

(2014) 11 GAU CK 0005
In the Gauhati High Court
Case No : CrI.A. No. 179 of 2012

Aminur Islam and Others

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 14-11-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 162 162(1) 162(2) 173 313
Evidence Act, 1872 — Section 157
Penal Code, 1860 (IPC) — Section 147 148 149 302

Citation : (2015) 2 GLT 708

Hon'ble Judges : C.R. Sarma, J;Prasanta Kumar Saikia, J

Bench : Division Bench

Advocate : S.S.S. Rahman, S.F. Rahman and N. Islam, Advocate for the Appellant; S. Jahan and PP, Advocate for the Respondent;

Final Decision : Allowed

Judgement

Prasanta Kumar Saikia, J.

1. This appeal is directed against the judgment dated 17.7.2012 rendered by Addl. Sessions Judge, Dhubri, Assam in Sessions Case No. 2 of 2002 convicting (1) Sahajan Ali, (2) Md. Nur Islam, (3) Samsul Hoque, (4) Md. Aminur Islam & (5) Md. Mozammel Hoque of offences u/s. 147/148/302/149 and sentencing them to suffer R.I. for one year and fine of Rs. 5,000/- each for offence u/s. 147 IPC, R.I., for 2 (two) years and fine of Rs. 5,000/- each for offence u/s. 148 IPC and for life and to pay a fine of Rs. 10,000/- each for offences u/s. 302/149 IPC. Heard Mr. S.S.S. Rahman, learned counsel for the appellants and Ms. S. Jahan, learned Addl. Public Prosecutor, appearing for the State.

2. It may be stated that while so convicting the appellants (hereinafter referred to as accused persons), the trial court was pleased to acquit other co-accused, namely, (1) Maleka Bewa (2) Atihur Rahman, (3) Marjina Bewa, (4) Majibur Rahman, (5) Majibur Ali and (6) Habibur Rahman of offences aforesaid on holding that the prosecution could not make out the charges against them

beyond all reasonable doubt.

3. Being aggrieved by the aforesaid judgment, the appellants herein had preferred this appeal citing several infirmities of extremely serious in nature in the judgment under challenge.

4. The projected case of the prosecution, in short, is that on 31.08.2000, one Md. Anowar Ali Sheikh (PW 1) lodged an FIR with the Officer-In Charge, Gauripur Police Station alleging that on the night intervening 29th and 31st August, 2000, accused Hazarat Ali and Sahajan Ali came to the house of his nephew Peer Baksh (since deceased) and called him to their house stating that they required to discuss some urgent matters with him.

5. Since Peer Baksh did not return home for a considerably long period, his wife Razia Bibi (PW 2) and her daughter Peer Banu Bibi (P W 4) came out of their house in search of their husband/father. When they reached the house of accused Hazarat Ali, they saw the accused persons, namely (1) Hazarat Ali, (2) Sahajan Ali, (3) Mozammel Hoque, (4) Habibur Rahman, (5) Samsul Hoque, (6) Nur Islam, (7) Md. Aminur Islam, (8) Fazrat Ali and (9) Mansur Ali assaulting Peer Baksh by various weapons like dagger, club, rod garasi etc.

6. Seeing said Peer Baksh, being assaulted by accused persons, they raised hue and cry for which accused persons left such place. The deceased died at the place of occurrence itself moments after the alleged incident. On receipt of the FIR with such allegations, O/C Gauripur P.S. registered a case vide Gauripur P.S. No. 118 of 2000 u/s. 147/148/149/302 IPC and ordered one Kamal Ch. Rajbongshi to investigate the case.

7. Being so entrusted with the investigation, Sri Rajbongshi visited the place of occurrence, held inquest on the dead body, sent it to the hospital for post mortem examination, examined the witnesses, well acquainted with the fact and circumstances of the case, arrested some of the accused persons and on the conclusion of trial, submitted charge-sheet u/s. 147/148/149/302 IPC against as many as sixteen accused persons and forwarded them to the court to stand trial.

8. On receipt of the case on commitment and on hearing the learned counsel for the parties, the court below framed charges u/s. 147/148/302/149 of IPC against as many as 16 accused persons. Charges, so framed, on being read over and explained to them, they pleaded not guilty and claimed to be tried. Accused Hazarat Ali, Saukat Ali @ Naktu, Monowar Ali and Fazrat Ali @ Abdul Rahman died during pendency of the trial and as such, the case stood abated against them and it proceeded against the remaining surviving accused persons.

9. During the course of trial, the prosecution had examined 7 witnesses including the Medical Officer who conducted autopsy on the dead body of the deceased as well as the Investigating Officer. The statements of the accused persons were recorded u/s. 313 CrPC. Their plea was that of total denial. They, however, declined to adduce any evidence of their own. On the conclusion of trial, the

learned court below convicted the accused appellants of offence u/s. 147/148/302 IPC and sentenced them to punishment as aforesaid. It is that judgment which has been challenged in the present appeal.

