
(1971) 11 GAU CK 0003
In the Gauhati High Court

State of Assam

APPELLANT

Vs

Bhabananda Sarma and Others

RESPONDENT

Date of Decision : 24-11-1971

Acts Referred:

Evidence Act, 1872 — Section 105, 134

Penal Code, 1860 (IPC) — Section 302, 323, 326, 34, 97

Citation : (1972) CriLJ 1552

Hon'ble Judges : M.C. Pathak, J;D.M. Sen, J

Bench : Division Bench

Judgement

M.C. Pathak, J.—The three respondents-(1) Bhabananda Sarma. (2) Phanidhar Sarma and (3) Harendra Nath Sarma; who are brothers were charged under Sections 302/34 and 323/34. Indian Penal Code and tried by the learned Sessions Judge. L. A. D. Gauhati. On consideration of the evidence on record, the learned Sessions Judge by his judgment and order dated 24-7-68 acquitted the Respondents on benefit of doubt and the present Government Criminal appeal is directed against this order of acquittal.

2. The prosecution case may be briefly stated: On 10-11-67. at about 7 A. M. in the morning. Sashi Mohan Sarma (deceased) was proceeding to their field with some mustard seeds in a "Kharahi" (basket) for sowing in the field. His elder brother Gopinath Sarma was also going with him taking some cattle to be tethered in the field. They proceeded together about half a furlong from their house by the village path when Gopinath with the cattle left the path and proceeded to nearby field for tethering the cattle and Sashi Mohan proceeded along the path towards their field where their ploughmen were working. In the meantime, the three accused persons, namely (1) Bhabananda Sarma, (2) Phanidhar Sarma and (3) Harendra Nath Sarma chased Sashimohan with weapons in their hands, Bhabananda had a lathi in his hand. Phanidhar had a "dalibari" (a wooden hammer with a long handle for breaking clods of earth) and Harendra had an iron rod in his hand. Having been so chased by the accused persons. Sashimohan ran towards his brother Gopinath raising alarm all the way.

As soon as Sashimohan being chased reached the field of one Mohodar near which Gopinath was going to tether his cattle, accused Bhabananda caught hold of Sashimohan by both of his hands from behind and then accused Phanidhar gave him a blow on his head with the "dalibari" as a result of which Sashimohan fell down. Thereafter, accused Harendra also struck Sashimohan on his head and other Parts of his body with the iron rod. Having seen his brother being so assaulted, Gopinath rushed to the place of occurrence with a view to intervene. At this, accused Bhabananda caught hold of Gopinath also and then accused Harendra gave him some blows with the iron rod causing injuries. In the mean time, hearing the "hulla" some persons rushed towards the place of occurrence and on seeing them the accused persons ran towards their house carrying the weapons with them.

Sashimohan was very seriously injured and was lying unconscious in the field. The persons who assembled there carried Sashimohan home. Umakanta Sarma, one of the brothers of Sashimohan who was in his house at that time, on hearing the occurrence from his brother Gopinath, proceeded to Barpeta Police Station and lodged an ejahar. Both the injured persons were taken to the Barpeta Civil Hospital where they were examined and were given medical aid. Sashimohan however, died on the following night in the hospital. Police registered a case and on completion of investigation submitted charge-sheet against the three accused persons under Sections 302/34 and 323/34 of the Indian Penal Code.

3. The learned committing Magistrate charged the accused persons under Sections 302/34 and 323/34 Indian Penal Code and committed them to be tried in the Sessions Court. Before the Sessions Court also, the accused were charged under Sections 302/34 and 323/34 Indian Penal Code.

4. The defence of accused Phanidhar and Harendra was that of denial and alibi and the defence of accused Bhabananda was that of exercise of right of private defence of person. Accused Bhabananda in his statement u/s 342 Criminal Procedure Code stated that on the day of occurrence, Gopinath and Sashimohan chased him while he was going to tether cattle and gave blows on his back. As he shouted for help, some people came. Being helpless, he picked up a "dalibari" lying nearby and brandished it around and he did not know on whose person it struck. According to Bhabananda the other two accused persons were not present at the place of occurrence. Phanidhar and Harendra in their statement u/s 342. Criminal Procedure Code stated that they were not at the place of occurrence but on hearing alarm raised by one Sarbananda both of them went to the place of occurrence,

5. The prosecution examined 9 witnesses. Defence also examined one witness, namely. Dr. B. N. Mukherjee.

6. On consideration of the evidence on record, the learned Sessions Judge gave benefit of doubt to all the three accused and acquitted them of the charges.

