

(2023) 12 GAU CK 0035

In the Gauhati High Court

Case No : Criminal Appeal No. 359, 362 Of 2017

Abdul Malek @ Malek Ali And Anr

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 21-12-2023

Acts Referred:

Indian Penal Code, 1860 — Section 34, 147, 148, 149, 302, 323, 324, 326
Code Of Criminal Procedure, 1973 — Section 154, 161, 164

Citation : Gauhati High Court

Hon'ble Judges : Suman Shyam, J;Kaushik Goswami, J

Bench : Division Bench

Advocate : R Islam, S Jahan, Z. Kamar, S. C. Biswas, A. Ahmed

Final Decision : Dismissed/Partly Allowed

Judgement

Suman Shyam, J

1. Heard Mr. Z. Kamar, learned senior counsel assisted by Mr. S. C. Biswas, learned counsel appearing for the appellants in both these appeals. We have also heard Ms. S. Jahan, learned Additional Public Prosecutor, Assam appearing on behalf of the State. Mr. A. Ahmed, learned counsel has appeared on behalf of the informant.

2. These two appeals arise out of the judgment dated 17.08.2017 passed by the learned Additional Sessions Judge, Barpeta in connection with Sessions Case No.41/2015 convicting all the seven accused persons under Sections 147/148/149/302 of the IPC for committing the murder of deceased Kader Ali and sentencing each of them to undergo rigorous imprisonments-- for life for committing the offence under sections 302/149 of the IPC; for one year for committing the offence under sections 147/149 IPC ; for two years for the offence committed under section 148/149/IPC and also to separately, pay fine for each of the offences, with default stipulations. Convicted Accused Abdul Malek has preferred Criminal Appeal No.359/2017 whereas, the remaining six convicted

accused persons viz., Abdul Gafur @ Gafur Ali, Abbas Ali, Abdul Hai Fakir, Shahjahan Fakir @ Shahjahan Ali, Taibur Rahman @ Taibar Ali and Abdul Hoque have jointly preferred Criminal Appeal No.362/2017. Be it mentioned herein that during the pendency of the appeal, accused/appellant Taibar Ali has expired as a result of which, Criminal Appeal No.362/2017 qua the appellant Taibur Ali, has abated.

3. As per the case projected by the prosecution, the occurrence took place on 16.02.2012 at about 8:00 a.m. in the morning, when the deceased Kader Ali, being accompanied by his wife Kariman Nessa, was going to attend a village 'mel' (meeting). At that time, the accused persons, being armed with deadly weapons, forming an unlawful assembly, had waylaid the deceased and his wife and on being exhorted by accused Abdul Malek and Abdul Hoque, accused Shahjahan Fakir @ Shahjahan Ali had stabbed Kader Ali on his belly with a dagger causing serious injury. The wife of the deceased Kariman Nessa was also attacked and injured by two of the accused persons. The victim was taken to the hospital but he succumbed to his injuries.

4. On 16.02.2012, an Ejahar was lodged by wife of the deceased viz., Kariman Nessa, at around 6:00 p.m. in the evening, with the Officer-in-Charge of Sorbhog Police Station narrating the incident. Based on the said Ejahar, Sorbhog P.S. Case No.23/2012 was registered under sections 147/148/149/302/326/324 of the IPC. In the Ejahar, names of all seven accused persons viz., 1) Abdul Malek, 2) Abdul Gafur @ Gafur Ali, 3) Abbas Ali, 4) Abdul Hai Fakir, 5) Shahjahan Fakir @ Shahjahan Ali, 6) Taibur Rahman @ Taibar Ali and 7) Abdul Hoque were mentioned. After registration of the ejahar, Police took up investigation in connection with Sorbhog P.S. Case No.23/2012 and on completion of the investigation, submitted charge-sheet against all the seven accused persons. Based on the charge-sheet submitted by the I.O., charge in respect of offences punishable under Sections 147/148/149/302/323/324 of the IPC were framed against all the accused persons. The same were read over and explained to the accuseds. However, since the accused persons had pleaded innocence and claimed to be tried, the matter went up for trial.

5. During trial, the prosecution had examined as many as 12 witnesses including the doctor (PW-3), who had conducted the post-mortem examination on the dead body of the deceased and the Investigating Officer (PW-11), who had conducted investigation in the connected police case. The case of the accused persons was one of total denial. The defense side, however, did not adduce any evidence. On conclusion of trial, the learned Additional Sessions Judge, Barpeta had passed the impugned judgment and order dated 17.08.2017 convicting all the accused persons and sentencing them in the manner indicated above. All the accused persons were, however, acquitted in respect of the charges framed against them under Sections 323/324 of the IPC by giving them the benefit of doubt.

6. Assailing the impugned judgment and order dated 17.08.2017 Mr. Z. Kamar,

learned senior counsel appearing for the appellants has argued that there is no evidence to either establish formation of unlawful assembly far less the presence of a 'common object' to commit the offence of murder. Therefore, the learned court below had committed a serious error in convicting the appellants/ accused persons under section 302 of IPC with the assistance of Section 149 of the IPC.

