
(2019) 03 GAU CK 0059

In the Gauhati High Court

Case No : Criminal Appeal No. 157, 166 Of 2015

Abdul Rahim Uddin @Abdul Rahim And And 26 Ors

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 15-03-2019

Acts Referred:

Indian Penal Code, 1860 — Section 141, 142, 147, 148, 149, 201, 302, 324, 326
Code Of Criminal Procedure, 1973 — Section 161, 164, 319

Citation : (2019) 03 GAU CK 0059

Hon'ble Judges : Songkhupchung Serto, J; Mir Alfaz Ali, J

Bench : Division Bench

Advocate : Hra Choudhury, Ia Hazarika, S. Jahan, B K Mahajan

Final Decision : Disposed Off

Judgement

Mir Alfaz Ali, J

1. We propose to decide the Crl. Appeal 157 of 2015 and Crl. Appeal 166 of 2015 by this common judgment as both these appeals are directed against the same judgment and order passed by learned Addl. Sessions Judge (FTC), Barpeta in Sessions Case No. 8 of 2008.

2. Thirty two appellants were convicted by the learned Addl. Sessions Judge(FTC), Barpeta u/s 302 IPC read with Section 149 IPC and sentenced them to rigorous imprisonment for life and fine of Rs. 10,000/- with default stipulation. Appellants were also convicted under Sections 147/148 IPC and sentenced to rigorous imprisonment for one year and two years respectively. Appellants were further convicted under Section 201 IPC and sentenced to rigorous imprisonment for six months.

3. As per prosecution case, on 01-10-1998 at about 6 am, when the victim Abdul Wahab, Raj Ali (PW 4), Afzal Ali (PW 5) and the informant Rahiz Uddin along with some others were constructing house on their land, the accused persons came in a mob towards the house of Abdul Wahab. Having noticed the accused persons

named in the FIR, armed with lathi, spear, dagger etc proceeding towards his house, Abdul Wahab took shelter in the house of Shorab Ali along with others. However, the accused persons surrounded the house of Shorab Ali, broke the walls of the house and mounted assault on the victim Abdul Wahab. Accused Azad Ali hit Abdul Wahab with spear and the accused Taizuddin and Samsul Haque stabbed him with dagger. Rest of the accused persons mounted assault on the victim with various weapons like dao, lathi, club etc and after killing Abdul Wahab, they carried the body and disposed the same by throwing in the river Brahmaputra. After committing the offence the accused persons left the place crossing the river Brahmaputra, by the engine boat belonging to one Bakkar Ali. PW 1, Rahizuddin lodged the FIR (Ext.1), on the basis of which, police registered Bagbar P.S. Case No. 145 of 1998 under Sections 147/148/149/324/326/302/201 IPC and commenced investigation. After four days of the occurrence, the decomposed body of the victim was found floating on the bank of the river, which was sent for post mortem examination. During investigation, the statement of some of the witnesses were recorded u/s 164 Cr.P.C., some incriminating articles were also recovered, inquest report (Ext.5) was prepared on the dead body by Md. Lal Chand Sikdar (PW 17) and the body was sent for post mortem examination.

4. Dr. N. N. Sharma (PW 2) conducted the post mortem examination on the body of the victim and found the following the injuries :-

1. One cut injury on the front of right shoulder jt. (4" x 2 x 1 ½") (LxBxD) with fracture of right clavicle on lateral third.
2. One deep cut injury on left shoulder with decomposition of muscles of vessels.
3. One cut injury on middle of the scalp (3"x2"x1") (LxBxD) = coming out of brain mater with fracture of both remittal found.
4. Scrotum swollen.
5. Ligature marks on both wrist joint. All injuries caused by sharp weapon and they are grievous, ante-mortem in nature."

In the opinion of the doctor death was due to shock and haerrmorrhage as a result of the injuries. On conclusion of the investigation, charge sheet was laid against the thirty accused persons, all of whom stood trial.

5. In course of trial, charges were framed against the accused persons under Sections 147/148/324/302/201 read with Section 149 IPC, to which all the accused persons pleaded not guilty. In order to establish the charges, prosecution examined 17 witnesses. Two witnesses were examined by the court as CW 1 & CW 2. During the course of trial, two more persons were proceeded against u/s 319 Cr.P.C. and tried along with the charge-sheeted accused persons. The accused appellants did not adduce any evidence in their defence. On appreciation of the evidence and materials brought on record, learned Sessions Judge convicted all the thirty two appellants and awarded sentence as indicated

above.

6. Aggrieved by the judgment and order passed by the learned Sessions Judge, the appellants preferred the instant appeals.

7. During pendency of the appeal, appellants Shober, Sharif Uddin, Shorab and Nizam Ali died. Therefore, remaining twenty eight appellants are now before us.

8. We have heard learned Senior Counsel Mr. HRA Choudhury assisted by Mr. A. Ahmed and Mr. B.K. Mahajan assisted by Mr. A. Choudhury for the appellants in two appeals. We have also heard Ms. S. Jahan learned Addl. Public Prosecutor for the state respondent and meticulously gone through the evidence and materials on record.

