
(2014) 09 GAU CK 0031
In the Gauhati High Court
Case No : Crl. Appeal Nos. 165 and 180/2012

John Ali

APPELLANT

Vs

The State of Assam

RESPONDENT

Date of Decision : 03-09-2014

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, 34, 354, 448

Citation : (2015) 2 GLT 71

Hon'ble Judges : Indira Shah, J; C.R. Sarma, J

Bench : Division Bench

Advocate : D. Das, Senior Advocate and D. Talukdar, Advocate, A.K. Bhattacharjee, Senior Advocate, A.K. Choudhury, Advocate for the Appellant; S. Jahan, Additional Public Prosecutor, Advocate for the Respondent

Judgement

C.R. Sarma, J.—These two appeals are directed against the common judgment and order, dated 31.07.2012, passed by the learned Sessions Judge, Nalbari, in Sessions Case No. 98 of 2006 (arising out of GR Case No. 906/2004).

2. By the impugned judgment and order, the learned Sessions Judge, while convicting the appellants, under Section 302/ 34 of the Indian Penal Code (for short, IPC), sentenced each of them to suffer rigorous imprisonment for life and pay fine of Rs. 1000/- (Rupees one thousand), in default, suffer rigorous imprisonment for another period of two months for their conviction under Section 302/ 34 IPC.

3. The learned Sessions Judge also convicted the appellants Mr. John Ali and Mr. Dhan Ali, under Sections 354// 34 and 448/ 34 IPC and sentenced them to suffer rigorous imprisonment for fifteen days under Sections 448/ 34 IPC and rigorous imprisonment for one month for their conviction under Sections 354/ 34 IPC.

4. Aggrieved by the said conviction and sentence, the convicted persons, as appellants, have come up with the present set of appeals.

5. As both the appeals are arising out of the same judgment and order, based on

same facts and as agreed to by the learned Counsel, appearing in both the appeals and also for the sake of convenience, we have heard both the appeals together and propose to dispose of the appeals by this common judgment and order.

6. We have heard Mr. A.K Bhattacharjee, learned Sr. Counsel, assisted by Mr. A.K. Choudhury, learned Counsel for the appellant in Crl. Appeal No. 180/2012 and Mr. D. Das, learned Sr. Counsel, assisted by Mr. D. Talukdar, learned Counsel, appearing for the appellants in Crl. Appeal No. 165/2012. We have also heard Ms. S. Jahan, learned Additional Public Prosecutor, Assam and perused the records.

7. Mr. A.K. Bhattacharjee, learned Sr. Counsel, appearing for the appellant, in Crl. Appeal No. 180/2012, taking us through the evidence, on-record, has submitted that the prosecution failed to prove the case beyond all reasonable doubt and that the learned Sessions Judge committed error by failing to properly appreciate the evidence, on-record.

8. Mr. Bhattacharjee, learned Sr. Counsel, has strenuously argued that failure of the prosecution to examine the vital witnesses i.e. the other daughter of deceased, who was also claimed to be one of the victims of outraging modesty and the mother of the victim girls, who were present in the house, raises serious doubt about the involvement of the accused persons.

It is also submitted that in view of the discrepancies, noticed in the oral evidence of the witnesses (non official) and the medical evidence, regarding the type of weapon, alleged to be used and the nature of the injuries sustained by the deceased, coupled with the failure of PW-1, PW-2 and PW-3 to support each other's presence, in the place of occurrence, the prosecution version can't be accepted.

It is contended that the material contradictions, found in the evidence of PW-5, regarding the type of seized weapon also raise serious doubt about the veracity of the evidence of PW-5. It is further contended that the contradictions with regard to the seized weapons, the evidence given by the non official witnesses and the Investigating Officer and the seizure list negate the prosecution version.

9. Mr. Bhattacharjee, learned Sr. Counsel, for the appellants, has submitted that failure of the Investigating Officer (I.O.) to identify and exhibit the seized weapons, and the contradictory evidence, given by PWs, regarding type of the weapons, used by the appellants and the medical evidence creates doubt about the prosecution evidence that the fatal injury i.e. incised injury was caused by the appellant.

10. Referring to the defence evidence, the learned Sr. Counsel, has submitted that the learned trial Judge committed error and illegality by refusing to accept the defence evidence, which remained unchallenged. It is contended that all the Defence Witnesses (DWs) stated that the deceased had visited the shop of Mr.