7. By pointing out that the investigation in this case had commenced on the basis of G.D. Entry No.470 made on 16.02.2012 at about 8:00 a.m. on receipt of telephonic information as regards two persons lying injured after a quarrel, Mr. Kamar has argued that the F.I.R. was lodged only at around 6:00 p.m. in the evening i.e. after a delay of more than 10 hours. Therefore, the said document cannot be treated as an F.I.R. Contending that the delay in lodging the F.I.R. indicates that the prosecution has not only suppressed the actual facts but has also changed the genesis of the case thus, causing serious prejudice to the interest of the accused persons. Mr. Kamar has further argued that the appellant Shahjahan Ali and his brothers were earlier assaulted by the deceased and hence, the appellants were not the aggressors in this case.

8. The learned senior counsel for the appellants has further submitted that the post-mortem report, which records the fatal injury just below the chest, does not match the ocular evidence which indicates that the stab injury was made in the belly region of the deceased. According to Mr. Kamar, PWs-2, 5 and 6 had not seen the occurrence and therefore, they cannot be treated as eye-witnesses to the occurrence. The learned senior counsel for the appellants has also argued that even if these witnesses are to be believed, even then, save and except Shahjahan Ali, there is no evidence to implicate the other accused persons in commission of the offence of murder. As such, submits Mr. Kamar, the impugned judgment and order convicting the appellants for commission of an offence under Section 302 of the IPC read with Section 149 IPC is erroneous and hence, liable to be set aside by this Court. In support of is above arguments Mr. Kamar has relied upon the following decisions :-

- 1) Lakshmi Singh Vs. State of Bihar [(1976) 4 SCC 394].
- 2) Benu Namasudra Vs. State of Tripura [2010 CriLJ 781 (DB)]
- 3) Abdul Rahim Uddin Vs. State of Assam [2019 CriLJ 231 (Gau)(DB)]
- 4) Jagdish and another Vs. State of Haryana [AIR Online 2019 SC 787].

9. Responding to the above arguments, Ms. S. Jahan, learned Additional Public Prosecutor, Assam has submitted that there is clinching evidence available on record supporting the prosecution case. She submits that the evidence on record clearly establishes that accused Shahjahan Ali had committed the murder of deceased Kader Ali. In so far as the other accused persons are concerned, according to Ms. Jahan, since all of them had gathered in one place prior to the incident and there is evidence to show that the accused persons were carrying arms and had also waylaid the deceased before he was fatally assaulted, the

conviction of all the appellants, with the assistance of Section 149 IPC was justified in the facts and circumstances of the case. Alternately, it is also the submission of the learned Additional P.P. that since there is unimpeachable evidence to show that accused Shahjahan Ali had dealt the dagger blow on the belly of the deceased on being exhorted by the two other accused persons viz. Abdul Malek and Abdul Hoque, the common intent on the part of these two accused persons along with Shahjahan Ali, to commit the murder of Kader Ali is firmly established. Therefore, submits Ms. Jahan, if not under Section 149 IPC, in view of the evidence available on record, the three accused persons are liable to be convicted under Sections 302/34 of the IPC.

10. We have considered the submissions made at the bar and have also carefully gone through the materials available on record.

11. As has been noted herein above, Musst. Kariman Nessa, who is the wife of the deceased, is the informant in this case. She was examined by the prosecution as PW-1. In her deposition, the PW-1 has stated that the incident occurred on 16.02.2012 at around 8/8:30 a.m. At that time, her husband Kader Ali had gone out on the road in order to call the people to attend a 'Mel' (meeting). She followed her husband. When her husband reached the pond near their house, seven accused persons, armed with dagger, dao, spear, lathi etc. came running. Accused Malek and Abdul Haque had exhorted accused Shahjahan to kill her husband. Then Shahjahan stabbed her husband Kader in his belly with a dagger. Her husband had sustained injury and was bleeding. He fell down on the ground. When she ran towards her husband to hold him, at that time, accused Abbas and Gofur came. Abbas had hacked her on her right hand with a dao and Abdul Gofur assaulted her on different parts of her body with a lathi. The other accused persons had also tried to kill her. She raised 'hulla' whereupon, people from the neighbourhood came, put her husband and herself into a vehicle and took them to Sorbhog Hospital. From there, they were taken to Barpeta Road Hospital. However, since no treatment could be provided there, they were again taken to Lower Assam Hospital, Bongaigaon. On reaching that place, she was told that her husband Kader has died. This witness has further stated that she underwent treatment at the Lower Assam Hospital, Bongaigaon. Post-mortem examination was conducted on the dead body of her husband in that hospital whereafter, the body was brought home on the same day. She had lodged an ejahar with the Sorbhog Police Station wherein she had put her thumb impression.