10. Opening up argument on behalf of the appellants, Mr. S.S.S. Rahman, learned counsel submits that the judgment under challenge is unsustainable in law for reasons more than one. In that connection, it has been contended that PW 2 and PW 4 seem to be the prime prosecution witnesses but their evidence cannot be relied on since such evidence suffers from serious contradictions/infirmities. In that connection, it has been pointed out that they had divulged before the court during trial some facts which they never disclosed before the I/O during investigation. This makes their evidence enormously suspicious.

11. The incident in question, according to the learned counsel for the appellants, occurred at midnight and it occurred at a place where there was no arrangement of light. In other words, the incident occurred in total darkness which is evident from the testimony of PW 5, Md. Ali Hussain who is found to be the only neutral, natural and independent witness, examined from the prosecution side in the case under consideration.

12. There is nothing on record to show that such evidence, rendered by PW 5, cannot be accepted as truthful one. Thus, though there was no light at the place of occurrence when the incident in question took place on the night of 30th August, 2000, yet, PW 2 & PW 4 claimed to have seen such an incident in the light of electric lamp and that too, from the distance of about 15 cubits from the place of occurrence. This only shows that evidence of PW 2 and PW 4 cannot be accepted as truthful evidence.

13. In attacking the testimonies of PWs more and more, learned counsel for the appellants further submits that PW 2 and PW 4 came to the place of occurrence only when the incident was over if one is to believe the testimony of PW 5. Such a claim of PW 5 finds support from the I/O as well. Therefore, according to learned counsel for the appellants, it needs to be held that the claim of PW 2 & PW 4 that they came to the place of occurrence when the incident was going is nothing but a pack of lies only.

14. The learned counsel for the appellants again submits that one Hasina, another wife of the deceased, reportedly went to the place of occurrence along with PW 1, PW 2 and PW 4 but such a vital witness was not examined, and, that too, without assigning any reason whatsoever which cast a serious doubt about the authenticity of the evidence, rendered by principal prosecution witnesses.

15. Mr. S.S.S. Rahman, learned counsel for the appellants again submits that the learned court below had placed huge reliance on the statements which some of the PWs made before the I/O during investigation in concluding that the prosecution had proved the charge against the accused appellants beyond all reasonable doubt. However, such reliance on the statements, made by the witnesses before the I/O during investigation cannot be acted upon unless

certain eventualities, enumerated in Section 162(2) CrPC, are fulfilled.

16. But in the case in hand, there is nothing on record to show that conditions, so specified in Section 162(2) CrPC were fulfilled paving the way for the court below to place reliance on the aforesaid statements which some of the witnesses rendered before the I/O during investigation. Once aforesaid statements, rendered before the I/O, is kept beyond the considerations of the case aforementioned, nothing remains on record to support the allegations against the appellants herein.

17. The further case of the appellants is that the alleged incident caused a huge hullabaloo which brought the nearby people to the place of occurrence since such a place is situated in a thickly populated area. But all those witnesses were not examined. Quite contrary to it, prosecution places huge reliance on the testimonies of PW 1, PW 2 & PW 4 who are extremely partisan to the prosecution since they are kith and kin of the deceased. On this count also, according to the learned counsel for the appellants, the evidence of P W1, PW 2 & PW 4 needs to be viewed with great suspicion.

18. It is also the case of appellants herein that the appellants are similarly situated with the other accused persons in whose favour the court below had recorded a verdict of acquittal. Since persons similarly situated with the appellants are acquitted by the court below, on the same set of evidence, the court below could not have convicted the appellants before this Court. He, therefore, urges this Court to set aside the judgment, under challenge and to acquit the appellants of the offences aforesaid.

19. Ms. S. Jahan, learned Addl. P.P., however, submits that the judgment under challenge invites no interference since the evidence of witnesses, more particularly, PW1, PW 2 and PW 4 are found to be reliable and dependent, more so, when their cross-examination, could elucidate nothing to show that those witnesses had falsely charged the appellants herein as the persons responsible for killing Peer Baksh at the place of occurrence on 30th August, 2000.

20. According to learned Addl. P.P. it is true that prosecution place huge reliance on the testimonies of wife, daughter and his uncle. But then, it is not the law that evidence of related witnesses needs to be discarded always only for they being the relatives of the victim. The law on this matter is well settled which requires that evidence of related witnesses can be used in recording a verdict of guilt against the accused person(s). But the only rider, placed on the evidence of such witnesses, is that the evidence of those witnesses is to be scrutinized with, care and caution. If the evidence of such witness withstands such a test, their evidence can very well be relied on.

