

(2022) 01 GAU CK 0059
In the Gauhati High Court
Case No : Criminal Appeal No. 242 Of 2018

Nazir Ali And 3 Ors

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 27-01-2022

Acts Referred:

Indian Penal Code, 1860 — Section 34, 148, 149, 302, 341
Code Of Criminal Procedure, 1973 — Section 161, 164, 313

Citation : (2022) 01 GAU CK 0059

Hon'ble Judges : Suman Shyam, J;Arun Dev Choudhury, J

Bench : Division Bench

Advocate : H R A Choudhury, B Bhuyan

Final Decision : Dismissed

Judgement

A. D. Choudhury. J

1. Heard Mr. A. Choudhury and Mr. A. Ahmed, the learned counsels for the appellants. We have also heard Ms. B. Bhuyan, the learned Additional

P.P., Assam, appearing for the State.

2. This appeal against conviction has been preferred by the 4 (four) appellants assailing the judgment and order dated 20.06.2018 passed by the

learned Sessions Judge, Nalbari in Sessions Case No. 89/2016.

3. The prosecution case unfolded from the materials available on record is to the effect that at about 08:30 PM on 05.07.2004, the appellant No. 1, 2

and 3 suddenly attacked the victim Md. Nimuddin Ali with deadly weapon like lathi, degar, axe, spear etc, fell him down on the road. Thereafter, some

villagers, including Khalil Ali took Nimuddin to his house in an unconscious state and thereafter, took the victim to Tihu Hospital on a vehicle and

subsequently doctors declared Md. Nimuddin dead. It was also stated in the FIR that at the time of the incident, Md. Rafique Ali, the P.W. 3, was

coming a little behind of Md. Nimuddin Ali and the said PW-3 fled away when one of the accused chased to attack him. It is also the case as narrated

in the FIR that there had been a quarrel between the family of the deceased and the accused persons with regard to right of farming of land of Rajiv

Gandhi College. On the next date of the incident i.e. on 06.07.2004, the brother of the victim viz. Md. Kashed Ali (PW-1) had lodged an ejahar before

the Officer In-Charge of Tihu Police Station. On the basis of the said Ejahar, Tihu P.S. Case No. 41/2004 under sections 341/302/34 of the IPC was

registered and the matter was taken up for investigation.

4. Upon completion of the investigation, the Investigating Officer had submitted charge sheet against the accused/appellants namely Uzir Ali

(Appellant No. 4) Md. Nashir Ali (Appellant No. 1), Md. Rashim Ali (Appellant No. 2) Md. Nur Ali and Md. Jalal Ali (Appellant No. 3). Though the

name of Uzir Ali was not mentioned in the Ejahar, but his name was included in the charge sheet on the basis of the statement made by witnesses

during the course of investigation. Accused persons/appellants namely Rashim Ali, Nur Ali and Jalal Ali were absconding at the time of filing of the

charge sheet.

5. Based on the charge sheet submitted by the Investigation Officer, charges were framed against the accused /appellants under Section 148 IPC

read with Section 302/ 149 of the IPC. The charges were read out and explained to them but the accused persons/appellants had pleaded not guilty

and claimed to be tried. Hence, the matter went up to trial.

6. In order to bring home the charges, the prosecution had examined as many as fourteen witnesses including the Medical Officer (PW-10) who had

conducted the post mortem examination on the dead body of the deceased and the Investigation Officer (PW-12). PW-2, Mustt. Jakima Begum and

PW-3 Md. Rafique Ali had claimed to have seen the occurrence; therefore, they were examined as eye witnesses.

7. By the impugned judgment and order dated 20.06.2018, the learned Sessions Judge, Nalbari, had convicted the accused persons / appellant Nos. 1,

2, 3 and 4 namely Nazir Ali, Rashim Ali, Md. Jalal Ali and Md. Uzir Ali under Section 302/34 IPC and sentenced each of them to undergo Rigorous

Imprisonment of life and also to pay fine of Rs. 5000/- each and in default to suffer Simple Imprisonment for one month each. However, accused Nur

Ali was acquitted on the ground that the prosecution had failed to bring home the charge against the accused under Sections 148/149/302 of the IPC.