12. PW-1 has also deposed that after the occurrence, when she had raised 'hulla', her brother-in-law i.e. husband's brother Saiful Islam had reached the place of occurrence and then accused Abdul Hai had stabbed him also on his belly with a knife due to which, he had sustained injury and he was also taken to Sorbhog Hospital. According to PW-1, the accused persons had left the weapons with which they had assaulted and stabbed them at the place of occurrence. Later on, Billal Hussain (PW-9) had brought the weapons in the vehicle in which they were

taken to the Police Station and handed over the same to the Officer-in-Charge of the Police Station, who had seized the article.

13. During her cross-examination, PW-1 has clarified that except Shahjahan Ali no other person had assaulted her husband but she had maintained that accused Abbas had hacked her on her right hand with a dao and Abdul Gofur had assaulted her on various parts of the body. This witness has further deposed that she had purchased a homestead land from accused Shahjahan and Taibur and there was a dispute with regard to the land with accused Shahjahan, Taibur and Abdul Hai. Her husband had gone out to call people for the 'mel' so as to discuss the matter pertaining to the purchased land. PW-1 has also clarified that except her brothers (i.e. Shahjahan, Abdul Hai and Taibur Rahman) rest of the accused persons had no enmity with them with her regarding the homestead land.

14. Musst. Almina Sultana is the daughter of the deceased and the informant. She also claimed to have seen the occurrence. Almina Sultana was examined as PW-2. In her deposition, PW-2 has stated that the incident occurred on 16.02.2012 at around 8:00 a.m. when her father Abdul Kader, accompanied by her mother Kariman Nessa, had gone out to call people to attend the 'mel'. When they reached near the house of Shahjahan, the accused persons came and gheraoed them. On being ordered by accused Malek, Abdul Haque, Gofur and Abbas, accused Shahjahan had stabbed her father on his belly with a dagger as a result of which, her father (deceased) had sustained injury and he fell down on the ground and was bleeding. PW-2 has further deposed that accused Abbas had hacked her mother on the right hand as a result of which, she had also sustained cut injury. She had witnessed the incident and when she raised 'hulla', her paternal uncle Saiful Islam came to the place of occurrence and then accused Abdul Hai stabbed him on his belly with a dagger. Then he fell down and was bleeding. At that stage, her relatives came and took her parents and uncle to Sorbhog Hospital. Her father breathed his last when he was being taken to Lower Assam Hospital, Bongaigaon. The dead body was buried at home.

15. During her cross-examination, PW-2 has stated that accused Shahjahan and Taibur were step brothers of her mother. The 'mel' was supposed to be held in a school which is adjacent to their house. The house of Shahjahan is situated in between. The distance between the school and their house is about 20 ft. Her father had called people to the 'mel'. At that time, only 2/3 persons had come and the rest of the persons did not turn up till then. According to PW-2, Billal and Enu had come to attend the 'mel' and they had witnessed the incident. Police recorded her statement after 15 days of the incident, at the Sorbhog Police Station. She has further stated that the dagger with which Shahjahan had stabbed her father was about 3 ft. long and the dagger had pierced about 6 inches deep into her father's belly. Her father's vest was torn and the trousers and vest got stained with blood. PW-2 has further deposed that she did not notice the length of the 'beki' dao by means of which accused Abbas had assaulted her mother. This witness has also deposed that police came to the

place of occurrence three days after the incident had taken place. She has also deposed that there has been dispute between the accused Shahjahan and their family with regard to landed property since many years prior to the incident and on the day of the occurrence her father had called for a 'mel'.

16. In her cross-examination PW-2 has admitted that she did not state before the Investigating Officer (I.O.) that her father Abdul Kader and her mother Kariman Nessa had gone out to call people to the 'mel' and when they had reached near accused Shahjahan's house, accused Malek, Abdul Haque, Gofur, Shahjahan, Abdul Hai and Taibur Ali came there and gheraoed her parents. PW-2 has also admitted that in her statement before the I.O. she did not mention that accused Malek, Abdul Haque, Gofur and Abbas had given directions to Shahjahan nor did she state before the I.O. that first accused Abbas had dealt a blow upon her mother by means of a dao and then Gofur assaulted her mother by means of a lathi; then her mother fell down unconscious in the middle of the pond. She also did not mention in her statement Exhibit-1 that the accused persons had gheraoed (surrounded) her parents in front of the house of accused Shahjahan or that accused Abdul Haque had stabbed her uncle Saiful Islam on his belly with a dagger. The witness has, however, stated that they had no enmity with rest of the accused persons except accused Shahjahan.

17. PW-4 Md. Saidul Islam is related to the informant. He had reached the place of occurrence after the incident had occurred. PW-4 has also confirmed that the incident took place at around 8:00 a.m. in the morning. Hearing 'hulla' on the bank of Kader's pond he went there and saw that Kariman Nessa and Kader Ali were lying in the pond (dry pond) and blood was oozing out from the chest of Kader Ali. PW-4 has stated that some other persons had reached there before him. Having seen the incident when he raised 'hulla', accused Abdul Hai had stabbed him on his lower abdomen with a dagger. According to PW-4, accused Taibur had also inflicted cut injury near his right wrist with a dao and blood came out from the injuries. During his cross-examination, PW-4 has stated that the dagger with which he was stabbed was about 1 ft. long and 1 ½ inch wide. This witness has denied the suggestion made to the effect that he was adducing false evidence.