9. On meticulous scrutiny of the evidence, we find that all the eye witnesses consistently deposed in the same voice, that the accused persons being armed with weapons in a group, attacked the victim Abdul Wahab. The consistent oral testimony of all the eye witnesses, that a large number of persons being armed with various weapons came in a mob, chasing the victim Abdul Wahab whistling war cry and killed him, clearly demonstrated, that there was an unlawful assembly and the object of the assembly was none but to kill the victim Abdul Wahab. In fact, formation of unlawful assembly by the perpetrators of the crime and the clear object of such unlawful assembly being the killing of the victim Abdul Wahab has not been disputed by the defence. What the learned senior counsel, Mr. HRA Choudhury as well as Mr. B. K. Mahajan strenuously submitted is that prosecution witnesses, who were mostly related to the victim, implicated the innocent bystanders or onlookers, who were neither members of the unlawful assembly nor shared the common object of the assembly. The contention raised is that having regard to the nature of offence and the facts and circumstances, under which the occurrence took place, mere presence of the persons at the place of occurrence or an omnibus allegation against all the accused persons, that they were also present at the place of occurrence, per se, would not be sufficient to rope in all such persons for the commission of offence with the aid of Section 149 IPC, in absence of proof of individual overt act. In order to embolden the submission, learned defence counsel placed reliance on a decision of the Apex Court in *Pandurang Chandrakant Mhatre & Ors.-VS- State of Maharashtra* reported in (2009) 10 SCC 773.

10. Section 149 of the IPC reads as under :-

"Every member of unlawful assembly is guilty of offence committed in prosecution of common object - If an offence is committed by any member of the unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of commission of that offence, is a member of the same assembly, is guilty of that offence."

11. A plain reading of the above provision would show that in order to attract the

provision of Section 149 IPC, it must be proved that there was an unlawful assembly as defined in Section 141 IPC and the incriminating act was done to accomplish the common object of the unlawful assembly or it must be within the knowledge of the members of the assembly, that such offence is likely to be committed in prosecution of the common object. Therefore, in order to invoke the provision of Section 149 IPC following ingredients are required to be established :-

- i) There must be an unlawful assembly;
- ii) commission of an offence by any member of the unlawful assembly;
- iii) such offence committed in prosecution of common object of the assembly, or,
- iv) the members of the assembly must have the knowledge that the particular offence is likely to be committed in prosecution of common object.

12. Once all the above elements of Section 149 IPC is satisfied, all members of unlawful assembly can be held constructively liable for the culpable act done by any of the members of the assembly, irrespective of the individual participation or irrespective of whether there is any proof of overt act of each member of the assembly. Therefore, the basis of constructive guilt under Section 149 IPC is the membership of the unlawful assembly with the requisite common object or knowledge and not the individual overt act. Whether a person is the member of the unlawful assembly or he shared the common object with the other members of the unlawful assembly or he had the requisite knowledge, has to be determined on the basis of facts and circumstances of each individual case. There cannot be a straight jacket formula to arrive at a conclusion, as to the membership of the unlawful assembly or sharing the requisite common object or knowledge. In case of a mob attack or where a large number of persons are involved, quite often it is found, that some people gathers at the scene of offence out of curiosity, in order to see as to what has happened or what was going to happen without being a member of the unlawful assembly or sharing any common object. Therefore, in case of a mob attack involving a large number of persons, or in a faction ridden village community, the court is obliged to be extra cautious, to ensure that no innocent bystander is falsely implicated. Absence of such cautiousness and alertness may result in conviction of an undeserving or innocent person, leading to miscarriage of justice.

13. The Apex Court in Pandurang Chandrakant Mhatre & Ors.-VS- State of Maharashtra(supra) extensively dealing with the standard of evidence required, for punishing a person with the aid of Section 149 IPC, in case of mob attack or where a large number of people are involved, quoted various earlier decisions with approval and held in para 66, 67, 68 and 69 as under :-

"66. In Masalti v. State of U.P., this Court exposted : (AIR pp. 210-11 g para 17)

" What has to be proved against a person who is alleged to be a member of an unlawful assembly is that he was one of the persons constituting the assembly

and he entertained along with the other members of the assembly the common object as defined by Section 141 IPC. Section 142 provides that whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly. In other words, an assembly of five or more persons actuated by, and entertaining one or more of the common objects specified by the five clauses of Section 141, is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141. while determining this question, it becomes relevant to consider whether the assembly consisted of some persons who were merely passive witnesses and had joined the assembly as a matter of idle curiosity without intending to entertain the common object of the assembly."

The legal position laid down in Masalti admits of no doubt and has been followed time and again. However, where a large number of persons are alleged to have participated in the crime and they are sought to be brought to book with the aid of Section 149 IPC, this Court has applied rule of caution taking into consideration particular fact situation and convicted those accused whose presence was clearly established and overt acts were proved.

67. In *Sherey v. State of U.P.* this Court held : (SS p. 440, para 4)

"4. But when there is a general allegation against a large number of persons the court naturally hesitates to convict all of them on such vague evidence. Therefore, we have to find some reasonable circumstance which lends assurance. From that point of view it is safe only to convict the abovementioned nine accused whose presence is not only consistently mentioned from the stage of FIR but also to whom overt acts are attributed."

68. In *Musa Khan v. State of Maharashtra* this Court observed (SCC p. 736m para 5).

"5. ... Thus a court is not entitled to presume that any and every person who is proved to have been present near a riotous mob at any time or to have jointed or left it at any stage during its activities is in law guilty of every act committed by it from the beginning to the end, or that each member of such a crowd must from the beginning have anticipated and contemplated the nature of the illegal activities in which the assembly would subsequently indulge. in other words, it must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but at all the crucial stages and shared the common object of the assembly at all these stages."

69. In *Nagarjit Ahir v. State of Bihar* this Court applied rule of caution and in the facts and circumstances of the case held that "it may be safe to convict only those persons against whom overt act is alleged with the aid of Section 149 IPC lest some innocent spectators may get involved".