21. According to learned Addl. P.P., the incident in question occurred at night, and that too, at a place not far away from the residence of deceased. There is evidence on record to show that accused Hazarat(since deceased) and Shajahan Ali came to the house of the deceased moments before the alleged incident, took

him to the place of occurrence stating that they had some urgent matters to be discussed with him only to be found him dead in the premises of Hazarat Ali little later.

22. In such a scenario, it is quite but natural for the relatives of the deceased to be at the place of occurrence when the incident was still going on, and that too, well before the coming of other persons to such place. In the face of such revelations, the testimonies of those witnesses cannot be discarded only for their being relatives to the deceased, more so, when the incident occurred towards the midnight and when there is nothing on record to show that those witnesses had falsely implicated the appellants with the aforesaid case.

23. In regard to allegation that incident in question occurred at a place where there was no arrangement of light, and as such, PW 2 & PW 4 could not have seen the deceased being attacked by accused persons, it has been submitted that mother and daughter duo in their evidence makes it more man clear that there were lamps which lit the place of occurrence and in such light, they could see the incident aforesaid. Therefore, no offence can be taken to the claim of PW 2 & PW 4 that they saw the incident under consideration in the light of the lamps which were on at the place of occurrence at the time in question.

24. Being so, the learned trial court did commit no wrong whatsoever in accepting the evidence of the P Ws, more particularly the evidence of PW 2 & PW 4 in recording a verdict of guilt against the appellants herein, more so, when their evidence finds corroboration from the M/O & I/O on material points. She, therefore, urges this Court to dismiss this appeal.

25. Before we could address the rival submissions, we find it necessary to have a look at the evidence on record and the evidence of the Doctor who conducted autopsy on the dead body is first taken up for consideration. He was Dr. Tapash Mazumder and was examined as PW 6. According to him, on 31.08.2009, he was posted at Dhubri Civil Hospital as Medical & Health Officer-I.

26. On that day, on police requisition, he conducted post mortem examination on the dead body of one Peer Baksh and found the following:--

"External Appearance: An average built male dead body, whose rigor mortis found present, laceration found over right side of the forehead with loss of brain matter, bones and soft tissues. Blood clots are present.

There are 5 nos. of stab injuries present over the anterior abdominal wall with protrusion of intestinal coils below the umbilicus on the midline. The sizes of the stab injuries are 3 cm x full depth of the interior abdominal wall. Blood clots are present.

Abdomen: There are multiple perforating injuries present over the both small and large intestines. Blood clots are present. Spillage of the intestinal contents on the peritoneal cavity present.

Cranium: There is a lacerated injury over the right side of the forehead- size 15 cm x 5 cm x full depth of the skull with loss of brain matters, bones and soft tissues. This skull was separated from scalp. Blood clots are present.

Membrane: Membrane found lost under the injury. Blood clots are present.

Brain: Part of the brain matter lost. Blood clots present.

Liver: There was rupture of left lobe with blood clots. The injuries, as described, are all ante-mortem in nature.

Opinion: Cause of death is due to shock and haemorrhage as a result of head injuries sustained by the deceased."

27. He prepared a report in that connection which he proved as Ext. 4.

28. A careful perusal of the Ext. 4 in the light of evidence, rendered by Dr. Tapash Mazumder (PW 6), reveals that the deceased died on or about 30th August, 2000 and his death was homicidal in nature since the deceased met his death having been subjected to multiple assaults which inflicted very many injuries on his body, more particularly on his head and stomach. Now, we need to know who occasioned the death of the aforesaid person.

29. In that connection, we find it necessary to have a look at the evidence of principal witnesses, they being PW 2, PW 4 and to some extent evidence of PW 1 as well. In her evidence, PW 2 states that on the fateful night at about 11.30 pm, she along with her daughter and another wife of deceased were taking meal in their house. While they were so taking meal, her husband came and started to change his clothes. Precisely at that moment, Hazarat and Shajahan came to their house and asked her husband to go to their house since they wanted to discuss some business matters with him.

30. Being so called upon, husband of PW 2 came out of his house and started to follow those two persons. However, her husband did not return home for a long time. She, therefore, went to the house of Hazarat which is situated at a place not far away from her house. Her daughter Peer Banu and another wife other husband Hasina too accompanied her. Going to such place, they saw her husband being beaten by (1) Hazarat, (2) Shajahan Ali, (3) Nur Islam, (4) Samsul Hoque, (5) Aminur Islam, (6) Mazommil Hoque.

31. She also saw her husband being assaulted by those persons with various weapons. Seeing her husband being brutally beaten by those accused persons, they raised hue and cry and also started running towards her husband. On seeing them coming to such place raising hulla, accused persons left such place. On arriving at the place of occurrence, PW 2 embraced her husband but only to be found him dead in the meantime.