18. PW-5 Md. Sadek Ali is another witness who claims to have seen the occurrence and therefore, he has been examined as an eye-witness. This witness has also stated that on the day of the occurrence he was inside his house. Hearing the commotion he went to the bank of the pond of Kader and saw that his elder brother (Kader) was lying in the middle of the pond. At that time the pond was dry. Blood was oozing out from the left side wound of his brother. PW-5 has further deposed that accused Shahjahan had stabbed his elder brother Kader with a dagger. He has also deposed that when Kariman Nessa (PW-1) was trying to hold her husband to save him from the accused, someone dealt a cut blow on the right hand of Kariman Nessa causing her injury. When Saidul arrived there, accused Abdul Hai stabbed him on his lower abdomen with a knife. This witness

has confirmed that accused Abdul Hai Fakir, Abdul Haque and Abdul Malek were present at the place of occurrence. He has stated that when they raised a commotion, the local people arrived there and then the accused persons fled the scene. Thereafter, a vehicle was arranged, in which, injured Kader, Kariman Nessa and Saidul were taken to Sorbhog Hospital.

19. Md. Chand Mia, another resident of the village, was examined as PW-6. He has deposed that the incident took place at around 8:30 a.m. in the morning. He was in his shop situated by the bank of the pond of Kader. At that time, Kader Ali (deceased) was going through his pond (dry pond) to attend the 'mel'. The accused persons had assembled in the house of Shahjahan. All the accused persons waylaid Kader and accused Shahjahan stabbed Kader on the right side of the abdomen with a dagger. Kader sustained injuries. No sooner had Kader fallen down, his wife arrived there and held him. Then, accused Abbas Ali dealt a cut blow above the elbow of the right hand of Kariman with a dao and she sustained injuries. Seeing the above, Saidul Islam rushed to the place when accused Abdul Hai stabbed him below his naval with a dagger. Then there was commotion and the public gathered. A Maruti car was arranged and injured Kader Ali was taken to the Sorbhog Government Hospital in that vehicle. This witness has categorically deposed that he had seen the incident from the bank of the pond. During his cross-examination, the PW-6 has reiterated that he had witnessed the entire incident from the road along the bank of the pond. He has further stated that besides the accused persons there were 5/7 other persons also who were present at the place of occurrence when he had reached there. Those people also witnessed the incident.

20. From a careful analysis of the evidence adduced by PWs-1, 5 and 6, what is apparent is that their testimony is free from any inherent contradiction and when read in conjunction, gives a vivid description of the manner in which the incident took place. It is clear from the evidence adduced by these witnesses that on the day of the occurrence, PW-1 was following the deceased to the village 'mel' and the incident took place on the dried pond of the deceased which was in the vicinity of the house of the deceased as well as accused Shahjahan Ali. It was none other than Shahjahan Ali who had dealt the dagger blow in the belly of the deceased causing grievous injury. At that time accused Abdul Malek and Abdul Hoque were also present there and they had exhorted Shahjahan Ali to assault the deceased.

21. In so far as the testimony of PW -4 is concerned, we find that he had not seen the occurrence but in all probability, he had reached the place of occurrence hearing the commotion, immediately after the incident took place. By the time they had reached the place of occurrence the incident had already happened and Kader Ali was lying injured. From his evidence, presence of Kariman Nessa in the place of occurrence is well established.

22. PW-7 Md. Shahjahan Ali also did not see the occurrence but he came to know from the public that a quarrel had taken place between accused Shahjahan and

Kader in the morning of 16.02.2012. When he went to the place of occurrence, he found that Kader was lying on the ground and his wife Kariman was holding him while the daughter was wailing and weeping. On being asked, Kader's wife and daughter told that accused Shahjahan had assaulted Kader in his dry pond. This witness has stated that he saw stab wound in the left side of Kader's abdomen.

23. PW-10 Md. Akbar Akand had also reached the dry pond after hearing the commotion. He also did not see the occurrence but this witness has deposed that when he reached the place of occurrence he saw Kader lying in the dry pond and screaming "I am dying, I am dying". He had seen bleeding injury in the abdomen of Kader. He had called some persons present in his shop and asked them to take Kader to the hospital. Then Samsul Haque had arranged a vehicle and taken Kader to the hospital.

24. Md. Mofidul Islam is the owner of the Maruti Eeco car which was used to take the injured victims to the Sorbhog Hospital. He was examined as PW-8. This witness has confirmed that on receipt of information from the villagers he went with his vehicle to the dry pond and thereafter, lifted Kader in an injured state and took him to the 30 bedded hospital at Sorbhog. This witness has further stated that when Kader was taken to the Lower Assam Hospital at Bongaigaon, the doctors declared him dead. He has further stated that Samsul Haque had handed over the weapons to the police, which he took in his car. The weapons were seized vide seizure-list Exhibit-3 which bears his signature Exhibit-3(1).

