to commit the crime has not been established. Prior to lodging FIR, telephonic message was received at the police station which was diarised. PW15 proceeded to go to the spot on the basis of the said information and received complaint from PW1. This complaint cannot be treated as FIR. Wearing apparels of the deceased containing bloodstains were not seized. Place of occurrence has not been proved. Recovery of lantern and kerosene lamp from the place of occurrence is doubtful. Mere presence of the appellants at the place of occurrence by itself would not prove they shared common intention with each other to murder. Recovery of the severed head on the leading statement of Kajal Sk and Janga has also not been proved beyond doubt. Hence, he prays for acquittal of the appellants.

9. On the other hand, Mr. Sudip Ghosh, learned Advocate for the State submits PWs1, 3 and 4 are natural witnesses. Incident occurred at night. They were sleeping with the deceased. They disclosed the manner of assault as well as the roles played by the appellants. All the appellants had come in a body armed with various weapons. They trespassed into the room and claimed they had found their target. Thereupon, Kadam chopped the head of the deceased with a *ramda*. Kajal and Giyas held his hands. Janga and Anarul held his legs. Kuddus sat on his chest while Daud had ordered to kill. Others also participated in the crime. On the

leading statement of Janga and Kajal Sk severed head of the deceased was found. Post mortem doctor (PW13) found sharp cutting injury on the decapitated body of the deceased which corroborates the ocular version of the eyewitnesses. PW16 deposed the severed head belonged to the deceased. The aforesaid evidence clearly establishes the prosecution case beyond doubt. The appeal is liable to be dismissed.

Whether the written complaint is FIR :-

10. PW6 (Madan Mohan Roy) is the Pradhan of the village. He stated he had informed the police over phone.

11. PW15 (SI Mani Mohan Mukherjee) is the first investigating officer. He deposed he received a telephonic message on 22.4.1993 at 6.05 hrs. that Sabur Ali had been murdered while sleeping in his room. He diarised the information as G.D. Entry No.757 dated 22.4.1993 and proceeded to the spot. At the spot he received written complaint from Sarbanu Bibi (PW1), Ext.1/1. He transmitted the written complaint through PW18 to the police station where FIR was registered.

12. Referring to the aforesaid evidence, Mr. Basu contends the written complaint of Sarbanu Bibi cannot be treated as FIR.

13. Evidence on record shows a cryptic telephonic message was received by PW15 regarding the death of Sabur Ali. The information was diarised as G.D. Entry No.757 dated 22.4.1993 and PW15 proceeded to the spot. Immediately after arriving at the spot he received the written complaint from Sarbanu Bibi (PW1) which was scribed by Binoy Chowdhury (PW2). The written complaint vividly depicts the manner and

circumstance in which Sabur Ali had been murdered. It also discloses the names of the miscreants. A cryptic telephonic message with regard to the death of an individual may trigger the police to go to the spot to enquire into the matter. Only after receiving the written complaint disclosing the manner and circumstance of the murder did the investigation in the crime for all practical purposes commence. In **Yanob Sheikh alias Gagu v. State of W.B.**¹ the Apex Court held as follows:-

“10. In Manu Sharma v. State (NCT of Delhi) [(2010) 6 SCC 1] , a Bench of this Court took the view that cryptic telephone messages could not be treated as FIRs as their object is only to get the police to the scene of offence and not to register the FIR. The said intention can also be clearly culled out from the bare reading of Section 154 of the Code which states that the information if given orally should be reduced to writing, read over to the informant, signed by the informant and a copy of the same be given to him free of cost. Similar view was also expressed by a Bench of this Court in State of A.P. v. V.V. Panduranga Rao [(2009) 15 SCC 211], where the Court observed as under: (V.V. Panduranga Rao case [(2009) 15 SCC 211] , SCC p. 213, para 10)

“10. Certain facts have been rightly noted by the High Court. Where the information is only one which required the police to move to the place of occurrence and as a matter of fact the detailed statement was recorded after going to the place of occurrence, the said statement is to be treated as FIR. But where some cryptic or anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as FIR. The mere fact that the information was the first in point of time does not by itself clothe it with the character of FIR. The matter has to be considered in the background of Sections 154 and 162 of the Code of Criminal Procedure, 1973 (in short ‘the Code’). A cryptic telephonic message of a cognizable offence received by the police agency would not constitute an FIR.”