John with a dao, for the purpose of attacking him and that the deceased had sustained injuries due to fall on a kerahi (cauldron) in the shop of Mr. John. It is submitted that the said defence evidence, which could not be demolished by cross-examination, negates the prosecution version.

The learned Sr. Counsel for the appellant, has contended that in view of the attending discrepancies in the prosecution evidence, the prosecution failed to prove the charges, beyond all reasonable doubt and as such, impugned conviction and sentence are liable to be set aside, resulting acquittal of the appellants.

11. Mr. Bhattacharjee, learned Sr. Counsel, in support of his contention, has relied on the following decisions:

(i) Boddapati Venkatramaiah (A.1) and Others Vs. State of Andhra Pradesh, .

(ii) Shaikh Nabab Shaikh Babu Musalman and others Vs. State of Maharashtra, .

(iii) Dudh Nath Pandey Vs. State of Uttar Pradesh,

(iii) Smt. Bimla Devi Vs. State of Haryana, .

12. Adopting the said argument, advanced by the learned Sr. Counsel, appearing for the appellant, in Crl. Appeal No. 180/2012, Mr. D. Das, learned Sr. Counsel, appearing for the appellants, in Crl. Appeal No. 165/2012, has submitted that the discrepancies, noticed with regard to the type of weapons, used by the appellants and the nature of injury, sustained by the deceased, raise doubt about the prosecution version making it unsafe to rely upon their evidence. It is also submitted that an iron rod, which was the weapon, alleged to be used by the appellants, being a blunt object, it can't be believed that the appellants had caused the fatal injury (incised), sustained by the deceased. It is also submitted that there are major contradictions in the evidence, given by PWs, on material point and that the nature of the said injury negates the use of iron rod by the appellants. It is argued by Mr. Das, learned Sr. Counsel, that the undemolished defence evidence has rendered the prosecution version unbelievable. In view of the above, the learned Sr. Counsel has submitted that the prosecution failed to establish the allegations, brought against the appellants and as such, they are entitled to acquittal.

13. The learned Sr. Counsel has relied on the following decisions:

(i) Mohar Singh and Others Vs. State of Punjab, .

14. Controverting the said argument, advanced by the learned Sr. Counsel, appearing for the appellants, Ms. S. Jahan, learned Additional Public Prosecutor, supporting the impugned conviction and sentence, has submitted that, except certain minor contradictions, there is no major contradiction on material point and that the evidence, on record, is sufficient to hold that the appellants committed the offence and that, the learned trial Judge committed no error or illegality by recording the conviction and sentence, as indicated above.

15. The learned Additional Public Prosecutor has referred to the following decisions:

(i) Sunil Kumar Vs. State of Haryana, .

(ii) Goudappa and Others Vs. State of Karnataka, .

16. In order to appreciate the arguments, advanced by the learned Counsel, appearing for all the parties, we feel it appropriate to, briefly, scrutinize the evidence, on-record, as below.

17. In the present case, the prosecution, besides examining the Medical Officer (PW-6), who performed the post mortem operation of the dead body of the deceased and the Investigating Police Officers (for short, I.O.) as PW Nos. 7 and 8, examined as many as 5 (five) non official persons as PW Nos. 1, 2, 3, 4 and 5.

18. Md. Ziaul Pasa (PW-1) is a brother of the deceased, who lodged the FIR (Ext.-1) as informant. PW-2 is one of the two daughters of the deceased, PW-3 is a neighbour of the deceased, PW-4 is another brother of the deceased, who was a witness to the inquest report (Ext.-2) and PW-5 is an independent person, who was a witness to the seizure.

19. In the case at hand, the occurrence took place in two phases. The first phase related to trespass into the house of the deceased and outraging modesty of PW-2 and her sister and the second part of the occurrence, which followed the first one, related to the causing death of the deceased by assaulting him with rod.

20. Admittedly, the alleged first incident took place inside the house. None of the prosecution witnesses, except PW-2 (i.e. one of the victims) appears to have witnessed this incident. All the other witnesses including PW -1 i.e. the informant were reported about the first incident by PW-2.

21. According to PW-1, who appears to be the first person to have arrived at the place of occurrence, on the fateful day, he had carried the deceased in his motor cycle and after dropping him at his house, while taking a turn with his motorcycle, he could see that the accused persons had chased and assaulted the deceased, with iron rods, causing fracture on his head, as a result of which the deceased became unconscious and fell down. He also stated that the accused persons ran away therefrom and that the deceased was taken to hospital at Nalbari, wherefrom he was shifted to GNRC, Guwahati, wherein he died on 06.10.2004. He exhibited the FIR, lodged by him, as Ext. No. 1.