32. Her daughter Peer Banu immediately went to the house of P W1 to report him about what had occurred at the place of occurrence on that night. She saw grave injuries on the head and stomach of her husband. In her cross

examination, she admitted that about 40 to 50 families reside in the immediate vicinity of their house. The suggestion that she did not tell the police that going to the place of occurrence, she saw aforesaid accused persons assaulting her husband, was denied by her. The suggestion that she did not tell police that Peer Banu had gone with her to the place of occurrence was also denied by her.

33. PW 4, Peer Banu, daughter of the deceased, deposes that on the fateful night at about 11.30 pm they were in their house. Their father came to the house on that day around midnight. When he was changing his clothes, accused Hazarat and Shajahan came to their house and called her father to go with them to their house. Since her father did not return home for about 10 to 15 minutes, her mother asked her to find out the reasons as to why her father did not return home despite a long period being elapsed in the meantime.

34. She, therefore, came out of her house and heard the sound of someone being beaten and such sound came from the side of the house of Hazarat. Hearing such noises, she along with her mother went to such place. On arriving at the place of occurrence, they saw about 10/12 persons assaulting her father with knives, Garshi etc. in the courtyard of Hazarat. She also saw, amongst the assailants, accused Nazrul, Hazarat, Samsul, Shajahan, Jabbar, Mojamnil, Noor Salam, Natku, Atinur, Monowar, Fazrat etc.

35. Being so beaten, father of PW 4 fell down on the ground. She immediately reported the matter to one of her brother Mani Sk. When they raised hue and cry, people nearby assembled there and seeing the people coming, accused persons left the scene. Her father breathed his last at the place of occurrence itself being so beaten. In her cross examination, she states that on the fateful night, her father came home around 11.30 pm after attending a Mel in their local Mosque.

36. The suggestion that she did not tell police during investigation that she had seen accused Nazrul, Hazarat, Samsul, Shajahan, Jabbar, Mojamnil, Noor Salam, Natku, Atinur, Monowar, Fazrat etc assaulting Peer Baksh in the courtyard of Hazarat as well as the suggestion that she did not tell the police that she had seen 10 to 12 persons assaulting Peer Baksh in the aforesaid place were denied by PW 4. The suggestion that she did not tell police that she saw her father being assaulted with Garshi and knives was also denied by PW 4.

37. The other important witness on whom prosecution places huge reliance is PW 1, the uncle of the deceased. PW 1 is found saying that on the fateful night, her granddaughter came to his house shouting that her father had been killed. Being so informed, he along with his brother Ansar Ali and her granddaughter rushed to such place. On the way to the place of occurrence, her granddaughter told them that Hazarat and Shajahan called her father from their house and thereafter, they had assaulted her father at the place of occurrence on that eventful night moments before.

38. Arriving at the place of occurrence, they saw Hazarat lying dead at the

backyard of the house of accused Hazarat Ali. He saw very many injuries on his body. He also saw intestinal matter coming out of the belly of the deceased. The matter was immediately reported to police by the Chowkidar. He also came to know from PW 2 that accused persons had assaulted Peer Baksh with various weapons and killed him on the spot moments before. On being informed, he lodged the FIR on the next day which he proved as Ext. 2.

39. During the course of investigation, police also seized one dagger on the strength of Ext. 3. But the dagger which was shown to him during trial in the court was not the dagger which police seized on the strength of Ext. 3. In his cross examination, he admitted that he did not mention in his FIR that Rejia had informed him about the incident in question. The suggestion that he did not tell the police that Peer Banu (P W 4) told him that Hazarat and Shajahan had called Peer Baksh to their house on the night aforesaid, took away the deceased from their house to the house of accused Hazarat and brutally assaulted him at such place were also denied by PW1.

40. PW 3 is Shri Zakir Hussain. According to him, on the eventful night at about 12 am, he heard hulla coming from the place of occurrence. He came out and found Rejia and Hasina shouting loudly. He also saw Hazarat (since deceased) and Jabbar going away from such place through the road. Hasina and Rejia told him that about 10 to 15 persons had killed their father/husband and left the place of occurrence. In his cross examination, he admitted that the deceased was the son of his maternal uncle.

41. The suggestion to the effect that he did not tell police that Rejia and Hasina told him about their seeing 10 to 15 persons killing Peer Baksh after attacking him with various weapons was denied by PW 3. The suggestion that he did not witness Hazarat and Jabbar going away from the place of occurrence was denied by him. He, however, admitted that there were many households in the vicinity of the P.O. but none of those neighbours came to such place after the incident aforementioned.