All the accused persons, including the present appellants were acquitted from the charge framed under Section 148 IPC on the ground that the prosecution had failed to establish the said charge.

8. By the impugned judgment and order dated 20.06.2018, the learned trial court had held that the prosecution had succeeded in establishing the charges brought against the appellants beyond reasonable doubt by direct evidence of the eye witnesses (PW-2 and PW-3). By rejecting the arguments advanced by the learned defence counsel to the effect that testimony of the prosecution witnesses were full of inconsistencies and material contradictions raising serious doubt on the prosecution story, the learned court below had held that those were minor discrepancies which would have no bearing in the prosecution case. It has also been held that the defence side had failed to prove the contradictions in the testimonies of the prosecution witnesses by following the due procedure laid down by law.

9. Assailing the impugned judgment and order dated 20.06.2018, passed by the learned Sessions Judge, Nalbari, Mr. A. Choudhury, the learned counsel appearing for the appellants has argued that the PW-3 cannot be said to be an eye witness. According to him, the FIR no way depicts him as an eye witness. He and PW2 were a chance witness only and in absence of any other eye witnesses, only on the basis of chance witnesses, the appellant ought not to have been convicted.

10. Mr. Choudhury further submits that there are material contradictions between the testimony of PW-3 and PW-2. According to Mr. Choudhury, the learned counsel for the appellants, the PW-3 has not mentioned about the presence of PW-2 at the place of occurrence and vice-versa and thus had failed to state the relevant facts not only before the police while recording their statements under Section 161 Cr.P.C. but also during their depositions as prosecution witness in the course of trial and therefore, these two witnesses are not at all reliable.

11. Mr. Choudhury has further argued that at the time of occurrence, it was dark in the night and therefore, it was not possible for the PW-3 and PW-

2 to witness the occurrence and the presence of the accused in the place of occurrence is doubtful.

12. The Learned Counsel for the petitioner submits that the informant PW-1 is the brother of the victim and the alleged eye witness PW-2 is the sister

of the victim. Therefore, had the PW-2 been present at the place of occurrence and had she been the eye witness, the PW-1 informant, would have

stated such fact in the FIR. But there is no mention in the FIR regarding presence of PW-2 at the place of occurrence and, therefore, Mr. Choudhury,

has argued that PW-2 is not an eye witness in the case. According to him the PW1, PW2 and the victim being siblings, they are interested witnesses

and the conviction cannot be sustained solely basing on the testimonies of such witnesses.

13. Mr. Choudhury has also invited the attention of this court to the discrepancies and / or improvement in the versions of the prosecution witnesses,

more particularly of PW-2 and PW-3, to contend that the prosecution case is entirely based on the testimony of these two witnesses who are close

relatives of the deceased. Since their testimonies were full of contradictions which have been duly proved during cross examination of the I/O (PW-

12), the learned Session Judge had committed manifest illegality in holding that the charges brought against the accused persons had been established

beyond reasonable doubt.

14. The learned Counsel for the Appellant relies on the following judgments to buttress his arguments made aforesaid.

i. (2020) 10 SCC 733, to impeach the conduct of the PW1 in not naming the PW2 as eye witness in the FIR.

ii. (2011) 2- SCC-676, in support of his argument regarding doubtful visibility/ presence of the accused in the place of occurrence and to establish that

non disclosure of presence of PW3 by PW2 and vice versa is fatal to the prosecution case.

iii. (2012)-2-GLT- 586, in support of his argument regarding contradictions in the testimonies of PW1, PW2 and PW3.

iv. (2002)-3 GLT-80, in support of his argument regarding value of interested witnesses.

