

**(2022) 06 GAU CK 0005**  
**In the Gauhati High Court**  
**Case No : Criminal Appeal No. 78 Of 2015**

Fakhar Uddin

APPELLANT

Vs

State Of Assam

RESPONDENT

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**Date of Decision :** 07-06-2022

**Acts Referred:**

Indian Penal Code, 1860 — Section 147, 148, 149, 302  
Evidence Act, 1872 — Section 154  
Code Of Criminal Procedure, 1973 — Section 161, 313

**Citation :** (2022) 06 GAU CK 0005

**Hon'ble Judges :** Suman Shyam, J; Malasri Nandi, J

**Bench :** Division Bench

**Advocate :** T.J. Mahanta, B. Bhuyan

**Final Decision :** Allowed

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## Judgement

1. Heard Mr. T.J. Mahanta, learned senior counsel assisted by Mr. A. Das, learned counsel for the appellants. We have also heard Ms. B. Bhuyan, learned senior counsel assisted by Ms. B. Bora, learned counsel representing the State respondent.

2. The instant appeal has been preferred by the accused/appellants being aggrieved and dissatisfied with the Judgment of conviction dated 23/12/2014 passed by the Learned Additional Sessions Judge, Karimganj in Sessions Case no 85/2011 whereby the Learned Trial Court had convicted the appellants u/s 302/149 IPC and sentenced them to undergo imprisonment for life and to pay fine of Rs. 50,000/- each in default to undergo rigorous imprisonment for one year each. They were further sentenced to undergo rigorous imprisonment for 3 years for committing the offence u/s 148/149 IPC. All the sentences were directed to run concurrently.

3. The brief facts of the prosecution case is that the informant Kalam Hussain lodged an Ejahar on 07/11/2009 before the O/C, Ratabari P.S. stating inter alia that on 04/11/2009 around 7 A.M. the accused persons namely Suruj Ali,

Fakharuddin, Jalaluddin, Haris Ali, Joinul Haque and Hussain Ahmed attacked his elder brother Abul Hussain on the road due to previous enmity. They first abused his brother and then Suruj Ali struck a blow with a lathi on the head of his brother causing injuries thereon. When his brother fell on the ground, the rest of the accused persons started to assault him with lathis as a result of which, he sustained injuries on different part of his bodies. Thereafter, his brother became unconscious and the accused persons had left the place. Subsequently his brother was taken to Ratabari P.S. in a critical condition and the police sent him to Chargola Hospital for treatment. As the condition of his brother was critical, his injured brother had been shifted to Silchar Medical College and Hospital wherein he succumbed to his injuries.

4. On the basis of the complaint, a case was registered vide Ratabari P.S. case no 105/2009 u/s 147/148/302/149 IPC and the investigation had started. In the course of investigation, the investigating officer visited the place of occurrence, recorded the statement of the witnesses and prepared the site plan of the place of occurrence vide exhibit 5. During investigation, inquest on the dead body of the deceased was performed and subsequently, post mortem examination was conducted at Silchar Medical College and Hospital. After completion of investigation, charge sheet was submitted against the aforesaid accused persons, except Haris Ali, u/s 147/148/302/149 IPC before the court of Judicial Magistrate First Class, Karimganj. Learned Judicial Magistrate First Class took cognizance of the case but as section 302 IPC is exclusively triable by the court of sessions, the case was committed accordingly. During trial, all the accused persons aforesaid put their appearance before the court and charge was framed accordingly u/s 148/302/149 IPC to which they pleaded not guilty and claimed to be tried.

5. To substantiate the case of prosecution, eleven witnesses including one court witness Noorjahan Bibi, wife of the deceased, were examined and marked six exhibits. On the other hand, the defence did not choose to adduce any evidence. The case of the defence was total denial. After conclusions of trial the trial, court recorded the statements of the appellants u/s 313 Cr.pc and on being asked against the incriminating materials found against the accused persons, they denied the same.

6. Accused Jalaluddin stated in his statement u/s 313 Cr.P.C that on the date of occurrence, at about 10-11 AM he came to know that deceased fell down from a bridge. He visited the house of the deceased and sent the deceased to hospital. He did not accompany the injured. He was sent to Ratabari and then to SMCH. On the next day, he came to know that Abul Hussain died. He had participated in performing the last rites of Abul Hussain. After about 7 days police informed him that a murder case was filed against him.

