
(2018) 06 GAU CK 0021
In the Gauhati High Court
Case No : Criminal Appeal No. 371 of 2013

Sarkar Unush Mandal And Anr APPELLANT
Vs
State Of Assam And Ors RESPONDENT

Date of Decision : 06-06-2018

Acts Referred:

Code of Criminal Procedure, 1973 — Section 161, 162(1), 207, 209, 313, 372, 382
Indian Penal Code, 1860 — Section 141, 146, 147, 148, 149, 299, 300, 302, 341
Indian Evidence Act, 1872 — Section 25, 26, 27

Citation : (2018) 06 GAU CK 0021

Hon'ble Judges : UJJAL BHUYAN, J;AJIT BORTHAKUR, J

Bench : Division Bench

Advocate : J Rahman, M Beria

Final Decision : Disposed Off

Judgement

Borthakur,J

1. Heard Mr. D. A. Kaiyum, learned counsel for the appellants. Also heard Mr. B. Sarma, learned Addl. P.P., Assam, appearing on behalf of State

respondent No. 1; and Mr. Kanak Sarmah, learned counsel, appearing for private respondents No. 2 to 4.

2. This is an appeal under Section 372 read with Section 382 Cr.P.C. preferred by the informant and another against the judgment and order, dated

16.09.2013, passed by the learned Additional Sessions Judge, F.T.C., Dhubri, Assam, in Sessions Case No. 41/2000, whereby the accused

respondents and another are acquitted of the charges under Section 148/149/302 of the Indian Penal Code (IPC), on benefit of doubt.

PROSECUTION CASE:

3. The appellants's case, precisely, is that the appellant No. 1, namely, Sarkar

Unush Mandal, son of late Monser Munsî, a resident of Hazari

Zhorna village, under Gauripur P.S. lodged an F.I.R., on 30.06.1998, with the Officer-in-Charge of the said P.S. alleging that on that day at about 6:30

a.m., when his nephew Jashim Mandal was going to Alamganz bazar, through a village road, all of a sudden, the respondent Nos. 2, 3, 4 and other

two, namely, Jamal Sheikh(since dead) and Abdul Sheikh(since dead) intercepted him, in front of the house of co-villager Fazar Mollah. They picked

up an altercation with Jashim and grievously injured him stabbing in his abdomen with dagger, which resulted in his instantaneous death.

INVESTIGATION:

4. Based on the above F.I.R., Gauripur P.S. G.D.E. No. 120, dated 30.06.1998, was made and registered as Gauripur P.S. Case No. 102/1998

under Sections 147/148/149/341/302 I.P.C. The Officer-in-Charge of the said Police Station endorsed the case to S.I. Binay Kumar Barman for

investigation and after completion of investigation, he laid a charge-sheet under Sections 147/148/149/341/302 I.P.C. against the respondent Nos. 2, 3,

4 and 3(three) others.

TRIAL AND ACQUITTAL:

5. As the offence under Section 302 IPC is exclusively triable by the Court of Sessions, the learned Judicial Magistrate, 1st Class, Dhubri, after

furnishing copy as required under Section 207 Cr.P.C., committed the case to the Court of learned Sessions Judge, Dhubri, under Section 209 Cr.P.C.

for trial, vide order, dated 29.07.2000, passed in G.R. Case No. GPR 10/1998. Thereafter, the case was registered as Sessions Case No. 41/2000.

The learned Sessions Judge, Dhubri, after hearing the learned counsel of both sides, and consideration of the case record along with the documents,

submitted therewith, having formed an opinion that there is ground for presuming that the accused persons committed the offences, framed charges

under sections 148/149/302 IPC against all the 6(six) accused persons inclusive the respondents No. 2, 3 and 4 vide order, dated 24.06.2002, passed in

Sessions Case No. 41/2000. The learned Sessions Judge, Dhubri, read-over and explained the charges to the accused persons to which they pleaded

not guilty. Thereafter, the prosecution examined as many as 14 witnesses including the autopsy surgeon and the Investigating Officer (I.O.). The

defence cross-examined them at length. After closing the evidence of the

prosecution side, the statements of the accused persons including that of the respondents No. 2, 3 and 4 were recorded under Section 313 Cr.P.C., vide order, dated 01.03.2005. They pleaded not guilty and inclined to examine witnesses in defence. However, later on, they did not examine any witness.

Â It may be mentioned that during trial of the case, the accused persons namely, Jamal Sheikh @ Jamal Jogani and Abdul Sheikh died and accordingly, the case abetted against them.

Â The learned Sessions Judge, Dhubri, after hearing the arguments advanced by the learned counsels of both sides, and appreciation of evidence adduced by the prosecution side, acquitted all the accused persons including the respondents No. 2, 3 & 4 of the charges on benefit of doubt.

LEGAL POSITION:

6. It needs to be mentioned that 'rioting' has been defined in Section 146 IPC. The offence of 'rioting' consists of the use of force or violence by an 'unlawful assembly', defined in Section 141 IPC, in the prosecution of the common object. Rioting with deadly weapons is punishable under Section 148 IPC, which is a distinct offence. Section 149 IPC, on the other hand, says that every member of such unlawful assembly is guilty of the offence committed in prosecution of the common object, i.e., sharing of the common object by the unlawful assembly. The said section constitutes a substantive offence.

Â Further, Section 299 IPC defines what is 'culpable homicide'. A person is said to have committed 'culpable homicide', if the act by which death is caused, is done with the (a) intention of causing death, or (b) intention of causing such bodily injury as is likely to cause death, or (c) knowledge that the act is likely to cause death. 'Intent' and 'knowledge' in the ingredients of Section 299 postulates the existence of a positive mental attitude and this mental condition is the special mens rea necessary for the offence. In the scheme of the Penal Code, 'culpable homicide' is a genus and 'murder', defined in Section 300 IPC, is a specie. All murders are 'culpable homicide', but not vice versa.

Culpable homicide amounts to murder only if prosecution can bring the case within any of the four Clauses, Firstly, to Fourthly, of Section 300 IPC, which are to be ascertained from evidence or attending circumstances regarding the numbers, situs, nature of the wounds and type of weapons used,

etc.

EVIDENCE:

7. To appreciate the matter, at hand, we have to first look at the evidence of all the prosecution witnesses minutely and for that reason, the evidence

of the witnesses are noted as under:

Â PW 1, Dr. Kamal Deka, is the doctor, who conducted post-mortem examination on the dead body of the deceased Jashim Mandal on being

identified by Constable No. 54-Monoranjan Roy of GPR P.S. and on examination, he found as follows:-

â??Multiple penetrating wounds present on the anterior abdominal wallÂ Â Â Â on the upper half on the left side;

Four oval shape penetrating wounds present on the upper abdomen on the left side: 0.5cm X 1.5 cm;

Two penetrating wounds present on the left side of the abdomen in the middle part & omentum came out through one wound, size-1

cmÂ Â Â Â Â x 1.5 cm;

Two penetrating wounds present on the back in the mid thoracic region on the right side: 0.5cm X 1.5 cm oval shape;

One penetrating wound present on the right side of the back, below right scapular angle: 1cm X 1cm;

One penetrating wound present on the back of the level of lower thoracic vertebral onÂ Â Â Â the left side: 1cm X 1cm;

In the chest: Penetrating injury on the right side, at three places from the back.