15. Responding to the arguments advanced by the appellants counsel, Ms. B. Bhuyan, the learned Additional P.P. Assam, has argued that the minor

inconstancies and discrepancies in the testimony of witnesses will not weaken the prosecution case unless those are found to be material

contradictions, proved by the defense side in accordance with law. In the present case, submits Ms. Bhuyan that the PW-2 and PW-3 had remained

consistent during their cross-examinations and the defence has failed to shake their testimony. Ms. Bhuyan further submits that the prosecution has

succeeded not only in establishing the motive behind the crime which is the dispute regarding the right of cultivation over the land belonging to the

Rajiv Gandhi College but has also succeeded in establishing the charges brought against the appellants beyond reasonable doubt on the basis of the

testimony of eye witnesses PW-2 and PW-3. Moreover, the medical report which indicates presence of multiple body injuries with bleeding wounds

also goes to establish beyond doubt that deceased was attacked with deadly weapon by an assembly of persons resulting into his death. Such being the

position, Ms. Bhuyan submits that the learned Sessions Judge has rightly convicted the appellants under Section 302/34 IPC. Therefore, the impugned

judgment and order does not call for any interference by this Court.

16. We have considered the submissions advanced by the learned counsel for both the sides and have also carefully gone through the materials

available on record.

17. Now let us first appreciate the depositions of the Prosecution witnesses.

i. The PW-1, Kashed Ali, the informant and brother of the victim has deposed that the incident took place at about 08:30 PM on 05.07.2004. There

had been a dispute as regards the possession of land of Rajiv Gandhi College between Nazir Ali and his group including the accused persons and

Nimuddin (deceased) and his group. A meeting was held at about 05.00 PM on 05.07.2004 at the College campus to arrive at a settlement between

the quarreling parties. Since no settlement could be arrived at that meeting, the party of Nazir Ali left the meeting. According to PW-1, he was also

present in the meeting and left the meeting with one Makib and came back to his house and Nimuddin went to the brick kiln where he was serving as

a Chowkidar. According to the version of PW-1, the accused persons went to the house of Gaonburah, Nur Hoque at about 08:00 PM and after

coming back therefrom, when the accused persons came across the PW-1 in the shop of one Md. Ali, the accused persons asked the PW-1 about the

deceased Nimuddin and accordingly PW-1 informed the accused that Nimuddin was at brick kiln. PW-1 also deposed that the accused persons

threatened that they would assault the PW-1 and therefore, he went back to his house and accused persons went towards the west. The PW-1

further deposed that about 10 minutes thereafter, there was a hue and cry in the village. One Ashim Ali informed that the accused person had

assaulted Nimuddin and left him on the road. The PW-1 rushed to the place of occurrence and found Nimuddin lying unconscious on the road. PW-1

saw injuries on the back side of the head near the right armpit, left side of the chest. He also saw injury on the right side of the head. Injured person

was immediately taken to Tihu Hospital and the Doctors declared him dead. Thereafter FIR was lodged by the PW-1 next day i.e. on 06.07.2004.

During the cross-examination, the PW-1 had stated that he made a statement to the police that after dissolution of the meeting without any settlement

he had left the place of meeting with Mukib Ali. He denied the suggestion that he did not state before the Police about Rafique Ali (PW-3) telling him

that accused Nazir had hacked Nimuddin in his head and leg with axe, Jalal had attacked the victim on his chest with dagger, Rashim had attacked

with dagger and Uzir had attacked on the head of the victim with lathi.

The defense had failed to shaken the testimony of the PW-1. During cross-examination, the PW-1 had reiterated and reaffirmed his earlier statement

made during examination in chief.

ii. PW-2, Mustt. Jakima Begum is an eye witness. She is the sister of deceased Nimuddin. She had deposed to the effect that the incident took place

on a date around three and half years back at about 08:30 PM. According to her testimony, at that point of time, Nimuddin the Mohori of KBIT, Brick

Kiln saw her and addressed her as â??Maiâ?. At that juncture, accused Nazir Ali (Appellant No. 1) hit at the back side of Nimuddinâ??s head with

an axe and fell him down on the ground. According to her, she witnessed the scene with the help of a two battery torch that was in her hand. With the

help of the said torch, she could see Nazir Ali (appellant No. 1) had hacked in the left leg of the Nimuddin with an axe. At that moment, Rashim Ali

(Appellant No. 2) dealt a heavy dagger attack near the left side of the chest of the Nimuddin but the dagger slipped off. Thereafter, accused Jalal

(Appellant No. 3) attacked the victim below his right armpit with dagger and in

the meanwhile Uzir Ali (Appellant No. 4) hit Nimuddin with lathi. The said witness deposed that on seeing this, she started raising alarm. The accused person put her under threat and threatened that they would harm her too. She further deposed that after committing the incident, the accused persons fled away from the spot.

