
(2010) 09 GAU CK 0046

In the Gauhati High Court

Case No : Criminal Appeal No(s).204 and 91(J) of 2004

Kulesh Rudra Paul and Ors.

APPELLANT

Vs

State of Assam (And another case)

RESPONDENT

Date of Decision : 03-09-2010

Acts Referred:

Penal Code, 1860 — Section 148, 302, 323, 447

Penal Code, 1860 (IPC) — Section 148, 302, 323, 447

Citation : (2012) 1 GLR 777

Hon'ble Judges : Ranjan Gogoi, J and A.C.Upadhyay, J

Bench : Division Bench

Advocate : Mr. J.M. Choudhury, Mr. B.M. Choudhury and Ms. S. Choudhury for the appellants., Mr. Z. Kamar for the respondent., Advocates appearing for Parties

Judgement

Ranjan Gogoi, J.—Criminal Appeal No.204 of 2004 is directed against the judgment and order dated 9.6.2004 passed by the learned Ad hoc Additional Sessions Judge, Karimganj in Sessions Case No.53 of 2001 by which the five accused appellants have been convicted under sections 148/323/447/302, IPC read with section 149, IPC. Each of them have been sentenced to rigorous imprisonment for life and to pay a fine of Rs.5,000, in default, to suffer rigorous imprisonment for three months more under section 302; rigorous imprisonment for six months each under section 148, IPC; rigorous imprisonment for six months for the offence under section 323, IPC read with section 149, IPC and rigorous imprisonment for two months under section 447, IPC read with section 149, IPC. By the aforesaid judgment and order, eight (8) other charge sheeted accused have been acquitted of the said offences. Criminal Appeal No.91(J) of 2004 have been filed separately by one of the five accused appellants in Criminal Appeal No.204 of 2004. Both the appeals were, therefore, heard and are being disposed of by this common order.

2. The prosecution case in short is that on 3.1.1993 at about 5.15 p.m PW4, Smt. Ratna Das, lodged an FIR in the Bazaricherra Police Outpost stating that at

about 7 p.m. of the previous day, i.e., 2.1.1993, the! accused named in the FIR (which included the accused appellants) came to the courtyard of their house and called her father Girindra Das. According to the first informant as soon as her father Girindraj Das came out of the house and reached the courtyard, accused appellant Kulesh hit him in the head with a dao. The father of the first informant became unconscious and fell down on the ground. Seeing this, hea younger brother Sailendra Das rushed to save his father when accused appellant Abhinash hit Sailendra with a "Ballam" (spear). According to the first informant, the accused persons had hit Sailendra repeatedly with lathi, dao and spear as a result of which he died at the place of occurrence. In the first information report, it was also mentioned that the eldest brother of the first informant one Shri Nirendra Das an another elder brother of the first informant Samarendra had all sustained injuries when they tried to save their father and their broth (Sailendra) from the assailants. According to the first informant, when she had come out of the house accused Shri Nagendra Rudra Pau caused injuries to her in the right elbow by hitting her with a lathi.

3. On receipt of the aforesaid FIR, an entry in the General Diary of the Bazaricherra Police Outpost (G.D. Entry No.36 dated 3.1.1993) was made and the ejahar was sent to the Officer Incharge of theJ Patharkandi Police Station for registration of a case. Shri Poona Gogoi, S.I. of Police (PW13), Incharge of Bazaricherra Police Outpost, went to the place of occurrence to investigate the crime alleged. At the same time, on receipt of the ejahar, Patharkandi P.S. Case No.4 of 1993 under! sections 147/148/149/447/325/326/302, IPC was registered. The police party led by PW13, Poona Gogoi on reaching the place of occurrence prepared a sketch map thereof. Inquest was held on the dead body of Sailendra Das which was sent for post mortem examination. The injured, including Girindra Das were sent for medical examination. Girindra Das also having died three days later, inquest was held and: the dead body was also sent for post mortem examination. Statements of persons acquainted with the incident were recorded by the" investigating officer under section 164, Cr.PC. Thereafter, at the conclusion of the investigation, charge sheet was submitted against 15 accused including the five accused appellants. As the offences alleged were exclusively triable by the court of Sessions, the learned Judicial Magistrate, FirstClass, Karimganj by order dated 21.8.2001 committed the case for trial to the court of Sessions at Karimganj.