7. In a criminal case the burden of proof is on the prosecution and in order to

prove a charge against an accused, the prosecution must establish its case beyond reasonable doubt by legal evidence adduced in the case. It is also an established principle that the accused must be presumed to be innocent until the prosecution has been able to establish the charge against him beyond reasonable doubt and the presumption of innocence must continue even in an appeal against acquittal, In a criminal case there is no burden on the accused to prove his Innocence.

8. Section 105 of the Indian Evidence Act has laid down:

105. When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any Special exception or proviso contained in any other part of the same Code, or in any law defining the offence is upon him and the Court shall presume the absence of such circumstances.

9. But even then decided cases have laid down the principle that where the burden of proving anything is on the accused this burden is less than what is required when the burden is on the prosecution. The standard of proof required from the accused for any circumstance under the law is not the standard required from the prosecution. The case law is clear that where an accused is charged with murder and the evidence discloses a possible defence of his self-defence or of provocation, the burden of proving the accused's guilt remains throughout on the prosecution and it is not at any time on the accused to establish either defence. It is also not necessary that the accused must plead the general or special exception specifically or lead evidence, if it is apparent from the evidence on record whether produced by the prosecution or the defence that any exception would apply then the presumption of absence of such circumstances against the accused is removed and it is open to the Court to consider whether the evidence proves to the satisfaction of the Court that the accused comes within the exception.

10. The Supreme Court in the case of Keshav Gangaram Navge and Another Vs. State of Maharashtra, has laid down that the High Court's power in appeal against acquittal is not different from its power in ordinary appeals against conviction. The High Court has to consider all the matters which weighed with the Trial Court and reasons given by it for disbelieving the witnesses, whose demeanour it had opportunity of observing. It has also been laid down whether the defence story is probable or not is not immediately relevant and the Court has to see whether the prosecution has established beyond doubt that the incident took place in the manner alleged by it.

11. In the case of the State of U.P. and Another Vs. Jaggo alias Jagdish and Others, the Supreme Court has observed that "It is true that all the witnesses of the prosecution need not be called but it is important to notice that the witness whose evidence is essential to the "unfolding of the narrative" should be called."

12. The above principles are required to be always kept in view in considering an

appeal against an order of acquittal and Mr. K. M. Lahiri the learned Counsel appearing for the accused-Respondents has rightly laid much stress on these principles at the outset of his submissions on behalf of the accused-Respondents.

13. Let us now examine the evidence in the instant case. P. W. 1 Umakanta Sarma lodged the first Information Report. He is the elder brother of deceased Sashimohan. The occurrence took place at about 7 A. M. on 10-11-67 and the First Information Report was lodged at Barpeta Police station at about 9. 30 A. M, on the same day. When the first information was lodged, Sashimohan was alive but lying in a seriously injured condition unconscious and speechless. According to P. W. 1 he lodged the ejahar on learning about the occurrence from Gopinath Sarma, P. W. 2.

14. P. W. 1 is not an eye witness to the occurrence P. W. 2 Gopinath Sarma. P. W. 3 Danesh Ali, P. W. 4 Nur Muhammed and P. W. 6 Kurpan Ali are according to the prosecution eye witnesses to the occurrence.