14. In *Ranjit Singh-VS- State of Punjab and Ors.* reported in (2013) 6 SCC 752 relied by learned senior counsel, Mr. HRA Choudhury, the Apex Court held "that in a faction ridden village community there is a tendency to implicate the innocent also along with the guilty, especially when a large number of assailants are involved in the commission of an offence, as a matter of common knowledge. Evidence in such cases is bound to be partisan, while court cannot take an easy road to rejecting out of hand such evidence only on that ground, what ought to be done is to approach the deposition carefully and scrutinize the evidence more closely to avoid any miscarriage of justice."

15. The Apex Court in *Subal Ghora and Others-VS- State of West Bengal* reported in 2013 (4) SCC 607. The Apex Court observed that "the concept of constructive liability must not be so stretched as to lead to false implication of innocent bystanders. Quite often, people gather at the scene of offence out of curiosity. They do not share common object of the unlawful assembly. If a general allegation is made against large number of people, the court has to be cautious. It must guard against the possibility of convicting mere passive onlookers who did not share the common object of the unlawful assembly. Unless reasonable direct or indirect circumstances lend assurance to the prosecution case that they shared common object of the unlawful assembly, they cannot be convicted with the aid of Section 149 IPC. It must be proved in each case that the person concerned was not only a member of the unlawful assembly at some stage, but all the crucial stages and shared the common object of the assembly at all stages. The court must have before it some materials to form an opinion that the accused shared common object. What the common object of the unlawful assembly is at a particular stage has to be determined keeping in view the course of conduct of the members of the unlawful assembly before and at the time of attack, their behaviour at or near the scene of offence, the motive for the crime, the arms carried by them and such other relevant considerations. The criminal court has to avoid roping innocent people in the crime. These principles laid down by this Court do not dilute the concept of constructive liability. They embody a rule of caution".

16. There is no gain saying, that the basic principle of constructive liability u/s 149 IPC is the membership of the unlawful assembly with the common object and the requisite knowledge. Once the membership with the requisite common object and knowledge is established, it is not necessary to prove the individual overt act of a particular member. What is important to note is that before punishing a person attributing constructive criminal liability, court must be sure that such person is the member of the unlawful assembly and he shared the common object of the assembly or he had the knowledge that a particular offence is likely to be committed in prosecution of the common object. In order to ascertain, as to whether a person was a member of the unlawful assembly with common object or requisite knowledge, the court must have some evidence before it. Mere presence of a person at the place of occurrence, in certain peculiar circumstances may not be sufficient to hold a person to be a member of

the assembly. For example, when the attack is actuated by old grudge or animosity by the rival group and large number of person are involved in committing the offence. Therefore, what is important to note is that the principle laid down in the above cited decision by the Apex Court do not dilute the basic tenet of constructive criminal liability, rather, embodied a rule of caution. In the present case evidently there was a mob attack and a large number of persons were sought to be implicated, and as such, prudence demands adherence to rule of caution, while attributing guilt on the basis of constructive liability with the aid of Section 149 IPC. Keeping in view the above principle and caution, let us now scan the evidence brought on record.

17. PW 1 Rahijuddin (son of the victim) deposed that on the day of occurrence, when he was working with his father Abdul Wahab (victim) in their land, they noticed that the accused persons being armed with various weapons, like daggers, spikes, spears etc were proceeding towards their house shouting "dhar-mar" (catch and hit) Abdul Wahab. Noticing the mob of the accused persons, they left their house and took shelter in the house of one Shorab Ali at a little distance. The accused persons reached the house of said Shorab Ali chasing the victim. The appellant Taizuddin pointing to the house of Shorab, told the others, that Wahab was inside the house of Shorab, whereupon all the accused persons surrounded the house of Shorab. The accused Rahim Uddin, Saheb Uddin, Shorab Dewani, Sontesh Ali, Komar Ali, Nizam, Nishen, Moin, Jumar, Badar Ali, Omer Ali, Asad, Afaz and Betlu broke the doors and walls of the house of Shorab and accused Azad Ali hit Abdul Wahab with an iron spike and dragged him (Abdul Wahab) out from the house. The accused Rahim Uddin and Saheb Ali (gaonburah), Nizam, Omer Ali and Kumar Ali hit the victim Wahab with the dagger. Shorab Dewani, Bablu, Badar Ali, Badsha and Chanmia assaulted the victim with lathi. Samsul and Rahim Uddin further hit Abdul Wahab (victim) with spike and as a consequence of such assault, Abdul Wahab died on the spot. PW 1 further stated, that the accused Badsha Ali tied the legs of the victim with a rope. When he (PW 6) resisted, the accused Badar Ali hit the PW 1. The accused persons also assaulted his sister Rup Bhanu (PW 6), his mother Julekha (PW 3), younger brother Afzal (PW 5) and Aaz Ali. PW 1 further stated that accused Omar, Moin, Badsha, Aynal and Bader carried the body of Wahab to the river Brahmaputra in an engine boat and disposed the body in the river. During cross-examination, it was elicited during cross-examination, that he did not mention the name of accused Santesh and Moin in his previous statement recorded u/s 161 Cr.P.C. He (PW 1) also did not mention the name of accused Kaddus Ali, Chan Mia, Saheb Ali and Jumar Ali in his previous statement. It was also elicited that, though, individual overt act was attributed to the various accused persons by PW 1, while deposing in court, he did not attribute any individual overt act to the accused persons in his previous statement.

