

(2013) 11 GAU CK 0051

In the Gauhati High Court

Case No : Criminal Appeal No's. 243 and 255 of 2005

Smt. Ayesha Begam

APPELLANT

Vs

Samir Uddin and Others
 Abdul Hannan Vs State of Assam

RESPONDENT

Date of Decision : 26-11-2013

Acts Referred:

Citation : (2013) 5 GLT 581

Hon'ble Judges : M.R. Pathak, J; Brojendra Prasad Katakey, J

Bench : Division Bench

Advocate : S.C. Biswas, Mr. A.K. Hussain, Mrs. S.H. Hussain, Mr. K. Hussain in Criminal Appeal No. 243/2005, Mr. B.D. Konwar, Mrs. J.M. Konwar, Mr. M. Sharma, Mr. R. Kalita in Criminal Appeal No. 255/2005, Dr. B. Ahmed, Mr. N. Haque, Mr. S.K. Deori and Mr. K. Uddin in Criminal Appeal No. 270/2005, for the Appellant; B. Ahmed, N. Haque, H.I. Choudhury, K. Uddin for the respondent Nos. 1, 5, 6 and 7, Mr. A.Y. Choudhury for the respondent Nos. 2, 3 and 4, Mr. K.A. Mazumdar, Addl. P.P., Assam, for the respondent No. 9 in Criminal Appeal No. 243/2005 and Mr. K.A. Mazumdar, Addl. P.P., Assam in Criminal Appeal Nos. 255 and 270/2005, for the Respondent

Judgement

M.R. Pathak, J.—Criminal Appeal No. 243/2005 has been filed by Smt. Ayesha Begam, the informant and mother of the deceased Mashuk Ahmed, u/s 378 of the Code of Criminal Procedure, 1973, against the judgment dated 28.09.2005 passed by the learned Sessions Judge, Karimganj, in Sessions Case No. 75/2004, corresponding to G.R. Case No. 1161/2001, arising out of Patharkandi P.S. Case No. 253/2001, acquitting the respondent Nos. 2 to 7 from the charges framed under Sections 148 /149 /447 /323 /302 IPC and convicting the respondent Nos. 1 and 8 u/s 304 Part-II IPC and u/s 323 IPC, respectively, praying for conviction of all the respondents under Sections 148 /149 /447 /323 /302 IPC. Criminal Appeal Nos. 255/2005 and 270/2005 have been filed by the accused, Abdul Hannan and Samir Uddin, (respondent Nos. 8 and 1 in Criminal Appeal No. 243/2005) against the judgment dated 28.09.2005 passed by the learned Sessions Judge, Karimganj, in Sessions Case No. 75/2004, (G.R. Case No.

1161/2001), arising out of Patharkandi P.S. Case No. 253/2001, convicting u/s 323 IPC and Section 304 Part-II IPC, and sentencing them to suffer rigorous imprisonment for 6(six) months and to pay fine of Rs. 500/-, in default, to suffer simple imprisonment of 1(one) month and to suffer rigorous imprisonment for 10(ten) years and to pay a fine of Rs. 5,000/-, in default, to suffer simple imprisonment of 6(six) months, respectively.

2. As all the above mentioned 3(three) criminal appeals have arisen out of the same judgment in Sessions Case No. 75/2004, corresponding to G.R. Case No. 1161/2001, arising out of Patharkandi P.S. Case No. 253/2001, those are taken up for hearing and disposal together.

3. Heard Mr. S.C. Biswas, learned counsel for the appellant, Dr. B. Ahmed, learned counsel appearing for the respondent Nos. 1, 5, 6 and 7 and Mr. A.Y. Choudhury, the learned counsel appearing for the respondent Nos. 2, 3 and 4 in Criminal Appeal No. 243/2005; Mr. B.D. Konwar, the learned counsel appearing for the accused appellant in Criminal Appeal No. 255/2005; Dr. B. Ahmed, the learned counsel appearing for the accused appellant in Criminal Appeal No. 270/2005 and also Mr. K.A. Mazumdar, the learned Addl. Public Prosecutor, Assam in all the aforesaid three criminal appeals.