15. P. W, 2 Gopinath deposed on oath that in the morning on the date of occurrence at about 7 A. M. his brother Sashimohan went from their house with some mustard seeds in a "Kharahi" to sow in the field and P. W. 2 went along with him to tether some cows in the field. Both of them proceeded for about half a furlong from their house, when P. W. 2 left the path and went to * nearby field to tether the cows. Sashimohan was proceeding along the path taking the "Kharahi" of mustard seeds in his hand. When P. W. 2 proceeded about 15 to 20 cubits towards the field for tethering the cows he heard his brother Sashimohan shouting "I am assaulted." At this he turned back and found that accused Harendra. Phanidhar and Bhabananda were chasing Sashimohan who was running towards P. W. 2. Harendra had an iron rod. Bhabananda had a bamboo lathi, and Phanidhar had a dalibari in their hands respectively. When Sashimohan reached near P. W. 2, he tried to resist the accused persons telling them not to assault.

At this. Harendra said "we have got the enemy today and he should not be let off." Immediately thereafter, accused Bhabananda caught hold of Sashimohan from behind and Phani gave a blow on the head of Sashimohan with the "dalibari." On receipt of the blow, Sashimohan immediately fell down. Then Harendra struck Sashimohan with the iron rod on his head, back and some other parts of the body. Thereafter Bhabananda caught hold of P. W. 2 felt dizzy and fell down when Bhabananda struck him with the lathi. On hearing the hue and cry raised by P. W. 2, Nur Muhammed (P. W. 4). Danesh AH (P. W. 3), Kurpan Ali (P. W. 6). Fazar, Ali and Ranjan Ali and some of his nephews came to the place of occurrence. Seeing those people, the accused persons left the injured persons and ran towards their home. After having given some water to Sashimohan. Danesh. Nur Muhammed, Kurpan. Harish Chandra and Dhaneswar carried Sashimohan to their house.

P. W. 2 came home with much difficulty on foot. Sashimohan was senseless at

that time. The bodies of Sashimohan and P. W. 2 were besmeared with blood. After coming home he told his brother Umakanta (P. W. 1) about the occurrence and asked him to inform the Police. P. W. 1 went to the Police station and lodged the ejahar. P. W. 2 came to the Police station and Sashimohan was also carried to the Police station. Thereafter, they were taken to the hospital. In the hospital, after about 1 A. M, at night. Sashimohan breathed his last. P. W. 2 was at the hospital under treatment for nine days and thereafter he came home. He identified the accused Harendra. Bhabananda and Phanidhar in the Court.

16. P. W. 4 Nur Muhammed stated in his evidence that on the day of occurrence which was a Friday in the month of Kati he was ploughing in the land of Dhani of village Baradi of whom he was an adhiar in respect of that land, while he was ploughing, he heard hulla towards the south at a distance of about 180 yards. On hearing the hulla. he left the plough and proceeded to that side and he found that accused Bhabananda, Harendra and Phanidhar were chasing Sashimohan and having so chased Bhabananda caught hold of Sashimohan in the field of one Mohodar. Then Phani Thakur (Phanidhar Sarma) gave a blow on the head of Sashimohan with a "dalibari". On receiving the blow, Sashimohan fell down. After Sashimohan fell down. Harendra gave blows on the head and other parts of his body with an iron rod. At that time. P. W. 2 was at a little distance.

On coming near. P. W. 2 tried to obstruct the accused when Bhabananda caught hold of P. W. 2 also and accused Harendra dealt blow on his head with an iron rod and P. W. 2 fell down. Thereafter Bhabananda also dealt blows on P. W. 2 with lathi. Having thus assaulted P. W. 2 and Sashi. the accused persons fled away In the meantime, Danesh (P. W. 3) Kurpan (P. W. 6), Fazar and Ranjan arrived at the place of occurrence. P. W. 4 stated that they found blood coming out from the nose, mouth and head of Sashimohan, At the request of P. W. 2. Danesh brought some water and applied on his head and mouth. Thereafter P. W. 4. P.W.3. P. W. 6, Harichandra and Fazar carried Sashimohan to his house. P. W. 2 somehow walked to his house, after being taken home, Sashimohan was taken to the police station and then to the hospital; P. W. 4 also accompanied them.