7. It is also stated by accused Jalaluddin when his statement was recorded u/s 313 that he won the Panchayat Election from the said locality. Had he committed any crime, he would not have been elected. The other accused persons also took the plea of Alibi during recording their statements u/s 313 Cr.P.C. They simply

stated that they were not present at the time of the incident. Abul Hussain died by falling from a bridge but to prove the plea of alibi no witness was examined in support of their contention.

8. The learned Trial court after appreciating and analysing the evidence of witnesses and other materials available on the record, delivered the impugned Judgment and order sentencing the accused/appellants as aforesaid. Hence, this appeal.

9. It is pertinent to say here that the prime accused/appellant Suruj Ali died during the pendency of the appeal as reported by learned counsel for the appellants. Hence, the case has abated against him.

10. Learned senior counsel for the appellants Mr. T.J. Mahanta submitted that there is no direct evidence in the case against the appellants. There is no material evidence on record for convicting the appellants. Though P.W-1 was the informant and the eye witness to the incident but while deposing before the court he did not support the prosecution case, As such, the witness was declared hostile during Trial. It is also the submission of the learned counsel for the appellant that P.W-3 Saddam Hussain who is the son of the deceased also turned hostile before the Trial court but after two years on a petition filed by the prosecution side the learned Trial court re-examined P.W-3 which is against the provision of law. Learned counsel for the appellant also argued that the Trial court has convicted the appellants on the evidence of hostile witnesses. The conviction cannot be based on the evidence of hostile witnesses and their testimony has to be discarded and the infirm witnesses cannot corroborate each other. Hence, accused/appellants deserve to be acquitted on benefit of doubt.

11. In reply, learned counsel for the respondent/state, Ms. B. Bhuyan has contended that there is no bar that the conviction cannot be based on the testimony of the hostile witnesses, if corroborated. In this case, the evidence of hostile witnesses is fully corroborated by the medical evidence. Though P.W-3 while deposing before the court, he was declared hostile but subsequently the trial court allowed re-examination of P.W-3 wherein he narrated the entire facts what he had seen on the date of incident. From his deposition, it is clear that as he was threatened by the accused Jalaluddin and that is why he did not support the prosecution case earlier. It is also her submission that his evidence before the court on subsequent date matches with his statement while recorded by the Investigating officer u/s 161 Cr.P.C. Hence, the Trial court has rightly convicted the accused/ appellants which does not call for any interference.

12. After hearing the learned counsel for the parties, we have considered the evidence of the witnesses. We have also gone through the record of the Trial court along with the other documents available therein.

13. Admittedly P.W-1, P.W-2 and P.W-3 did not support the case of the prosecution as such on the prayer of Public Prosecutor, these witnesses were declared hostile by the court.

14. In the case of Vinod Kumar v. State of Punjab reported in AIR 2015 SC 1206, Hon'ble Supreme Court held that the prosecution case would not collapse just because the complainant turned hostile. The accused can be convicted by the court if the other evidence adduced by the prosecution well proves the case to the satisfaction of the court. Now the question is whether there is any other evidence than that of PW1, PW2 and PW3 to prove the prosecution case.

15. It is not in dispute that the prosecution was permitted to cross examine P.W-1 Kalam Hussain but P.W-3 though declared hostile but he was not cross examined by the prosecution. P.W-3 on his re-examination had supported the prosecution case and it appears that he had stated the same version while his statement was recorded by the investigating officer during investigation. As per medical evidence, Dr. Gunajit Das found depressed fractures over the skull and linear fracture over left and right parietal bone and fracture of left temporal bone of the deceased. Doctor opined that the death was due to coma resulting from head injuries sustained which was antimortem and caused by blunt force impact and the death was homicidal in nature. In his cross examination, the medical officer admitted that such type of injuries cannot be caused by fall on stone and by fall from a bridge.