On dissection, blood present in thorax, right lung is collapsed, lung injured with penetrating object at three places. Abdomen-wall is penetrated at

multiple places in front and back. Multiple perforationÂ Â Â Â Â of peritoneum is present. Peritoneal cavity is filled with blood.Â Â Stomach is

cut at the greater curvature. Omentum is injured at three places. Spleen is perforated at two sides with penetrating sharp object. Injuries are ante-

mortem.â??

Â The doctor held the opinion that death was due to shock and hemorrhage as a result of multiple penetrating injuries sustained by the deceased and

he has proved the post-mortem report vide Ext. 1 and his signature vide Ext. 1(1). The defence declined to cross-examine the doctor.

PW-2 Md. Fakir Chand, inter-alia, deposed that all the six accused persons are residents of the same locality. The occurrence took place on a day at about 6.30 A.M. At that time, he was going to Nayarhat Bazar to buy goats. On his way, he found Fazar Ali (PW-6) working in his turmeric field and on his side, accused Jamal and Naser were sitting and accused Jamal stopped him. Jamal told him that Jashim Mandal was quarrelling. He advised him to complain to his guardian. At that moment, Jashim was seen coming out of his house via tinali. Jamal asked Jashim to stop. Jamal approached and catching hold of Jashim, asked him what he could do then. Naser stabbed Jashim on the left side of his abdomen. Witnessing the incident, he and Fazar(PW-6) ran towards them and by that time, Naser stabbed Jashim several times with a dagger. In the meantime, Jashim's wife, children and others namely, Palku(PW-12), Sheikh, Ibrahim, etc., reached the place. Abdul (PW-11) and his son Fakir, came from their agricultural field. He returned home. Naser threatened that if anybody stood witness, he would face the same fate of Jashim. His statement was recorded by a Magistrate vide Ext. 2. In cross-examination, he, inter-alia, stated that at the relevant time, he was going by Hazari Jhorna path. The deceased Jashim addressed him as brother, but there was no visiting terms. After about 5 minutes of the occurrence, 20/25 people gathered at the place of occurrence and among them, were Abu Bakker (PW-13), Retza, Puluk, Haran and Yunus. He reported the incident to the Secretary of the village, Joinal. Witnessing the incident, he and Fazar(PW-6) raised hue-and-cry.

PW-3 Md. Sarkar Yunus Mandal is the informant and uncle of the deceased Jashim. His evidence is that on 30.06.1998, at about 6.30am, while he was at home, all of a sudden, he heard great commotion in Hazari Jharna Gaon. He noticed from a little distance, Naseruddin stabbing Jashim @ Akbar Hussain by a dagger. Accused Ibrahim, the maternal uncle of Naseruddin, who was at a nearby place, asked Naseruddin to finish Jashim. Naser, in reply said that Jashim was finished. Naseruddin's father Jamal took over one dagger from accused Abdul, who was standing nearby and stabbed Jashim. Ibrahim, Abdul, Fakir, and Babu were also seen at the place. He has seen Ibrahim holding a rod, Abdul with a Falla, Fakir with a stick and Babu with a ballam. After killing Jashim, the accused persons left the place and thereafter, he went near. At that time, Fakir Chand, Fazar Ali

Mulla(PW-6), wife of Jashim, Safura(PW-4), daughter of Jashim, Jeleka(PW-5), son of Jashim, Sabaruddin were found at the place of occurrence.

Finding the dead-body, he rushed to file the FIR. Police arrived with a Magistrate and took away the dead-body. Jashim sustained 10/12 injuries in his

chest and back. In cross-examination, he, inter-alia, stated that his house is situated about 1 km away from the place of occurrence. Initially, he

witnessed the incident from a distance of about 300 gauges and being shocked, stood stiff at the place. He does not know if some militants fired at

Jashim, but, he was hospitalized. He denied the defence suggestion that Jashim was shot at by gun. Jamal (PW-8) wrote the FIR, which he lodged as

the guardian. Fazar Ali Mulla (PW-6) was seen at the place of occurrence from before. Police recorded his statement in presence of a Magistrate at

the place of occurrence. The incident of firing had taken place at a distance of about 6 miles from the place of occurrence. 3/4 days before the

incident, shopkeeper Jamal was requested to convene a bichar over some dispute. He denied the defence suggestion that in his statement given before

the police, he stated that having learnt about the incident from the local people to the effect that under the leadership of accused Jamal Jugani,

Naseruddin stabbed Jashim and then escaped, he lodged the FIR.

Â PW-4 Musstt. Safura Begum is the wife of the deceased Jashim Mandal. According to her, the incident took place on a day about 4 years ago at

about 6 A.M. At that time, she was at home. Accused Ibrahim called her husband Jashim to have a cup of tea at Alamganj. Her husband

accompanied Ibrahim. As soon as Jashim reached the road, accused Jamal appeared at the place and caught hold of the hands of Jashim. She had

gone out to the road along with her husband Jashim. When she saw Jamal caught hold of hands of Jashim, she rushed to the place and held her

husband in support. At that moment, accused Naser stabbed her husband with a dagger. Ibrahim separated her from her husband.

Jamal's wife and daughter arrived and former held her by her hands and latter, by her waist. She saw Naser stabbing her husband a number of

times more. Accused persons namely, Fakir, Babu and Abdul, arrived at the place. Babu pressed Jashim's neck. Disengaging herself, she went

near to her husband and held him to sit. Her husband's intestines perforated. Accused Naser tried to stab her husband with a dagger again.

Accused Ibrahim was seen telling â??do not leave poison in the tail after killing the snakeâ?. Then Jamal took one dagger from Abdulâ??s hand and

stabbed her husband in his chest. Ibrahim crushed Jashimâ??s testicles with his legs. They left the place of occurrence, saying that their job was

finished. She did not notice as to who else had come there at that time. Later on, police arrived and recorded her statement. She gave a statement

before a Magistrate one month later. She put thumb impression in the said statement. In cross-examination, she, inter-alia, stated that she wailed and

shouted. Yunus Mandal(PW-3) rushed to the place of occurrence, hearing her alarm. She told him about the accused persons, who assaulted Jashim.

When she was holding the hands of her husband, her fingers received hits of the assault. Nobody had fired gun shots at her husband before. Her

husband asked Jamal for a â??bicharâ?? as Jamalâ??s son assaulted their son. She did not tell any of her neighbours about the incident. She denied

the defence suggestion that some militants had killed her husband and that her husband was involved in illegal timber-trade with them.

Â PW-5 Musstt. Jeleka Khatoon is the married daughter of the deceased Jashim. Her version is that at the relevant time of the occurrence, she was

at her fatherâ??s house as she had come to stay at his house about 2 months before the incident. Accused Ibrahim went to her fatherâ??s place

and called her father away to a shop. When they reached the road, accused Jamal held her father by his hands and asked â??What will you do

now?â? At that moment, Jamalâ??s son accused Naser appeared at the place and stabbed her father in his abdomen with a dagger. Accused Abdul

held her father by the hair. Abdulâ??s sons Babu and Fakir held her father by the neck and hands respectively. When she offered resistance, she

was kicked by Jamal. When Ibrahim told Jamal to finish her father, Jamal took one dagger from Abdulâ??s hands and stabbed her father in his chest

and her father died on the spot. In cross-examination, she, inter-alia, stated that when she raised alarm, nobody from the neighbouring area had come

out. Neighbours, namely, Abdul Fakir, Arfan, Amir Ali, Samser, Rahim, Majid, and Badshah had not come out, when she had raised the hue-and-cry.