4. Smt. Ayesha Begam (PW-3) lodged an FIR (Ext.-4) with the Officer-in-Charge of Karimganj Police Station (Sadar) on 04.12.2001 alleging that on that day at about 8.30 A.M. the accused persons, namely, (i) Samir Uddin; (ii) Abdul Hannan; (iii) Azir Uddin; (iv) Gias Uddin; (v) Numan Uddin; (vi) Rezan Uddin; (vii) Abdul Jabbar and (viii) Abul Hussain, jointly, by forming an unit, trespassed into the land of the informant and started cutting paddy by force, despite the objection raised. It has further been alleged that the accused persons then assaulted the informant and her family members with dao, lathi, spear, etc. and caused grievous injuries on the person of the informant, her husband and her 3(three) sons. Fearing for the life, the complainant and her family members shouted for help and then nearby people came to the place of occurrence, and taken to Karimganj Civil Hospital where they were admitted. The informant further stated that had the neighbours not arrived, the accused persons would have killed them. The informant further stated that her husband Ismail Ali and her 2(two) sons, namely, Ashik Ahmed and Mashuk Ahmed, are still under treatment in the Karimganj Civil Hospital and that the physical condition of Mashuk Ahmed is very critical, who is still under unconscious state.

5. The Officer-in-Charge of Karimganj Police Station entered the said FIR as G.D. Entry No. 84 and forwarded the same to the Ram Krishna Nagar Police Station as the place of occurrence fell under the said police station, where G.D. Entry No. 68 dated 05.12.2001 was made. The said FIR was then forwarded to the Patharkandi Police Station since the place of occurrence was within its jurisdiction. Accordingly, Patharkandi P.S. Case No. 255/2001 under Sections 147 /148 /149 /447 /325 /326 /307 IPC was registered and started investigating the same.

6. As the injured victim Mashuk Ahmed, son of the informant, succumbed to his injuries at Karimganj Civil Hospital, the Investigating Officer (in short the I.O.) vide his communication dated 05.12.2001 prayed before the learned Chief Judicial Magistrate, Karimganj to allow him to add Section 302 IPC in the above noted Patharkandi P.S. Case No. 255/2001 and accordingly, Section 302 IPC was added pursuant to the order dated 12.12.2001 passed by the learned Chief Judicial Magistrate, Karimganj.

7. The I.O. during investigation seized the articles of the deceased victim, held inquest on his dead body, sent it to Karimganj Civil Hospital for post-mortem examination, recorded the statements of persons acquainted with the facts and on conclusion of the investigation on 28.02.2003 vide No. 19 submitted the charge-sheet in the Court of the learned Chief Judicial Magistrate, Karimganj, under Sections 147 /148 /149 /447 /325 /326 /307 /302 IPC against all the 8(eight) accused persons and forwarded them to the Court to stand trial.

8. The learned Addl. Chief Judicial Magistrate, Karimganj, vide his order dated 09.07.2004 committed the case to the Court of the learned Sessions Judge, Karimganj, the case being exclusively triable by the Court of Sessions. Thereafter, Sessions Case No. 75/2004, in the Court of the learned Sessions Judge, Karimganj, has been registered and numbered. The learned Sessions Judge, Karimganj, vide his order dated 06.08.2004, framed charges under Sections 148 /149 /302 /323 /447 IPC against all the accused persons, which when read over and explained to all the 8(eight) accused persons, they pleaded not guilty and claimed to be tried. Hence the trial commenced.

9. During trial, prosecution has examined 10(ten) witnesses including the informant, doctors, who examined the injured persons and who conducted the autopsy of the dead body and also the Investigating Officer of the concerned Karimganj P.S. case. The defence did not examine any witness, though cross-examined the prosecution witnesses. The statement of all the accused persons u/s 313 Cr.P.C. were also recorded.

10. PW-1, Dr. Rabindra Nath Das, Senior Medical & Health Officer of Karimganj Civil Hospital, who performed post-mortem examination on the dead body of Mashuk Ahmed, the victim, in his evidence has stated about the injuries found on his body, which were as follows:--

(i) One stitched wound over middle of the temporal frontal bone about 4" in length.

(ii) One abrasion over the right forearm about 2" X 2".

(iii) One bruise over the left wrist about 3" X 3", and

(iv) One fracture of the temporal bone.