During her cross-examination, PW-1 had reiterated and reaffirmed her statement made during examination in chief. She denied the suggestion that on

the date of occurrence, the deceased Nimuddin and the members of his team went to the house of Nazir Ali (Appellant No. 1) for committing decoity.

She denied the suggestion that she neither stated to the Police nor to the Magistrate that Nazir had hacked Nimuddin on head and legs with axe.

The prosecution has failed to shaken and dislodge her testimony.

iii. PW-3, Rafique Ali is another eye witness. He deposed that the incident took place at about 08:00 PM on a day about 3 years back on the road. He

also deposed that his house is situated near the place of occurrence. According to him, he went to the nearby shop just before the incident. While

coming back from the shop, he saw Nimuddin in a bicycle. He had a torch in his hand. Then Nazir (Appellant No. 1) hacked Nimuddin on his head

with an axe at the place of occurrence. Then Rashim (Appellant No. 2) attacked Nimuddin near left side of his chest with dagger. He further deposed

that right at that moment, Uzir (Appellant No. 4) hit Nimuddin with lathi and then Jalal (Appellant No. 3) hit Nimuddin on the right side of his chest

with dagger. Thereafter, accused persons fled away. He deposed that he witnessed the incident from a distance of 24 feet from the place of

occurrence. He saw the accused persons in the flash of the three battery torch which he had in his hand. The accused left the lathi etc. at the place of

occurrence. Thereafter, public took Nimuddin to Hospital.

During his cross-examination, he affirmed that he saw accused Nazir had hacked on the back side of the head of Nimuddin with an axe with his both

hand. He further affirmed during cross examination that thereafter, the rest of the accused persons hit the victim. He also denied the suggestion that

he had not seen the incident, that he had not stated to the police that Rashid and Jalal had hacked the Nimuddin with dagger.

Thus the testimony of this witness also remain unshaken. Rather his testimony was reaffirmed during the cross examination by the defense.

iv. PW-4. Md. Didar Hussain, as per his version, reached the place of occurrence subsequently and saw Nimuddin lying on the ground near the

boundary of the house of one Kashim and also saw Jakim Begum (PW-2) and Rafique Ali (PW-3). On being asked, they (PW-2 and PW-3) replied

that Nazir, Jalal, Uzir Ali and Rashim had attacked Nimuddin.

During cross examination he stated that it was a moonlight night. He also denied the suggestion that the victim Nimuddin was related to him.

Thus his evidence goes to show that he saw Nimuddin lying at the place of occurrence and also found the two PWs (PW2 and PW3) in the place of occurrence. And he has not witnessed the commission of the Crime.

v. PW-5, Sri Dipak Sarma, a constable attached to Tihu Police Station, was on duty at Tihu Police Station, deposed that he accompanied the S.I. M.

M. Barowati and S.I. B. Kalita to the place of occurrence. He is a witness to the Inquest done on the dead body of the victim.

This witness is not vital for determination of the case.

vi. PW-6 is Secretary to the Principal of Rajiv Gandhi College, who was present in the meeting of settlement between the two quarreling parties.

According to his version, the accused objected to letting out the land of the College for Cultivation to Nimuddin and his group and the meeting was

held on 05.07.2004 at 03:00 PM and it lasted upto 06:00 PM. He further deposed that the land was equally allotted between the two parties.

Subsequently he heard about the death of Nimuddin.

In his cross examination, he deposed that the land was divided equally between the two groups and they left the meeting satisfied by the decision of the meeting.

His version depicts the existence of the dispute between the group of the victim and the accused regarding right of cultivation over the land of the

College and objection of accused person for settling the land in favour of the group in respect of which the victim was also a part. But according to him the dispute was amicably settled.

vii. PW-7, Sri Dhiren Thakuria is the Principal of Rajib Gandhi College. He was also the part of the meeting. He also deposed regarding issue of dividing the possession of the land equally between the quarrelling parties.