However, a lot of villagers had arrived at the spot, after her fatherâ??s death, whose names she did not know. She denied the defence suggestion

that she was not present at the time of the incident and that she did not witness the incident.

Â PW-6, Md. Fazar Ali, a neighbour of the deceased Jashim, had, inter-alia, stated that he knew the accused persons. The deceased had died about 4 years ago. The incident took place at about 6:30 A.M. One day, while he was working in his turmeric field, Jamal Jogani had said that Jashim would be finished. A little later, when Jashim came out of his house alone on the road, Jamal grabbed Jashim's hands and Nasir came there and stabbed Jashim with a dagger in-between his chest and abdomen and the deceased died on the spot. Jashim's wife, daughter and son Sabur arrived at the spot and the accused persons fled away. He put thumb impression in the statement recorded by a Magistrate. In cross-examination, he stated that people used the road, on which the incident took place, all the time. On the day of the incident, Jashim was going alone towards the north and on hearing his cry, he went there and saw Jashim falling down and he could not say anything more. He further stated that Jashim had been under medical treatment in Dhubri Civil Hospital once, after sustaining bullet injury for about 10/12 days. On an earlier occasion also, Jashim, who dealt in timber, had been shot at on that road itself, but he did not know as to who fired the gun shot at Jashim. He further stated in his cross-examination that Badsah, Samad and Yunus took Jashim towards the BSF Camp by crossing Hazari Jhorna stream and returned back with Jashim to the place of occurrence after about 2 hours and he did not know as to where they kept Jashim during that 2 hours period. He categorically stated that he did not see PW-2 Fakir Chand. Except Jamal and Naser, he did not see any other accused persons there. He denied the defence suggestion that someone had killed Jashim somewhere else and left the dead body on the road and that he had falsely implicated the accused persons.

Â PW-7, Md. Joynuddin Sheikh, a co-villager, stated, inter-alia, that the incident took place in 1998, in a morning at about 6 o'clock. He heard hue and cry and saw Jashim lying on the ground near the house of PW-6 Fazar Ali. The deceased was found dead with stab injuries on his person. He saw Fazar, Fakir Chand and Palku there and other people arrived afterwards. He learnt from Fazar that Jamal and Naser had killed Jashim. Police came and took away the dead body. He stated that Ext.3 is the inquest report and Ext.3 (1) is his signature. In cross-examination, he stated that he had reached the spot about 10/15 minutes, after the incident and that he did not know what the Daroga wrote in Ext.3. He stated that he had narrated

the incident to Yunus and asked him to lodge the FIR.

Â PW-8 Md. Sarkar Alam Jamal, another co-villager, had, inter-alia, stated that the accused persons are his co-villagers and that Jashim had died on

30.06.1998. About 4/5 persons went to him and narrated the incident, whereupon he wrote Ext.1/Ejahaar and read over the same to them. He obtained

complainant Yunus's signature on it and he testified that Ext.1 (1) is Yunus's signature and Ext.1 (2) is his signature. In cross-examination, he

stated that about 3/4 villagers including Yunus asked him to write the ejahaar and the same was written in the house of Yunus at about 9.30 AM. He

further stated that the house of the complainant is on the side of a stream and the house of the deceased Jashim is on the other side of the said stream

which are 1 KM apart.Â

Â PW-9 Md. Rajab Ali, the co-villager, inter-alia, stated that he knew the accused persons and that Jashim died 4/5 years ago. He stated that in his

presence at the Police Station, on being asked, Naser told the Daroga that he had murdered Jashim and told that his sister Jamiran knew about the

weapons of offence. When police called Jamiran, she produced two daggers and two spears and thereafter, police seized the same. Ext.4 is the

seizure list and Ext.4 (1) is his signature. In cross-examination, he admitted that his eye-sight is poor and he cannot see even the nearby objects, but he

can hear properly. He stated that the dagger like weapon which Jamiran brought, may be found in ordinary households. When police brought Naser,

about 10/15 persons were present there including him, but he did not know the names of those persons. He denied the defence suggestion that Naser

did not confess before the police to have killed Jashim and accused Naser was brought there with his waist tied. He stated that he was an accused in

Nur Hussain murder case and Abdul was a witness in that case. He further stated that the weapons were wrapped with a cloth.

Â PW-10 Md. Aran Ali, other co-villager, had, inter-alia, stated that the accused persons are his covillagers and that about 3/4 years ago, while he

was returning home after shopping, in the afternoon at about 2-2:30 P.M., he saw accused Naser being led to his house by the police. On being asked

by the police, Naser told him that he had killed Jashim. Naser's sister Jamiran, who was present there, brought two daggers from near the jungle

of their house and the police seized the same. In cross-examination, he, inter-

alia, stated that Naser was in handcuffs and police personnel were carrying lathis and threatened to beat up Naser, if he did not produce the weapons. He stated that it was about 15/16 days after the incident and neither she nor police went with Jamiran to bring weapons, so he does not know as to whose stuff Jamiran had brought or from where she brought the same. He further stated that such type of daggers is available in ordinary households. He denied the defence suggestion that Naser did not confess before police and that Jamiran did not bring the two daggers.

Â PW-11 Md. Abdus Samad Mandal, a co-villager, inter-alia, stated that the accused persons are his co-villagers. He stated that Jashim Mandal died about 4 years ago. He further stated that at about 6:00 A.M., hearing hue and cry from his house, he went there and saw Jashim's dead body bearing stab wounds in his chest and back. Fakir Chand, Palku Sheikh and Fazar Ali were seen standing by the side of the dead-body. They told him that accused Jamal, Naseruddin and Ibrahim had assaulted Jashim and left, but he did not find them there. When police came for search on the following day, nothing was found in Jamal's house. Jamiran(Jamal's daughter and Naser's sister) could not find the weapons in the jungle near the house, so police made the search and found two daggers and a spear. Police seized the same and took his signature. In cross-examination, he admitted that Jashim(deceased) was his nephew. He admitted that he did not tell police that he had seen Jashim's dead body lying on the ground and that he had been told by Fakir Chand, Palku and Fazar Ali that Jashim had been killed by accused Ibrahim, Jamal and Naser. He did not know as to what had happen to the dead body. His younger brother Yunus Mandal filed the ejahar. He further stated that police came to the place of occurrence on the following day and nobody was present in Jamal's house, when police made the search, as the inmates of Jamal's house took refuge in Sanowar's house. The four police personnel searched for the weapons and one found out all the weapons. At the time of search, his nephew Moinuddin was present. He further stated that he did not know what was written in the seizure list.

Â PW-12 Md. Pulku Sheikh, who was declared as a hostile witness, inter-alia, stated that he knew the deceased Jashim Mandal, who died about 6 years ago, and the incident took place at about 6:30 A.M., while he was at his

home. On hearing commotion, he reached the road with other people and saw Jashim lying on the road. Jashim incoherently told him that accused Jamal and Naser had assaulted him.Â Jashim, who was bleeding, died on the way to the BSF Camp, while he was carrying him on a pull cart. He stated that he did not see Jamal and Naser on the road. Police came in the afternoon and he was released from the police station after questioning. Later on, he gave statement in the police station and in the Court.