25. Md. Billal Hussain was examined as PW-9. He had reached Sorbhog Police Station at around 3:30 p.m. on that day after hearing that Kader's dead body had been brought there. He saw the dead body of Kader in Sorbhog Police Station. Then one Samsul Haque had handed over three weapons i.e. a dagger, a dao and a knife, to the police in his presence. The police had seized those weapons vide Exhibit-3 seizure-list after obtaining his signature. PW-9 has proved his signature as Ext-3(2) and has deposed that the 'beki dao' with wooden handle was M. Ext-1, the dagger (sword) was M. Ext-2 and the knife was M. Ext-3.

26. It has come out from the evidence of Dr. Haridas Sarkar (PW-3), i.e. the doctor who had conducted the post-mortem examination on the dead body of the victim that there was a deep cut wound found in the right lower part of the chest. As per the post-mortem report (Exhibit-2) the following injuries were found in the dead body :-

"A male dead body of average built, non emaciated non decomposed.

Wounds position and character :-

A deep sharp cut wound found on the right lower part of chest. Size – Length 3", Breadth – 1", depth – 4".

Laceration wound on right elbow jt., size – 3"x ½ "x 1".

The doctor has opined that the cause of death was due to shock and hemorrhage as a result of chest injury which was ante mortem in nature.

28. PW-11 Sri Deo Hari Das was the Investigating Officer (I.O.) in this case. This witness has deposed about the process followed by him while carrying out investigation in the connected police case. According to PW-11, upon receipt of a piece of information over phone on 16.02.2012, Sri P. K. Saikia, O/c of the Police Station made a G.D. Entry No.470 to the effect that a man, smeared with blood was lying at the place of occurrence in an injured state and that he was struggling for life and the situation was tense. Upon receipt of such information he proceeded to the place of occurrence along with his staff and on reaching there, found that there was blood on the soil in the pond. There, he could learn that Kader had sustained grievous injuries and the locals had already taken him to Sorbhog C.H.C. in a vehicle and that other injured persons, viz., Shahajahan Fakir, Saidul Islam, Abdul Hai and Kariman Nessa had also been taken to the hospital. Then he, along with his staff, went to Sorbhog CHC to examine the injured persons. Kader Ali passed away when he was being taken to the Lower Assam Hospital at Bongaigaon. He had made a request to Rouslina Das, ACS, Circle Officer to hold inquest on the dead body of Kader and accordingly, she did so. Thereafter, he had sent the dead body to the Bongaigaon Civil Hospital for post-mortem examination and on completion of the same, handed over the dead body to the family members of the deceased and returned to the Police Station. Around 6:00 p.m. on that day, informant Kariman Nessa had lodged a written ejahar based on which, the police case was registered. The I.O. has further confirmed that at around 7:00 p.m. one Samsul Haque had handed over one iron dao, one iron sword and a folding knife, which were carried to the Sorbhog Police Station in the same ambulance in which the dead body was brought from Bongaigaon. He had seized those articles vide seizure-list Exhibit-3. He again went to the place of occurrence on 17.02.2012, drew a sketch map(Exhibit-7), recorded the statements of the witnesses, arrested accused Shahjahan Fakir and forwarded him to the court, recorded statements of the injured witnesses and informant, made a prayer before the Court to record the statement of witness Almina Sultana under Section 164 Cr.P.C. and on completion of investigation, submitted charge-sheet against the accused persons.

29. During his cross-examination, the I.O. has replied that there was a land dispute between the members of the two families as a result of which, the incident took place. This witness has exhibited the G.D. Entry No.470 and has stated that G.D. Entry No.473 dated 16.02.2012 was based on the second information received in connection with the incident. The I.O. has further deposed that save and except the 7 accused persons, the names of whom were mentioned in the ejahar, he did not find any incriminating material against the other persons. The I.O. has further stated that he found accused Shahjahan Fakir and Abdul Hai in an injured state in the Sorbhog C.H.C. He recorded their statements under Section 161 Cr.P.C. and also took the statements of other accused.

30. Sri Pranab Kumar Saikia, who was working as the Officer-in-Charge of Sorbhog Police Station on 16.02.2012, was examined as PW-12. This witness has stated that on at around 8:40 a.m. one Fazal Hoque of Sahpur under Sorbhog P.S. had informed him over phone that following an altercation over land dispute, some members of two families of Sahpur, armed with daos and daggers, got involved in a fight as a result of which, two persons were lying in the field in injured state and that the police should go there. Accordingly, he had made Sorbhog P.S. G.D. Entry No.470 dated 16.02.2012 and instructed ASI Dilip Talukdar to go to the place of occurrence. PW-12 has exhibited the G.D. Entry No.470 as Exhibit-5 and has also proved his signature therein as Ext-5(2).