42. PW 5 is one Md. Ali Hussain. According to him, the incident in question occurred on the eventful night at about 12 am. He, as Chowkidar, was doing night duty near the house of one Dr. Ulla. One Bhitha Bagsu was also with him. There was a meeting in the house of one Mansur Daroga. The deceased was also there and consuming liquor, he was raising hulla in the meeting. Said meeting was attended to by one Azan. The deceased after consuming liquor caught Azan by his throat and assaulted him for which persons present at the meeting left such place. He also assaulted Dr. Ulla with a torch.

43. Sometime thereafter, he heard hue and cry. He immediately informed the police over phone about such commotion. Police came to such place of occurrence on being so informed. He also went there along with the police and found Peer Baksh lying dead at such place. But he did not know who had killed Peer Baksh. In his cross examination, he deposes that there was no electricity at

the place of occurrence for which the neighbors came to such place with lamps in their hands.

44. Sri Kamal Ch. Rajkhowa (PW 7) is the I/O of the case. According to him, on 31.08.2000, he was working as S.I. of Police of Gauripur Police Station. On that day, the then O.C entrusted him to investigate the case registered on the basis of the FIR (Ext. 2). Being so entrusted, he went to the place of occurrence, held inquest on the dead body, sent the same to the hospital for post mortem examination and also drew sketch map of the P.O.

45. He also examined the witnesses acquainted with the facts and circumstances of the case and seized a dagger found lying at the place of occurrence on the strength of Seizure List Ext. 3. He proved the inquest report and sketch map as Ext. 1 and 5 respectively. On conclusion of investigation, he submitted charge-sheet against as many as 16 persons and forwarded them to the court to stand trial for offences u/s. 147/148/302 IPC.

46. In his cross examination, he denied the claim of PW 2 that she told him during investigation (a) that she saw accused persons assaulting her husband or (b) that Peer Banu (PW4) had gone to the place of occurrence along with her. He also denied the claim of PW 4 that she told him during investigation") that she saw 10/12 persons assaulting her father at the place of occurrence or(b) that she saw accused Nazrul, Hazarat, Samsul, Shajahan, Jabbar, Mojammit, Noor Salam, Natku, Atinur, Monowar, Fazrat etc assaulting Peer Baksh in the courtyard of Hazarat.

47. PW 7 (I/O) also denied the claim of PW 1 that during investigation, he (PW 1) told him (PW 7) that Peer Banu(PW4) told him that on the aforesaid night, Hazarat and Shajahan came to their house and thereafter, she saw them assaulting her father at the place of occurrence. He also did not admit that PW 3 told him during investigation that Rejia and Hasina told him (PW 3) that 10/12 persons killed Peer Baksh or that those persons killed their husband/father after assaulting him with knives, daggers and garshi.

48. Above being the evidence on record, let us see how far such evidence makes out the charges brought against the appellants. Evidently, the witnesses who reportedly saw the appellants and others assaulting the deceased were PW 2 and PW 4. Now, let us see to what extent their evidence inspire confidence. In their evidence, PW 2 and PW 4 claim that they saw the appellants herein and other persons assaulting the deceased at the place of occurrence on the night in question. Undoubtedly, such evidence provides the very fulcrum of the prosecution case.

49. However, it is found well apparent from the testimony of PW 7 (I/O) that none of them uttered a word to him during investigation about their seeing appellants and other persons beating their husband/father at the place of occurrence on the fateful night. This clearly shows that those two PWs did not divulge some very vital information to the I/O during investigation. In our

considered opinion, such omissions on the part of PW 2 and PW 4 are contradictions, as contemplated in explanation to 162(2) Cr.P.C.

50. It is a settled law that only for evidence of a witness being afflicted with contradictions), his/her evidence cannot be thrown away altogether. But then, such evidence needs to be viewed with suspicion. In that connection, we can profitably peruse the decision of Hon"ble Apex Court in the case of Fazlur Rahman Vs. Emperor, .The relevant part is reproduced below:--

"6. The correct position in regard to the veridical considerations which arise in connection with previous statements to a police officer, which have been reduced to writing, and to which the provisions of Section 162 of the Code apply, have been elaborately stated in *Heramba Lal v. Emperor* AIR 1945 Cal 159. For the purposes of the present case, it is the following points elucidated in that decision which have to be noted: (1) That the statement recorded by the police officer is not the writing of the witness nor is it a writing signed by the witness; (2) that it may not represent what the witness actually say; (3) that the police officer may nevertheless testify on oath that the writing is an accurate record or a correct summary of the statement of the witness; (4) that the attention of the witness should be called to those parts of the recorded statement by which it is intended to contradict him in order to enable him, if he desires to do so, to furnish an explanation for any alleged contradiction or materials omission. But when, the Court having steered, in regard to the statements under Section 162, a judicial course set by these considerations, real contradiction or material inconsistency still nevertheless remains between what are proved to be a witness"s earlier statements recorded by the police, and the witnesses" evidence given in Court, what then? What is the duty of the Court in that event? Clearly it is to tell the jury in no uncertain terms that the witness is unreliable, and that they would be well advised to ignore evidence. To leave the matter where the Judge has here left it, amounts at the very least to an incomplete direction.