Â In cross-examination by the prosecution side, he denied that he had stated before the police as well as in the Court that when he was returning home after defecting, he saw Jamal Jogani, Nasiruddin and Ibrahim sitting on the road and chatting with Fakir Chand. He also denied that when he came out on the road, he had seen Jamal grabbing Jashimâ??s hands, while Nasiruddin stabbing Jashim with a dagger and Abdul Kader, Babu and others rounded-up the spot taking spears and daggers and instigated Naser to stab Jashim. He stated that accused persons are his co-villagers.Â In cross-examination by the defence side, he, inter-alia, stated that his house and Jashimâ??s house are situated adjacent and that about 400/500 people had gathered at the place of occurrence and that he had not seen anybody making the assault. He stated that he had seen Jashim lying on the ground on the south bank of the stream and Jashim was taken on a pull cart to the BSF Camp by Badsah, Bakkar and one of Jashimâ??s brother. He stated that he neither asked Safura, wife of the deceased, anything about the incident nor heard anything from the villagers. He also stated that he did not see the accused persons assaulting at the place of occurrence. He further stated that some persons had fired gun shot at Jashim before the incident and that Jashim had been shot at, because of his involvement in illegal activities. He categorically stated that he did not know how the names of the accused persons have been mentioned in the ejahar and that he met Fazar Ali at the place of occurrence. He categorically stated that he had given his statement as tutored by the police and that he was not familiar with the witnesses, namely, Alam, Jalam, Rajib Ali and Arfan Ali, who belonged to a village situated to the north of their village.

Â PW-13 Md. Abu Bakkar, inter-alia, stated that Jashim Mandal died more than 5 years ago and that in the morning of the day of the incident, he heard hue and cry towards the stream and he saw Jamal Jugani, Naser, Abdul,

Babu and Fakir, who hail from a neighbouring village, returning to their home from the place of occurrence. He stated that he had crossed the stream and saw Jashim lying on the ground, while his wife and children crying by his side. He stated that he heard from the people that Jamal Jugani and Naser had killed Jashim and left. He also stated that he had heard Fakir Chand telling about it. He saw the accused persons going through the ridge of the agricultural field and also saw stab wounds in Jashim's chest, abdomen and in other parts of the body. In cross-examination, he stated that Jashim is the son of his father's younger brother and that, he did not know that Jashim had been shot at, for which he had to be hospitalized before the incident. He denied the defence suggestion that he did not state before the police that he heard Fakir Chand telling Yunus that Jamal Jugani, Naser and others had killed Jashim. He further stated that on reaching the place of occurrence, he became unconscious. He did not ask Jashim's wife and children anything. He further stated that Jashim was a cultivator.

Â PW-14,Â S.I. Binoy Kumar Barman, who was the Investigating Officer, inter-alia, stated that the Officer-in-Charge of Gauripur P.S. had entrusted him to investigate the Gauripur P.S. Case No. 102/1998. On the day of the incident, i.e. 30.06.1998, the Executive Magistrate held inquest on the dead-body of the deceased Jashim Mandal. He examined the witnesses at the place of occurrence. The dead body was, thereafter, sent for post-mortem examination. He stated that he apprehended accused Nasiruddin Sheikh and on being led by the said accused, he recovered and seized two iron spears kept concealed in a bamboo groove, near the house of accused Abdul Sheikh, who was also involved in the incident. He stated that after completion of the investigation, he submitted the charge sheet.

Â In cross-examination, he stated that Ext.6 neither contained his signature nor of the Executive Magistrate. He stated that while making statement before him, PW-3, Sarkar Yunus Mandal neither gave any description of the daggers nor stated that Ibrahim was carrying a rod in his hand and Abdul was carrying dagger and spear in his hands. The witness did not state before him that firing of gunshots had taken place near the place of occurrence.

He stated that he did not take the statements of Arfan, Sahjahan, Raju, Samser, Abdul Fakir and Arman, but he took the statements of Yunus and Fakir Chand. He stated that PW-6 Fazar Ali did not tell him that Badsah, Samser

and Yunus had taken the injured in a pull cart to the BSF camp by crossing Hazari stream. He also stated that PW-12 Palku Sheikh did not state before him that the injured was taken to the camp and that, the injured told Palku that he was assaulted by some persons. He further stated that the accused Naser had made a statement in connection with hiding of stuff in the jungle, as a third person, but not as a first person. He also stated that there is no mention as to how the accused was taken to the place, wherefrom the weapons were recovered. He denied the defence suggestion that accused Naser was taken in handcuff to the place from where the weapons were recovered. He also stated that he did not examine Jamiran. He also stated that he was accompanied by his staff, but their names were not mentioned and that he did not prepare any memorandum, in connection with recovery of the weapons. He also stated that he did not take photograph and did not seize the blood stained clothes of the injured. He also denied the defence suggestion that witness Fakir Chand was not at the place of occurrence.

ARGUMENTS:

8. Mr. Kaiyum, learned counsel for the appellants, submitted that while appreciating the evidence adduced by the prosecution side, the learned Sessions Judge failed to appreciate that there are consistent and convincing testimony to show that the chances of false implication of the accused respondent Nos. 2, 3 and 4 in the offences are eliminated beyond doubt. According to Mr. Kaiyum, the learned trial Court failed to appreciate that the discrepancies in evidence, which are highlighted in the impugned judgment, are absolutely normal errors of human observations occasioned by sudden shock and horror that developed at the time of the occurrence which took place in broad day-light, on public road and which in no case, can corrode the credibility of the prosecution witnesses. Drawing attention to the evidence of eye-witnesses, more particularly PWs-2 and 3, Mr. Kaiyum submitted that they could boldly withstood the tests of cross-examination and as such, there cannot be any reason to disbelieve their testimony. Mr. Kaiyum, learned counsel for the appellants further submitted that the impugned judgment of the learned Court below has resulted in gross miscarriage of justice to the victim's family as in the occurrence that took place in their presence, lost an innocent

sole bread earning member of the family due to improper appreciation of evidence. Placing reliance on the judgment of the Supreme Court, rendered in Mookkiah & anr. V. State, reported in (2013) 2 SCC 89, and of this Court in State of Assam v. Golbar Hussain & ors., reported in 2012(4) GLT 959, Mr. Kaiyum, vehemently submitted that to meet the ends of justice, the acquittal of the respondents No. 2, 3 and 4 should be reversed.

9. Per contra, Mr. K. Sarmah, learned counsel for the accused/private respondent Nos. 2, 3 & 4, submitted that the learned trial Court has given

adequate reasons on proper appreciation of evidence on record for acquitting the accused persons and as such, no interference is warranted by this

Court. Mr. Sarmah submitted that the evidence of the so-call eye-witnesses more particularly PW-4(wife of the deceased) is ravaged with

exaggeration and embellishments, without any consistency so far in regard to the presence of the accused/respondents at the place of occurrence is

concerned and there are material contradictions with their statements, recorded by the PW-14, the Investigating Officer, under Section 161 Cr.P.C..