18. PW 3, wife of the victim stated that 30 to 40 persons including Rahim Uddin, Shorab Ali, Babul, Sofor Ali, Chandmia, Badsha, Nizam, Aynal, Komar Ali, Omar Ali, Nishen and Badar were coming to their house. Noticing them, they left the

house and took shelter in the house of Shorab. Then the accused persons entered the house of Shorab by breaking the doors and walls, dragged out her husband Abdul Wahab and started assaulting him. She further stated that Rahim Uddin, Saheb Ali, Shorab, Babul, Nizam, Moin, Omar and Komar hit the victim with dagger. Chan Mia, Santesh, Nishen, Badar and Aynal assaulted him with lathi. Thereafter, accused Santesh and Badsha tied the hands and legs of her husband with the rope and took him towards the river Brahmaputra. While she was trying to save her husband, she was also assaulted with dagger and lathi.

19. PW 4 stated that he along with PW 1, PW 6, PW 3, PW 5, PW 11, PW 10 and one Nayab Ali were constructing house at Dharampurchar. When they were engaged in their works, he noticed that the accused persons crossed the river by the machine boat of one Bakkar Dewani and all the accused persons, namely, Rahim Uddin, Shorab, Sofer, Bablu, Samsul Nizam, Chan Mia, Moin, Badsha, Komar Ali, Omar Ali, Nishan Ali, Aynal Ali, Sabur, Samej Ali, Samsul Hoque, Sayed Ali, Sakat Ali, Azad Ali, Taleb Ali, Nakib Ali, Atwar Ali @ Atwar Ali and many others armed with lathi, dao etc were proceeding towards them, raising slogan "catch Abdul Wahab and hack him !. "Seeing the mob, they took shelter in the house of Shurab. Meanwhile all the accused persons who were about to move forward crossing the house of Surhab, Taizuddin pointed out, that Abdul Wahab was inside the house of Surhab. Then all the accused persons surrounded the house of Shorab. The accused Rahim Uddin, Shorab, Saheb, Santesh, Komar Ali, Omar Ali, Nishen, Moin, Badar, Bablu and Azad broke the doors and walls of the house and accused Azad Ali stabbed Abdul Wahab with a dagger and dragged him out of the house. Accused Azad, Rahim Uddin, Shorab, Sharaf, Saheb, Bablu, Moin, Komar Ali, Omar Ali hit him with a dagger, Nazim Ali @ Nizam Ali struck Abdul Wahab with a sharp weapon. Nishan, Samsul Hoque, Badsha, Chan Mia, Santesh Ali, Aynal, Nayeb and Badsha Ali assaulted the victim with lathi and as a consequence of such assault, the victim died on the spot. After his death accused Santesh Ali and Badsha Ali tied the hands and legs of the victim and Omar Ali, Badar Uddin, Aynal and others carried the body of the victim and disposed of the same by throwing into the river Brahmaputra.

20. PW 5 Afzal Ali (son of the victim) deposed, that while he was working in the house of the victim, the accused persons, namely, Rahim Uddin, Saheb Ali, Subur, Shorab, Bablu, Nizam, Moin Ali, Omer Ali, Komar Ali, Samsul, Badsha, Santesh, Aynal, Bader, Jumar Ali and Nishen came there by a machine boat raising slogan "catch Wahab and kill him !" Noticing the accused persons they left the house and took shelter in the house of Shorab. Accused Taizuddin pointed out that Abdul Wahab was inside the house of Shorab and then all the accused persons entered the house, breaking the doors and walls and dragged the victim out of the house. Thereafter, all the accused persons assaulted Abdul Wahab by weapons like dao, lathi etc carried by them. The accused persons also assaulted him. Accused Santesh and Badsha tied the victim with a jute rope and thereafter, accused Moin, Nishen, Aynal and Badsha carried the body of the victim and disposed of the same by throwing it into the river Brahmaputra. During cross-

examination, he stated that in his statement recorded u/s 164 Cr.P.C., he mentioned the name of the accused persons on being told by police.

21. PW 6, Rupbhanu (daughter of the victim) deposed, that she and her mother (PW 3), Julekha Khatun were digging earth in their house. Her brothers Rahizuddin, Sahidul and Sharif were working on their land with her father (victim). At that time the accused persons Rahim Uddin, Saheb Ali, Safer Ali, Sohrab, Bablu, Nizam, Moin, Omar Ali, Komar Ali, Santesh, Badsha, Samsul, Azad, Badar, Nishant, Aynal and Jhumar Ali entered the house of her father and by breaking the doors, dragged out the victim and assaulted him with dao, dagger, lathi, club etc. Thereafter, the accused Santesh and Shorab tied the victim with jute rope and carried the body and disposed of the same by throwing it into the river Brahmaputra. After four days of the occurrence, the dead body was recovered. She further stated, that when they tried to resist the accused persons, she was also assaulted by accused Aynal. During cross-examination of this witness, it was elicited that at the time of recording statement before police u/s 161 CrPC she knew the name of the accused persons, however, she did not mention their names, rather, stated that some people chased Abdul Wahab to assault him. It is also elicited from this witness during cross-examination that she did not mention the names of Rahimuddin, Nizam, Saheb, Badsha, Omar, Aynal and Jumar before police. This witness further stated during cross-examination that though she knew the names of all the accused persons, she mentioned the names of only 15/16 accused persons and did not state the names of the remaining accused persons.