4. In the trial court, charges under section 148, IPC; section 447 read with section 149, IPC; section 323 read with section 149, IPC; section 325 read with section 149, IPC and section 302 read with section 149 IPC were framed against 14(fourteen) of the charge sheeted accused. One accused, i.e., Rongesh Rudra Paul was declared absconder. The charges framed against the accused persons including the present appellants were read over and explained to which they pleaded not guilty and claimed to be tried. In the course of the trial, 13 witnesses were examined by the prosecution. One defence witness was also examined. Thereafter, at the conclusion of the trial, while the accused appellants

have been convicted and sentenced as aforesaid, the remaining 8(eight) accused (one accused Sushanta Rudrapaul) died during the pendency of the trial were acquitted of the offences alleged. Aggrieved by the aforesaid conviction and the sentence imposed, the present appeal has been filed by the five accused appellants.

5. We have heard Mr. J.M. Choudhury, learned senior counsel appearing for the accused appellant and Mr. Z. Kamar, learned Public Prosecutor, Assam. To appreciate the arguments advanced by the counsels for the parties, it is necessary for the court to briefly notice the main part of the evidence tendered by the prosecution witnesses.

6. PW1, Shri Samendra Das, is the son of the deceased Girindra Das and elder brother of the other deceased Sailendra. In his deposition, PW1 had stated that at about 7 p.m. of the day of occurrence, accused Rabindra Namasudra and Abinash Rudrapaul had gone to their house and had called his father Girindra. According to this witness, when Girindra came out accused Pramesh and Kulesh hit Girindra with a dao. Hearing the scream of his father, PW1 came out, when he was hit by accused Abinash and Deepika with a dao. According to PW1, he sustained injuries in his hands and legs whereas his father had suffered injuries on the head. PW1 had specifically named all the accused appellants along with others as being present at the place of occurrence. PW1 had further deposed that because of the injuries sustained by him, he was taken to the Bazaricherra Hospital, whereas his father was taken to the Karimganj Civil Hospital. According to PW1, his father died in the hospital three days later. PW1 had deposed that later on he could come to learn that his younger brother Sailendra had also died at the hands of the accused persons in the course of the same incident.

7. PW 2, Deepak @ Deepak Das in his deposition had stated that at the time of occurrence he was in the Bazaricherra market. After he had come home he could come to learn of the incident. Thereafter he went to the house of Girindra Das and found him lying unconscious. According to PW2, he found Sailendra Das lying dead in the house. Furthermore, according to PW2, he along with Pranoy Das and Indrajit Das took the injured Girindra and deceased Sailendra to the Karimga Civil Hospital. Three days later, the injured Girindra also died.

8. PW3, Shri Nirendra Kumar Das, is the eldest son of the deceased Girindra and the eldest brother of deceased Sailendra. According to PW3, though he lives in a separate house, at about 7 p.m. of the day of occurrence while he was in his house he heard the cries of his younger sister Ratna (PW4) and his sisterinlaw Ms. Champu Rani Das (PW5) and the children. Hearing the cries, he had come to the house of the deceased and found his father and brother lying in the vegetable garden. According to PW3, at that point of time accused Rudrapaul shouted to other accused to assault him, i.e., PW3. Thereafter, according to PW3, accused Bibhash hit him in the chest with a lathi whereas accused Abinash hit him in the head with a dao. He also suffered an assault on his head from behind. According to PW3, he fell unconscious as a result of the assault and

regained his senses in the Karimganj Civil Hospital. Thereafter, he was informed by PW4 about the assault] on his father and younger brother by the accused persons.