17. P. W. 3 Danesh All stated that on the day of occurrence which was Friday in the month of Kati while he was ploughing in the morning on the land of Bisha Thakur of village Baradi, he found Sashimohan Sarma going along the path with a "Kharahi" in his hand. A little while thereafter, he found that accused Harendra, Phanidhar and Bhabananda were chasing Sashimohan. Sashimohan was running towards the field of Mo-hodar. Accused Bhabananda caught hold of Sashimohan by clasping around and then Phanidhar gave a blow on the head of Sashimohan with a "dalibari" Sashimohan fell down. Then Harendra gave blows on Sashimohan with an iron rod. At that time Sashimohan's brother Gopi went there to tether cows. When Gopinath obstructed. Bhabananda clasped round Gopi and Harendra gave blows on his head and other parts of his body with an iron rod. P. W. 3 further stated that at that time he was ploughing at a distance of 40 to 50 ft. away from the place of occurrence. Hearing hulla at the time of

occurrence Ranjan. Fazar. Nur Muhammed and Kurpan came running, Finding P, W. 3 and others arriving at the place the accused persons ran away. After a little while. Dhaneswar and Harichandra also arrived at the place of occurrence. All of them carried Sashimohan to his house. Gopi went on foot. Thereafter, some people carried Sashimohan to Bar-peta. Gopi also went with them. P. W. 3 went home when Sashimohan was taken to Barpeta Police station. After the assault Sashimohan was unable to speak.

18. P. W. 6 Kurpan AH stated that at the time of occurrence he and Fazar were cutting thatch on the land of Thanu of village Baradi. While doing so. they heard hulla towards the south and at this, they stood up and saw accused Harendra. Phani and Bhabananda chasing Sashimohan. After chasing to some distance, Bhabananda caught hold of Sashimohan in the field of Mohodar, Then the accused gave a blow on the head of Sashimohan, Immediately Sashimohan fell down. Then accused Harendra gave blows on Sashimohan with an iron rod. At that time. Gopinath was tethering cattle at a little distance and he came and tried to obstruct the accused persons from assaulting Sashimohan. Then accused Harendra and Phanidhar gave blows on Gopinath also. Seeing the occurrence they came near the place. The accused persons having so assaulted Sashimohan and Gopi. left the place. At the request of Gopi, Danesh brought some water and applied on the mouth and head of Sashimohan. Thereafter, Sashimohan was carried home by several persons jointly. P. W. 6 went to his house.

19. The above is in short the evidence of the eye witnesses to the occurrence.

20. P. W. 5 is Dr. S. Kalita. This witness was examined by the committing Magistrate and his evidence was tendered u/s 509 (i) Criminal Procedure Code and he was cross-examined by defence in the Sessions Court. P. W. 5 did the post-mortem examination of the body of Sashimohan aged about 36 years and he found the following external injuries on the dead body of Sashimohan,

1. Lacerated wound 1" x 2" over scalp near posterior fontanelle.
2. Lacerated wound 1" x 2" over scalp on left side of occipital region.
3. Lacerated wound 1" x 2" on scalp over mastoid region on right side.
4. Lacerated wound 1" x 1" skin deep over anterior aspect of right shoulder joint.
5. Lacerated wound 1 1/2" x 1" x skin deep over right side of chest wall below clavicle.
6. One Ecchymosis 4" x 3/4" over back area of left scapula with an abrasion 1" x 1/2" over it.

Occipital bone fractured into six pieces. Right parietal bone fractured 2" in length, blood clot over membrane present. Membrane lacerated 1" x 1/2" x thickness from posterior aspect. Blood clot over both lobes of brain. P. W. 5 stated that the patient was admitted in hospital on 10-11-67 at about 9 A. M. in an unconscious state and he died at about 3 A. M. on 11-11-67. The injuries were all ante-mortem. According to P. W. 5. the death was due to coma as a result of intra

cranial haemorrhage due to the injuries sustained. P. W. 5 stated that the injuries Nos. 2 and 3 might be caused by some hard substance. Internal haemorrhage was caused as a result of injury Nos. 1, 2 and 3. All the injuries were caused by blunt weapons.

21. P. W. 5 also examined Gopinath on 10-11-67 at about 10 a. m. and found the following injuries on his person-

1. One lacerated wound 1"x?" over scalp on right side of parietal region.
2. One abrasion 2"xl" over the anterior aspect of the right shoulder.
3. He complained of pain over the chest on both sides. Injuries were fresh, simple and caused by blunt weapon.