The aforesaid injuries were found to be ante mortem and opined that death of the victim was due to depression resulting from head injuries sustained by him

and that injury No. 1 might be caused by the hit by "Bung" (a bamboo stick) and injuries Nos. 2, 3 and 4 could be caused by any blunt object.

During cross-examination, PW-1 stated that injuries Nos. 1 and 4 were made by a single blow and injury Nos. 2 and 3 might be caused by fall on the rail line or hard substance, which were superficial injuries. The doctor, during cross-examination, further stated that death of the victim could have been prevented, had he been provided with immediate medical treatment.

11. PW-2, Dr. F. Karim, Sub-Divisional Medical Officer in Karimganj Civil Hospital, in his evidence stated that on 06.12.2001 at around 3.30 P.M. he examined one Ismail Ali (husband of the informant) in the said hospital, on police requisition with reference to the Patharkandi P.S. Case No. 255/2001 and found one stitched wound vault scalp of 1" long and on X-ray of the injured victim, his scalp was found normal. The doctor opined that victim's injury was simple in nature and as his wound was stitched, the doctor could not give any definite opinion. During cross-examination, PW-2 stated that injury might be caused due to fall on a hard substance.

12. As discussed above, Dr. Rabindra Nath Das (PW-1) who conducted the autopsy, has proved the nature of injuries found on the body of the deceased Mashuk Ahmed. The defence has not challenged the nature of injuries found on the body of the deceased. The doctor has opined that the injuries found are ante mortem and the death was caused because of the head injuries sustained by him. The factum of death of Mashuk Ahmed, resulting from the injuries caused to him has, therefore, been proved by the prosecution. The prosecution also could prove that the death of the deceased was homicidal in nature.

13. The learned Sessions Judge while convicting Sri Samir Uddin and Sri Abdul Hannan, respondent Nos. 1 and 8 in Criminal Appeal No. 243/2005 u/s 304 Part-II IPC and u/s 323 IPC, respectively, has acquitted the respondent Nos. 2 to 7 in the said Criminal Appeal of charges framed against them. Sri Samir Uddin and Sri Abdul Hannan have accordingly been sentenced to undergo rigorous imprisonment and to pay fine, as noticed above.

14. The appeal having been filed by the informant challenging the acquittal of the respondent Nos. 2 to 7 and conviction of the respondent Nos. 1 and 8 u/s 304 Part-II and 323 IPC, respectively, and also there being appeals by Shri Abdul Hannan and Shri Samir Uddin challenging their conviction, this Court is required to consider whether there are sufficient evidence on record to convict all the accused persons or any of them for all or any of the charges framed against them, in other words, whether the learned Sessions Judge was justified in acquitting the respondent Nos. 2 to 7 from the charges leveled against them and in convicting the respondent Nos. 1 and 8 u/s 304 Part-II IPC and Section 323 IPC, respectively.

15. We shall first consider as to the involvement of the respondent Nos. 2 to 7 in Criminal Appeal No. 243/2005 with the offence alleged and whether there are

materials on record to convict them for all or any of the charges framed against them. PW-3 Smt. Ayesha Begam, who claims to be the witness to the occurrence and lodged the first information report (Ext.-4) alleging involvement of these respondents, has stated in the first information report that on 04.12.2011 at about 8.30 A.M. these respondents along with Samir Uddin and Abdul Hannan, appellants in Criminal Appeal Nos. 270/2005 and 255/2005, respectively, by forming a unit trespass into the land armed with dao, lathi, spear, etc., started beating and caused injuries on the person of the informant and her husband and three sons including the deceased Mashuk and when she raised hue and cry, the neighbouring people came, who could save them from the hands of the accused persons. It has further been stated that the physical condition of Mashuk Ahmed was very critical and was in an unconscious state at the time of lodging the FIR. The written FIR was lodged on 05.12.2001 at 10.30 P.M. PW-3, however, during her examination in Court stated that Samir Uddin, Abdul Hannan and Azir Uddin etc. beaten up Mashuk. She has further stated that while Samir Uddin had spade in his hand, Abdul had a "bung" and the other accused persons had sticks in their hands. This witness, therefore, has not supported her own version in the FIR that the accused persons were armed with dao, spear, etc. This witness also did not name the respondent Nos. 2 to 6 in her evidence and attributed nothing against them, though she has stated that Azir Uddin, the respondent No. 7, beaten up Mashuk. This witness though claimed that apart from her husband Ismail and her youngest son Abdulla were present at the place of occurrence, who were also beaten up by the accused persons, they have not been examined by the prosecution in support of the charges leveled against them and no injury report in respect of the injuries stated to have sustained by them have been produced and proved.