16. P.W-1 Kalam Hussain is the informant of the case. He is the brother of the deceased Abul Hussain. He deposed in his evidence that on the date of occurrence at about 6 A.M while he was working in his paddy field, he had heard shout of his brother Abul Hussain and he rushed to the place of occurrence and found that he was lying in a drain. He pulled out his brother from the drain and took his injured brother to Ratabari Hospital fromwhere he was referred to Karimganj Civil Hospital and thereafter he was shifted to Silchar Medical College and Hospital where he died. He noticed injuries on the back side head of his brother. His wife Jaimunnessa told him that accused Suruj Ali, Jalal, Fakharuddin and one Hussain and Joinal Haque were found running from the place of occurrence. On the following day he lodged an Ejahar vide exhibit 1. He could not say who assaulted his brother.

This witness was declared hostile.

17. It is seen that this witness stated before the IO that he had seen Suruj Ali with a wooden Stick in his hand and with the said lathi, he struck the blow towards his brother Abul Hussain causing injury to his head. Suruj Ali was accompanied by his sons Fakharuddin, Jalaluddin, Haris Ali and Joinal Haque. They also assaulted his brother Abul Hussain. The statement of PW1 was confirmed by P.W-10, the Investigating officer while deposing before the court.

18. P.W-2 is Ator Ali. He deposed in his evidence that he belongs to the same locality of the accused and the complainant. About two years back, Abul Hussain, elder brother of the complainant, died. On the date of incident at about 7 – 7:30 A.M. he was at his house. Having heard hue and cry he rushed to the place of occurrence and found Abul Hussain being injured, was taken to the hospital. He

noticed blood was oozing out from ears of Abul Hussain. He succumbed to his injuries at Silchar Medical College and Hospital. He (P.W-2) did not see the occurrence. This witness was also declared hostile during trial.

19. The statement of PW2 was also confirmed by the PW10 Investigating officer that P.W-2 stated before him that hearing a sudden commotion, he went to the place of incident and while on the road, he had seen six persons viz. Suruj Ali, Fakharuddin, Jalaluddin, Haris Ali, Joinal Haque and Hassan Ahmed going along with the road to the south and each of them was carrying wooden stick and he had noticed a 'bhojali' in the hands of Jalaluddin.

20. P.W-3 Saddam Hussain is the son of the deceased Abul Hussain. He deposed in his evidence that on the date of occurrence, in the morning hour at about 6 A.M. his father went out with his cycle. At that time, having heard hue and cry he went out and found his father lying beneath a wooden bridge. He found his father being injured, was lifted by his uncle Kalam Hussain. He was then taken to SMCH. He returned back home and subsequently came to know that his father expired in the hospital. There was a land dispute between his father and the accused persons. He could not say how the accused persons were made accused in this case.

21. This witness was also declared hostile during trial, but it is curious to note that there was no prayer by the prosecution to cross examine P.W-3 as such P.W-3 was not cross examined by the prosecution.

22. As we have already stated that on the prayer of prosecution PW3 was re-examined, wherein PW3 stated that he studied upto class VI. He had earlier given evidence in this case. At that time he was compelled to give false evidence because he was threatened by the accused Jalaluddin on the previous day of giving his earlier deposition that If he deposed truly before the court, they would kill him and his younger brothers and sisters. Jalaluddin is their neighbour. Due to the said threat, he got frightened and to save their lives he did not say the true facts before the court earlier in his evidence.

23. According to P.W-3, on the day of occurrence in the morning hour, he was sitting in his house and playing with his mobile phone. At that time, he saw accused Suruj Ali and Jalaluddin taking away beetle nut leaves from their beetle nut leaf garden. When his father protested and asked as to why they took away beetle nut leaves from their garden, accused attacked him and struck him with wooden stick over his head. Accused Jalaluddin had asked Suruj Ali to assault his father. Then Suruj Ali struck his father with wooden stick over his head. Other accused namely Fakharuddin, Joinul Haque and Noor Hussain were also present there with Suruj Ali and Jalaluddin. After receiving the blow over his head, his father fell down. At that time his mother rushed to the place to save his father and she was also assaulted by the accused Jalaluddin. All the accused persons assaulted his father with a wooden stick. He also rushed to the spot where the accused were assaulting his father. By that time the accused persons had left the

place. After the incident Farukuddin, aunt Sofa Khatoon and Jaimunnessa also came to the spot. They had also noticed the accused persons leaving the said place. He along with his uncle took his father to Ratabari PHC where from he was referred to Karimganj Civil Hospital and then to Silchar Medical College and Hospital wherein he succumbed to his injuries.