9. PW4, Smt. Ratna Das, is the daughter of the deceased Girindra Das and elder sister of the deceased Sailendra. According to this witness, at about 7 p.m. of the day of occurrence, accused Rabindra, Kulesh, Pramesh and Abinash came to their house and had called her father Girindra out. According to this witness, as soon as her father Girindra came out of the house, the four accused hit him with dao as a result of which Girindra fell down. PW4 having raised alarm, her younger brother Sailendra came out when accused Pramesh hit him in the head with a ballam (spear). According to this witness, accused Subal had pressed down deceased Sailendra with his foot whereas accused Motai pressed the nose of his brother. Furthermore, according to PW4, accused Motai, Bidhan, Sidam, Nagendra and Sibul had struck her with a lathi. Thereafter, according to PW4, when Sailendra (PW1) had come out, accused Deepika and Abinash had hit him in his hands and legs with a dao. PW4 had further deposed that on hearing the alarm raised by her, her elder brother Nirendra Kr. Das (PW3) came out from the house when he was hit by accused Bibhash in his chest with a lathi. Accused Ajit had also hit Nirendera in his head with a dao. According to PW4, all the accused persons unitedly had assaulted her father and her three brothers with dao, lathi, spear, etc.

10. PW5, Smt. Champu Rani Das, is the wife of Samarendra Das (PW1). According to this witness, at about 7 p.m. of the day of occurrence, accused Rabindra, Kulesh, Pramesh and Abinash had came and called her fatherinlaw Girindra from the house. According to PW5, Girindra was assaulted by accused Pramesh on the head with a dao. This witness had categorically deposed that Pramesh and Abinash had repeatedly cut Girindra in his head and body. PW5 had further deposed that her brotherinlaw Sailendra had also come out of the house and accused Pramesh and Kulesh assaulted him with a spear. According to this witness, her husband Samendra (PW1) was hacked in his hand by accused Deepika whereas accused Pramesh had hit her husband in his leg with a dao. Furthermore, according to PW5, accused Bibhash and Ajit had assaulted her other brotherinlaw Nirendra (PW3) in the head with a dao and that when her sisterinlaw Ratna (PW4) came out, she was also assaulted by accused Nagendra and Sibal with lathis.

11. PW6, Shri Pranay Das, in his deposition had stated that about 7 p.m. of the day of occurrence, while he was returning from the Bazaricherra market along with his uncle Dhirendra and his cousin Deepak, they heard hue and cry coming out from the house of Girindra. PW6 had deposed that when they were climbing up to the house, they had seen the accused persons (including the accused appellant) coming down. PW6 had deposed that the house of Girindra was located in a hillock and that he had seen the accused persons armed with dao, lathis and ballam in their hands. According to this witness, the accused persons

told them that they had killed the contractor and his family. On reaching the house of Girindra, according to PW6, he could see Girindra lying with injuries in the head and Sailendra lying dead with injuries on the head. PW6 had further deposed that he found Samendra (PW1) with dao injuries in his legs and hands and Nirendra (PW3) with cut wounds in his hands. According to PW6, he was informed by Ratna (PW4) that the accused persons had caused the injuries after which they had left the place.

12. PW7, Dr. Matindra Sutradhar, had examined Ratna Rani Das (PW4), Samarendra Das (PW1) and Nirendra Kr. Das (PW3) in the Bajaricherra PHC on 2.1.1993. He had proved the injury reports of PWs 4,1 and 3 as Exts.2, 3 and 4 with his signatures thereon as Ext.2(1), 3(1) and 4(1). PW7 had also examined Girindra Das (since deceased) in the PHC on the same day, i.e., 2.1.1993. The report of the medical examination of Girindra Das on 2.1.1993 was proved by PW7 as Ext. 5 and his signature therein as Ext.5(1). The findings of the injuries on Ratna Das (PW4), Samarendra Das (PW1), Nirendra Kr. Das (PW3) and Girindra Das (since deceased) may be extracted hereinbelow :

"Ratna Rani Das (PW4):

1. A fresh abrasion 1" x W in the lower part of the rt arm.
2. Swelling and tenderness on rt. Elbow.
3. Swelling and tenderness on the left arm.
4. Fresh swelling with tenderness in the back 4" x 1/2" by blunt weapon I age 1? old.

All are simple injuries.

Other : Patients conscious. Pulse : regular B.P.: normal, chest and cug ; NAD, Advised X ray for rt. Arm, rt elbow and left arm X ray reports were? not produced before me.