31. Coming to the evidence of PW-2, although she has also been projected as an eye witness to the occurrence, yet, from the evidence available on record it appears that she did not actually see the occurrence but had reached the place soon after the accused Shahjahan Ali had assaulted her father. This we say so because none of the eye witnesses, viz. PWs 1, 5 and 6 have mentioned about the presence of PW-2 near the place of occurrence when the incident took place. PW-5 had also mentioned only about Kader and his wife Kariman going in the road before the incident took place. If PW-2 was also with them at that time, then there is no reason as to why, PWs-1, 5 and 6 would not mention that.

32. PW-2 had also not stated before the I.O. that her father Abdul Kader and her mother Kariman Nessa had gone out to call people to the 'mel' and when they had reached near accused Shahjahan's house; accused Malek, Abdul Haque, Gofur, Shahjahan, Abdul Hai and Taibur Ali came there and gheraoed her parents. PW-2 had also not stated before the police that accused Malek, Abdul Haque, Gofur and Abbas had given directions to Shahjahan nor did she state before the I.O. that first accused Abbas had dealt a blow upon her mother by means of a dao and then Gofur assaulted her mother by means of a lathi, then her mother fell down unconscious in the middle of the pond. She also did not mention in her statement Exhibit-1 that the accused persons had gheraoed (surrounded) her parents in front of the house of accused Shahjahan or that accused Abdul Haque had stabbed her uncle Saiful Islam on his belly with a dagger. We find that there is substantial improvement in the testimony of this witness. We also find that her statement was recorded by the police about 15 days after the incident. Therefore, it is possible that by that time she had come to know the story about the incident from the other witnesses and had deposed accordingly. As such, it is doubtful as to whether PW-2 had actually seen the occurrence. We are, therefore, of the opinion that not much reliance can be placed on the testimony of this witness (PW-2). Be that as it may, based on the evidence brought on record by the prosecution side the learned trial court has convicted all the accused/ appellants under sections 147/148/149/302 of the IPC while acquitting all of them in respect of charge framed under sections 323/324 IPC

33. As has been discussed herein above, this Court is of the opinion that not only

the PW-1 but even the PWs-5 and 6 were eye-witnesses to the occurrence. From the testimony of these witnesses it has clearly come out that it is none other than accused Shahjahan Fakir @ Sahajahan Ali, who had grievously assaulted deceased Kader Ali by stabbing him on his belly with a dagger. The testimonies of PW-1, 5 and 6 corroborates the version of one another. These witnesses have spoken in one voice and there is nothing to disbelieve these witnesses in so far as the involvement of Shahjahan Ali, Abdul Malek and Abdul Hoque, in their respective roles in committing the offence of murder, is concerned. The medical evidence brought on record confirms that Kader Ali died a homicidal death due to grievous injury sustained by him on his belly. The description of the injury appearing in the postmortem report, in our opinion, is consistent with the ocular evidence.

34. Coming to the next question as to whether, the prosecution has succeeded, in establishing the 'common object' on the part of the unlawful assembly allegedly formed by the seven accused persons so as to convict them for committing the murder of the deceased with the assistance of Section 149 of the IPC, what is to be noted herein is that it has clearly come out from the evidence on record that there was a land dispute between the PW-1 and her brothers, viz., Shahjahan, Abdul Hai and Taibur Rahman. She has deposed that there was no animosity with any other accused persons save and except her three brothers. Evidence on record further goes to show that on the day of the occurrence, there was a village meeting called by the deceased so as to discuss the matter of land dispute and people had started to gather in the meeting place around the time when the incident took place. From the evidence of PW-11 it is seen that there were other persons present in the place of occurrence. As such, it is obvious that not only the accused persons but some other people were also present there on the day of the incident. Therefore, the question that would arise for consideration in this case is as to whether, there is cogent evidence available on record to hold that there was an 'unlawful assembly' of the accused persons which had acted with a 'common object' to commit the murder of the deceased. In our considered opinion, the evidence available on record is insufficient to draw such an inference. We say so for the following reasons:-

(i) Firstly, the venue of the meeting was situated in the vicinity, not only of the house of the deceased and the accused Shahjahan Ali but also the dry pond where the incident took place. Therefore, in the absence of proper evidence it cannot be presumed that all the accused person present there were in an unlawful assembly or had participated in the incident with the intent of assaulting the deceased.

(ii) Secondly, there is only one fatal injury in the body of the deceased which makes it clear that only one person had assaulted the victim with a sharp weapon. There is no evidence to show that any other accused persons had assaulted the deceased.

(iii) Thirdly, only three weapons were recovered from the place of occurrence

which were later seized by the police vide Ext-3, thereby suggesting that only three persons were carrying deadly weapons.

(iv) Fourthly, there is reliable evidence on record to show that only accused Abdul Malek and Abdul Hoque had exhorted the accused Shahjahan to attack Kader. Acting on their instruction, Shahjahan had assaulted the victim almost instantaneously. There is no evidence to implicate the other accused persons in that regard.

(v) Fifthly, it has come out from the testimonies of the witnesses that accused Abbas and Gofur had attacked the informant PW-1 and caused injury to her whereas, accused Abdul Hai had attacked Saidul Islam and caused injury to him but not the deceased.