7. In *Leonard Harris* (1927) 20 Cr. App. R. 144, it was laid down that if a witness is proved to have made a statement, though unworn, in distinct conflict with his evidence on oath, the proper direction to the jury is that his testimony is negligible and that their verdict should be found on the rest of the evidence."

51. We have also found that PW1 & PW 3 did not divulge some vital information to the I/O during investigation. Thus, PW 1 did not tell the I/O about Peer Banu"s (PW 4) reporting him Hazarat"s and Shajahan"s coming to their house little before the alleged incident or their taking the deceased with them to the place of occurrence or her seeing her father being assaulted by accused persons.

52. In the same way PW 3 too did not disclose to the I/O during investigation that he was told by PW 2 and PW 4 that 10/12 persons killed their father/husband at the place of occurrence on the night in question having subjected him to a barrage of assault by means of various weapons. Thus, the evidence of PW 1 & PW 3 too suffers from some contradictions which, in turn, make their evidence

equally suspicious.

53. One may note here that in his evidence, PW 3 deposes that on going to the place of occurrence he saw accused Hazarat and Jabbar leaving the place of occurrence hurriedly. However, he did not disclose such information to the I/O during investigation which again shows that the evidence of PW 3 suffers from more and more contradictions which makes his evidence even more suspicious.

54. It is in those backdrops, let us consider some other alleged infirmities in the evidence of PWs, PW 2 & PW 4 in particular. These two PWs claim that they saw the incident in the light of electric lamps which lit the place of occurrence on the night in question and they saw such incident from a distance of 15 cubits. Does such a claim inspire confidence? In this context, one needs to look at the evidence of PW 5.

55. The evidence of PW5 assumes tremendous importance since in the facts and circumstances of the case, under consideration, he appears to be the most neutral, natural and independent witness. According to him, there was no arrangement of light at the place of occurrence for which the neighbors who came to such place after the incident came there with lamps in their hands. Such evidence remains almost unquestioned and therefore, it needs to be held that there was no arrangement of light at the place of occurrence which again makes the claim of PW 2 and PW 4 that they saw the incident under consideration in the light of the electric lamps in the place of occurrence enormously doubtful.

56. Even if one assumes for the sake of argument that there were electric lamps at the place of occurrence on the night in question, such evidence no way tilts the balance in the case under consideration in favor of the prosecution since the PW 2 and PW 4 claim that they saw the incident aforementioned from a distance of about 15 cubits. On a dark night in the normal circumstances, one cannot view an incident from a distance of 15 cubits even if there is arrangement of electric light This is another reason as to why the evidence of PW 2 and PW 4 needs to be discarded.

57. It is worth noting that in his evidence, PW 7 admitted that PW 4 told him that during investigation that she did not see who assaulted whom. Such evidence of PW 7 gives more and more substance to our opinion that the claim of PW 2 or for that matter the claim of PW 4 that they saw the incident in question enormously doubtful.

58. It may be stated that Hasina, another wife of the deceased reportedly came to the P.O. along with PW 2 and PW 4 and saw the incident in question. However, she was not examined and no reason was assigned as to why such a vital witness was not made a witness in the case aforementioned. This again casts a serious doubt about the authenticity of the prosecution case.

59. In that connection, one may also note that on the fateful night one Bhitha Bagsu along with PW 5 were guarding the place of occurrence and the adjacent

places when the incident in question took place. However, such a witness was also not examined, and that too, without assigning any reason whatsoever. Once again leaving beyond the arena of the present case such a person does not advance the cause of prosecution. Instead it supports the claim of appellants that they were falsely implicated with the case under consideration.

60. It is evident from the FIR (Ext. 2) that the incident under consideration was reported to police on the night of the incident itself and in pursuance thereto, police came to the place of occurrence and recovered the dead body of Peer Baksh from the premises of Hazrat Ali. Such statement in the FIR finds support from the evidence of PW 5 as well.

The relevant part of the FIR is reproduced below:--

"Subsequently, when the incident was reported to the police over phone, police came to the house of the accused No. 1 and recovered the dead body there-from and took the dead body to the police station. However, the ejahar is lodged today.... Date 31.08.2000".