The Ext.2 is my report, Ext.2(1) is my signature." "Samarendra Das (PW1):

1. Fresh lacerated injury on the medial side of the left palm 4" x ? x 1?".
2. Fresh lacerated injury just distal to right ankle 2" x ? x ?".
3. Fresh abrasion in the chin by blunt weapon half an hour old. Clothes were blood stained patient was conscious. Pulse and B.P. Normal, Chest and CIS NAD. Others NAD X Ray of left palm and rt ankle advised. X reports were not produced.

The Ext.3 is my report. Ext.3(1) is my signature."

"Nirendra Kr. Das (PW3):

1. Fresh lacerated injury in the frontal region of the midline of the scalp 4" x ?" x ?"

2. Fresh lacerated injury on the occipital region of the rt side of the scalp 7" x 1" x 1"

3. Fresh swollen rt arm and redness and tenderness.

4. Fresh swollen in the surrounding area of the rt eye of the eye lid. Whole area was blackish and tender. Age 1?

Weapon : blunt.

Nature : Seemed to be grievous

Patient conscious

Pulse abnormal

B.P. : Below normal.

Chest: Clear

CUS : Low blood pressured rt eye. Pupil constricted reaction of both the eyes were sluggish. Patient referred to KXJ Civil for investigation, etc.,

Ext.4 is the report Ext.4(1) is my signature."

"Girindra Das (deceased died after 3 days):

1. Fresh lacerated injury on the frontal region of the rt. side of the scalp 4" x 1" x 1"

2. Fresh lacerated injury on the frontal region of left side of the scalp

2" x 1" x 1"

3. Fresh lacerated injury on the occipital region of rt. side of the scalp 4" x 1" x 1"

4. Fresh lacerated injury on the forehead.

5. Fresh multiple swellings in all the four limbs with redness. 1? hours old.

Blunt weapon. Scalp and forehead injuries seemed to be grievous. Limb over seemed to be simple.

Patient was semi conscious. Pulse was 100 p.m. regular, B.P. was low. Clothes were blood stained. Chest: clean. CIS : High blood. High pulse rate. B.P. : Low, Pupils constricted & sluggish light reaction.

Patient referred to KXJ Civil for investigation and treatment. Ext.5 is my report of Ext. 5(1) is my signature."

13. PW8, Shri Dhirendra Das, in his deposition had stated that at about 8.30/9 p.m. of the day of occurrence while he was returning from the market, he heard hue and cry in the house of Girindra Das. According to this witness, while he was climbing up the hillock to reach the house of Girindra he had seen some persons climbing down with daos, lathis, etc., in their hands. PW8 had named the

accused including the accused appellants. Thereafter, according to PW8, when he had reached the house of Girindra, he found Girindra (since deceased), Nirendra Kr. Das (PW3), Sailendra (since deceased) and Samarendra Das (PW1) lying on the ground with injuries.

14. PW9, Subrata Das, is the son of Samarendra Das (PW1). This witness had deposed about the assault and injuries suffered by his grandfather Girindra and his paternal uncle Sailendra on the day of occurrence.

15. While the evidence of PW10 would not be very material, PW11, Shri Indrajit Das, in his deposition had stated that on hearing about the occurrence he went to the house of Girindra and found that while Girindra was lying unconscious, Sailendra was lying dead in the courtyard. He was informed by the womenfolk of the house that it is the accused persons who had committed the assault on the injured persons.

16. PW12, Dr. (Mrs. Nazma Begum) had performed the post mortem of deceased Sailendra in the Karimganj Civil Hospital on 3.1.1993. She had also conducted the autopsy of the deceased Girindra on 8.1.1993. She had proved the reports of post mortem of deceased Sailendra as Ext. 6 and her signature thereon as Ext. 6(1), whereas the post mortem report of Girindra by PW12 was proved by PW12 as Ext. 7 and her signature thereon as Ext. 7(1). The findings of injuries on the deceased, as deposed to by PW12, may best be extracted below :

"Sailendra Das :

The dead body was healthy Hindu, male whose rigor mortis is present. Eye open, mouth closed. Dried blood seen in the nostrils. A lacerated wound seen on the right upper part of occipital area 1" lateral and parallel to the mid line. Size 2" x 1" x 1" bone deep. On removing the scalp blood collection seen on the posterior aspect of the head. Beneath the injury the whole length of the occipital bone is fractured with about 2 mm gaping. The fracture line is irregular. On removing the bone, the membranes beneath are found to be lacerated with subdural and subarachnoid haematoma. The underlying brain is also lacerated. A contusion 7" x 1" seen over the right scapula parallel to the mid line.