22. In the FIR (Ext. No. 1), it was mentioned that the accused Md. John Ali and Md. Dhan Ali had entered the house of the deceased with an intention to rape his daughters and that alarm being raised, by the said two daughters, their father i.e. the deceased arrived at his house and the said two miscreants, on being altered by Md. Majibur Rahman, who was outside the house, came out from the house and assaulted the deceased with iron rods. But the informant, in his evidence, given as PW-1, did not whisper anything about the trespass into the

house and outraging the modesty of the said two girls.

23. One of the said two daughters (victims) of the deceased, deposing as PW-2, stated that accused Md. Dhan and Md. John had entered their house and that they, by pulling them (girls) by their hands, tried to outrage their modesty. She also stated that on being alerted by Md. Majibar, who was waiting outside, about the arrival of the deceased, they went out and all of them had assaulted the deceased with iron rod. Though both PW-1 and 2 stated about the presence of the mother and the sister of PW-2 in the house, at the relevant time, the prosecution failed to examine the other sister of PW-2 and their mother, who appear to be vital witnesses to the occurrence.

24. PW-1, who claimed to have seen the accused persons chasing the deceased, did not indicate as to from where they had come. His oral evidence does not inspire confidence to believe that the said two accused persons had come out from the house of the deceased. Rather, his evidence indicates that he had seen the accused persons outside the house.

The defence plea is that the deceased had visited the shop of Md. John Ali, with a dao in his hand, for the purpose of attacking him and that due to the scuffle, that took place in the said shop, the deceased had fallen down on utensils (cauldron etc.) and sustained the injuries.

25. From the evidence of PW-1 and PW-2, it is found that, in fact, PW-1 did not see as to what incident had taken place inside the house. There is no corroboration in the evidence of PW-1 and PW-2 to believe that two of the accused persons had trespassed into the house and outraged the modesty of the two girls therein.

26. As per the prosecution version, it is not a case that there was no other eye witness to the said incident. It is revealed, from the evidence of PW-1, that the sister of PW-2, i.e. the other victim and their mother were there in the house. In order to substantiate the allegations of trespass and outraging modesty, the prosecution ought to have examined the sister of PW-2, who was also a victim and their mother.

27. In our considered opinion, they were vital witnesses to the said incident. But the prosecution failed to examine the said two witnesses. Withholding of such vital eye witness, without any explanation, raises serious doubt about the prosecution story itself.

28. That apart, PW-1, though, in the FIR (Ext.-1), stated about outraging modesty and trespass; in his oral evidence, he did not state anything about such incident. On the other hand, in the FIR, he did not state anything with regard to bringing the deceased in his motor cycle. He, even, did not mention about using his motor cycle. He denied the suggestion that he did not tell Police about taking a turn with his bike. The I.O. on being asked, by the defence, stated that PW-1 did not tell him that while taking a turn with his bike, he could see the accused

persons assaulting the deceased with rod. The said omission has been proved through the I.O. PW-1's arrival at the place of occurrence, if so, relates to the arrival of the deceased in his premises. It appears that PW-1, for the first time i.e. at the time of giving oral evidence, stated about the use of the bicycle.

29. The learned Additional Public Prosecutor, relying on the decision, held in the case of Jitender Kumar (*supra*), has submitted that omission to mention, in the FIR, about the use of the motorcycle is not a major and vital one and as such, this omission can't negate the evidence given by PW-1.

As held in the said case, every omission in the FIR may not be fatal to the prosecution case. It is settled law that every minute detail need not be mentioned in the FIR. However, failure to mention about the vital fact in the FIR, i.e. at the earliest point of time, has a bearing on the veracity of the prosecution version as well as the evidence given by the prosecution witnesses. Such omission is required to be examined cautiously so as to determine the effect of such lapse.

30. PW-1's failure to disclose such vital fact at the earliest opportunity i.e. before the I.O. is a serious lapse raising doubt about the veracity of his evidence. Hence, the story of bringing the deceased in his bicycle appears to be anew addition or improvement of the story at the time of giving evidence as PW-1. None of the other witnesses, who appeared at the place of occurrence, stated that they had seen the PW-1. Therefore, the very presence of PW-1, at the place of occurrence, is doubtful.