22. On consideration of the evidence of P. Ws. 2, 4, 3 and 6 and the evidence of P. W. 5 the Doctor, it is proved beyond reasonable doubt that Sashi Mohan died as a result of the injuries sustained by him and that Gopi also sustained some simple injuries on his person.

23. On consideration of the defence taken by the accused persons in the case it is found that the defence has not seriously challenged that on the date of occurrence Sashimohan received serious injuries as a result of which he died in hospital and it was also not seriously challenged that P. W. Gopi also sustained some simple injuries during the course of the occurrence. In this regard the learned Sessions Judge also has observed as follows :

The defence has not challenged the fact that on the date of occurrence Sashimohan Sarma received serious injuries and that as a result of the injuries sustained by him, he died in the hospital on the following night. It was also not disputed that P. W. Gopi also sustained some simple injuries.

24. There cannot be any doubt as to the fact that P. W. 2 Gopi Nath Sarma was present at the time of occurrence. He is one of the persons injured in the occurrence.

25. The point that arises for consideration at this stage is whether P. Ws. 4, 3 and 6 were really present at the time of occurrence and their evidence may be relied upon, in this regard we have first to consider whether these persons' presence nearabout the place of occurrence is believable. P. W. 4 Nur Muhammed who is aged about 26 years, stated that at the time, of occurrence he was ploughing on the land of Dhani of Baradi village. He is an Adhiar of Dhani in respect of that land. It was the month of Kati. In cross-examination it was even not put to P. W. 4 that he did not plough the land of Dhani of Baradi as Adhiar, On the other hand in cross-examination he categorically stated that he had no agricultural land, but he cultivated other persons' land on adhi terms. On a careful examination of the evidence of this witness it cannot be doubted that at the time of occurrence this witness was ploughing on the land of Dhani nearabout the place of occurrence. P. W. 3 Danesh AH aged about 18 years

stated that at the time of occurrence he was ploughing on the land of Bisa Thakur of Baradi.

P. W. 3 stated that he occasionally worked as a day labourer. Sometimes he worked as a day labourer of Sashi also. It was not even suggested to the witness that on or about the time of occurrence this witness was not ploughing on the land of Bisa Thakur of Baradi village. P. W. 6 who is about 30 years old stated that at the time of occurrence he along with one Fazar was cutting thatch on the land of Thanu of Baradi village and while cutting thatch they heard the hulla and stood up and saw the occurrence as stated above. To this witness also it was even not suggested that he was not cutting thatch on the land of Thanu of village Baradi about the time of occurrence. On examination of the evidence of these two witnesses also, we are satisfied that there cannot be any doubt as to the presence of these two witnesses nearabout the place of occurrence at the relevant time.

26. It is now required to be considered whether the evidence of P. Ws. 4, 3 and 6 may be relied upon. We have already observed that their presence at the time of occurrence nearabout the place of occurrence cannot be doubted. P. Ws. 2, 3, 4 and 6 have consistently stated that accused persons chased Sashimohan, while he was going along the path and while so chasing, Sashi ran back towards his brother Gopi and when he arrived on the field of Mohodar. Bhabananda caught hold of Sashi from behind and Phanidhar gave a blow on the head of Sashi with the dalibari. Sashi on receiving the blow immediately fell down and thereafter Haren struck him on the head and other parts of the body with the iron rod. In the meantime P. W. 2 Gopi Nath tried to intervene when he was also caught hold of by Bhabananda and assaulted by the accused persons. On these broad facts there does not appear any discrepancy at all in the evidence of P. Ws. 2, 3, 4, and 6 though some minor and immaterial discrepancies are found in their evidence as pointed out by defence.

27. The learned Sessions Judge has discarded the evidence of the eye witnesses mainly on the following grounds:

(1) that the P. Ws. did not state about the injuries of Bhabananda and that the injuries found on Bhabananda were not explained by the prosecution:

(ii) That the persons at the Namghar who were informed by Danesh. P. W. 3 were not examined:

(iii) that there were discrepancies as to the persons who carried Sashimohan to his house after he was assaulted:

(iv) that the Kharahi and the mustard seeds were not seized by Police; and

(v) that three of the eye witnesses examined in the case were day labourers and landless.