24. In his cross examination, P.W-3 replied that on the previous occasion i.e. before the present re-examination, he was brought to the court by the accused Jalaluddin. At that time he had not received any summons from the court. Before the present re-examination he had received summons issued by the court. The beetle nut leaf garden is situated at a distance of 1 k.m. from their house. Accused Suruj Ali is a resident of village Pechala. He knew him since his childhood and he used to call him as uncle. Accused Jalaluddin is their adjacent neighbour.

25. P.W-4 is Ijjad Ali. He deposed in his evidence that on the date of occurrence at about 7 A.M. while he was in his paddy field, he heard hue and cry and went to the place of occurrence and found Abul Hussain lying under the wooden bridge in injured condition. He found Kalam Hussain brother of the deceased and wife of the deceased with some other persons present there. They lifted the injured. After two days he came to know that Abul Hussain died.

26. The evidence of P.W-5 is not of much importance. According to him, at the relevant time on hearing shout, he went to the place of occurrence and found Abul Hussain lying near the bridge.

27. P.W-6 is Faruk Ahmed, cousin of the deceased. He deposed in his evidence that on the date of incident at about 6 A.M. he was working in his paddy field. Suddenly he saw accused Suruj Ali, Jalaluddin along with some others were going out from their homestead with lathi, handle of spade etc. He had seen Sofa Khatoon, sister of Abul Hussain, wife of Abul Hussain and wife of Kalam Hussain and brother of the deceased chasing the accused persons. Having seen the same, he went to the house of Abul Hussain and on being asked, Sofa Khatoon told him that accused Jalaluddin and Suruj Ali inflicted injuries on the head of Abul Hussain. He also noticed injury mark on the head of Abul Hussain. Though the injured Abul Hussain was taken to the hospital but subsequently he died.

28. In his cross examination, P.W-6 replied that he did not witness the incident of assault. Occurrence took place on the western side of the homestead of the deceased Abul Hussain on the road. There is a stream name Kalacherra passing near the place of occurrence. There is also a wooden bridge over the stream which is in the western side of the place of occurrence.

29. P.W-7 is Sofa Khatoon, sister of the deceased Abul Hussain. She deposed in her evidence that on the date of incident at about 6 A.M while she was working in their paddy field, at that time she had seen her brother came out on the road. While her brother was proceeding, accused Jalaluddin had given order to accused Suruj Ali to assault her brother and accordingly accused Suruj Ali inflicted

injuries on the head of her brother with a handle of spade. Having seen the same she chased them and on the way she found her cousin Faruk, who stopped her and brought her back to the place of occurrence where she found her injured brother lying on the ground. The injured was taken to the hospital. Later on, she came to know that her brother Abul Hussain succumbed to his injuries.

30. In her cross examination, P.W-7 replied that there was a wooden bridge over the Kalacherra stream near the place of occurrence. They are to cross the bridge to reach their respective houses. At the time of alleged incident, his brother Kalam was in his house and his wife was on the other side of the bridge. She (P.W-7) first reached the place of occurrence and thereafter Jaimunnessa, wife of Kalam and Noorjan Bibi, wife of the deceased came to the spot. Similarly Saddam Hussain, son of Abul Hussain came lately on the spot.

31. P.W-8 is Jaimunnessa, wife of the informant Kalam Hussain. From her deposition, it reveals that on the date of incident in the morning hour at about 6 A.M she was collecting garbage from their garden and at that time her husband was also at home. Suddenly she had heard scream of her sister in law and she rushed to the place of occurrence and found Abul Hussain lying on the ground with head injuries. Blood was oozing out from his nose and ear. She along with Sofa Khatoon chased the accused persons from the place of occurrence. Sofa Khatoon told her that she saw accused Suruj Ali inflicted injuries with a lathi. The injured was taken to the hospital but on the same night he succumbed to his injuries at SMCH.

32. In her cross examination, P.W-8 replied that the occurrence took place near the stream Kalacherra on the road. There was a wooden bridge across the Kalacherra stream. When she came to the spot, she found wife of Abul Hussain and Sofa Khatoon. She did not see any accused assaulting Abul Hussain.