22. According to PW 7, while he was engaged in the construction of the house of the victim Abdul Wahab along with Shorab, Sahjahan and Afzal, the accused persons Samed, Saket, Azad Ali, Samsul, Taleb, Taiz Uddin, Atab and Alepuddin armed with lathi, dao, club etc came there and shouted "catch Abdul Wahab"!. Seeing them Abdul Wahab ran away and took shelter in the house of Shorab. He further stated, that when they tried to save Abdul Wahab (victim), accused Sayed, Taizuddin, Sakat and Azad Ali and Taleb also assaulted him. This witness was, however, declared hostile by the prosecution.

23. PW 8, a neighbor of Shorab Ali, in whose house, the victim took shelter, deposed, that accused Samsul, Taizuddin, Sayed along with 5/6 accused persons chased Abdul Wahab and the aforesaid persons killed Wahab in his house. During cross-examination this witness stated that he was in his house and out of fear he did not come out and therefore he did not see as to who killed the victim.

24. PW 10 (son of the victim) also stated in the same tune that when he was working along with PW 1, PW 5 and PW 6, the accused persons, namely, Rahimuddin, Saheb, Sakat, Bablu, Afaz, Omar, Komar, Moin, Santesh, Badsha, Badar, Jumar and Azahar etc came to the place of occurrence by the boat belonged to Bakkar Dewani. After embarking from the boat they started shouting that Wahab be caught and finished. Noticing the accused persons they left the house and took shelter in the house of Shorab. Accused came there chasing the

victim Wahab and surrounded the house of Shorab. He further stated that accused persons dragged out the victim from the house and mounted assault on him with dao, dagger and lathi etc and the victim died on the spot. Accused persons tied the victim, carried the body and disposed it of by throwing it into the river Brahmaputra. After 3 to 4 days of the occurrence, the body was recovered on the bank of the river Brahmaputra.

25. PW 11(son of the victim) deposed that at about 6/7 am while he was working with his father (victim), accused persons were proceeding to their house by shouting "catch Abdul Wahab". Seeing the accused persons they left the house and took shelter in the house of Shorab Ali. The accused persons Rahimuddin, Saheb, Safar, Bablu, Samsul Hoque, Santesh, Badsha, Nizam, Aynal, Omar, Komar, Nishen, Badar and Moin assaulted his father (victim) and he died at the spot. The accused persons tied the hands and legs of the victim with the rope and threw the body into the river Brahmaputra.

26. PW 13, who happened to be a ferryman deposed, that at about 3 pm at night one Sofiquil requested him to ferry him for crossing the river but he declined. However, said Sofiquil forced him and 8 to 10 persons crossed the tributary of Brahmaputra by his boat and after 1 ½ hour he came to know that Wahab was murdered. He further stated that out of 8/10 persons who crossed the tributary by his boat, he could recognize only Saket, Saheb, Nishen and Omar. However, he could not recognize the rest of the accused persons.

27. PW 9 and PW 14 were the witnesses to seizure list and PW 12 was a reported witness, who came to know about the occurrence later. The PW 15, PW 16 & PW 17 were the investigating officers. Out of three investigating officers, PW 15 was the main investigating officer, who was cross-examined at length by the defence to prove the contradictions and the previous statement of the witness recorded u/s 161 of the Cr.P.C.

28. Referring to the oral testimony of PW 15, the investigating officer, through whom defence sought to prove the previous statement as well as certain contradictions and discrepancies in the oral testimony of the eye witness, learned counsel for the appellants submitted, that prosecution witnesses not only stood contradicted with their previous statement recorded u/s 161 CrPC and 164 CrPC, they also stood contradicted against each other on material facts, including the overt act attributed to various accused persons. It was also contended by the learned defence counsel, that though, as many as thirty accused persons have been named in the FIR by PW 1, the overt act was attributed only to three accused persons, namely, Azad Ali, Taijuddin and Samsul Hoque. Whereas, while deposing in court, the prosecution witnesses including the PW 1, attributed individual overt act almost to all the accused vividly, and as such, no reliance could be placed on the oral testimony of the prosecution witnesses. It was also contended, that the prosecution witnesses named some of the accused persons for the first time in court, which were never stated in the previous statement recorded u/s 164 or 161 Cr.P.C.

29. We have scanned the evidence thoroughly and in our assessment of the evidence we have noticed, that there were some embellishment and embroidery in the oral testimony of the prosecution witnesses. We have also noticed in the evidence of PW 15 and the oral testimony of the prosecution witnesses, that there were some omissions in the previous statement recorded u/s 161 Cr.P.C. as well as 164 Cr.P.C. Evidently there was a mob attack and a large number of persons brutally attacked the victim and killed him. Apparently the evidence was recorded after about 10 years of the occurrence and therefore, invariably some omissions and discrepancies were bound to occur, because of fading of memory, due to efflux of time, individual perception, observation of facts etc. Therefore, the discrepancies and contradictions which are natural and insignificant and does not go to the root of the prosecution case or the contradictions which are not material, do not impair the overall testimony of the witnesses. While appreciating the evidence, one is required to bear in mind the peculiar fact situation and the environment, in which, the occurrence took place. We are also aware, that in case of an offence of the present nature actuated by previous animosity, where a large number of persons are involved, the likelihood of the witnesses, more particularly who are closely related to the victim and interested, trying to rope as many persons as possible, belonging to the other group or their relatives out of grudge, cannot be ruled out. The tendency of the witness more particularly the relatives of the victim to make exaggerated or embroidered statement, out of anxiety to ensure maximum punishment or at least to ensure that the perpetrators of the offence do not get any hole to escape punishment is also quite natural, and therefore, exaggeration, per se, does not render the evidence discredited.