¹ (2013) 6 SCC 428

11. Thus, the purpose of telephone call by PW 6, when admittedly he gave no details, leading to the recording of entry, Ext. 7, would not constitute the first information report as contemplated under Section 154 of the Code. The reliance placed by the learned counsel appearing for the appellant upon the provisions of Section 162 of the Code, is thus, not well-founded."

14. In this backdrop, the aforesaid cryptic information cannot be treated as FIR in place and stead of an elaborate complaint by Sarbanu Bibi (PW1). Even otherwise the complaint of Sarbanu Bibi was received as soon as the police arrived at the spot. There is little possibility of fabrication or concoction of the contents of the complaint. Viewed from every perspective, the written complaint lodged by Sarbanu Bibi ought to be treated as FIR and appears to be a truthful disclosure of circumstances regarding the murder of her husband viz., Sabur Ali.

Credibility of the eyewitnesses :-

15. PW1 (Sarbanu Bibi), her granddaughter, Abida Khatoon (PW4) and nephew Hanai Sk (PW3) are the eyewitnesses.

(a) Presence at the spot – most natural:-

16. PW1 deposed at 10.00 PM on 22.4.1993 they had dinner and went to sleep. She along with her husband and granddaughter slept in the room and Hanai, brother of the deceased was sleeping in an open area just outside the room. A temporary tin shed was at the entrance of the house. At 1.00 AM there was a sound and a number of persons entered through the tin shed. Kajal Sk told them to keep quiet otherwise they would be killed. Kadam was armed with *ramda*. Kajal Sk had a firearm and others were armed with knives and live bombs. All of them stated they

had found the target. Then Kuddus sat on the chest of Sabur Ali. Kajal and Giyas caught hold of his hands. Janga and Anarul held his legs. Kadam beheaded Sabur with the help of *ramda*. Daud had exhorted them to cut his head. Daud and Torab also abused her when she requested her granddaughter to call others. Thereafter, the miscreants took the head of her husband in a polythene bag and left. They threw bombs while leaving. Police came to the spot. She narrated the incident which was scribed by PW2. She put her LTI on the written complaint. Police seized lantern and other articles. She deposed her husband was a witness in a case involving the murder of one of his nephew viz. Laltu. Out of grudge the appellants had committed the murder.

17. PW3 (Hanai Sk) and PW4 (Abida Khatoon) were present at the spot when the incident occurred. They had substantially corroborated PW1. They are the most natural witnesses to the incident and have clearly depicted the manner in which Sabur Ali was beheaded in his room. They also stated that the miscreants had taken away the severed head of Sabur with them. Defence has been unable to cause dent to the consistent evidence of the aforesaid eyewitnesses who corroborate one another.

(b) Corroboration from post occurrence witnesses:-

18. PW4 further stated after the incident Makar Ali Sk. (PW5), Nausad, Jamur Ali, Paru, Mahibul Sk. (PW8) and others came to the spot.

19. PWs.5, 7, 8 and 19 are the post occurrence witnesses. All these witnesses stated they had heard hue and cry and explosion of bombs. PW5 claimed he saw Kadam and Kajal Sk carrying a human head. Torab

and Daud were shouting that they would cut the head of anyone who would come near them. PW3 (Hanai Sk) informed the incident to him. Similarly, PW19 (Ejajul Haque Khan) deposed he saw Kadam carrying a severed head. Torab and Daud had threatened him. He also found Kajal, Kuddus, Giyas, Janga, Anarul and Kalo Mallick with them. He identified all the accused in Court.

20. PW8 (Mohibul Sk.) also came to the spot after the occurrence and heard the names of Kuddus, Kajal, Giyas, Janga, Daud, Torab, Nizam, Mator, Baijit, Kadam, Kalo and Anarul from Hanai Sk.

21. Mr. Basu referred to the evidence of another post occurrence witness i.e. PW7 (Answar Ali Sk.) to emphasise that Hanai Sk. (PW3) did not disclose the names to him.

22. Evidence of the post occurrence witnesses requires to be assessed collectively. All of them stated they heard hue and cry and explosion of bombs. Some of them rushed out of their home and reached the place of occurrence at different times. PWs.5 and 19 deposed some of the appellants had threatened them. PW5 saw Kadam and Kajal Sk carrying the severed head. They arrived at the spot earlier than PW7 and heard the incident from PW3. PW8 also corroborated that PW3 had narrated the incident to him.