During cross examination he has stated that he came to know about the death of

victim subsequently from the newspaper.

viii. PW-8, Azam Ali, another brother of the victim, is a witness to the Inquest done on the dead body of the victim. He was not even cross examined.

ix. PW-9, Md. Nur Haque Ali, is the seizure witness. He put his signature in the Ext-3 Seizure List.

During cross examination he deposed that he did not know to whom the seized articles belonged.

x. PW-10 Achyut Narzary was the Doctor on duty at SMK Civil Hospital, Nalbari. On 06.07.2004 he had conducted the post mortem examination on

the dead body. As per the post mortem report (Exhibit 4) following injuries were found on the dead body.

1. Lacerated injury of scalp 2x2 cm cover the left parieto occipital region is fracture of occipital bone(left).

Membrane, Brain and spinal cord are congested .

(1) Deep 1 cm stab injury over the right chest wall at the level of occipital to the right side of abdominal wall 4 cm in length.

Right pleurae punctured

Larynx and tracheae is intact . Right lung is injured. Left lung is intact

.Pericardium is intact. Heart is empty. Vessels is intact.

Walls is deep horizontal abrasion over the right side of abdomen 4 cm in length. Peritoneum is intact. Mouth, pharynx esophagus is intact. Stomach and

its contents, Small intestine and its contents , large intestine and its contents are congested. Liver, spleen , kidneys , Bladder, Organs of generation,

Extrema, and internal are healthy.

1. Lacerated injury of scalp with fracture of occipital bone.

2. Deep stab injury over the right side of chest injury the right lung

3. Cut injury of the lower end of left leg with fracture of lower and tibia. All the wounds are ante mortem.

In my opinion death is due to hemorrhage caused by injuries to the vital organs (brain and lung)

During cross examination, he deposed that the Scalp Injury was 2x2 cm length and breadth. He further stated that the stab injury in the right side of

the wall is sufficient to puncture the Pleurae. It was affirmed by him during cross examination that he had examined the Pleurae and after crossing the

muscle and bond Pleurae can be rusted and that he found lacerated injury on the Scalp. He deposed that he did not mention the measurement of the

Cut injury over the left leg and did not mention the nature of weapon by which the injuries were inflicted.

Deposition of this witness was also unshaken. And from his deposition and the Report (EXT.4), the nature of injury as well as cause of death was established.

xi. PW-11, Medini Mohan Baruti was the Officer In Charge of Tihu Police Station on the date of the occurrence. He only collected the post mortem

report and submitted charge sheet against the accused. He deposed that S.I. Biren Kalita (PW12) had conducted the investigation.

xii. PW-12, Sri Biren Kr. Kalita, the investigating officer in the case, deposed that he went to the place of occurrence since the dead body was in the

hospital. He deputed police personal at the hospital, drew sketch map. He seized one four ft long spear with iron pipes, one lathi made out of betel nut

tree and one old bicycle from the place of occurrence. He was also present during the inquest done by one Ashim Sarma, Executive Magistrate. He

also deposed that he recorded the statement of the PW2, Jakima Begum and got her statement recorded under Section 164 Cr.P.C. He examined the

witnesses, collected post mortem report, arrested accused Nazir Ali (appellant No. 1) and Uzir Ali (appellant No. 4). He could not arrest other

accused as they had absconded. Thereafter, he was transferred and subsequently one Medini Mohan Baruti (PW-11) submitted the charge-sheet.

During his cross-examination, he stated that witness Kashed Ali, the informant (PW1) while making statement under section 161 of the Cr.P.C, did

not disclose that Rashim Ali (appellant No. 2) and Nazir Ali (appellant No. 1) had assaulted the deceased in his head and leg by means of axe, and

that Jalal (appellant No. 3) assaulted in the wrist. He also deposed that witness, Jakima Begum (PW2) during her statement recorded under Section

161 Cr.P.C., did not disclose that while she raised hue and cry then accused persons threatened her with dire consequences. PW-12 also deposed,

during cross-examination that PW3 (Rafique Ali) during his statement recorded under Section 161 Cr.P.C. did not disclose that Rashim Ali (appellant

No. 2) and Jalal (appellant No. 3) assaulted the deceased by dagger. He stated, during cross-examination that PW2 during his statement recorded

under Section 161 Cr.P.C. did not disclose that he had a three battery torch in his hand and witnessed the occurrence in the light of the torch. He

stated that he did not seize any torch light from Jakima.