16. PW-3, as discussed above, in the first information report as well as in her evidence has stated about the presence of her husband and three sons in the place of occurrence, who also according to her were witness to the occurrence. PW-4, one of the three sons, who according to PW-3 was present at the place of occurrence, in his evidence, however, did not support the version of PW-3 in its entirety. This witness has stated that he went to the place for some work 2 to 4 minutes before the occurrence and saw the respondent Nos. 2, 3 and 7, apart from the respondent Nos. 1 and 8 approaching their land in a fit of rage, where his father and two brothers were sowing potatoes. This witness has not stated that he saw any of the persons named by him armed with any weapon while approaching their land. This witness has further stated that Samir asked why his father and two brothers were sowing potatoes there and before Mashuk (deceased) could reply, Samir hit him with a spade in his hand and as a result of which the fight took place where the potatoes were being sowed and at that time all persons named by him started beating Mashuk (deceased). This witness also stated that then out of fear Abdulla, his younger brother fled the place of occurrence and only thereafter his mother (PW-3) arrived at the place of occurrence and tried to obstruct them. This witness further claims that Gias

Uddin (respondent No. 3) hit his father and also Mashuk (deceased), who fell on the ground and did not regain the sense. It has also been stated that Abdul Hannan (appellant in Criminal Appeal No. 255/2005) hit Mashuk with a stick as he was still alive. This witness has also admitted that hearing the commotion a few people came to the place of occurrence and tried to stop the fight and then the accused persons left the place. This witness did not say anything about the presence of respondent No. 4 Numan Uddin, respondent No. 5 Abdul Jabbar and respondent No. 6 Abul Hussain in the place of occurrence or their involvement in the offence alleged.

17. Two independent witnesses, namely, PW-5 (Abdul Haque) and PW-6 (Kabir Ahmed) were examined by the prosecution in support of the charges leveled against the accused persons. While PW-5 has stated about the presence of Samir Uddin (appellant in Criminal Appeal No. 270/2005), Abdul Hannan (appellant in Criminal Appeal No. 255/2005), Gias Uddin, Rezan Uddin and Numan Uddin, (respondent Nos. 2, 3 and 4 in Criminal Appeal No. 243/2005), he has not stated anything as to how Gias Uddin, Rezan Uddin and Numan Uddin participated in the crime. This witness who claims to be the witness to the occurrence, has not stated how respondent Nos. 2 to 7 have inflicted any blow on the person of the deceased, though he has stated that Samir Uddin first hit Mashuk, the deceased, and thereafter all the accused persons started beating and lastly Abdul Hannan hit Mashuk (deceased) on his head by the bung. PW-5 in his evidence has also not supported the version of PW-3 relating to her presence in the place of occurrence. This witness, however, has stated that at the time of occurrence, Mashuk's father Ismail as well as the youngest brother (Abdulla), were present at the place of occurrence, apart from Mashuk. As discussed above, neither the father (Ismail) nor the younger brother of Mashuk (Abdulla) has been examined by the prosecution.

18. PW-6, another independent witness and who also saw the occurrence, in his evidence has stated about the presence of Ismail (father of the deceased Mashuk), Ashik Ahmed (PW-4) and Abdulla (younger brother of the deceased Mashuk) at the place of occurrence. He has further stated that Abdul Hannan, Samir Uddin, Numan Uddin, Rezan Uddin and Gias Uddin armed with lathi, dao, etc. in a group, assaulted Mashuk Ahmed, Ismail Ali, Ashik Ahmed and Abdulla. This witness has not stated which of those accused persons carry what weapon and who hit Mashuk. This witness has also not implicated Abdul Jabbar, Abul Hussain and Azir Uddin, the respondent Nos. 5, 6 and 7 in Criminal Appeal No. 243/2005, at all. PW-6 did not support the version of PW-3 about her presence in the place of occurrence.