23. In view of the overwhelming evidence on record that PW3 had narrated the incident to his neighbours, I do not give much credence to a stray sentence in the deposition of PW7 that PW3 did not disclose the name of the assailants to him. It is possible that PW7 may have come to

the spot later on and Hanai Sk. who had already disclosed the incident to others chose not to reiterate it all over again. Evidence of the post occurrence witness taken as a whole corroborate the version of the eyewitnesses viz., PWs. 1, 3 and 4.

(c) Corroboration from medical evidence:-

24. PW13 (Dr. Swapan Kumar Mukherjee) is the post mortem doctor. He conducted post mortem examination over the body of the deceased. He found the following injuries:-

*“1. Sharp cut injury of four stroke incising at structure of neck and mandible detouching head to the label of cut body of cervical seven posteriol and root of incisor tooth anteriorly;
2. Two incised wounds over right deltoid 3” X 2” deep;
3. Incised wound over medial aspect of right arm extending above down words 10” X 4” deep at departer tailing of lower end.”*

He opined death was due to shock and haemorrhage from the aforesaid wounds which are ante mortem in nature. The injuries were caused by sharp cutting weapon and were sufficient in ordinary course of nature to cause death.

25. In course of investigation, PW15 arrested Kajal Sk and Jangsher Sk. In police custody on 9.7.1993 Jangsher Sk. made the following disclosure statement:-

“After cutting the head of Saba Haji, I, on that night concealed it in the canal of Hurko-danga and fled away. I went on hiding myself after knowing that I was named as accused. If I and Kajal are taken to Hurko-danga field, we can find out the same.”

26. Kajal also made the following disclosure statement :-

“After cutting the head of Saba Haji, I concealed it in the canal of Hurko-danga. If anyone takes me and Janga to that place, we can find out the same.”

The statements have been marked as Exts.14 and 15 respectively.

27. Pursuant to the said statements the said appellants took out a severed head of the deceased which was wrapped in a red coloured cloth from the water of Nilay Nala at Mouza: Hurko-danga. Recovery was made in presence of PWs 5 and 8. PW15 prepared the seizure list which was signed by the said witnesses as well as the appellants. PW5 deposed he identified the skull of the deceased by noticing the missing dentures.

28. PW16 (Dr. Dipankar Guha Roy) was posted as a Lecturer in the Department of Forensic Science and State Medicine, Medical College, Kolkata. He examined the skull and opined it might be the skull of the deceased. He gave written opinion wherein it is stated that the body and the skull belonged to a single individual, Ext.13.

29. Medical evidence on record shows that the deceased had suffered sharp cutting injuries on his neck by a sharp cutting weapon which was sufficient in ordinary course of nature to cause death. Skull recovered on the showing of Janga and Kajal Sk fitted snugly with the decapitated body and it was opined to belong to the same person. Manner and course of assault as narrated by the eyewitnesses, therefore, find resonance from the medical opinion. The prosecution case of Sabur Ali being attacked by large number of persons who had trespassed in the dead of night into his room and beheaded him has been proved beyond doubt.

Place of occurrence:-

30. It is strenuously argued that the place of occurrence has not been fixed. No bloodstained wearing apparels of the deceased were seized. I give little credence to such submission. Even in the cryptic telephonic message as per the investigating officer (PW15) it has been stated that Sabur Ali was murdered in his room. Place of occurrence had been disclosed at the earliest point of time. PW15 proceeded to the room of Sabur Ali. He found the decapitated body in the room. Bloodstained earth and bloodstained hand fan were seized from the place of occurrence. Thus, the place of occurrence has been proved beyond doubt.

Source of light:-

31. In the FIR lodged by PW1 she categorically stated that she and other witnesses had seen the appellants in the light of a burning lantern. Investigating officer (PW15) deposed he seized a lantern as well as a kerosene lamp from the place of occurrence. PWs 2 and 5 are witnesses to the seizure. Recovery of the lantern and the kerosene lamp from the place of occurrence corroborates the stance of PW1 and establishes the source of light beyond doubt.