30. From a dispassionate scrutiny and assessment of the evidence it transpires, that though, as many as thirty persons have been named in the FIR, the PW 1, PW 3, PW 4, PW 5, PW 6, PW 10 and PW 11 all of whom were eye witness of the occurrence, clearly deposed in their evidence meticulously describing the involvement of the appellants Rahimuddin, Aynal, Badsa Ali, Sanchul Hoque, Bablu, Komar Ali, Badar Ali, Omar Ali, Azad, Taizuddin, Santesh, Moin Ali @ Mayan, Saheb and Nishen Ali attributing individual overt act to them.

However, our further scrutiny revealed that none of them mentioned the name of Santesh and Mayan @ Moin in their previous statement recorded u/s 161 CrPC or 164 CrPC. Name of Saheb Ali was also not mentioned in the previous statement recorded u/s 161 CrPC by any of the witness. Therefore, what we find is that so far Rahimuddin, Aynal, Badsa Ali, Sanchul Hoque, Bablu, Komar Ali, Badar Ali, Omar Ali, Azad, Taizuddin, and Nishen are concerned, evidence of all the above mentioned eye witness was fully consistent and coherent throughout all the stages of the proceeding starting from the FIR, till their deposition before the court during trial. However, PW 8 did not mention the name of all of them, reason being that admittedly he did not have the opportunity to witness the entire occurrence, inasmuch as, according to PW 8, he did not come out of the house out of fear. PW 13 also did not mention the name of all the witness

because only few of the accused persons crossed the river by his boat and others used another boat belonging to one Bakkar. Therefore, in our assessment of the evidence, we find that involvement of the above mentioned eleven accused has been established beyond doubt.

31. Learned counsel, Mr. HRA Choudhury contended that the oral testimony of the prosecution witnesses cannot be relied upon, as the same were contradictory to medical evidence and as such not worthy of trust. The medical evidence shows that the victim sustained three cut injuries with fracture caused by sharp weapon, one being on the front right shoulder and the other being on left shoulder and third one on the middle of the scalp. Besides, the above three cut injuries caused by sharp weapon, the victim also had a ligature mark on both the wrist joint and scrotum swollen. Whereas, according to the oral testimony of the eye witnesses, as indicated above, eight accused persons hit the victim with sharp weapons like dagger and spike and other accused persons assaulted the victim with lathis. Referring to the above evidence, learned senior counsel, Mr. HRA Choudhury submitted that the oral testimony of the prosecution witnesses were contrary to the medical evidence, and therefore, such oral testimony cannot be given any credence. To buttress his submission, learned counsel also placed reliance on the decision of the Apex Court in State of Haryana - VS- Ram Singh (2002) 2 SCC 426. On the facts of the said case, where medical evidence ran counter to the version of the eye witness, the Apex Court was reluctant to believe the testimony of the eye witness. The fact in the State of Haryana -VS- Ram Singh (supra) was that all the witnesses were under trial prisoner for commission of murder and they were brought to the court in handcuffed by the police and the evidence of those witnesses having found contrary to the medical evidence, on the facts and circumstances of the case, were held to be not credible.

32. It is not the law that in all cases, where the medical evidence is in conflict with the oral testimony of the eye witness, the oral testimony has to be rejected, rather the settled law is other way round. The Apex Court in Ganga Bhawani-VS- Raya Pati Venkata Reddy, AIR 2013 (SC) 3681, observed that where the eye witness's account is found credible and trustworthy, a medical opinion pointing to alternative possibilities cannot be accepted as conclusive. In the instant case, apparently the victim had three cut injuries on his body by sharp weapon. When there was a mob of a large number of people and most of the witnesses were none, but close relations of the victim and were under extreme trauma, noticing the brutality of the attack and killing of their near and dear one, it was quite natural, that in such a situation, it might not be possible for the witnesses to minutely observe, as to who dealt which blow or blows or with what weapon. In the above circumstances, it was also absurd to expect from the eye witnesses, an account, of what they have seen, with arithmetical accuracy. Rather, a tendency to make some exaggerated statement by the kith and kin of the victim out of anxiety to ensure the punishment of the offender is natural human conduct. Be that as it may, the fact remains that the victim received multiple

injuries including three cut injuries. Therefore, when a large number of persons attacked the victim and inflicted injuries causing his death, eye witness accounts cannot be brushed aside merely for the reason, that number of cut injuries as noticed by the doctor did not tally with the oral testimony, reason being that the testimony of the eye witness as to involvement of the accused persons and inflicting injuries by sharp weapon was consistent and did not suffer from any impairment. A contradiction is one, when two versions are so mutually destructive, that one version completely negate or rule out the other. When medical evidence says that there were three cut injuries, whereas, eye witnesses's account says that more than three persons hit the victim with sharp weapon, such difference between the medical evidence and testimony of the eye witnesses in the facts and circumstances of the present case can by no stretch of imagination be held to be contradiction in its true sense. That apart, having regard to the facts and circumstances and the environment in which the occurrence took place, such discrepancies between the medical evidence and the ocular evidence as indicated above, or some exaggeration as to the injury inflicted to the victim were quite natural and could not be a ground for discarding the evidence of the eye witnesses lock, stock and barrel.