31. As stated by PW-1, he, along with the deceased arrived at the place of occurrence, riding his motor cycle and on such arrival, the appellants, in presence of PW-1, chased and assaulted the deceased with rod.

But, in the FIR, this PW-1, as the informant, stated that Md. John Ali and Md. Dhan Ali had entered the house of the deceased and they tried to commit rape on the two daughters of the deceased, but alarm being raised by the two sisters, their father i.e. the deceased arrived there and he was chased and assaulted by the accused persons.

32. It is found that, in the FIR, while mentioning about house trespass and outraging modesty, PW-1 did not mention about arriving at the place of occurrence, carrying the deceased in his motorcycle. Whereas, in his oral evidence, the informant, while omitting about house trespass and outraging modesty of the girls, stated about the story of taking the deceased to his house in his motorcycle. In our considered opinion, this is a major contradiction, on material point, raising doubt about the very presence of PW-1, in the place of occurrence, at the time of the incident. A close reading of the FIR does not lead to find that the deceased was brought by PW-1 in his motorcycle. The FIR implies that the deceased arrived there himself. The motor cycle not being seized and in absence of any other corroborating evidence regarding arrival of PW-1 and the deceased, in the place of occurrence, the evidence of PW-1 can't be safely

accepted.

33. In view of the above discussion, we are inclined to hold that there is no corroboration in the evidence of PW-1 and PW-2 regarding outraging modesty and house trespass. Therefore, lack of corroboration, on material point, coupled with the withholding of the vital witnesses i.e. the sister of PW-2 and their mother, makes it unsafe to conclude that such incident, i.e. the first one had taken place.

Therefore, in our considered opinion, the prosecution failed to prove the charges, brought under Sections 448/ 354/ 34 IPC and as such the conviction and the sentence, recorded under Sections 448 and 354 read with Section 34 IPC, can not be maintained.

34. With regard to second part of the incident i.e., causing death of the deceased, PW-1 has been projected as the first person to have seen the occurrence. As discussed above, he, in his evidence, stated that, while taking a turn with his motorcycle, after dropping the deceased in front of his house, he saw that accused persons had chased the deceased to the corridor and assaulted on his head with iron rod, as a result of which the deceased had fallen down in the place, where the corridor had joined the road. According to PW-1, alarm being raised, the accused persons fled the place and other persons arrived there.

35. Supporting the evidence of PW-1, one of the daughters of the deceased, deposing as PW-2, stated that, on being alerted by Md. Majibur, about the arrival of her father, the other two accused persons rushed out of the house and all of them (three) had assaulted her father with iron rods, outside the house i.e. in the corridor.

If the incident, as alleged by PW-1 and PW-2, had taken place, then the other sister of PW-2, who was also one of the victims and their mother, who were in the same house, would have seen the occurrence along with PW-2. Considering the alleged facts and circumstances of the case, there was no reason for them not to follow PW-2, to witness the incident. They were the best persons to corroborate the evidence, given by PW-1 and PW-2. Therefore, withholding such vital witnesses, without any explanation, raises serious doubt about the prosecution story itself.

36. According to PW-1, he was the first person to have arrived at the place of occurrence and he was there from the beginning of the incident till the shifting of the deceased to hospital. None of the witnesses named the person(s), who had arrived at the place of occurrence. While deposing in the Court, on 08.05.2007, both PW-1 and PW-2, stated that they saw, in the Court, the iron rod, used by the accused persons. From this evidence, it appears that the iron rods, alleged to be used by the appellants, were shown to them, by the prosecution and they clearly stated that those were the rods, used by the accused persons. Of course, they have neither exhibited the seizure list nor marked the iron rods, shown to them.

37. From the order, dated 08.05.2007, passed by the learned trial Judge, it is found that the seized articles i.e. the rods were not produced in the Court on the said date i.e. on the date of giving evidence by PW-1 and PW-2. Therefore, in view of the said order, which is a part of the judicial proceedings, it is not known how PW-1 and PW-2 could see the incriminating weapons i.e. the rods in the Courts the date of giving evidence.

The order, dated 08.05.2007, aforesaid belies their evidence regarding production of rods. Hence, their evidence that they had seen the incriminating iron rods, in the Court, is not correct and true. They appears to have exaggerated the actual facts, by giving false evidence. This conduct, on their part, raises doubt about their presence in the place of occurrence and also about the credibility of their evidence.