According to Mr. Sarmah, the learned counsel for the accused/private respondents, PWs-4 and 5 stated that just before the incident, accused Ibrahim

called Jashim to have tea at Alamganj, from their house and accordingly, both of them went out of home and when they reached the nearby road,

accused Jamal(since dead) appeared at the place, caught hold of Jashim, but eye-witnesses, namely, PWs-2 and 6, who allegedly saw Jashim coming

out of his home, have not stated to have seen Ibrahim accompanying him, rather stated that he came to the place, at a later. Mr. Sarmah further

submitted that although the eye-witnesses more or less pointed to the act of stabbing of Jashim by accused Nasiruddin @ Naser, there is, however, no

consistency in their evidence so far the identity of the weapons each of the accused wielded at the relevant time of the occurrence, that allegedly took

place in broad day-light and who appeared at what time at the place of occurrence.

10. Mr. Sarmah also submitted, pointing to the evidence of PWs-9, 10 and 14(I.O.) leading to discovery of weapons at the instance of accused Naser

that the said alleged discovery had taken place, as it has come in the cross-examination of PW-10, after 15/16 days of the incident and that there are

clear contradictions regarding the nature of weapons so discovered, whether two

daggers or whether two iron spears were, infact, discovered. The contents of Ext. 4, the seizure memo, apparently contradict the ocular evidence of the seizure witnesses aforementioned and as such, the alleged oral disclosure statement of accused Naser cannot be believed. Mr. Sarmah also submitted that the weapons were allegedly handed-over by one Jamiran, to the police, who was not examined during investigation and resultantly in trial of the case. Mr. Sarmah submitted that in the backdrop of facts and the evidence adduced by the prosecution, no interference in the acquittal judgment of the learned trial Court is called for. Mr. Sarmah relied upon the ratio of the judgments rendered by the Apex Court in the cases of Mohammed Ankoos & ors. v. Public Prosecutor, High Court of A.P., Hyderabad reported in (2010) 1 SCC 94, Babu V. State of Kerala reported in (2010) 9 SCC 189 and Rohtash V. State of Haryana reported in (2012) 6 SCC 589.

PRINCIPLES GOVERNING APPEAL AGAINST ACQUITTAL:

11. In paragraph No. 14 of the judgment rendered by the Apex Court in the case of Mookiah & anr. v. State (supra), succinctly explained the principles of law for interference by the High Court in appeal against acquittal recorded by the trial Court, as herein below quoted:

“14. In a recent decision in Murugesan & Ors. vs. State Through Inspector of Police, 2012 (10) SCC 383, one of us Ranjan Gogoi, J. elaborately

considered the broad principles of law governing the power of the High Court under Section 378 of the Code of Criminal Procedure while hearing the

appeal against an order of acquittal passed by the trial Judge. After advertng to the principles of law laid down in Sheo Swarup vs. King Emperor,

AIR 1934 PC 227 (2) and series of subsequent pronouncements in para 21 summarized various principles as found in para 42 of Chandrappa & Ors.

vs. State of Karnataka, (2007) 4 SCC 415 as under:

“21. A concise statement of the law on the issue that had emerged after over half a century of evolution since Sheo Swarup is to be found in para

42 of the Report in Chandrappa v. State of Karnataka. The same may, therefore, be usefully noticed below: (SCC p. 432)

“42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with

an appeal against an order of acquittal emerge:

(1) An appellate court has full power to review, reapprciate and reconsider the

evidence upon which the order of acquittal is founded.

(2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence

before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances",

"distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against

acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere

with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly,

the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be

innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence

is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of

acquittal recorded by the trial court."

12. In the case of *State of Assam v. Gulbar Hussain & ors.*, reported in 2012 (4) GLT 959, a Division Bench of this Court, reversed the judgment &

order of acquittal of the accused as recorded by the learned trial Court, thereby holding that the impugned judgment suffered from perversity and

findings of the trial Court, on evidence and materials available on record, placing reliance, inter-alia, on the legal principles that culled-out of the

judgments of the Apex Court in *Chandrappa & ors. V. State of Karnataka*, reported in (2007) 4 SCC 415 and *Kallu v. State of M.P.*, reported in 2006

CrL. LJ 799. In *U.P. State v. Samman Dass* reported in 1972 CrL. LJ 487, the Apex Court observed as herein below extracted:

"There are, however, certain cardinal rules which have always to be kept in view in appeals against acquittal. Firstly, there is a presumption of

innocence in favour of the accused which has to be kept in mind, especially when

the accused has been acquitted by the Court below; secondly, if two views of the matter are possible, a view favourable to the accused should be taken thirdly, in case of acquittal by the trial judge, the appellate Court should take into account the fact that the trial judge had the advantage of looking at the demeanour of the witnesses; and fourthly, the accused is entitled to the benefit of doubt. The doubt, should, however, be reasonable and should be such which rational thinking men will reasonably, honestly and conscientiously entertain and not the doubt of a timid mind which fights shy-though unwittingly it may be-or is afraid of the logical consequences, if that benefit was not given.â??

13. In the case of Mohammed Ankoos & ors. V. P.P., High Court of A.P., reported in (2010) 1 SCC 94, the Apex Court in paragraph 15 of the judgment, held as under:

â??15.Â This Court has, time and again, dealt with the scope of exercise of power by the appellate Court against judgment of acquittal under sections 378 and 386 of the Code of Criminal Procedure, 1973. It has been repeatedly held that if two views are possible, the appellate court should not ordinarily interfere with the judgment of acquittal. This Court has laid down that the appellate Court shall not reverse a judgment of acquittal because another view is possible to be taken. It is not necessary to multiply the decisions on the subject and reference to a later decision of this Court in Ghurey Lal v. State of U.P. shall suffice wherein this Court considered a long line of cases and held thus:

Â Â Â Â Â Â â??69.Â The following principles emerge from the cases above:

1. The appellate Court may review the evidence in appeals against acquittal under Sections 378 and 386 of the Criminal Procedure Code, 1973. Its

power of reviewing evidence is wide and the appellate Court can reappraise the entire evidence on record. It can review the trial Courtâ??s

conclusion with respect to both facts and law.

2. The accused is presumed innocent until proven guilty. The accused possessed this presumption when he was before the trial Court. The

trial Courtâ??s acquittal bolsters the presumption that he is innocent.

3. Due or proper weight and consideration must be given to the trial Courtâ??s decision. This is especially true when a witnessâ?? credibility is

at issue. It is not enough for the High Court to take a different view of the evidence. There must also be substantial and compelling reasons for holding that the trial Court was wrong.â??

14. In the case of Babu V. State of Kerala reported in (2010) 9 SCC 189, the Apex Court in paragraph 12 of the judgment, held as under:

â??12.Â This Court time and again has laid down the guidelines for the High Court to interfere with the judgment and order of acquittal passed by

the trial Court. The appellate Court should not ordinarily set aside a judgment or acquittal in a case where two views are possible, though the view of

the appellate court may be the more probable one. While dealing with a judgment of acquittal, the appellate court has to consider the entire evidence

on record, so as to arrive at a finding as to whether the views of the trial Court were perverse or otherwise unsustainable. The appellate Court is

entitled to consider whether in arriving at a finding of fact, the trial Court had failed to take into consideration admissible evidence and/or had taken

into consideration the evidence brought on record contrary to law. Similarly, wrong placing of burden of proof may also be a subject-matter of scrutiny

by the appellate Court.â??