Cranium and spinal canal as already described. Thorax : Walls, ribs and cartilages are healthy.

Pleurae, larynx and tracheae, both right and left lungs, & pericardium are healthy. Heart healthy and contains blood. Vessels healthy.

Abdomen : Walls, peritoneum, stomach, pharynx and oesophagus are healthy. Stomach and its contents healthy containing semidigested food. Small intestine and its contents is healthy. Large intestine and its contents healthy contains faecal materials. Liver healthy and congested. Spleen is healthy and congested. Kidneys congested. Bladder empty. Organs of general, external internal are healthy.

Muscles, bones and joints as described in No.1.

Opinion : In my opinion the person died instantaneously as a result of injury fr> the vital part of the brain.

Ext.6 is my report and Ext.6(1) is my signature."

"Girindra Das External Appearance

The dead body of an average built Hindu male aged about 70 years whose rigor mortis is present. Eyes open, mouth half open, five stitched partially healed injuries seen over the scalp. Skin aprasion partially healed over right arm 1" x ?. Partially healed skin abrasion over the left shoulder joint size 1/8" 1/8".

Cranium and spinal canal:

Scalp, skull and vertebrae as described above. Membrane congested. On sectioning haemorrhagic fluid seen in the subarachnoid space.

Brain and spinal cord are congested.

Thorax : Walls, ribs and cartilages are healthy. Pleurae congested, right and left lungs are congested. Heart congested and contains blood. Vessels contains blood.

Abdomen : Walls healthy, peritoneum congested, mouth, pharynx, oesophagus are congested. Stomach and its contents are congested and empty. Small intestine and its contents are congested. Large intestine and its contents congested and contains fecal matter. Liver, spleen, kidney are congested. Bladder is empty. Organs of generation, external and internal are healthy.

Muscles, bones and joints : As described above. Injuries are antemortem.

Opinion : In my opinion death is due to subarchnoid haemorrhage as a result of injuries sustained.

Ext.7 is my report and Ext.7(1) is my signature."

In crossexamination, PW12 had stated that in her opinion the head injuries on deceased Sailendra Das were caused by blunt object. According to PW12, as the injuries on the deceased Girindra were stitched she was not in a position to opine whether the same were caused by a sharp weapon or by a blunt weapon.

17. PW13, Shri Poona Gogoi, is the Investigating Officer of the case who apart from deposing with regard to the steps taken in the investigation of the case had deposed with regard to the statements made before him by the prosecution witnesses through which the defence had tried to prove omissions in the statements of the said witnesses with reference to their previous statements in writing.

18. The defence examined one witness, i.e., one Shri Rakhil Das. Through this witness the defence had tried to prove that the accused Ajit Rudrapaul was present at a "kirtan" held in the house of the defence witness at about the time

of the occurrence. As the accused Ajit has been acquitted by the learned trial court, the evidence of defence witness will not be very material for the purpose of present appeal.

19. At this stage, the court must notice that from the judgment of the learned trial court it appears that in respect of the same incident another case was registered at the instance of the accused which was numbered as Sessions Case No.52 of 2001. The said case was tried along with the present case. From the judgment, it appears that the accused involved in the aforesaid case, i.e., Sessions Case No.52 of 2001, i.e., the party of the deceased and the injured of the present case were acquitted on the findings that the party of the first informant in the said case (accused herein) were the aggressors. It would also be significant to take note of the fact that in the said case accused appellant Kulesh was examined as PW2 whereas accused Abinash as PW3; the accused appellant Shri Nagendra Rudra Paul was examined as PW4; accused Sibal Rudra Paul was examined as PW5 and accused Deepika Rudra Paul was examined as PW6. In their testimonies, all the aforesaid accused were found to have admitted their presence at the place of occurrence. The ; findings of the learned court to the above effect as recorded in Sessions Case No.52 of 2001 are not open to scrutiny in the present appeal in the absence of any appeal against the final judgment and order passed in the aforesaid Sessions Case No.52 of 2001.