Roles of the appellants in the crime :-

32. The last but most important point is whether all the appellants shared common intention to murder the victim.

33. To determine the extent of involvement of the appellants in the crime a tabular chart showing the roles of each of the appellants as per FIR and the version of eyewitnesses is set out hereinbelow :-

Analysis of eye-witnesses in tabular form:-

Appellants	FIR	P.W. 1 <i>Sar Banu Bibi</i>	P.W. 3 <i>Hanai Sk</i>	P.W. 4 <i>Abida Khatoon (Bibi)</i>
Kuddus	• Shouted found target • Sat on chest	• Sat on chest	• Shouted found target • Sat on chest	• Shouted found target • Sat on chest
Kadam	• Shouted found target • Chopped with ramda	• Beheaded with ramda	• Shouted found target • Cut head with ramda	• Shouted found target • Cut head with ramda
Kajal	• Held left hand	• Armed with firearm • Held hand	• Threatened prior to occurrence • Held hand	• Threatened prior to incident • Held hand
Giyas	• Held right hand	• Held hand	• Shouted found target • Held hand	• Found target • Held hand
Jangsher @ Janga	• Held leg	• Held leg	• Shouted found target • Held leg	• Shouted found target • Held leg
Anarul Sk	• Held another leg	• Held leg	• Shouted found target • Held leg	• Shouted found target • Held leg
Daud Ali Sk	• Ordered to kill and threatened P.W. 4	• Ordered to chop • Abused P.W. 4	• Ordered to chop	• Ordered to chop
Torab Sk	• Threatened P.W. 4	• Abused P.W. 4	• Shouted found target	• Shouted found target
Nizam	• Shouted found target • Threatened P.W. 4	• Present • Entered room		
Habul	• Shouted found target • Threatened P.W. 4	• Present • Entered room		• Shouted found target
Kalo	• Shouted found target	• Present • Entered room		• Shouted found target

Anowar Sk @ Anar	Shouted found target	- Present - Entered room		Shouted found target
Baijit Sk	Stood in front of D/C (P.W. 1)	- Present - entered room	Shouted found target	Shouted found target
Jiral @ Jao			Threatened after the occurrence	
Mator Sk			Threatened after the occurrence	
Mojel Sk			Threatened after the occurrence	
Bagbul Sk			Threatened after the occurrence	
Kamrul Sk @ Kamu	Shouted found target	- Present - Entered room	Shouted found target	Shouted found target
Nano (acquitted)				
Other relevant particulars		- Identified appellants apart from Kuddus, Kajal, were armed with knives and bombs - They left exploding bombs	- Left the house exploding bombs - Thereafter, (P.W. 5), Mohibul (P.W. 10) and others came to the spot	Identified appellants were armed with ramda, firearms and other weapons

34. From the aforesaid chart it appears Kuddus, Kadam, Kajal, Gias, Jangsher and Anarul were attributed with specific roles with regard to beheading the deceased. Daud Ali Sk. had exhorted others to cut the head. Thereupon Kuddus sat on his chest. Kajal and Gias held his hand while Jangsher and Anarul held his leg. Kadam chopped his head with a

ramda. As per FIR and deposition of de-facto complainant viz. PW1, Nizam Sk, Habul Sk, Kalo Mullick, Anowar Sk. Baijit Sk., Kamrul Sk. @ Kamu had come in a body along with the aforesaid appellants who played active role in the assault. They were variously armed with firearm, knives, bombs etc. Seeing the victim they stated that they had found their target. After the murder they left together taking the severed head of the victim. On the way they exploded bombs. Bomb remnants have been seized from the road in presence of PW7. Deposition of PW1 in Court and in FIR with regard to roles of Habul, Kalo, Anwar, Baijit, Kamrul @ Kamu is corroborated by her granddaughter i.e. Abida Khatoon (PW4). The other witness Hanai Sk. (PW3) in addition to the active roles of Kuddus, Kadam, Kajal, Gias, Jangsher, Anarul and Daud in the beheading corroborates the roles of Baijit and Kamrul @ Kamu in coming in a body and shouting they had found the target after noticing the victim. He also deposed after the incident when he tried to flee away Jiral @ Jao, Mator Sk, Mojel Sk and Bagbul Sk threatened him. It may be pertinent to note names of these appellants, i.e. Jiral @ Jao, Mator Sk, Mojel Sk and Bagbul Sk are not in the FIR and had not been taken by the other eye-witnesses too.

35. It was strenuously argued that mere presence of the appellants at the place of occurrence is not sufficient to establish that they shared common intention to murder. I am afraid the prosecution has been able to prove much more than that. Evidence on record of the eyewitnesses i.e. PWs.1, 3 & 4 show apart from the direct role of Kuddus, Kajal, Kadam, Gias, Jangsher and Anarul in the murder, the following appellants viz.