15. In the case of Rohtash V. State of Haryana reported in (2012) 6 SCC 589, the Apex Court in paragraph 27 of the judgment, held as under:

â??27.Â The law of interfering with the order of acquittal is well settled. It is to the effect that only in exceptional cases where there are compelling

circumstances and the judgment in appeal is found to be perverse, the appellate Court can interfere with the order of the acquittal. The appellate court

should bear in mind the presumption of innocence of the accused and further that the trial Court's acquittal bolsters the presumption of innocence.

Interference in a routine manner where the other view is possible should be avoided, unless there are good reasons for interference.â??

APPRECIATION OF EVIDENCE:

16. Perusal of the F.I.R., dated 30.06.1998, vide Ext. 1 lodged by P.W. 3, Sarkar Unush Mandal before the Officer-in-Charge, Gauripur P.S. reveals

that the occurrence had taken place on a day at about 6.30 A.M., in broad daylight, during summer season of the month of June, on village road, near

the house of P.W.6 Fazar Mullah @ Fazar Ali. In the said occurrence, the F.I.R. most pointedly reveals, the acquitted 4 (four) accused/respondents

along with 2 (two) other deceased accused persons, namely, Jamal Sheikh and Abdul Sheikh intercepted the deceased Jashim Mandal and after

involving in an altercation with him, stabbed him to death with a dagger at the spot. The F.I.R. was lodged promptly after the occurrence was over on

30.06.1998 at about 10 a.m. vide G.D. Entry No. 1208. It may be mentioned that the place of occurrence is situated about 12 k.m. away from

Gauripur P.S. Therefore, in absence of any indication on evidence or evidence to the contrary, prompt and early reporting of the occurrence by the

informant (P.W. 3) with vivid details gives an assurance regarding truth of its version.Â

Â Be it mentioned here that the case against the accused persons, namely, Jamal Sheikh @ Jamal Jogani and Abdul Sheikh abetted on their death

although their names are reflected in the impugned judgment and order.

Â It is noticed that PW 3 Sarkar Unush Mandal, the informant and a resident of about 1 KM away from the place of occurrence, hearing great

commotion on the direction of Hazari Jharna Village, situated to the south of his house, rushed to the said village and witnessed the occurrence from a

distance of about 300 yards, which took place about 80 cubits away from the house of the deceased Jashim, who happened to be his nephew. On

scrutiny of his whole evidence reveals that he saw the accused/respondent No. 2 Nasiruddin @ Naser stabbing the deceased Jashim with a dagger,

on the direction of his maternal uncle accused/respondent No. 3 Ibrahim Ali @ Ibrahim from the other side of a nearby stream and Naser saying that

Jashim was dead. He (PW3) saw the accused/respondent No. 3 Ibrahim and accused/respondent No. 4, Babu Sheikh @ Babu, present at the place of

occurrence armed with deadly weapons such as iron rod and spear respectively. His (PW3) evidence further reveals that immediately after they

committed the offence, left the place of occurrence, leaving the dead body of Jashim, bearing 10 or 12 injuries in his chest and back, at the spot.

17. In cross-examination, PW 3 denied knowledge of the defence suggestion if Jashim was shot by militants, for which he was to be hospitalized. PW

3 specifically denied the defence suggestion that the deceased was shot. The defence contradicted it suggesting that he stated before the police that

on hearing from the public to the effect that â??upon being led by Jamal Jogani, Naser had stabbed the deceased and fledâ??. Both the said two

accused as stated earlier, are now dead and therefore, the case abetted against them, whereby the act of any militants as suggested above is ruled out

and shifted the entire blame for death of Jashim to the said deceased accused persons. Both the aforesaid defence suggestions are established neither

by any evidence nor by way of cross-examining the PWs. The aforesaid first defence suggestion that the deceased might have succumbed to bullet

injuries is not even supported by the medical evidence of PW 1, Dr. Pramod Dekka, who performed the post-mortem examination on the body of the

deceased and as such, this defence suggestion is rejected and the aforesaid second defence suggestion is subjected to further scrutiny.

18. Turning to the evidence of PW 2, Fakir Chand, who was an eye witness to the occurrence, it is seen that he has given a vivid detail of the whole

occurrence. His evidence reveals that at the relevant time, he happened to be present in the turmeric field of PW 6, Fazar Ali, who was working in the

said field and talking to accused Jamal (since dead), who sought advice from him (PW 2) as to what to do against Jashim (the deceased), who

quarreled with him. PW 2, Fakir Chand advised him to inform his (the deceased) guardian about the incident, but at that moment, as Jashim was seen

proceeding towards tinali, he (Jamal) asked him to stop and all of a sudden caught hold of his hands and sought for his (PW 2) advice, once again, as

to what to do then. In the meantime, accused Naser stabbed Jashim on the left side of the abdomen with a dagger several times. PW-6, Fazar Ali and

he rushed towards them. Naser threatened the people such as Jashim's wife, his children and others, namely, Palku (PW 12), Palku's wife,

Abdus (PW 11), his son Fakir and Babu etc., with dire consequences if any of them adduced evidence against him.

19. Corroborating the evidence of PW 2, PW 6, Fazar Ali deposed that accused Nasiruddin @ Naser stabbed Jashim with a dagger on the left side of

his abdomen causing his instantaneous death at the spot. In the meantime, PW 4, Safura Bewa (the wife of Jashim), PW 5 Jeleka Bibi (the daughter

of Jashim) and Jashim's son Sabur as well as other villagers arrived. Reinforcing presence of PW-3, Unush Mandal at the relevant time, in

cross-examination, he (PW 6) deposed that "at the time of carrying the injured across the stream, Unush Mandal was present there too."

The evidence of PW 4 Safura Bewa, the wife of the deceased, appears to be more vivid in narration of the occurrence and corroborative to the said

eye witnesses, namely, PWs 2, 3 and 5. Her evidence reveals that at the relevant time, when she along with her husband and accused Ibrahim

advanced towards the road, and when she saw accused Jamal (since dead) caught hold of her husband, she rushed to his rescue from his clutch, but

at that moment accused Naser stabbed him a number of times with a dagger and accused Ibrahim separated her. According to her, accused Babu

pressed her husband's neck and receiving the stab injuries caused by accused Naser, Jashim's intestines protruded. The accused Jamal (since

dead) took a dagger from accused Abdul (since dead) and stabbed in his chest. The accused persons were not even stopped with this, accused

Ibrahim crushed Jashim's testicles with his legs. At this baffled situation, she (PW 4) failed to notice, who had come to the place, but asserted that

hearing her wailing and hue and cry, PW 3 Sarkar Unush Mandal rushed to the place. The evidence of PW 5 Jeleka Khatoon, the married daughter

of the deceased, has corroborated the evidence of her mother PW 4, so far her (P.W. 4) evidence against accused persons, namely, Ibrahim, Naser,

Abdul (since dead), Babu is concerned, in material particulars.