19. The defence during cross-examination of PW-8, Rahim Uddin Choudhury, Investigating Officer, tried to brought out the omission and contradiction of the statements made by PWs-4 and 5 before police and the statement made in Court. It has been proved that PW-4 did not say before police that the accused persons were armed and came to their place in an agitated mode but has stated

that Abdul Jabbar, Rezan Uddin, Abul Hussain, Gias Uddin and Azir Uddin started brawl with arms in their hand, Azir Uddin pull down Mashuk on the railway track and then Abdul Hannan hit Mashuk on his head by bung. The Investigating Officer has further stated that PW-5 in his statement has stated that mother of Mashuk, PW-3, arrived at the place of occurrence on hearing the commotion and then the accused persons fled away.

20. From the aforesaid evidence adduced by the prosecution, it is, therefore, evident that the presence of PW-3 in the place of occurrence is doubtful, though she claims to be the witness to the occurrence. None of the witnesses have attributed anything individually to Rezan Uddin, Gias Uddin, Numan Uddin, Abdul Jabbar, Abul Hussain and Azir Uddin, respondent Nos. 2 to 7 in Criminal Appeal No. 243/2005 as well as their individual act except saying that some of them in a group beaten up Mashuk, the deceased. While PW-5 stated about the presence of Gias Uddin, Rezan Uddin and Numan Uddin, PW-6 did not name any of them. PW-4 has only named Gias Uddin and stated that he hit Ismail, his father. The injury report of the father of PW-4, Ismail, has not been produced and proved. The presence of the respondent Nos. 2 to 7 and also their involvement in the offence alleged, therefore, could not be proved by prosecution.

21. It also appears from the evidence of Dr. Rabindra Nath Das (PW-1) and the post mortem report (Ext.-1) that only three injuries were found on the body of Mashuk, the deceased, out of which injury Nos. 1 and 4 are related to each other i.e. one injury, which was found to be sufficient to cause death and the injury Nos. 2 and 3 are superficial injuries. The version of PWs-3, 4, 6 and 8 that all the accused persons including the respondent Nos. 2 to 7 in Criminal Appeal No. 243/2005 assaulted Mashuk, also does not get any support from the aforesaid medical evidence.

22. Hence the learned Sessions Judge, in our considered opinion, has rightly recorded the judgment of acquittal in so far as the respondent Nos. 2 to 7 in Criminal Appeal No. 243/2005, which does not require any interference.

23. All the accused persons, who are respondents in Criminal Appeal No. 243/2005, have also been charged u/s 148 /149 /447 IPC. To constitute an offence punishable u/s 148 /149 IPC the prosecution must first prove the ingredients to constitute "unlawful assembly", within the meaning of Section 141 IPC, which provides that an assembly of five or more persons is designated an "unlawful assembly", if the common object of the persons composing the assembly is:--

First - To overawe by criminal force, or show of criminal force, the Central or any State Government or Parliament or the Legislature of any State, or public servant in the exercise of the lawful power of such public servant; or

Second - To resist the execution of any law, or of any legal process; or

Third - To commit any mischief or criminal trespass, or other offence; or

Fourth - By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or

Fifth - By means of criminal force, or show of criminal force, to compel any person to do what he is not legally entitled to do.

An assembly, which was not unlawful when it assembled, may subsequently become an unlawful assembly.

24. "Rioting" has defined as whenever force or violence is used by an unlawful assembly, or by any member thereof, in prosecution of the common object of such assembly, every member of such assembly is guilty of the offence of rioting. The assembly of five or more persons and the common object of the persons to the assembly to do any act stipulated in Section 141 are the basic requirements to constitute an offence punishable u/s 148 /149 IPC.