33. Mr. B. K. Mahajan strenuously argued, referring to the oral testimony of PW 1, PW 4 and PW 5 and the sketch map (Ext. 7), that from the evidence of PW 1, PW 4 and PW 5, appellant Taizuddin could not be held to be a member of the unlawful assembly sharing the common object or even having the requisite knowledge. PW 1 & PW 5 stated in their evidence that accused Taizuddin showed, that Wahab was inside the house of Shorab and then the other accused persons surrounded the house of Shorab and mounted assault on him. PW 4 stated that when the accused persons moved forward and was about to cross the house of Shorab, then Taizuddin told, "where are you proceeding ? Abdul Wahab is there in the house of Shorab". Then all the accused persons surrounded the house of Shorab and mounted assault on him causing his death. The contention of Mr. Mahajan was that from the above evidence, there could not be a presumption, that Taizuddin being a co-villager, had shared the common object or he was also a member of the unlawful assembly, though, he might be present at the place of occurrence as bystanders being co-villagers. Besides, the above evidence of PW 1 4 & 5, the PW 7 stated that Taizuddin and some other accused persons named by him being armed with lath, dao club etc., chased the victim Wahab by shouting "catch Abdul Wahab". However PW 7 was declared hostile by the prosecution. It is the trite law, that the testimony of the hostile witness does not get washed off the record, merely because of the prosecution disowning such testimony. If the oral testimony of the hostile witnesses is found supporting the other evidence, there is no bar in relying or believing the testimony of such hostile witness. The testimony of PW 7 clearly supported the other prosecution witnesses being PW 1, PW 4 and PW 5, showing the presence of Taizuddin at the place of occurrence, and helping the other accused persons in tracing out the victim, who took shelter in the house of Shorab Ali. PW 8 and another

independent witnesses also stated that Taizuddin along with others chased Wahab. However, in cross-examination PW 8 stated that he was scared of seeing the occurrence and did not come out of his house. When PW 8 categorically stated that he had seen the accused Taizuddin along with other accused persons chasing the victim, the oral testimony of PW 8, which remain undented, cannot be disbelieved only because he did not come out of the house out of fear. He might not have seen the entire occurrence or all the accused persons for not coming out of the house, but, what he stated cannot be disbelieved, inasmuch as, he was the most natural witness, being close neighbour of Shorab, in whose house, the occurrence took place, and in fact, the presence of PW 8 in his house at the time of occurrence was also not disputed. The eye witness's account clearly demonstrating that Taizuddin also accompanied the accused persons in chasing the victim Wahab and it was Taizuddin, who assisted the other members of the unlawful assembly to locate the victim in the house of Shorab, leaves no room for doubt, that he (Taizuddin) shared the common object or at least he had the knowledge that the victim Abdul Wahab was likely to be killed in prosecution of the common object. Also, because evidently the accused persons being armed with deadly weapons chased the victim whistling war cry that "catch and kill Wahab" and Taizuddin also accompanied them and actively participated and guided the others to locate the victim. In view of above overwhelming and clinching evidence, we do not find any reason to hold that Taizuddin was a mere bystander or mere spectator.

34. As regards involvement of accused Moin Ali @ Mayan, Santesh Ali we find that none of the eye witnesses, namely, PW 1, PW 3, PW 4, PW 5, PW 6, PW 10 & PW 11 implicated these two accused persons either in their previous statement recorded u/s 161 Cr.P.C. immediately after the occurrence or the statement recorded by the magistrate under section 164 Cr.P.C. after about 12/13 days of the occurrence. In the FIR also, no specific overt act was attributed to these two accused persons. However, while deposing in court after about 10 years of occurrence, all the above mentioned witnesses, who were closely related to the victim, being wife, sons, daughter etc, of the victim, tried to implicate them attributing specific overt act. Therefore, the oral testimony of PW 1, PW 3, PW 4, PW 5, PW 6, PW 10 and PW 11 as regards the involvement of accused Santesh Ali and Moin Ali@ Mayan, whose names were neither mentioned in the previous statement recorded u/s 161 CrPC, nor in the statement recorded u/s 164 CrPC, by any of the witnesses, was hardly worthy of trust and as such, in our considered view, it would be unsafe to hold, that Santesh and Moin are also guilty of the offence charged, with the aid of Section 149 IPC.

35. So far the accused/appellant Saheb Ali was concerned, none of the witness implicated the accused Saheb Ali (gaonburah) in their previous statement recorded u/s 161 CrPC. In the statement recorded by the magistrate u/s 164 CrPC also, besides, the PW 1 & PW 6, being the son and wife of the victim, others did not implicate Saheb Ali (gaonburah). In the FIR also except making general allegations, no other overt act was attributed to this appellant. However,

while deposing in court, PW 1, PW 3, PW 4, PW 5, PW 6 & PW 10, all of whom were the close relatives, being son, daughter and wife etc of the victim as indicated above, have implicated Saheb Ali. We have also notice that the PW 7 & PW 8, both being independent witness, also did not mention the name of appellant Saheb Ali (gaonburah) in their evidence. Therefore, the appellant Saheb Ali (Gaonburah) was apparently implicated only by the witnesses, who were related to the victim, while deposing in court. What therefore, transpires is that, though all the witnesses related to the victim aggressively deposed before court vividly describing the overt act of the appellant Saheb Ali, none of these witnesses even mentioned his name in their previous statement recorded u/s 161 Cr.P.C. and only PW 1 & PW 6 mentioned the name of Saheb Ali during examination u/s 164 Cr.P.C. after 12 days of the occurrence. Such omission of material facts in the previous statement obviously shrouded the credential of the oral testimony before the court regarding the involvement of Saheb Ali, inasmuch as, omission of the name of Saheb Ali by all the witnesses in their previous statement recorded u/s 161 CrPC amounted to contradiction on material facts creating doubt about the involvement of the appellant Saheb Ali.