Habul, Kalo, Anowar, Jirul and Kamrul @ Kamu had come to the spot with arms and having seen Sabur Ali had stated that they had found their target. Thereafter, Sabur was murdered and after the murder they left with the severed head after exploding bombs. The conduct of Habul, Kalo, Anowar, Baijit and Kamrul @ Kamu in coming to the spot with arms and upon finding Sabur Ali exclaiming that they had found the target who was thereafter murdered leaves no doubt in my mind that they had shared the common intention to commit murder with Kuddus, Kadam, Kajal, Gias, Jangsher and Anarul who actually took part in the beheading of the victim. Subsequently, they left the spot with the severed head after exploding bombs which reinforces this conclusion.

36. However, the roles of Jirul Sk., Mator Sk, Bagbul Sk. in the murder appear to be sketchy. Apart from PW3 who claimed that he had been threatened by these appellants and one Younus (not charge-sheeted) after the occurrence the names of these appellants do not feature either in the FIR or in the deposition of the other eyewitnesses viz. PWs.1 & 4.

37. It is settled law that quality and not the number of witnesses are relevant to prove a prosecution case. However, when a large number of persons are alleged to have come in a body and attacked the victim is a matter of prudence the Court may seek corroboration from two or more witnesses with regard to their presence and sharing of common intention to commit the crime.

38. In **Masalti vs. State of U.P.**² the Apex Court held in a case involving a large number of offenders and a large number of victims as a matter of prudence support from two or three or more witnesses may be sought to sustain conviction. The Court observed as follows:-

“16. ... where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident.””

39. This view was explained in **Binay Kumar Singh v. State of Bihar**³ as follows:-

“31. ... There is no rule of evidence that no conviction can be based unless a certain minimum number of witnesses have identified a particular accused as a member of the unlawful assembly. It is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but the quality that matters. Even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as a member of an unlawful assembly. All the same, when the size of the unlawful assembly is quite large (as in this case) and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as a participant in the rioting. In Masalti v. State of U.P. [AIR 1965 SC 202] a Bench of four Judges of this Court has adopted such a formula. It is useful to extract it here:

“... where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders and a large number of victims, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident.””

40. In **Duleshwar v. State of Madhya Pradesh**⁴ the same proposition was reiterated and described as a test of consistency. Nonetheless it was

² AIR 1965 SC 202

³ (1997) 1 SCC 283

⁴ (2020) 11 SCC 440

clarified mere counting of heads or recitation or omission of names is not the sole determining factor. Other relevant factors may also be taken into consideration. The Bench held as follows:-

15. ... In regard to such a case involving multiple accused persons and several witnesses, it would be worthwhile to refer to the principles expounded in Masalti v. State of U.P. [Masalti v. State of U.P., (1964) 8 SCR 133 : AIR 1965 SC 202] , as reiterated in Chandra Shekhar Bind [Chandra Shekhar Bind v. State of Bihar, (2001) 8 SCC 690] in the following : (SCC pp. 692-93, paras 9-10)

“9. However, this is an incident in which a large number of accused had participated. The Constitution Bench of this Court has, in Masalti v. State of U.P. [Masalti v. State of U.P., AIR 1965 SC 202] held that under the Evidence Act, trustworthy evidence given by a single witness would be enough to convict the accused persons, whereas evidence given by half-a-dozen witnesses which is not trustworthy would not be enough to sustain the conviction. It was held that where a criminal court has to deal with evidence pertaining to the commission of an offence involving a large number of offenders, it is usual to adopt the test that the conviction could be sustained only if it is supported by two or three or more witnesses who give a consistent account of the incident. It was held that in a sense, the test may be described as mechanical, but it cannot be treated as irrational or unreasonable. It was held that even though it is the quality of the evidence that matters and not the number of witnesses, still it is useful to adopt such a mechanical test.

10. This two-witness theory has also been adopted by this Court in Binay Kumar Singh v. State of Bihar [Binay Kumar Singh v. State of Bihar, (1997) 1 SCC 283] . It is held that there is no rule of evidence that no conviction can be based unless a certain minimum number of witnesses have identified a particular accused as a member of the unlawful assembly. It is held that it is axiomatic that evidence is not to be counted but only weighed and it is not the quantity of evidence but the quality that matters. It is held that even the testimony of one single witness, if wholly reliable, is sufficient to establish the identification of an accused as a member of an unlawful

assembly. It is held that all the same, when the size of the unlawful assembly is quite large and many persons would have witnessed the incident, it would be a prudent exercise to insist on at least two reliable witnesses to vouchsafe the identification of an accused as a participant in the rioting.”