It is noticed in her cross-examination that the learned Additional Sessions Judge, Dhubri recorded the demeanour of PW 5 to the effect that she

was adamant and did not want to answer the learned defence lawyer's queries and as such, her evidence had to be closed. In this

regard, it is pertinent to refer to the ratio of the judgment rendered by the Apex Court in Ganeshbhai V. State, reported in (1972) 2 SCC 73, wherein it

was held that when such remarks are directly related to obliging others, without giving reasons there for, appellate court need not give attention to

such remarks. Considered thus, so far the part of her (PW 5) testimony which finds corroboration from other PWs, who have been subjected to

extensive cross-examination, so much of her evidence is to be taken into consideration.

20. The evidence of PW-7, Joynuddin Sheikh reveals that he reached the place of occurrence about 10/15 minutes after the occurrence and he found

Jashim lying dead on the ground, near the house of PW-6, Fazar, bearing stab injuries and further, came to know from PW-6, Fazar that accused

Jamal (since dead) and Naser had killed him. PW-12, Palku Sheikh's evidence shows that the prosecution declared him as a hostile witness and it

was elicited that at the relevant time of the occurrence, that is, at about 6:30 A.M., when he was at home, situated nearby to the house of Jashim, he, hearing the hue and cry on the road, went to the road, like other 400/500 villagers, and saw Jashim lying on road, grasping for life, with bleeding injuries. His evidence further reveals that Jashim succumbed to his injuries, in course of shifting to the nearby B.S.F. camp on a pull cart. What it appears from his (PW12) evidence is that he was not telling the whole truth of the occurrence, for which reason, the prosecution cross-examined him, exhaustively, drawing his attention to his previous statements given under Section 161 Cr.P.C. and contradicted him under Section 162 (1) Cr.P.C. In the case of Gubala v. State, reported in (2004) 3 41 CrL.R. 186, the Apex Court held that court can accept that part of evidence of a hostile witness which is cogent and credible. On close scrutiny of his (PW 12) evidence as a whole with that of the evidence of the other PWs examined in the case, it can only be accepted that he (PW12) saw Jashim lying on road sustaining multiple bleeding injuries and succumbed to his injuries at the spot.

21. Coming to the evidence of PW 8, Sarkar Alam Jamal, a co-villager of the deceased and the accused persons, was the scribe of the F.I.R. vide

Ext. 1, on behalf of PW-3, Sarkar Unush Mandal and he wrote the same at the house of PW 3, as per narrative of 3/4 villagers inclusive that of PW 3,

the informant. His evidence, therefore, reveals that the F.I.R. contains the version of PW 3, the informant only, which is as stated above, and

corroborated by him in evidence.

22. PW 13, Abu Bakkar, who is a neighbouring resident of the place of occurrence, circumstantially corroborated the evidence of the eye witnesses

aforementioned, deposing that he saw the accused persons namely, Jamal (since dead), Naser, Abdul (since dead), Babu and another, who are

residents of neighbouring village, returning from the place of occurrence and on his crossing the stream, he saw Jashim, who was his cousin brother,

lying on the ground, while his wife (PW 4) and children crying on his side. He (PW13) also noticed stab wounds on Jashim's chest, abdomen and

in other parts of his body.

23. So far the medical evidence of PW 1, Dr. Pramod Deka, the autopsy surgeon, is concerned, he found multiple penetrating wounds, on abdomen,

back, chest, as described in the summary of his evidence stated above, caused

by penetrating sharp object and ante-mortem in nature, on the dead body of Jashim Mandal vide Ext. 1, the post-mortem report. The defence declined to cross-examine the autopsy surgeon. Therefore, a presumption can be drawn to the effect that the defence accepted the doctor's findings on injuries sustained by the deceased Jashim were true. Thus, the evidence of PW 1, the autopsy surgeon, clearly supports the ocular testimony of the prosecution witnesses that the cause of death of Jashim was undisputedly the result of multiple stab wounds by sharp edged weapon(s).

24. The next most pertinent question is as to who caused those stab wounds on the person of the deceased Jashim? The oral testimony of the direct and circumstantial prosecution witnesses are discussed in detail above. Scrutiny of the evidence of witnesses namely, PW-2, Fakir Chand, PW 3, Sarkar Unush Mandal, PW 4, Safura Bewa, PW 5, Jeleka Khatoon and PW 6, Fazar Ali, as a whole, reveal that they have implicated the accused persons, namely, Nasiruddin @ Naser, Ibrahim Ali @ Ibrahim, Babu Sheikh @ Babu and three others, with the alleged offence of causing the death of Jashim, on the public road, by means of weapons, such as dagger and spear etc. It needs to be mentioned that there are omissions on the part of the said prosecution witnesses to state in regard to the exact role each accused had played in the occurrence, except in respect of Nasiruddin @ Naser, which took place on 30.06.1998 at about 6.30 A.M., and when their evidence was recorded in the years 2002/2003, that is, after about 4½/5 years, thereafter.

25. In the case of *Boya Ganganna v. The State of Andhra Pradesh*, reported in AIR 1976 SC 1541, the Supreme Court observed that evidence given by a witness would very much depend upon his power of observation and it is possible that some aspects of an incident may be observed by one witness while they may not be witnessed by another, though both are present at the scene of offence. In the gruesome incident like the one under consideration in this case, the witnesses are naturally prone to make such omissions as they were certainly seized by sudden fear in the confusion of the moment. Therefore, nonmentioning of the overt acts in evidence by the eye witnesses aforementioned does not lose their credibility as memory withers away by efflux of time.

26. With regard to the seizure of the weapons of offence, it is noticed that PW14

S.I. Binoy Kumar Barman, the investigating officer, recovered and seized two daggers and two spears by Ext. 4, the seizure memo, dated 03.07.1998, which were kept hidden in a bamboo grove near the house of accused Abdul Sheikh (since dead), the father of accused Babu Sheikh @ Babu, on being led by accused Nasiruddin @ Naser. He (PW 14) recognized Mat. Ext. 1 and Mat. Ext. 2, the seized daggers and spears respectively. PW 9, Rajab Ali, PW 10, Aran Ali and PW 11, Abdus Samad Mandal, the seizure witnesses testified to the seizure of those weapons and thereby corroborated the evidence of P.W. 14, the investigating officer. PWs 10 and 11 recognized Mat. Ext. 1 and Mat. Ext. 2, the said seized weapons. Scrutiny of evidence of PWs 2, 3, 4, 5 and 6, the eye-witnesses and PWs 7 and 11, who appeared at the place of occurrence, after the occurrence reveals that their evidence is clearly supported by the evidence of the doctor (PW 1) and the content of the inquest report vide Ext. 3, although those seized weapons were not shown to the eyewitnesses, the nature of injuries found on the body of the deceased suggests use weapons like the seized ones in causing those injuries on his person, which resulted in his instantaneous death on the spot beyond doubt.

27. So far the question of recovery of the seized weapons at the instance of the appellant Nasiruddin @ Naser, who is projected as the prime assailant in evidence, is concerned, it is noticed that the seizure was made on 03.07.1998 at about 5:05 P.M., that is, after three days of the occurrence from a hidden place, pointed out by the said appellant to PW 14, the I.O., in presence of witnesses, namely, PWs 9, 10 and 11. All the said seizure witnesses [PWs 9, 10, 11 and 14 (the I/O)] have corroborated this material fact. In the case of *Anter Singh v. State*, reported in 2004 (10) SCC 657, the Supreme Court observed that the portion of the information, which relates distinctly or strictly to the fact discovered can be proved and the rest is inadmissible. In the case of *Geejaganda V. State*, reported in AIR 2007 SC 1355, the Supreme Court succinctly interpreted the connotation of Section 27 of the Evidence Act and held that the said Section is, in fact, a proviso to Sections 25 and 26, while the former raises an embargo as regards proof of confession before a police officer, which need not be in police custody and the latter raises a bar as regards admissibility of such confession, if made by an accused in the custody of the police officer, although such a

confession might have been made before a person, who is not a police officer. The Supreme Court observed in the said case that Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence.