Thus, it can be seen that during cross-examination of the I/O (PW12), the defense side had brought on record certain contradictions in the

testimonies of PW1, PW2 and PW3. Since such contradictions in the testimonies of these witnesses have been relied upon by the defence side so as

to impeach the prosecution case, we propose to deal with them in greater details in the later part of its judgment.

xiii. PW13, Sri Ashim Sarma, was the Executive Magistrate and performed the inquest over the dead body of the victim, identified by one Amzad Ali.

He deposed that he prepared the inquest Report.

During Cross Examination he deposed that multiple stab injuries were found on the body of the deceased but he did not mention whether these injuries

were found on the back side or the front side of the body.

xiv. PW 14, Mrs. Barnali Mahanta was the judicial Officer 1st Class, who had recorded the statement of PW2, Jakima Begum under section 164

Cr.P.C. on 15.07.2004, on being identified by UBC 119 Bhagya Deka. The said witness has proved her signature put in Ext.8 (statement of Jakima

Begum recorded under section 164 Cr.P.C.)

18. The accused persons had denied all the circumstances put to them, while recording their statements under Section 313 Cr.P.C. and led evidence

through DW1, DW2, DW3 and DW4 in their defense.

19. The Depositions of the DWs are as follows:

i. DW1, Badrul Ali deposed that while he was serving in Morigaon, he used to attend his office from Guwahati and the accused Jalal (appellant No. 3)

used to stay at his residence and on the date of occurrence also he resided with the DW1. After the incident, accused appellant No. 2 left the house

of the DW1. He denied the suggestion of prosecution that Jalal was not in his residence on the date of occurrence.

ii. DW2, Md. Hamid Ali deposed that his sister, Nilima Begum got married with PW3, Rafique Ali. On 05.07.2004, in the afternoon, DW2 reached the

house of his sister. On that night, at about 9.30 p.m., they heard that somebody shouted â??Decoit and Decoitâ?. DW1 also went to the place of

occurrence and saw a person lying on the ground and people shouted that he was Nimu Decoit. He did not notice accused persons present at the dock, at that particular time and place. As per his deposition, at that point of time, Nimu Decoit was alive, blood was coming out from the body of the said Decoit. Thereafter, they left the place.

During his cross-examination, he deposed that his house is at the distance of 8 to 10 k.m. from the house of the PW3. He could not recognize those persons who gathered at the place of occurrence. He noticed only 4/5 persons were present at the place of occurrence and some people had already left the place prior to his arrival.

iii. DW3, Mafiz Ali deposed that his house is near to the place of occurrence and there are 4/5 houses in between his house and the place of occurrence. When some people shouted Decoit, Decoit, he came out from his house and noticed in the light of torch that Nimu Ali was lying on the road behind the house of Kashem Ali. He also noticed blood in his body and at that time he was not in a condition to speak. He noticed injury at his chest and neck. He did not know who committed the murder of Nimu Ali.

During cross-examination, he has deposed that prior to his arrival at the place of occurrence, Nimu Ali was assaulted. He had noticed cut injury in Nimu Ali's leg, in the chest, he had noticed puncher wound. He has deposed that his niece married to appellant No. 3.

iv. DW4, Tezia Begum, mother-in-law of appellant Nazir Ali (Appellant No.1) deposed that on the date of occurrence, she went to the house of her son-in-law and while she was there, at about 8.30 pm, Nimu Ali, the deceased, Saifu Ali and Mokib Ali came to the house of appellant No. 1, tied the appellant No. 1, assaulted him and snatched away gold earring of her daughter, Iliza Begum, and took away Rs. 3,000/-. Thereafter, the other brothers of her son-in-law, namely Harmuj Ali and Uzir Ali (appellant No. 4) took them to nearby pharmacy. Later on, she heard that somebody killed Nimu Ali.