61. One may note here, the investigation, as contemplated in CrPC consist of several components. In this connection, we may look at decision of the Hon''ble Supreme Court in the case of H.N. Rishbud and Inder Singh Vs. The State of Delhi, .As held by the Hon''ble Supreme Court in H.N. Rishbud (supra), the investigation generally consists of the following steps:--

- "(i) Proceeding to the spot;
- (ii) Ascertaining of the facts and circumstances of the case;
- (iii) Discovery and arrest of the suspected offender;
- (iv) Collection of evidence relating to the commission f the offence which may consist of (a) the examination of various persons (including the accused) and the, reduction of their statements into writing. If the Officer thinks, fit, (b) the search of places of seizure of things considered necessary for the investigation and to be produced at the trial; and
- (v) Formation of the opinion as to whether on the material collected there is a case to place the accused before a Magistrate for trial, and if so, taking necessary steps for the same by filing of a charge-sheet under Section 173 Cr.P.C. before the competent Court."

62. Thus, it is apparent that the information regarding cognizable offence was reported to police on the night of 30th August, 2000 itself and on the basis of such information relating to cognizable offence, police too swung into action, visited the place of occurrence and recovered the dead body from such place and more importantly, took the dead body to the police station. This clearly shows that the Ext. 2 was not first information. Rather it is information which police received during the course of investigation, first FIR being one which was evidently drawn on the basis of information furnished by PW 5 on the night of the

incident itself.

63. Since the Ext. 2 was brought into existence during the course of investigation, such a statement is hit by Section 162(1) Cr.P.C. and as such, in the terms of aforesaid provisions, Ext. 2 becomes an inadmissible document and as such, same needs to be removed from the list of evidence tendered from the side of prosecution. In this connection, we may profitably peruse the decision of this court in the case of *Gonesh Gogoi v. State of Assam*, reported in 2011 (2) GLT (SC) 18. The relevant part is reproduced below:--

"(21) P.W. 7- Prabhat Gogoi is another police officer. He initially took up the investigation and he recorded the statements of witnesses Dharam Chand Agarwalla and Sushil Mazumdar but they have not been examined in Court. He claimed to have filed the FIR. In cross-examination P.W. 7 deposed that in the FIR he has not specifically mentioned the involvement of the appellant in the aforesaid incident. He did not mention anything about the statement of witness Sushil Mazumdar. The FIR was recorded by the P.W. 7 in this case "during investigation". However, in the course of his evidence P.W. 7 never stated anything about the appellant being a member of the United Liberation Front of Assam. In the FIR it has clearly been stated "that investigation has already been taken up by me. The certified copy of G.D.E. No. 19 is enclosed herewith."

(22) It is clear from the aforesaid statement, investigation in the case had already commenced and once investigation commences the FIR is hit by Section 162 Cr.P.C. and no value can be attached to the same."

64. We have already found that prosecution case suffers from several serious infirmities. Such infirmities become more and more severe and harsh in their effect once the Ext. 2 is removed from the list of evidence.

65. Not producing the original FIR before the court has some other adverse implications on the prosecution case. It is a settled law that best evidence needs always to be placed before the court. Non-production of such document may require the court to draw a presumption that if such document were produced, it would not have supported the case of party who withheld such document. In our instant case, for non-production of original FIR, this Court needs to hold that the story, depicted in such a FIR does not match with the story which told and retold by the witnesses before the court during trial.

66. One may note here that the learned court below has placed enormous reliance on the statements that the witnesses which they rendered before the I.O. during investigation on invoking the provisions of Section 157 of the Evidence Act. In this connection, we find it necessary to have a look at Section 157 of the Act which is reproduced below:--

"Former statements of witness may be proved to corroborate later testimony as to same fact---In order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact, at or about the time

when the fact took place, or before any authority legally competent to investigate the fact, may be proved."

67. On perusal of Section 157 of the Evidence Act in the light of proviso to Section 162(1) of the Cr.P.C. one would find that Section 157 is a general provision whereas Section 162 is a special legislation, and as such, Section 157 of the Evidence Act cannot control the operation of Section 162(1) Cr.P.C. The language used in Section 162(1) Cr.P.C. makes it abundantly clear. Therefore, the statements, made to the police during investigation can be used only for certain purposes, so specified in that Section itself and it cannot be used for any other purpose whatsoever.

68. In that connection, we can profitably peruse the decision of the Privy Council in Queen-Empress Vs. Bhairab Chunder Chuckerbutty--> . The relevant part is reproduced below:--

"21. In support of the fourth ground it is urged that by sec. 157 of the Evidence Act the testimony of a witness may be corroborated by any statement made by him relating to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact, and that the previous statements made by the witnesses to the Police were therefore admissible in evidence. But sec. 157 of the Evidence Act, which lays down the general rule, must be taken subject to the exception contained in the special rule enacted by sec. 162 of the Code of Criminal Procedure which makes statements to the Police other than dying declarations inadmissible in evidence against the accused."