36. It may be profitable to refer to paragraph 35 of Sunil Kumar Sambhudayal Gupta (DR.) & Ors. VS. State of Maharashtra reported in (2010) 13 SCC 657 relied by learned senior counsel, Mr. HRA Choudhury, where the Apex Court observed as under :-

"35. In case, the complainant in the FIR or the witness in his statement under Section 161 Cr.P.C., has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded."

37. As regards involvement of appellant Taleb only PW 4 and PW 7 mentioned his name generally in their evidence for the first time, without attributing any specific overt act. None of them, however, stated about the said appellant Taleb in their previous statement. Other prosecution witness also did not implicate him. Similarly, during evidence in court, for the first time, PW 7 implicated appellant Alep@Alepuddin, PW 4 implicated appellant Nekib and Sayed PW 4, PW 7, PW 8 and PW 10 implicated accused Sakat PW 1, PW 3, PW 4 and PW 5 implicated Chan Mia. However, none of the above prosecution witnesses stated regarding the above named appellant Nakib, Sakat, Sayed, Chanmia and Alep in their previous statement. In their evidence in court also no overt act was attributed to them. PW 1, PW 6 and PW 10 implicated the appellant Jumar@Jhumer for the first time, while deposing in court. However, none of them mentioned about the presence of appellant Jumar@Jhumer in their previous statement under Sections 161 or 164 Cr.P.C. Therefore, the evidence, as indicated above, in our considered view was grossly inadequate to rope in the appellant Alep, Taleb, Nakib, Jumar@Jhumer, Chan Mia, Sayed and Sakat in the commission of the offence with the aid of Section 149 IPC in the facts and circumstances of the case.

38. On careful scrutiny of the entire evidence, we also find that none of the

witnesses implicated accused appellant Kaddus Ali, Jaban Ali, Anar, Somej, Suratjamal, Atwar and Sobed Ali. In fact, there was absolutely no incriminating evidence against these seven persons. Not to speak of their being members of the unlawful assembly with requisite common object or knowledge or any other incriminating materials, none of the witness deposed even regarding their presence at the place of occurrence. It was only the FIR, wherein the name of these seven persons were included without attributing any overt act to them. It is the trite law, that the FIR is not a substantive evidence and it can ordinarily be used only for contradicting or corroborating its author, unless, tendered in evidence under any provision of Chapter 2 of the Evidence Act. What is pertinent to mention is that even the PW 1, the author of the FIR also did not implicate these seven appellants in his evidence in court. Therefore, in our considered opinion, no conviction could be recorded against these eight appellants merely on the basis of FIR, in the absence of any legal evidence before the court. However, while convicting all the accused persons charge sheeted by police, the learned trial court is found to have lost sight of these vital facts, that there was absolutely no legal evidence to hold the above named eight appellants guilty of any offence even with the aid of Section 149 IPC.

39. Therefore, on careful scrutiny of the entire evidence, we are of the considered opinion that the charges against the appellants Abdul Kaddus, Chan Mia, Jumar@Jhumar, Zaban Ali, Saheb Ali (gaonburah), Anar Ali, Samej Ali, Suratjamal, Sabed, Santesh, Atowar, Nakib, Alep, Taleb, Sakat, Sayed and Moin Ali@Mayan have not been proved beyond reasonable doubt. So far as the accused Rahimuddin, Aynal, Badsha, Samsul Hoque, Bablu, Omar Ali, Komar Ali, Badar, Taizuddin, Nishan and Azad is concerned, prosecution evidence are found to be consistent and coherent throughout all the stages starting from the lodging of the FIR till deposition in court, clearly establishing beyond all doubt, that the above mentioned eleven accused appellants are guilty of the offences charged against them.

40. In view of the discussions made hereinabove, we concur with the findings of the learned trial court so far as the conviction and sentence of the appellants Rahim Uddin, Ainal, Badsha, Samsul Hoque, Bablu, Komar Ali, Bader, Omar Ali, Taizuddin, Nishen and Azad is concerned. However, we find the prosecution evidence against appellants Chanmia, Kaddus Ali, Jaban Ali, Anar, Juber, Santesh, Suratjamal, Sabed Ali and Moin Ali @ Mayan, Sakat, Alep, Taleb, Nakib, Atowar, Jumar@Jhumar, Sayed and Saheb Ali, was grossly inadequate to establish the charges beyond reasonable doubt and as such, we set aside the conviction and sentence of the aforementioned appellants. Accordingly, the Criminal Appeal No. 157 of 2015 qua the accused Kaddus Ali, Chandmia, Anar, Somej, Sabed, Zaban, Saheb Ali (gaonburah), Jumar, Suratjamal, Santesh, Sayed, Saket and Moin@Mayan, and Crl. Appeal No. 166/2015 qua the appellants Nakib, Alep, Taleb and Atowar are allowed. The appeals qua the appellants Rahimuddin, Aynal, Badsha, Samsul Hoque, Bablu, Komar Ali, Badar, Omar Ali, Taizuddin, Nishen and Azad stands dismissed.

41. Accordingly, we direct that the appellants Kaddus Ali, Chanmia, Anar, Somej, Sabed, Saheb Ali (gaonburah), Jumar@Jhumar, Suratjamal, Santesh, Moin Ali@Mayan, Nekib, Alep, Taleb, Atowar, Sakat, Zaban Ali@ Jaban and Sayed be released forthwith if not required in any other case.

42. Both the appeals are accordingly disposed of.

43. Send back the LCRs along with a copy of the judgment. A copy of the judgment be also sent to the Superintendent of jail, Barpeta.