20. In the above facts, the question that would arise for determination in the present appeal is whether the accused appellants had formed an unlawful assembly and whether in course of prosecution of the common object of the said assembly the offence(s) alleged against them had been committed by any of the accused appellants or whether the offence(s) so committed were known to the accused appellants to be likely to be committed in prosecution of the common object of the unlawful assembly.

21. Unlawful assembly is defined by section 141 of the Indian Penal Code to be an assembly of five or more persons if the common object of the members of that assembly is to commit a criminal act as spelt out in the different situations enumerated in section 141 of the Indian Penal Code. Being a member of an unlawful assembly itself is an offence punishable under section 143 of the Indian Penal Code whereas if force or violence is used in prosecution of the common object of an unlawful assembly the offence of rioting under section 146, IPC is committed which is punishable under sections 147 and 148 of the Indian Penal Code. Section 149 of the IPC makes each member of the unlawful assembly liable for the offence committed by any member thereof if such offence is committed in prosecution of the common object of the assembly or if the members of the assembly knew that such offence is likely to be committed in prosecution of the common object.

22. In the present case the evidence of PWs 1, 3, 6 and 8 make it amply clear that all the charge sheeted accused were together at the place of occurrence where the deceased Girindra (died subsequently) was found lying unconscious

and deceased Sailendra was found lying dead. While PWs 1 and 3 are the injured themselves, PWs 6 and 8 are independent persons who had specifically stated that while they were going up to the hillock to the house of deceased Girindra, they had found all the accused coming down and that the accused persons were armed with deadly weapon like dao, lathi and spears. PW6 had further deposed that the accused persons had informed him that they had finished the contractor and his family. The aforesaid witnesses had further stated that when they had reached the house of Girindra, they found Girindra lying unconscious, Sailendra lying dead and PWs 1 and 3 with injuries on their body. If the above is the core of the evidence tendered by the prosecution witnesses, it is difficult to see as to how the five accused appellants, notwithstanding the acquittal of the other accused, can escape liability for commission of the offence under section 148 and sections 323, 447 read with section 147. The formation of an unlawful assembly with a common object to cause harm to deceased Girindra and whoever was to come to his assistance is clearly discernible from the evidence on record with the further fact that in prosecution of the said common object, the accused persons had by use of criminal force trespassed into the house of accused Girindra and had caused injuries to his two sons, namely Samarendra (PW1) and Nirendra Kr. Das (PWS). The conviction of the accused appellant under section 148, IPC and 323/447 read with section 149 IPC, therefore, is found to be free from any error. The conviction of the accused appellant under the aforesaid sections of the Indian Penal Code, as recorded by the learned trial court as well as the sentences imposed are, therefore, required to be maintained.

23. This will bring the court to the consideration of the tenability of the conviction of the accused appellants under section 302/149, IPC. Insofar as the deceased Girindra is concerned, this aspect of the prosecution case hinges on the evidence of PWs 1, 4 and 5, whereas the assault on Sailendra resulting in his death has been testified to by PWs 4 and 5. It will, therefore, be necessary to carefully analyse the evidence of the aforesaid witnesses.

24. While PW1 had stated that acquitted accused Rabindra along with accused appellant Abinash had gone to their house and had called his father out, PW4 had named acquitted accused Rabindra and Pramesh along with convicted accused Kulesh and Abinash as the persons who had gone to their house to call out the deceased Girindra. On the other hand, the names mentioned by PW5 are the same as those mentioned by PW4. Insofar as the actual assault on deceased Girindra is concerned, according to PW1, acquitted accused Pramesh and Kulesh had committed the assault, whereas according to PW4, all the four accused who had gone to call Girindra out of the house had assaulted him in the courtyard. On the other hand, the evidence of PWS is to the effect that when Girindra had come out of the house, acquitted accused Pramesh had hit him in the head with a dao and, thereafter, acquitted accused Pramesh and convicted accused Abinash had repeatedly cut her fatherinlaw in the head and in the body. That apart, PWs 1, 4 and 5 have categorically stated that the deceased was assaulted with a dao and, infact, according to PW4, the deceased was repeatedly cut by acquitted accused

Pramesh and the accused appellant Abinash in the head and the body.