28. The learned Counsel for the respondents also has laid much stress on these

points in his submissions.

29. The defence of Bhabananda was that Gopi and Sashimohan chased him, while he was going to tether cattle and they gave him blows on his back. He having raised alarm nearabout people came and he picked up a Dalibari lying nearby and brandished it and he did not know who was hit by the Dalibari. In other words the defence of Bhabananda is that of right of private defence.

30. From the evidence of D. W. 1, Dr. B. N. Mukherjee. it is found that on 10-11-67 at about 9.30 A. M. he examined Bhabananda Sarma of Baradi in out-door patient department of the Civil Hospital at Barpeta and he found the following injuries:

- (1) One ecchymosis 6" x 3/4" on middle of back of right side of chest.
- (2) One ecchymosis 2"x?" on back of lower part of right arm.
- (3) One ecchymosis 5" x ?" on middle of back of left side of chest near the midline.
- (4) One swelling of the root of right index finger with an abrasion 3/4" x ?" on dorsum of it and dislocation of the meta-carpo phalangeal joint.

According to D. W. 1 all the injuries were simple in nature except No. (4). which was grievous one and all of them might be caused by some blunt weapon. The age of injuries is noted as within 24 hours. In cross-examination D. W. 1 stated that he had not noted the surname of the patient nor did he record the name of father of the patient or his address in the out-door patient Register from which he deposed. He would not be able to identify the man then, if seen. That the patient was not admitted as indoor patient no X-ray examination was made to ascertain if there was dislocation of the metacarpophalangeal joint and that the dislocation might be caused by a fall, as well. The witness, however, stated that he issued a certificate to the injured, which is Ext. A. It is obvious from the evidence of the D. W. 1 that his opinion regarding dislocation in the right index finger was without any X-ray examination and the dislocation if at all might be caused by a fall as well, and 3 of the injuries mentioned above were ecchymosis and the 4th one, which is said to be grievous injury, was the swelling of the root of the right index finger with abrasion.

Apart from the omissions tant amounting to discrepancies admitted by D. W. 1 between the out-door patient register of the Civil Hospital and the certificate Ext. A, the injuries on the person of Bhabananda appear to be ecchymosis and abrasion. These injuries were not bleeding injuries or otherwise so conspicuous that these might have attracted attention of the persons who came to the place of occurrence at the time or immediately after P. W. 2 admitted that he tried to obstruct the accused from assaulting his brother. P. W. 3 stated that when Sashi was assaulted his brother Gopi Nath who went to tether cattle there tried to obstruct the assault. P. Ws. 3.4 and 6 stated that when Sashi was assaulted. Gopi was tethering cattle at a little distance and on coming, he tried to obstruct

the accused from assaulting Sashi.

As soon as the eye witnesses P. Ws. 3, 4 and 6 reached the place of occurrence, the accused persons ran away. Considering the nature of the injuries on the person of Bhabananda, it cannot be said that these ecchymoses and abrasion could not but attract the attention of the eye witnesses at the time of occurrence and therefore when P. Ws. 2, 3, 4 and 6 did not see injury on Bhabananda, they must have lied or suppressed real facts or that their presence at the place of occurrence at the relevant time is in any manner doubtful. In this connection the following passage from Modi's Medical Jurisprudence and Toxicology Fourteenth Edition, Chapter X, at page 217, may be considered:

Ecchymosis makes its appearance over the seat of injury in one or two hours after the injury. It may appear even in less time, if the skin injured is very thin, as the eyelids and scrotum when ecchymosis has occurred into the deeper tissue or under tense fasciae, it appears on the surface at an interval of one or two days or even more at some distance from the seat of injury following the line of least resistance and in obedience to the law of gravity, e.g., the appearance of a black eye in the case of a contusion on the forehead or on the head....