During cross-examination, she deposed that her son-in-law returned back after treatment provided at pharmacy. She also deposed that she is not aware, if her son-in-law, his brother and neighbouring people had chased the Decoit.

20. Upon analyzing the materials brought on record, the learned trial court was

of the view that the prosecution side had succeeded in establishing the charges brought against the appellants on the basis of the evidences adduced by the PW2 and PW3, as well as other circumstantial evidence, which go to show that the appellants had committed murder of the deceased Nimuddin.

21. We have carefully gone through the evidence available on record and find that homicidal death of deceased Nimuddin is well established from the post-mortem report Ext. 4 as well as from the testimony of PW10. The post mortem report also shows that the victim had died due hemorrhage caused by multiple injuries inflicted on the Vital organs (Brain and Lung). The evidence brought on record also establishes the fact that the incident took place on 05.07.2004 at about 8/ 8.30 p.m. on the road of village Chapra.

22. We also find from the material on record that PW2, Musst. Jakima Begum and PW3, Md. Rafique Ali are the two most important witnesses in the case. Let us, therefore, first examine as to whether, the evidence adduced by these two witnesses have correctly been appreciated by the learned trial court.

23. As noticed above, PW2 has categorically deposed that she had seen the four appellants namely, Nazir Ali, Rashim Ali, Jalal and Uzir Ali assaulting Nimuddin by means of Axe, Dagger and Lathi. The evidence of PW2 could not be shaken during her cross-examination. It is also seen from her statement recorded by the police under Section 161 Cr.P.C and before Magtistrate u/s 164 Cr.P.C. that her statements are consistent with that of her deposition during the trial.

24. The PW3 has categorically deposed that he saw the accused/ appellants attacking the deceased Nimuddin and he had vividly described the role of the each of the accused appellants. During cross-examination, his evidence could not be shaken. Thus, his evidence has remained un-impeached.

25. Mr. Choudhury, Learned Counsel for the petitioner had argued that the version of PW2 and PW3 discloses that though both of them have claimed to be present at the place of occurrence, they did not speak about the presence of each other at the scene. Moreover, the PW1, (informant) and PW2, the alleged eye witness and the victim are siblings; therefore, it is not believable that the PW1 while lodging the FIR, will not mention in the FIR that

PW2 was present at the place of occurrence. Therefore, according to Mr. Choudhury, learned Counsel for the Appellants the PW1 cannot be said to

be an eye witness and her presence at the place of occurrence itself is doubtful.

However, on a close scrutiny of the evidence adduced by these two witnesses PW2 and PW3, we are unable to accept the aforesaid argument of Mr.

Choudhury for the following reasons. Firstly, the defense has not laid such foundation during the cross-examination of either of PW1 or PW2 and

PW3. Secondly, in view of the un-impeached testimony of both PW2 and PW3, failure to mention about the presence of each other in the place of

occurrence cannot be a valid ground to disbelieve their testimony in absence of any specific challenge made during their the cross examination of the

witnesses.

26. The contention of Mr. A. Choudhury, learned Counsel for the appellants that the very fact of using torch light by the alleged eye witnesses for

purpose of identifying the accused suggest that it was a dark night and it was not possible to identify the assailants and that it is doubtful as to whether

torch light was there in the hands of the PW2, in the absence of recovery of such torch light, also fails to persuade us to accept his argument for the

reason that the PW2 did not say either in examination in chief or in her cross-examination that it was a dark night and nothing was visible. In fact no

suggestion from the defence side was made to the effect that it was dark in the night and nothing was visible. All the PWs, who reached the place of

occurrence subsequently, i.e. PW4, PW8 and PW9, deposed in one voice that they saw the victim lying on the road with injuries, from a distance. In

fact, the evidence adduced by the appellants, who according to their deposition reached the place of occurrence at later point of time, also saw the

victim lying on the road from a distance and also the injuries inflicted upon the victim. The PW2 has stated that she clearly saw the accused with the

help of torch light in her hand and such deposition remained unshaken during her cross examination.