28. In the instant case, the appellant Nasiruddin @ Naser, in his statement under Section 313 Cr.P.C., denied to have led the police to recovery of the weapons of offence. However, the seizure witnesses, aforementioned, corroborated the fact of recovery of the weapons at the instance of accused Naser. However, the evidence of PWs 9 and 10 reveal that Naser's sister Jamiran knew where those weapons were kept hidden and she handed over the weapons to the police, but she was not examined in the case. There is no explanation from the prosecution side as to why she was kept out of the witness box. Their (PWs 9 and 10) evidence further reveal that Naser was forced to lead the police to recovery of the seized weapons, which were not even sent for the serological test in the Forensic Laboratory to establish that those weapons were, actually used in the commission of the offence. Therefore, we are of the opinion that the prosecution contention that Naser led the police to recovery of the weapons cannot be relied on beyond reasonable doubt.

29. With regard to the defence suggestion to PWs 3, 4, 6, 12 and 13 that Jashim was "shot at by some unknown miscreant", for which he had to be hospitalized for treatment, on earlier occasion and as such, the possibility of the miscreants might have attacked him and left him dead cannot be accepted in view of the suggestion being not supported by the nature of injuries, the doctor (PW 1) found during his post-mortem examination, which find support from the evidence of eye-witnesses (PWs 2, 3, 4, 5 and 6). The said defence suggestion is contradicted by another suggestion to PWs 3 and 4 that about 3/4 days before the incident, the deceased had asked accused Jamal (since dead), that is, the father of accused Nasiruddin to convene a "bichar" but no "bichar" was held and as such, Jamal was falsely implicated in the case. Such contradictory suggestions of involvement of any unknown miscreants strongly focused on the motive of the accused persons to divert attention from the available incriminating

evidence against them. Explaining the significance of motive in a murder case, the Supreme Court in *Kulvinder Singh V. State*, reported in 2011 Cr.LJ

2633, held that motive to commit murder becomes an issue of importance in a case based on circumstantial evidence only. In the instant case, the

prosecution relied on the evidence of eye-witnesses and as such, motive behind the murder of Jashim is immaterial.

30. Perusal of the impugned judgment and order, dated 16.09.2013, passed in Sessions Case No. 41/2000, we find that the learned Additional Sessions

Judge, Dhubri, acquitted the accused persons, on having found two sets of contradictory prosecution evidence, which are, inter-alia, recorded in the

two paragraphs of the judgment as extracted herein below:

“P.W. 4 & P.W. 5 claiming themselves to be the eye-witness have deposed that Ibrahim was accompanied with Jashim and P.W. 3, P.W.

4 & P.W. 5 have implicated all accused-persons with the offences but other two eye-witnesses (P.W.2 & P.W.6) have miserably failed

to implicate other accused-persons except accused Jamal Jagani & accused Naseruddin.

Thus, there are two sets of evidence adduced by the prosecution side with aforesaid discrepancies and also contradicting each other. That is to say

that one set of evidence implicates accused Jamal Jugani & Naseruddin but the other set of evidence implicates all accused- persons and both the sets

of evidence comes from the eye-witnesses. When the account of the incident given by the eye-witnesses is inconsistent and not tallies with each

other, rather substantially differs in material particulars, in that case the evidence of eyewitnesses is not convincing and unsafe to be relied upon.”

31. We are unable to approve the above view taken by the learned trial court, besides the reasons cited above, because, it is a well settled principle

that the evidence of the eyewitnesses have to be judged on the touchstone of credibility test. In *Ramkant Rai V. Madan Rai*, reported in 2003 AIR

SCW 5633, the Supreme Court observed that the evidence of an eyewitness must be tested for its inherent consistency and the inherent probability of

the story, consistency with the amount of other witnesses, consistency with undisputed facts and the power of observation of the witnesses. It needs

to be kept in mind that every person, who witnesses an incident of murder reacts in his own way, where is certainly no set rule of natural reaction. In

Vikram v. State, reported in AIR 2007 SC 1893, the Supreme Court observed that contradiction or omission in stating details of the occurrence by the eye-witnesses does not lead to a conclusion that the accused is falsely implicated. A duty is cast on the court while appreciating the evidence on record to sift carefully the evidence to separate the truth from untruth, exaggeration and improvements, if any. Guided by such settled principle of appreciation of evidence, to our mind, the manner of appreciation of evidence by the learned trial court in the instant case is highly unsatisfactory which certainly resulted in miscarriage of justice.

Therefore, judging the prosecution evidence, as a whole, having regard to the totality of the evidence, by way of appreciation, analysis and assessment of evidence, with the yardstick of intrinsic value and probabilities, in our view, there is no plausible reason to hold that there are two sets of evidence as has been observed by the learned trial court.

32. In State V. Orilal, reported in (1994) 1 SCC 2010, the Supreme Court observed that reasonable doubt is simply that degree of doubt, which would permit a reasonable and just man to come to a conclusion. Reasonableness of the doubt must be commensurate with the nature of the offence to be investigated. In our opinion, therefore, in the backdrop of facts and evidence of this case, no doubt arising out of surmise and conjectures is permissible to influence the judgment of any court. But in the light of the evidence on record, to our mind, the judgment of acquittal may require a fresh look.Â

33. It is noticed that the instant appeal has been preferred against the impugned judgment of acquittal in respect of 3 (three) accused persons, out of 4 (four) accused persons baring accused Fakir Chand @ Fakir. On the other hand, the prosecution, the respondent No. 1, the State of Assam has desisted itself from preferring any appeal. Therefore, in the absence of all the acquitted accused persons before us, we are unable to render a judgment in parts and bits; therefore it would be more appropriate if the matter is remanded back to the Court below for a fresh decision keeping in mind the discussions and observations made above.

34. In view of the above reasons, we set aside the impugned judgment and order of acquittal and in exercise of our inherent jurisdiction, remand back the proceeding to the learned Court below to afford opportunity of hearing afresh to both the sides, so as to enable the learned court below to remove

its confusions regarding the purported two views, recorded by it in the judgment and deliver a fresh judgment as per discretion, in accordance with

law. Before that the learned Court, after hearing both the sides, may consider to grant opportunity to the accused persons to adduce evidence in

defence, as they expressed willingness in their statements under Section 313 Cr.P.C., but later on, no witness was examined. Respondent Nos. 2, 3

and 4 shall appear before the court below on 10.07.2018 at 10:30 A.M. On that day, the learned trial court shall issue summons to accused Fakir

Chand @ Fakir for his appearance.

35. Be it mentioned that while delivering the fresh judgment, the learned trial court shall not be influenced by the observations made in the course of this judgment.

36. Accordingly, the appeal stands disposed of.

37. Send back the LCR along with a copy of this judgment and order.