69. Coming back to our case, we have found that the statements of some of the witnesses which they rendered before the I/O during investigation were heavily relied on by the learned trial court although such statements do not satisfy the conditions, so mentioned in Section 162(2) of the Cr.P.C. and as such, reliance on such statements, made by some of the witnesses before the police during investigation on invoking the provision of section 157 of the Evidence Act in coming to the conclusion that the accused were the persons responsible for assaulting and killing the deceased on the night of 30th August, 2000, is not permissible under the law.

70. Situation being such, conclusion of the court below in so far it is founded on the statements of the witnesses, rendered before the I/O during investigation is concerned, is required to be held as unsustainable in law. Once finding of the court below is interfered on the above count, it further weakens the decision arrived at by the court below that the appellants are responsible for the crime in question.

71. We have found that the appellants herein are very similarly situated with the accused persons who stood acquitted of the charges under the judgment which is questioned in this appeal. Since the appellants herein are similarly situated with those acquitted accused persons, the appellants need to be given the same

benefit. Since that was not done, the judgment in question needs to be set aside on that ground too- argues learned counsel for the appellants.

72. On perusal of the record, we have found that such an argument cannot be brushed aside easily since the accused persons who were acquitted under the impugned judgment and the appellants who stood convicted of various offences including the offence of murder are all similarly situated. Therefore, in our considered opinion, the appellants herein need to be extended the benefit which other almost similarly situated accused persons were given.

73. Here it is worth noting that in their evidence, PW 2 and PW 4 depose that on the fateful night, accused Hazarat(since deceased) and Sahajan came to their house and took the deceased with them only to be found him dead sometime thereafter. According to prosecution, such episode clearly takes at least those two accused persons within the purview of the theory which is commonly called last seen theory. Therefore, such accused persons are bound under the law to explain as to how the deceased met his death soon after they took him from his house.

74. Since accused Sahajan could not offer any explanation as to how the deceased met his death soon after their taking him from his own house, it needs to be held that at least those two persons were responsible for the killing of deceased on the night of 30th August, 2000 and that too, at a place, not far away from the house of the deceased. However, we find it difficult to persuade ourselves to accept such a contention.

75. It is true that there is evidence on record to show that those two persons came to the house of deceased on the night in question and took him away with them only to be found him dead little thereafter. But then, it is the case of the prosecution that a large number of people had beaten the deceased at the place of occurrence on the night in question, and, more importantly, the identities of most of those assailants remained totally obscure which is why the court below was forced to acquit some of the accused persons.

76. In such a situation, in our considered opinion, the last seen theory cannot have application to the case in hand since evidence on record does not establish that those two accused persons, and none else, were responsible for the killing of the person aforesaid on the all eventful night. Therefore, we have no difficulty in rejecting the plea that on invoking last seen theory, the appellants, at least, appellant Shajahan should be convicted of offences, he was charged with.

77. It may be noticed here that the moments before the incident in question, the deceased had brutally beaten one Anzan and Dr. Ulla. Such an episode again reveals that some persons, other than charge sheeted accused persons, may have serious grudge against the deceased and in execution of such grudge, they might have extinguished the life of aforesaid person on the all eventful night. This again makes the application of the last seen theory to the case in hand more and more inapplicable.

78. One may note here that the evidence of PW 2 and PW 4 reveals that accused Hazarat (since deceased) and Shajahan had gone to the house of Peer Baksh, at about 11.30 p.m. on the night aforesaid, took him with them to the house of Hazarat where he was killed sometime later. Such evidence, of course, raised a serious doubt about the involvement of aforesaid two persons in the killing of Peer Baksh in the premises of Hazarat.

79. However, it is a settled law that suspicion, however, grave, however serious, cannot take place of proof. There is a gulf of difference between proof and suspicion. In our case in hand, suspicion never crossed that gulf to partake the form and shape of proof. Being so, merely on suspicion, in our considered opinion, none of the appellants including appellant Shajahan could be convicted of offence they were charged with.

80. In view of what we have discussed hereinbefore and what have emerged therefrom, we are of the clear opinion that the prosecution could not make out the charges, leveled against the appellants beyond all reasonable doubt and as such, the present appellants, like other acquitted accused persons, ought to have been acquitted on giving them the benefit of doubt. Since the appellants were not given the benefit of doubt, the judgment under challenge becomes unsustainable in law.

81. Consequently the judgment in question is quashed and set aside on acquitting the appellants of offences u/s. 147/148/302 IPC and we set them at liberty forthwith, if their detention is not required in connection with any other case.

82. The appeal is allowed. Return the LCR.