This doubt is fortified by the contradictory statements, made in the FIR as well as in the oral evidence of PW-1 (informant). As discussed above, in the FIR (Ext. 1), PW-1 (informant) did not state that he had brought the deceased to the place of occurrence for dropping him in his house. Omission to state such vital fact, in the FIR, which is a statement made at the first point of time, also raises doubt about the veracity of the prosecution version.

38. We have already discussed the affect of omission in disclosing vital facts in the FIR as well as the evidence of the informant (PW-1). That apart, the motorcycle, alleged to be used by PW-1 and the deceased has not been seized, to prove the claim that they had had arrived in the place of occurrence, on the said day. PW-1, as it appears from the suggestion put to him and the I.O.'s evidence, stated about the use of motorcycle for the first time at the time of giving evidence. His failure to state about the use of motor cycle in the FIR as well as at the time of giving statement before the I.O. strengthens the said doubt, making evidence of PW-1 unsafe to rely upon.

39. In view of the above, considering entire aspect of the matter, more particularly, the omission to mention in the FIR, about the use of motorcycle and arrival of the PW-1 and the deceased, at the place of occurrence, by ridding the motorcycle, is found to be an omission on material point affecting the foundation of the prosecution story. This omission, as noticed earlier, raises doubt about the presence of PW-1 in the place of occurrence, just prior to the incident.

40. PW-1, neither in his evidence, nor in the FIR (Ext. 1) disclosed about the source of his information regarding the incident that took place inside the house prior to his arrival at the place of occurrence. But he alleged about house trespass and outraging the modesty of the girls in the house. There is no evidence that anybody had reported him.

That apart, none of the other PWs stated that PW-1 was present at the time of occurrence at the said place. Even PW-2 also, who stated that PW-1, had dropped her deceased father at their house, clearly stated that she did not see when Ziaul had arrived. This indicates that she did not know about the arrival of

the PW-1 along with her father. PW-1 also did not state about the arrival of PW-2 and other PWs, at the place of occurrence. The other PWs i.e. PWs-3, 4 and 5 also did not state about the arrival of PW-1 at the place of occurrence. From the evidence of the said witnesses, it is found that none of them supported the presence of each other at the place of occurrence.

In view of the above, there is no corroboration on material point, i.e. regarding the presence of the said witnesses at the place occurrence. Therefore, for want of corroboration, it can't be safely concluded that they had arrived in the place of occurrence, at the time of occurrence.

41. Mr. Mahram Ali (PW-3), one of the brothers of the deceased, who used to live near the house of the deceased, stated that, hearing shouting of the daughters of the deceased, he came out from his house and saw the accused Md. Dhan and Md. John beating the deceased with rods. According to him, Md. Majibur was also with them. He stated that the injured was shifted to hospital and that he died in the Gauhati Medical College Hospital (GMCH). He again stated, in his cross examination, that the deceased was caught hold by Majibur while Md. John had beaten him and that Dhan had a rod in his hand. This evidence indicates that Md. Dhan, except having a rod in his hand, did nothing incriminating. But, in his in-chief examination, he stated that Dhan had also assaulted with rod.

This witness contradicted his evidence, given in-chief examination, regarding the role played by the appellants. His said self contradictory evidence, on such vital point i.e. the role played by the accused persons, raises doubt about the truth of his evidence, more particularly, his presence in the place of occurrence. That apart, none of the other witnesses stated about holding the deceased by Md. Majibur and beating by Md. John. In our considered opinion, this is a major contradiction, raising doubt about the evidence given by the said PWs.

42. PW-4, Mr. Shahnur Pasa, was a witness to the inquest. He did not see the occurrence.

The last non official witness, examined by the prosecution, was Md. Son Ali, who deposed as PW-5. He made a different statement regarding the type of weapon, used by the accused persons. He was the only seizure list witness examined by the prosecution. He stated that Md. Dhan, Md. John and another person assaulted the deceased with flat rod and a tube well handle and that they had left those weapons at the place of occurrence. He is the only witness, who stated about the use of a flat rod. Beyond this he did not state anything about the shape and size of the rod. He further stated that Police seized those items, vide Ext. No. 3, in his presence. He has exhibited his signature in Ext. No. 3 as Ext. No. 3(i) and identified the said items, at the time of giving evidence in the Court, and exhibited as Material Ext. No. 1, a shovel with flat end and Material Ext. No. 2, a tube well rod. From his cross examination, it appears that the seized articles were lying in the place of occurrence i.e. on the road, in front of their house.