15.1. Thus, it is the quality of evidence that matters and not the quantity; and even the testimony of a single witness may be sufficient to establish the identity of an accused as member of an unlawful assembly but, when the size of assembly is quite large and many persons have witnessed the incident; and when a witness deposes in general terms, it would be useful to adopt the test of consistency of more than one witness so as to remove any doubt about identity of an accused as a member of the assembly in question. However, even if adopting such a test of consistency, what is to be looked for is the “consistent account of the incident” and the requirement of consistency cannot be overstretched as if to search for repetition of each and every name of the accused in each and every testimony. In other words, the comprehension of overall evidence on record is requisite; and mere counting of heads or mere recitation of names or omission of any name in the testimony of any particular witness cannot be decisive of the matter. In such facts and circumstances, even the relevance of the corroborating facts and factors like that of recovery of weapons or any other article co-related with the crime in question cannot be ignored altogether.

41. Similarly, in **State of Maharashtra v. Ramlal Devappa Rathod and Others**⁵ the rule in **Masalti** (supra) was held inapplicable to cases where overt role in the offence is clearly spelt out against a named assailant. The Court held:-

“26. We do not find anything in Masalti [Masalti v. State of U.P., AIR 1965 SC 202] which in any way qualifies the well-settled principle that the conviction can be founded upon the testimony of even a single witness if it establishes in clear and precise terms, the overt acts constituting the offence as committed by certain named assailants and if such testimony is otherwise reliable.”

⁵ (2015) 15 SCC 77

42. I have applied the aforesaid ratio to the facts of the case. I note that amongst the three eyewitnesses at least two of the eyewitnesses have specifically disclosed the presence and participation of the following appellants, i.e. Kadam Mallick, Kajal Sk., Gias Sk., Janga @ Jangsher Sk., Anarul Sk., Habul Sk., Kalo Mallick, Anar @ Anowar Sk. and Baijit Sk. in the incident which establish their common intention to murder Sabur Ali.

43. The other appellants, i.e. Jirul Sk. @ Jas @ Jairul Sk., Mator Sk., Mojel Sk and Bagbul Sk. are named by PW3 only and no overt act in the assault is attributed to them. Their presence is not even noted in the FIR.

44. Hence, I am inclined to extend the benefit of doubt with regard to Jirul Sk. @ Jas @ Jairul Sk., Mator Sk., Mojel Sk and Bagbul Sk. sharing common intention with the other appellants in trespassing into the room of Sabur Ali and committing his murder.

45. In the light of the aforesaid discussion, I uphold the conviction and sentence of Kadam Mallick, Kajal Sk., Gias Sk., Janga @ Jangsher Sk., Anarul Sk., Habul Sk., Kalo Mallick, Kamu @ Kamrul Sk., Anar @ Anowar Sk. and Baijit Sk. under Sections 449/34 and 302/34 IPC.

46. Conviction and sentence of Jirul Sk. @ Jas @ Jairul Sk., Mator Sk., Mojel Sk. and Bagbul Sk. are set aside.

47. Bail bonds of the appellants viz. Janga @ Jangsher Sk., Habul Sk., Kalo Mallick, Kamu @ Kamrul Sk., Anar @ Anowar Sk. and Baijit Sk.

are cancelled and they are directed to surrender forthwith and serve out the remainder of their sentence.

48. Appellants viz. Jirul Sk. @ Jas @ Jairul Sk., Mator Sk., Mojel Sk. and Bagbul Sk. shall be discharged from their bail bonds after expiry of six months in terms of Section 437A of the Code of Criminal Procedure.

49. The appeal is allowed in part.

50. Connected application being CRAN 8 of 2020 is also disposed of.

51. Period of detention suffered by the convicted appellants during investigation, enquiry and trial shall be set off from the substantive sentence imposed upon them in terms of Section 428 of the Code of Criminal Procedure.

52. Let a copy of this judgment along with the lower court records be forthwith sent down to the trial Court at once.

53. Photostat certified copy of this judgment, if applied for, shall be made available to the appellant within a week from the date of putting in the requisites.

I agree.

(Ajay Kumar Gupta, J.)

(Joymalya Bagchi, J.)