25. Insofar as the assault on the deceased Sailendra is concerned, according to PW4, when Sailendra had come out of the house, the acquitted accused Pramesh hit him in the head with a ballam (spear), while convicted accused Subal had pressed him down with the foot, Motai (acquitted) had pressed the nose of the deceased. On the other hand, according to PWS, when Sailendra had. come out of the house, acquitted accused Pramesh and accused appellant Kulesh had assaulted Sailendra with a Jatha (spear).

26. The prosecution witnesses had clearly implicated some of the accused persons who have been acquitted by the learned trial court. Such acquittal made by the learned trial court is on the basis that in the FIR filed only the five accused appellants and one Rangesh Rudra Paul, who was declared as absconder, have been implicated. In other words, the learned trial court did not accept the testimony of the eye witnesses with regard to the assault on the two deceased persons by the other accused who were not named in the FIR. If that be so, serious doubt would arise whether the part of the testimony of the prosecution witnesses which implicates the accused appellants can be considered to be reliable when the version narrated by the prosecution witnesses is a single version.

27. Apart from the above, a consideration of the evidence of PWs 1, 4 and 5 insofar as the assault on the two deceased persons is concerned clearly indicates that the deceased Girindra was assaulted by the accused with a dao, whereas the deceased Sailendra was assaulted with a spear. Assault committed with a dao and a spear, in the normal course, would have resulted in cut injuries on the deceased. It is not the case of the prosecution that the accused had committed the assault with the blunt side of the dao or with the wooden part of the spear which resembles a lathi. However, from the post mortem report of the deceased, i.e., Exts. 6 and 7, it appears that what was found on the body of the deceased are lacerated wounds and not cut injuries. Infact, according to PW12, Dr. (Mrs.) Nazma Begum, who had conducted the post mortems, the injuries on the deceased Sailendra in her opinion were caused by a blunt weapon though, according to PW12, as the injuries on deceased Girindra were stitched, she was not in a position to render a firm opinion as to whether the injuries on the said person were caused by a sharp or a blunt weapon. The benefit of the said ambiguity in the evidence of PW12 with regard to the weapon of assault leading to the injuries found on the body of deceased Girindra must naturally go in favour of the accused. That apart, the deceased Girindra died three days after the incident and he was subjected to a medical examination on the day of occurrence by PW7. The report of such medical examination was exhibited as Ext. 5 in the case. A reading of the said report clearly indicates that lacerated injuries were found which injuries are normally caused by a blunt weapon. As against the aforesaid findings of the medical and post mortem examination, from the evidence of PW5, who the prosecution claims to be an eye witness to the

assault on the deceased Girindra, it clearly transpires that the witness had categorically stated that accused Pramesh (acquitted) and the accused appellant Abinash had repeatedly cut her fatherinlaw in the head and in the body.

28. The aforesaid evidence on record leaves room for serious doubt with regard to the commission of the assault on deceased Girindra and Sailendra by the accused persons leading to the death of the aforesaid two persons, as alleged by the prosecution. In the present case, the acceptance of a part of the prosecution case and the rejection of the remaining part only on the basis of the version narrated in the FIR, will be open to grave doubt in any case, the evidence of the prosecution witnesses being wholly contrary to the medical evidence on record, we are of the view that the conclusion that should be reached is that the prosecution in the present case has not proved the charge under section 302/149, IPC against the accused appellants beyond all reasonable doubt. We, therefore, acquit the accused appellants of the said charges.

29. In the result, the appeal is partly allowed. The accused appellants are in jail since 9.6.2004. They have already served the sentences for the offences under sections 148, 323 and 447, IPC read with section 149 of the IPC. We, therefore, direct for their release from custody forthwith unless such custody is required in connection with any other case.