43. From the seizure list (Ext. 3), it appears that the Police seized the articles, on

05.10.2004, i.e. the following day of the occurrence. As per the seizure list, the place of occurrence was N.T. and (1) one iron khanti (an iron tool with flat edge, used for digging/removing earth and cleaning weeds in agriculture) about three feet long and (2) one tube well rod were seized.

44. The FIR was lodged and received by Police, on the date of occurrence, i.e. on 04.10.2014. The occurrence took place at about 1.30 PM, on 04.10.2014. The Investigating Officer (i.e. I.O.), deposing as PW-8, stated that, on receipt of the FIR, a case was registered and he proceeded to the place of occurrence and seized, vide Ext. No. 3, a tube well handle, some broken articles, handle, a khanti and a rod. The I.O., who seized the said articles did not identify and exhibit the same in the Court. Hence, as pointed out by the learned Sr. Counsel, appearing for the appellants, it can not be conclusively held that the items, exhibited by the seizure list witness i.e. PW-5, were the seized articles and that those were the weapons, used by the appellants.

That apart, PW-5 exhibited two items i.e. a shovel with flat end and a tube well rod, but according to the I.O., he, besides seizing a tube well handle and a khanti (say shovel), had also found some broken articles and a rod. But PW-5 did not say about any broken pieces and another piece of rod. The seizure list (Ext. No. 3) is also silent regarding any such broken pieces and rod. If the PW-5 was present with the I.O. in the place of occurrence at the time of making the seizure, he ought to have found the broken pieces of the rod.

45. Though the PW-1, PW-2 and PW-3 stated about use of only one type of weapon i.e. a rod, PW-5 stated about a flat rod and a tube well handle. But the I.O. found some more items. The terms "rod" can't be confused as flat rod or shovel as a weapon with a sharp edge.

In view of the above, if PW-1, 2 and 3 are believed then the evidence of PW-5 regarding use of flat rod and tube well handle can not be believed. Whereas the I.O., found a tube well handle, a khanta (shovel), some broken articles and a rod. But the evidence of PW-5 and the seizure list (Ext. No. 3) are silent regarding broken articles i.e. iron rod and khanta. There is no explanation as to what happened to the broken articles and the rod.

46. Further from the evidence of the I.O., it appears that the place of occurrence was PNC Road of Nalbari, Bata Point and as per the seizure list (Ext. No. 3), he seized the said articles from the place of occurrence, on the next day i.e. on 05.10.2014 at 10.30 AM. The occurrence took place on the previous afternoon i.e. on 04.10.2004, at about 1.30 PM. There is no evidence indicating as who was guarding the said weapons in the place of occurrence, which was a public place. That apart, PW-5 did not disclose the source of his knowledge i.e. whether he had seen the occurrence himself or someone had informed him. The evidence of DW-5 does not inspire confidence to believe that he had seen the alleged occurrence. This doubt is more fortified by the defence evidence, which remained undiscredited.

47. In view of the above contradictions regarding the number and type of the seized articles, we find no corroboration in the evidence of the prosecution witnesses, on material point i.e. regarding using the weapon by the appellants. The above stated discrepancies indicate lack of corroboration in their evidence, raising doubt about the prosecution version.

48. In view of the above, if the evidence of PW-1, PW-2 and PW-3 is not found to be trustworthy for want of corroboration, are not believed, then there remains nothing in support of the evidence of PW-5.

49. Now with regard to the injuries sustained by the deceased and cause of death, we find that the Medical Officer (PW-6), who performed the autopsy, stated that he found the following 2 (two) injuries:

"(i) Stitch around of size 10 cm in length with 9 nos. of stitches present on the left temporoparietal region of the scalp, 2 cm above from the level of the left ear and 14 cm above from tip of 7th cervical vertebrae. On removing the stitches the wound margins of scalp are found to be clean cut. The underlying bone is completely incised. The membrane is incised completely. The underlying brain is partially incised the depth of which is 0.5 CM which corresponds with incised around of the scalp and the skull. The antemortem blood clot present, margin of the around which is resistant with water.

(ii) Old abrasion of size 5 cm x 1 cm present over the left shoulder."

50. The said Medical Officer opined that the death of the deceased was due to the head injury, which was caused by moderately heavy sharp edged object. He further opined that the clean cut injury might be caused by sharp cutting weapon alone and that, though the injury No. 2 might be caused due to fall, the injury No. 1 i.e. cut injury could not be caused due to fall.