33. The wife of the deceased Noorjan Bibi was examined in the case as CW1. She deposed in her evidence that on the date of incident at about 6 to 6:30 A.M. she along with her husband were working in a vegetable garden in front of their house. At that time for bringing some beetle nut leaves from their beetle nut leaf garden, her husband went out from the vegetable garden and he could see accused taking away beetle nut leaves from their garden. Her husband protested and asked accused Suruj Ali, Fakharuddin, Jalaluddin, Joinul Haque and Noor Hussain as to why they took away the beetle nut leaves from their garden. At this, her husband was assaulted by the accused persons with wooden sticks causing injury to his head. After hearing the scream of her husband, she rushed to the place of occurrence and she was also assaulted by accused persons with wooden sticks as a result of which she fell down and became unconscious. At the time of occurrence, her sister in law Sofa Khatoon and Jaimunnessa were also working in their respective vegetable garden. They had also rushed to the place of occurrence following her.

34. In her cross examination, C.W-1 replied that the beetle nut garden is

situated in the southern side from their house. The said garden is not visible from their house. At the time of occurrence, she had reached the place of occurrence first. Thereafter PW1, PW7 and PW8 reached there. Though she sustained injuries, she was not treated in any hospital. Police did not record her statement because she was unconscious for about one week after the incident.

35. P.W-10 is Sajal Kumar Deb, the investigating officer of the case. He deposed in his evidence that on 04/11/2009 he was posted at Ratabari Police Station. On that day, the informant Kamal Hussain had come to the police station along with his injured brother Abul Hussain at about 9:15 A.M in the morning hour and reported about the incident which had taken place in the locality where they used to live. Accordingly GD entry was made vide Ratabari P.S. GDE No. 71 dated 04/11/2009. The injured was immediately sent to Karimganj Hospital for treatment and thereafter to Silchar Medical College and Hospital wherein he succumbed to his injuries. On 05/11/2009 the informant Kamal Hussain had lodged a formal FIR at Ratabari P.S. and a case was registered vide Ratabari PS case No 105/2009 u/s 147/148/302/149 IPC. The OC Ratabari PS endorsed him with the investigation of the said case. On 05/11/2009 he had visited the place of occurrence, prepared a rough sketch map vide exhibit 5 and recorded the statement of witnesses. He had also arrested accused Suruj Ali, Fakharuddin, Jalaluddin, Joinul Haque and Noor Hussain and forwarded them before the court. After completion of the investigation, he had submitted charge sheet against the aforesaid accused persons.

36. It is not in dispute that the deceased Abul Hussain died due to homicidal death. As per the PM report, the deceased sustained depressed and linear fractures on his head. The medical officer who conducted autopsy also opined that death was due to coma resulting from head injuries sustained which were antimortem and caused by blunt force impact. Now the question comes who were the perpetrators of the crime. The Trial court convicted the accused Suruj Ali, Fakharuddin, Jalaluddin, Joinul Haque and Noor Hussain. Though appeal was filed by those five persons out of which one of the appellants Suruj Ali died during the pendency of the appeal.

37. Admittedly PW1 did not support the case of prosecution and he was declared hostile during trial. Though he resiled from his earlier statement that he had seen the accused Suruj Ali struck lathi blow to his brother Abul Hussain causing injury to his head, but he has supported the prosecution case by stating that on the date of occurrence in the morning hour while he was working in his paddy field, he heard the shout of his deceased brother Abul Hussain and rushed to the place of occurrence and found his deceased brother lying on the drain. He came to know from his wife Jaimunnessa that she had noticed accused Suruj Ali, Jalaluddin, Joinul Haque, Fakharuddin and Hussain running from the place of occurrence. It also appears from the evidence of P.W-1 that there had been land dispute and a case is pending with the accused persons for that he suspected that the accused persons had committed the offence. According to P.W-1, he was

not present when the incident took place. P.W-7 and P.W-8 also supported the versions of P.W-1 that he came to the spot later on. According to P.W-7, she first reached the place of occurrence and thereafter Jaimunnessa, wife of Kalam Hussain and Noorjan Bibi (C.W-1) and P.W-3 Saddam Hussain came to the spot. But C.W-1 deposed that she arrived at place of occurrence first and thereafter P.W-1, P.W-7 and P.W-8 reached there.