27. Regarding the submission of Mr. Choudhury, learned Counsel for the Appellants that the PW1 and PW2 are Chance witnesses and therefore, only

on the basis of testimony of such witnesses, without there being any independent corroboration, the learned trial court could not have convicted the

appellants herein, we may note herein that a "Chance Witness" is a person who by coincidence happens to be present at the site of crime

committed. Law is well settled that the evidence of Chance witness cannot be

brushed aside simply because he/she is a Chance witness, but his/her presence at the place of occurrence must be satisfactorily explained by the prosecution so as to make his/her testimony free from doubt.

28. In the case in hand the PW2, in her evidence had satisfactorily explained her presence at the place of occurrence. She had stated that at the time of occurrence she was going to Munia Ojah for her treatment and such statement of her has remained unshaken.

PW3, has also satisfactorily explained his presence at the place of occurrence in his testimony before the Trial Court. He categorically deposed that few minutes prior to the incident, he went to the nearby shop and was returning from the shop and was at a distance of almost 24 feet behind the victim, when the accused started attacking the victim. Such testimony also remained unshaken.

29. The learned counsel for the appellants has also made an attempt to impeach the evidence of PW2 and PW1 on the ground that both of them were close relatives to the victim and therefore, were interested witnesses.

30. The question of reliability of evidence adduced by close relative of the victim was considered by the Honâ??ble Supreme Court in case of Dalip Singh vs. State of Punjab reported in AIR 1953 SC 364 wherein it was observed that when feelings run high and when there is personal enmity, it is true that there would be a tendency to drag an innocent person against whom a witness has a grudge but foundation must be laid for such criticism and mere fact of relationship far from being a foundation, is often a guarantee of truth.

31. In the present case, it is true that the PW1 and PW2 are related to the victim and therefore, can be viewed as interested witnesses. However, their testimony finds due corroboration from the evidence of PW3, who is an independent witness examined by prosecution. Moreover, the defence has also failed to lay the foundation to impeach the testimony of the said two witnesses on the ground that they, being close relatives of the victim, had deposed falsely before the court. Under the circumstances, we are of the opinion that their evidence need not be discarded merely on the ground that they were close relatives of the victim, if such evidence is otherwise found to be reliable.

32. In so far as the discrepancies and improvements in the testimony of PW2 and

PW3, we have perused the statement recorded under section 161

Cr.P.C. of both these witnesses as well as the statement of the PW2 recorded under Section 164 of the Cr.P.C. and find that there is no such

material discrepancies and/or improvements. The discrepancies, if any, are of minor effects and do not, in our opinion have a relevant bearing in the

outcome of the case. On the contrary, the evidence of the two eye witness are found to be credible and trustworthy. Therefore, minor discrepancies

which has not affected the core of the prosecution case, cannot be made a ground to doubt the trustworthiness of the witness.

The Honâ??ble Apex Court while dealing such issue in Sunil Kumar Sambhudayal Gupta v. State of Maharashtra reported in (2010) 13 SCC 657,

held as follows:

â??30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that

they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core

of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must

form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again

without justifiable reasons. (Vide State v. Saravanan (2008) 17 SCC 587.)â??.

33. The common intention on the part of the appellants to fatally assault the deceased is also well established from the evidence brought on record.

From a careful appreciation of the evidence brought on record, we find that the prosecution has succeeded in establishing the chain of circumstances

so as to prove the charges brought against the accused beyond doubt. The motive of the crime is also apparent which is nothing but dispute over land.

34. Therefore, we do not find any good ground to interfere with impugned judgment and order passed by the Learned Session Judge, Nalbari

convicting the Appellants.

35. In the aforesaid backdrop, we are of the opinion that the prosecution has succeeded in establishing the charges brought against the

Appellants/accused persons, Namely, Nazir Ali, Rashim Ali, Md. Jalal Ali and Md. Uzir Ali beyond reasonable doubt. Their conviction is, therefore,

affirmed.

36. The appeal is dismissed. Send back the LCRs.