So, as per the medical evidence, the head injury, which was a cut (incised) injury, was the cause of the death of the deceased. The said Medical Officer (PW-6) has ruled out the hypothesis of sustaining the said injury due to fall on an object. He also clarified that the said injury might have been caused by a sharp cutting weapon i.e. sharp edged weapon.

51. As defined, in the Hand Book of Forensic Medicine, by Dr. M.K.R. Krishnan, an incised wound is a solution in the continuity of tissues without loss of substance, caused, as the name itself suggest, by a sharp weapon with cutting edge, such as knife or razor. In the said Book, it has been provided as under:

"Medico-legal importance of incised wounds: An incised wound provides the following information:

(a) The weapon responsible for the injury, namely a sharp-edged weapon.

(b) The direction in which the injury was inflicted, from the situation of the tail, and

(c) Whether it is suicidal or homicidal, from the presence of hesitation or defence cuts."

As provided in the book named "Forensic Medicine and Textology-Volume one" written by J.B. Mukharjee, incised wounds are caused when body tissue is struck or pressed by weapons or instruments having sharp linear edges. The manner of causing incised wounds are (a) striking with sharp edge of a cutting object, (b) Drawing-when sharp edge of a cutting weapon is drawn over the body surface.

52. From the above, it is clearly found that the fatal injury, on the head of the deceased, was caused with a sharp cutting object or an object having sharp edge. No blunt weapon or even a flat instrument, without sharp edge, was sufficient to cause the said injury. Therefore, it was the burden of the prosecution to establish that the seized weapons were sharp cutting weapon or weapons having sharp edge and that the appellants had used sharp cutting weapon i.e. a weapon with a sharp edge.

53. As discussed above, there are discrepancies in the oral evidence given by the prosecution witnesses and the seizure list regarding the type and shape of the weapons alleged to be used by the appellants. The projected eye witnesses i.e. PW-1, PW-2 and PW-3 clearly stated about use rod, which was a blunt weapon. They did not state about use of sharp weapon by the appellants.

Though PW-5 stated about a flat rod, his evidence does not lead to hold that the said flat rod had sharp edge, sufficient to cause an incised wound.

That apart, in view of the evidence, given by PW-1, PW-2 and PW-3 regarding use of iron rod and the evidence given by PW-5 regarding flat rod and tube well handle, it is not understood to as to how and under what circumstances the I.O. (PW-8) could seize, vide Ext. No. 3, one iron khanta (i.e. a spud) and a tube well handle. I.O. (PW-8) stated that he had also found broken articles, handle, a khanta, a rod and a tube well. In view of I.O.'s said evidence, if he had found those five items, it is not understand why he seized only two items. Facts remains that he did not identify or exhibit the seized items during the trial. Hence, his evidence regarding seizure is not free from doubt. The shape, type and the number of the seized articles don't tally with those articles, as stated by the non official witnesses. These discrepancies, coupled with the medical evidence aforesaid raise doubt about the use of any weapon with sharp cutting edge by the appellants.

54. In the case of Bimala Devi (supra), an injured eye witness stated that Manti was around with Kulhari, Jaily and Bimla Devi was around with Bankri. PW-1 stated that Bimla Devi gave a Bankri blow on the left ear of Jaipal. PW-2 also stated so. From cross-examination, it was found that PW-2 stated before the Police that Bimla Devi did not use the sharp side of the weapon. But there is no injury, which could be attributed to a blunt weapon. There was an incised wound on the left ear lobe. Doctor opined that all the injuries on the deceased could be caused by weapons, like, Jaily lathi and khukuri. When the Bankri was sent to

him for his opinion, he opined that the lacerated injury, found on the head of the deceased, could be caused by the said Bankri. But according to the eye witness, the injury, caused on the deceased by the appellant, was not on the head but on the left ear. In view of the above, the Supreme Court refused to accept that part of the prosecution evidence.

55. In the case of Mohar Singh(supra), the deceased, in his statement, i.e. Ext. 19, stated that he was assaulted by a "kassi". But ocular evidence was that the appellants assaulted the deceased by a spade. The Doctor, who held autopsy of the deceased stated that the injuries could be caused only by "kassi". No question was put to the Doctor whether any or all of the injuries on the deceased could be caused in the manner alleged by the witnesses i.e. by a spade. In view of inconsistency in the ocular evidence and medical evidence, the Supreme Court found it extremely unsafe and hazardous to maintain the conviction of the appellants.