25. In the instant case, according to the prosecution 8(eight) accused persons formed an unlawful assembly and used force or violence in prosecution of the common object of such assembly. We have already held that the presence of 6(six) out of the 8(eight) accused persons, namely, Rezan Uddin, Gias Uddin, Numan Uddin, Abdul Jabbar, Abul Hussain and Azir Uddin in the place of occurrence and also their involvement in the offence alleged could not be proved by the prosecution by adducing any cogent and reliable evidence. Hence there cannot be any offence committed by the other two accused persons, namely, Samir Uddin and Abdul Hannan, who are the appellants in Criminal Appeal Nos. 270/2005 and 255/2005, respectively, punishable u/s 148 and 149 IPC, the prosecution having failed to prove the presence of the aforesaid 6(six) accused persons in the place of occurrence. Hence Samir Uddin and Abdul Hannan cannot be convicted u/s 148 /149 IPC.

26. The accused persons were also charged for the offence punishable u/s 447 IPC. Section 441 provides that whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property, or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass". To constitute the offence of "criminal trespass", the prosecution must, therefore, prove that the accused persons enters into or upon property in possession of the another and with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property. An accused person can be punished for criminal trespass even if his initial entry into or upon property was lawful but he remains unlawfully there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence. Mere entering into or upon property in possession of

another without the intention to commit an offence etc., would not constitute criminal trespass. The prosecution must also prove that the person is in actual physical possession of the property and not constructive possession.

27. In the instant case, PW-3 Smt. Ayesha Begam, mother of the deceased during cross-examination has admitted that part of the land belongs to the railway. She has also stated that there is a railway culvert near the land. PW-4 Ashik Ahmed, elder brother of the deceased, during cross-examination has stated that the railway authority is the owner of the land, which is by the side of the railway line. This witness has also admitted that there is a drain passing through the railway line, which starts from the north and passes through the side of the land and goes down through the railway culvert. It has also been stated that the land of accused Samir is on the west of the said drain. PW-3 though claimed that the land over which the alleged occurrence took place belonged to them, PW-4, however, did not support her. PW-3 also could not prove that the land belonged to them. That apart it is in the evidence of PWs-3 and 4 that the trouble started when according to the prosecution, the accused persons objected to blocking the drain by the victim party, which drain admittedly on the railway property. It, therefore, appears that the prosecution has failed to prove that the land in question belongs to the victim party and on the other hand, it has come out in evidence that the land is Government land, over which the victim party cannot claim possession. The prosecution, therefore, has also failed to bring home the charge framed against the accused Samir Uddin and Abdul Hannan u/s 447 IPC.

28. We shall now proceed to decide as to whether the prosecution could bring home the charge against the accused persons u/s 323 and 302 IPC and in other words, whether the conviction of the accused Samir u/s 304 Part-II IPC and Abdul Hannan u/s 323 IPC can be sustained.

29. The prosecution, in order to bring home the charges framed against Samir Uddin and Abdul Hannan, has examined 4(four) witnesses, namely, PW-3, Smti. Ayesha Begum; PW-4, Ashik Ahmed, PW-5, Abdul Haque and PW-6, Kabir Ahmed, all of whom, according to the prosecution, are the witnesses to the occurrence, apart from Dr. Rabindra Nath Das, PW-1, who conducted the autopsy on the body of Mashuk Ahmed, the deceased as well as the Investigating Officer, Rahim Uddin Choudhury, PW-8 and PW-9, Dr. Lipi Deb, who examined Ashik Ahmed (PW-4) in Karimganj Civil Hospital on 25th December, 2001 and proved the injuries found on Ashik Ahmed. For the reasons recorded in this judgment, we have held that the presence of PW-3 in the place of occurrence is doubtful, though she claims to be the witness to the place of occurrence. We shall, therefore, now marshal the evidence of PWs-1, 4, 5, 6, 8 and 9 for the purpose of recording the finding relating to the culpability of Samir Uddin and Abdul Hannan.

30. PW-4, the elder brother of the victim, in his evidence has stated that Samir Uddin had a sped in his hand and hit Mashuk and when he (PW-4) tried to

obstruct, he was also bitten up. This witness has further stated that Abdul Hannan hit Mashuk with "bung" after Mashuk fell on the ground. PW-4 further deposed that on hearing commotion, few people come to the place of occurrence and tried to stop the fight and thereafter, the accused persons left the place. This witness, however, did not say in which part of the body of Mashuk they gave the blows. During cross-examination, PW-4 has stated that Samir Uddin by the sped in his hand injured him (PW-4) on his leg. This witness has also stated that he has stated before police that Samir Uddin injured Mashuk by the sped and Abdul Hannan hit Mashuk with a "bung" on his head. PW-8, Rahim Uddin Choudhury, the Investigating Officer, has corroborated the said version by deposing that PW-4 disclosed before him that Samir Uddin hit Mashuk by the sped and Abdul Hannan hit Mashuk by the "bung" on his head.