(vi) Sixthly, the charge framed under section 323/324 of the IPC against the accused persons could not be proved. No appeal has been preferred against the said judgment of acquittal. Therefore, it is doubtful as to whether appellants Abbas, Gofur and Abdul Hai at all had any role to play in assaulting the PW-1 or Saidul.

(vii) Seventhly, there is no evidence of any previous animosity between the deceased and accused Abbas, Gofur and Abdul Hai. PW-1 has also clarified the said position in her evidence.

35. From the above, it is apparent that the prosecution had failed to adduce evidence to show that the accused persons Abbas, Gofur and Abdul Hai were a part of the unlawful assembly so as to prosecute the common object of committing the murder of deceased Kader Ali. On the contrary, there is evidence on record to suggest that these accused persons had attacked some other persons with sharp weapon but as has been noted above, the said charge also could not be established. Having observed as above, we are, however, of the view that evidence available on record, is sufficient to establish that there was a common intent on the part of accused/ appellant Shahjahan, Abdul Malek and Abdul Hoque to commit the murder of deceased Kader. It was on the exhortation of Abdul Malek and Abdul Hoque that Sahajahan Fakir @ Sahajahan Ali had inflicted fatal injury upon the victim.

36. In *State of Karnataka vs. Chikkahottappa alias Varade Gowda and others* reported in (2008) 15 SCC 299 the Supreme Court has dealt with the distinguishing features of "common object" and "common intention". The observations made in paragraphs 9 and 10 would be relevant for this case and therefore, are being reproduced herein below for ready reference :-

"9. Common object is different from a common intention as it does not require a prior concert and a common meeting of minds before the attack. It is enough if each has the same object in view and their number is five or more and that they act as an assembly to achieve that object. The common object of an assembly is to be ascertained from the acts and language of the members composing it, and

from a consideration of all the surrounding circumstances. It may be gathered from the course of conduct adopted by the members of the assembly. What the common object of the unlawful assembly is at a particular stage of the incident is essentially a question of fact to be determined, keeping in view the nature of the assembly, the arms carried by the members, and the behaviour of the members at or near the scene of the incident. It is not necessary under law that in all cases of unlawful assembly, with an unlawful common object, the same must be translated into action or be successful. Under the Explanation to Section 141, an assembly which was not unlawful when it was assembled, may subsequently become unlawful. It is not necessary that the intention or the purpose, which is necessary to render an assembly an unlawful one comes into existence at the outset. The time of forming an unlawful intent is not material. An assembly which, at its commencement or even for some time thereafter, is lawful, may subsequently become unlawful. In other words it can develop during the course of incident at the spot eo instante.

10. Section 149, IPC consists of two parts. The first part of the section means that the offence to be committed in prosecution of the common object must be one which is committed with a view to accomplish the common object. In order that the offence may fall within the first part, the offence must be connected immediately with the common object of the unlawful assembly of which the accused was member. Even if the offence committed is not in direct prosecution of the common object of the assembly, it may yet fall under Section 141, if it can be held that the offence was such as the members knew was likely to be committed and this is what is required in the second part of the section. The purpose for which the members of the assembly set out or desired to achieve is the object. If the object desired by all the members is the same, the knowledge that is the object which is being pursued is shared by all the members and they are in general agreement as to how it is to be achieved and that is now the common object of the assembly. An object is entertained in the human mind, and it being merely a mental attitude, no direct evidence can be available and, like intention, has generally to be gathered from the act which the person commits and the result there from. Though no hard and fast rule can be laid down under the circumstances from which the common object can be culled out, it may reasonably be collected from the nature of the assembly, arms it carries and behaviour at the time of or before or after the occurrence. The word knew used in the second limb of the section implies something more than a possibility and it cannot be made to bear the sense of might have been known. Positive knowledge is necessary. When an offence is committed in prosecution of the common object" it would generally be an offence which the members of the unlawful assembly knew was likely to be committed in prosecution of the common object. That, however, does not make the converse proposition true; there maybe cases which would come within the second part but not within the first part. The distinction between the two parts of Section 149 cannot be ignored or obliterated. In every case it would be an issue to be determined, whether the

offence committed falls within the first part or it was an offence such as the members of the assembly knew to be likely to be committed in prosecution of the common object and falls within the second part. However, there may be cases which would be within the first part but offences committed in prosecution of the common object would also be generally, if not always, be within the second part, namely, offences which the parties knew to be likely to be committed in the prosecution of the common object. (See Chikkarange Gowda and others v. State of Mysore [AIR 1956 SC 731])."

37. Applying the test laid down by the Apex Court in the aforesaid decision to the facts of this case, we are of the view that the prosecution has failed to prove the existence of any common object of the unlawful assembly formed by five or more accused persons to commit the murder of the deceased Kader Ali. We are also of the view that the prosecution has succeeded in adducing sufficient evidence to establish that there was a meeting of mind amongst appellants Shahjahan, Abdul Malek and Abdul Hoque to commit the murder of Kader Ali and with such intention, Shahjahan had caused fatal injury on the person of the deceased on being instigated and exhorted by the appellants Abdul Malek and Abdul Hoque thus leading to his death.