56. In view of the said decisions and the above discussed contradictory evidence, given by the prosecution witnesses, in the present case, regarding the type of the weapon, prosecution ought to have brought the seized weapons to the notice of the Medical Officer, inviting his opinion as to whether the incised wound, found on the head of the deceased, could have been caused by the seized "khanta" i.e. material exhibit No. 1, or the tube well rod (Material Ext. No. 2), but prosecution has failed to do so.

57. The Medical Officer (PW-6), who examined the wounds clearly stated that the fatal injury i.e. cut injury was caused by a sharp cutting weapon.

There is no evidence to show that the Material Exhibit Nos. 1 and 2 were sharp cutting weapons or weapons having sharp edge sufficient to cause the said fatal wound. The Supreme Court in the case of Bodda Pati Venkatramaih (supra), referring to the cases of Milkiyat Singh and Ors Vs. State of Rajasthan, , observed that in the event of existence of difference as to injuries caused by the alleged overt acts spoken to by the witnesses, and the evidence given by the Doctor, it is not safe and proper to base conviction on such inconsistent evidence. In such cases, benefit of doubt should be given to the accused.

58. In the case at hand, in view of the above discussed inconsistent evidence it is doubtful whether the accused had used a shovel or an iron rod or an iron rod with a flat end or any other weapon. There is no evidence to show that the seized articles had sharp edge sufficient to cause the incised wound. Except PW-5 none of the PWs said about use of any flat weapon. It is also doubtful if PW-5 was an eye witness to the occurrence. Even if his evidence, regarding use of a flat rod, which is contrary to the evidence given by PW-1, PW-2 and PW-3 is accepted, then also, it can't be concluded that the flat rod was a weapon with a sharp edge. Because PW-5 did not say that the same had a sharp edge.

In view of the above discussion, it can't be concluded that the appellants, with the seized articles had caused the injuries, more particularly the incised wound,

resulting death of the deceased. Therefore, the question as to who and by what type of weapon had caused the said cut injury remained unexplained.

59. In support of their plea of innocence, the appellants have examined three defence witnesses. According to the defence version, on the date of occurrence, the deceased, being armed with a dao, had visited the shop of Md. John and while attempting to inflict blows on Md. John, the deceased had fallen on utensils and sustained the injuries.

60. From the evidence, on -record, it appears that the shop of the appellants and the house of the deceased were adjacent and situated near the road. DW-1, whose evidence remained undemolished, clearly stated that the deceased had made attempt to assault Md. John and thus sustained injury due to falling. He also stated that the deceased and the appellants had land dispute.

61. Supporting the evidence of DW-1 Mr. John Das, who visited the shop of Md. John Ali, at the relevant time, stated that he saw the deceased attempting to inflict dao blows on Md. John Ali and that the deceased sustained injury, due to fall. He further stated that, earlier also, the deceased had attacked Md. John Ali. His said evidence remained undemolished.

62. Md. Rafiqul Hussain, a brother of the deceased, deposing as DW-3 stated that, on 04.10.2014, the deceased attacked Md. John Ali and that he sustained injury due to fall. This witness ruled out the presence of other appellants at the place of occurrence. He also stated that there was no good relation between the two families.

Though the said DWs were cross examined by the prosecution, nothing could be elicited to render their evidence disbelievable. Hence, their evidence, that the deceased had gone to the shop of Md. John with a dao in his hand and that the deceased sustained injuries due to fall, remained undiscredited.

63. In the case of Dudh Nath Pandey (supra), the Supreme Court observed that defence witnesses are entitled to equal treatment with those of prosecution. Their evidence can't be discarded merely on the belief that they have given fake evidence. If their evidence is found to be credible after cross examination, the same is required to be accepted, giving weight to their evidentiary value.

In view of the said principle, the consistent evidence, given by DWs, which remained undemolished, despite cross-examination, can not be thrown out. Considering the above, we find that the evidence given by DWs negates the prosecution version that the appellants had caused the injuries sustained by the deceased. We have already found that the prosecution has failed to establish that the appellants had caused the fatal injury (cut incised) in the alleged way.

64. In the light of the above, we have no hesitation in holding that the prosecution failed to prove the case, against the appellants, beyond all reasonable doubt.

we find merit in these appeals. The appeals are allowed. The impugned judgment and order of conviction and sentence are set aside. The appellants stand acquitted and they be set at liberty forthwith, if not required in any other case.

65. Return the LCR.