31. PW-5, Abdul Haque, an independent witness to the occurrence, though in his examination-in-chief did not say who gave what blow on the person of Mashuk and by what, except saying that he saw accused persons beating Mashuk where he found Mashuk's father and his younger brother, he, however, during cross-examination by accused Samir Uddin stated that it was Samir Uddin, who first hit Mashuk and thereafter, Abdul Hannan hit Mashuk on his head by the "bung". PW-6, Kabir Ahmed, another independent witness to the occurrence, has also stated that he saw all the accused persons beating Mashuk (deceased); Ismail and Ashik Ahmed (PW-4) left the place and thereafter, saw Abdul Hannan coming back and hit Mashuk by a "bung". PW-4, PW-5 and PW-6 have corroborated each other relating to giving blow by Abdul Hannan on the head of Mashuk by a "bung" in his hand and beating Mashuk by Samir Uddin with a stick. Injuries No. 1, 4 and 2, 3 found on the person of Mashuk relate to the blow given by Abdul Hannan and beating by Samir Uddin, respectively. The evidence of PW-9, Dr. Lipi Deb, is not of much importance as she examined Ashik Ahmed of certain injuries only on 5th February, 2001, i.e. after 21 days from the date of occurrence. The prosecution has not examined any doctor, who immediately treated PW-4 for his injuries stated to have received.

32. As discussed above, PW-1 in his evidence has found 4(four) injuries on the person of the deceased Mashuk and while injury Nos. 1 and 4 were made by a single blow, injury Nos. 2 and 3 are superficial injuries. The doctor has opined that all the injuries are anti mortem in nature and the injury No. 1 might be caused by the hit by a "bung" and the injury Nos. 2 and 3 could be caused by any blunt object.

33. From the discussions of the aforesaid evidences on record, it is, therefore, evident that the prosecution could prove that it is Abdul Hannan, who caused the injury No. 1, which is related to injury No. 4, on the person of Mashuk, which resulted in the death of Mashuk. Injury Nos. 2 and 3, which are found on the person of Mashuk were caused by Samir Uddin.

34. In view of the aforesaid discussion, conviction of Samir Uddin u/s 304 Part-II IPC is set aside. He is, however, convicted u/s 323 IPC. The accused Abdul

Hannan is found guilty of the offence punishable u/s 304 Part-II IPC, as he though knew that giving the blow on the head of Mashuk is likely to cause death but he did not have any intention to cause death or to cause such bodily injuries as is likely to cause death.

35. The accused Samir Uddin is, therefore, sentenced to undergo rigorous imprisonment for a period of 1(one) year and to pay a fine of Rs. 1,000/-, in default to suffer simple imprisonment for another 1(one) month. The accused Abdul Hannan is sentenced to suffer rigorous imprisonment for 7(seven) years and to pay a fine of Rs. 5,000/-, in default to suffer further rigorous imprisonment for a period of 3(three) months. Both the accused persons, namely, Samir Uddin and Abdul Hannan, shall be entitled to set off, u/s 428(1) Cr.P.C., the period of detention, if any, undergone by them. Fine, if realized, shall be paid to the informant.

36. The Criminal Appeal No. 243/2005 and Criminal Appeal No. 270/2005 are, therefore, allowed to the extent indicated above. The Criminal Appeal No. 255/2005 is dismissed.

37. The appellant in Criminal Appeal No. 255/2005, Abdul Hannan, who is on bail, is directed to surrender before the learned Sessions Judge, Karimganj, to serve out the sentence. His bail bond stands cancelled. The appellant in Criminal Appeal No. 270/2005, Samir Uddin, who is in custody, shall be released as he has already served out the sentence. The State Government is directed to pay Rs. 1,00,000/-(Rupees One Lac) as compensation to the legal heirs of the deceased Mashuk Ahmed, within a period of 6(six) months from today.