38. In State of Orissa V Arjun Das Agarwal and Another reported in AIR 1999 SC, 3229 it has been held that section 34 IPC does not create a distinct offence and it is the participation of the accused that the intention of committing crime is established and section 34 IPC is attracted. Accused persons charged under section 302/149 IPC can be convicted under section 302/34 by the appellate court if sufficient evidence is available to show their common intention. That was a case where the trial court had convicted five accused persons under sections 302/149 IPC. In the appeal filed by the convicted persons, the High Court had acquitted two of the appellants and upheld the conviction of three others under section 302/34 IPC. In an appeal preferred by the State of Orissa against the order of acquittal of the two accused, the acquittal of one of the accused was reversed by holding him guilty u/s 302/34 IPC whereas, the acquittal of the fifth accused person was upheld. Thus, conviction of four out of the five accused person by the trial court under section 302/149 IPC was affirmed under section 302/34 IPC.

39. In the case of Nallabothu Venkaiah Vs. State of A.P. reported in (2002) 7 SCC 117 it has been held that charge under Section 302/149 IPC can be converted to one under section 302/34 IPC if the number of persons involved in the crime is proved to be less than 5 (five).

40. Mr. Kamar, learned senior counsel for the appellants has made an attempt to punch a hole in the prosecution case by urging that the investigation in this case was started on the basis of G.D. Entry No.470 and the delay in lodging the F.I.R. has eroded the credibility of the prosecution story and has distorted the genesis of the case. In the case of Sidhartha Vashisht alias Manu Sharma vs. State (NCT of Delhi) reported in (2010) 6 SCC 1, the Supreme Court has observed that the

information about the commission of a cognizable offence given in person at the Police Station and the information about a cognizable offence given on phone stand on a different pedestals. Merely because information given on phone was prior in time, it would not mean that the same would be treated as the First Information Report (FIR) as per requirement of Section 154 of the Code of Criminal Procedure.

41. In the case of Yanob Sheikh alias Gagu Vs. State of W.B. reported in (2013) 6 SCC 428 similar observations have been made by the Supreme Court wherein it was observed that the purpose of telephonic information given to the police leading to recording of a G.D. Entry would not constitute the First Information Report as contemplated under Section 154 of the Cr.P.C. Such observation was made by relying upon the previous decisions of the Supreme Court in the case of Sidhartha Vashisht alias Manu Sharma (supra) as well as in the case of Ravishwar Manjhi Vs. State of Jharkhand reported in (2008) 16 SCC 561 wherein it was held that mere information received on phone by a police officer, without any details as regards the identity of the accused or the nature of injuries caused to the victims as well as the name of the culprits, may not be treated as F.I.R.

42. From a careful examination of the records, we find that G.D. Entry No.470 was made on receipt of telephonic information as regards an incident that took place in the village wherein two persons were found to have been seriously injured. Such information was apparently aimed at calling the police to the place of occurrence and the same did not in any way give the details of the incident which were available in the ejahar lodged at 6:00 p.m. on the same day. Therefore, the G.D. Entry No.470, in our opinion, cannot be treated as an F.I.R.

43. It is also apparent from the evidence on record that soon after the incident, the injured victim was carried from one hospital to another and eventually he was declared dead at the Lower Assam Hospital at Bongaigaon. After conducting the post-mortem examination the body was brought to Sorbhog Police Station at around 3:30 p.m. whereafter, the same was handed over to the family members of the victim. Thereafter, the dead body was brought back home wherein it was buried. The aforesaid process would naturally consume some time leading to delay in lodging the F.I.R. Therefore, it cannot be said that there is unexplained delay in this case in lodging the FIR.

44. For the reasons stated here- in-above, we set aside the conviction of accused/ appellants Shahjahan Fakir @ Sahajahan Ali, Abdul Malek and Abdul Hoque under Section 302/149 IPC and instead, convict the aforesaid three accused/ appellants under Section 302/34 IPC. The sentences imposed by the learned trial court upon these three appellants would, however, remain un-altered.

45. In so far as the remaining appellants viz Abbas Ali, Abdul Gofur and Abdul Hai are concerned, we are of the opinion that the evidence on record is insufficient to convict any of those appellant for committing the murder of Kader Ali with the assistance of either section 149 or 34 of the IPC . As such, giving

them the benefit of doubt, the convictions of these three appellants viz. Abbas Ali , Abdul Gofur and Abdul Hai are hereby set aside. These appellants are hereby acquitted of all the charges brought against them. They may be set at liberty.

46. In the result, Criminal Appeal No.359/2017 stands dismissed.

47. Criminal Appeal No.362/2017 stands partly allowed.

48. We are informed that all the appellants are out on bail. As such, the accused/ appellants Shahjahan Fakir @ Sahajahan Ali, Abdul Malek and Abdul Hoque are directed to surrender before the learned trial court within 10 days from today to serve out the remaining part of the jail sentence.

Send back the LCR.