38. We have already discussed the evidence of P.W-3 who is the son of the deceased. Though, he was declared hostile during trial, but he was not cross examined by the prosecution. Subsequently, he was re-examined as per the order of the Trial court wherein he narrated about the case that he had seen the accused/appellants assaulting his father. According to P.W-3, Suruj Ali inflicted injuries towards his father with a wooden stick causing injury on his head. All the accused then started to assault his father with wooden sticks. P.W-3 specifically stated that after the incident, his uncle Farukuddin, aunt Sofa Khatoon and Jaimunnessa also came to the place of occurrence. They had also seen the accused leaving the said place. From the evidence of P.W-3, it transpires that P.W-7 and P.W-8 were not present when the actual incident of assault took place.

39. There are also some contradictions on the relevant points in the statement of the witnesses while recorded by investigating Officer and their evidence before the court. P.W-10, the Investigating Officer, also confirmed the statement of the witnesses while deposing before the Court.

40. P.W-6 admitted that he did not state before the investigating officer that he had seen the wife of the injured (Abul Hussain) along with P.W-7 and P.W-8 chasing the accused and he could know from the wife of the injured that as ordered by the accused Jalal, accused Suruj Ali had inflicted injury. P.W-7 in her statement before the investigating officer did not state that as ordered by Jalaludin, Suruj Ali inflicted injury with the handle of spade and she had chased and drove away the accused.

41. P.W-7 also did not state before the investigating officer that at the time of occurrence she was about 4/5 nals away from the place of occurrence but she stated before him that she was present in the vegetable garden.

42. P.W-8 in her statement before the investigating officer did not state that she along with P.W-7 had chased away the accused from a place near the house of P.W-6.

43. In view of the evidence of aforesaid witnesses, now the sole question before this court is that what is the legal position of the evidence of hostile witness, whether testimony of the hostile witnesses is to be fully discarded or any conviction can be based on the evidence of hostile witnesses. Section 154 of the Evidence Act provides that the court may in its discretion permit the person who calls a witness to put a question to him which might be put in cross examination by the adverse party.

44. In the case of Bhagwan Singh v. State of Haryana reported in AIR 1976 SC 202, three judges of the Supreme Court has held that where the court gives permission to the prosecutor to cross examine his own witness, thus characterizing him as a hostile witness, that fact does not completely efface his evidence. The evidence remains admissible in the trial and there is no legal bar to base a conviction upon his testimony if corroborated by other reliable evidence.

45. In another case Devraj v. State of Chattisgarh reported in (2016) 13 SCC 366, it was held that evidence of hostile witness can be relied on, if there are some other material, on the basis of which said evidence can be corroborated and more so, that part of evidence of witness, as contained in examination in chief, which remains unshaken even after cross examination, is fully reliable, even though witness has been declared hostile.

46. From the above conspectus, it emerges clear that even in a criminal prosecution when a witness is cross examined and contradicted with the leave of the court, by the party calling him, his evidence cannot, as a matter of law, be treated as washed off the record altogether.

47. From the aforesaid decisions, it is also clear that the Apex court has clearly laid down the law that the evidence of hostile witnesses cannot be discarded in toto. His evidence to the extent to which it supports the prosecution version, can be relied upon if that part of the deposition is found to be creditworthy. Therefore, if the case in hand is examined in the light of the aforesaid pronouncement of the Apex court, there is no trustworthy evidence found against the appellants as P.W-3, P.W-7, P.W-8 and C.W-1 have created doubt about their presence at the relevant time of incident on the spot. Therefore, simply on the evidence of P.W-3 and P.W-7 (when their presence at the place of occurrence are doubtful) that as per direction of Jalaluddin, Suruj Ali inflicted injury to the deceased, conviction of the appellants cannot be sustained. Admittedly, Suruj Ali died during pendency of the appeal.

48. In the result, appeal is allowed. The impugned judgment dated 23.12.2014 passed by the learned Additional Sessions Judge, Karimganj, in Sessions case no. 85/2011 is set aside. The accused/appellants be released forthwith if not wanted in any other case.

49. LCR be returned back.