31. In view of the nature of the ecchymosis and the swelling of the root of the right index finger with an abrasion when the eye witnesses stated that they did not see any injury on the person of Bhabananda at the time of occurrence it cannot be said that they stated so falsely or that they suppressed truth.

32. The learned Sessions Judge has laid much stress on the fact that the prosecution did not explain the injuries on the person of accused Bhabananda. We have already considered the nature of the said injuries which are Ecchymosis and swelling of the root of the right index finger. We have also found that when the P. Ws. 2, 3, 4 and 6 stated that they did not see any injury on the person of Bhabananda, they cannot be said to have stated so falsely or by way of suppressing the truth. The eye witnesses who have been examined, namely, P. W. 2 Gopi Nath, P. W. 3 - Danesh Ali, P. W. 4 - Nur Mahammed and P. W. 6 - Kurpan Ali, all have stated that P. W. 2 Gopi Nath tried to obstruct the accused from assaulting Sashimohan whereupon after having seriously assaulted Sashi, the accused persons assaulted Gopi also. The resistance of Gopi after Sashi fell down unconscious being assaulted clearly explains the ecchymosis on Bhabananda which might be caused during resistance by Gopi, D. W. 1 himself says that the injury on right index finger might have been sustained even by fall.

33. In the circumstances we are clearly of opinion that the evidence of the eye witnesses cannot be discarded because they stated that they did not see any injury on Bhabananda at the time of occurrence or that the prosecution failed to explain the injuries on Bhabananda.

34. P. W. 3 Danesh Ali stated in cross-examination that when Sashi fell down he took some water from the well (Inara) of Kirtanghar, which was situated at a distance of about 2 furlongs and there were 10 or 12 men in the Kirtanghar and

P. W. 3 informed them of the occurrence and some of them came to the place of occurrence after him. P. W. 2 also stated that after applying some water on the mouth and head of Sashi Danesh. Nur Muhammed. Kurpan, Dhaneswar. Hari Chandra carried him home. P. W. 4 Nur Muhammed stated that they saw blood coming from the nose, mouth and head of Sashi and on the request of Gopi, Danesh brought some water and gave on the head and mouth of Sashi. P. W. 6 also stated that on the request of Gopi. Danesh brought some water and gave on the head and mouth of Sashi. It is quite clear from the evidence of these witnesses that when Sashi was assaulted severely, blood was coming out from his nose, mouth and head and P. W. 3 Danesh AH brought some water from the well of the nearby Kirtanghar. The learned Sessions Judge has observed in his judgment that non-examination of the persons who came from the Kirtanghar after the occurrence raised the presumption that these witnesses were withheld by prosecution because if examined, they would not have supported the prosecution case. This observation of the learned Sessions Judge is farfetched and not warranted at all in the face of the direct evidence of the eye witnesses. After assault was over and the accused persons left, it was found that blood was coming out from the nose, head and mouth of Sashi Mohan and naturally his brother Gopi asked Danesh to bring some water, who must have rushed to the well of Kirtanghar and brought some water. P. W. 3 also stated that some people from Kirtanghar came to the place of occurrence after his coming from the well with water but these persons were not at all eye witnesses to the assault on Sashi and Gopi, and these persons could not have stated anything about the actual assault, which had already taken place and accused had run away.

So in our opinion non-examination of these witnesses who came sometime after the occurrence does not raise any adverse presumption against the prosecution story or the evidence of the eye witnesses examined in the case. At the time of occurrence. hearing shouts, Ranjan, Fazar, Nur Muhammed. and Kurpan came running. P. W. 2 stated that when he raised alarm, Nur Muhammad, Danesh. Kurpan, Fazar Ali. Ranjan and some of his nephews came to the place of occurrence. P. W. 4 Nur Mahammed stated that during the time of occurrence. Danesh. Kurpan, Fazar, Ranjan also reached the place of occurrence. The persons who are stated to have seen the occurrence are P. Ws, 2. 3. 4, 6. Fazar Ali and Ranjan Ali and some nephews of P. W. 2. Of these eye witnesses, the prosecution has examined P. Ws. 2. 3. 4 and 6. Law does not require that all the eye witnesses to an occurrence must be produced and examined in a criminal case to prove a charge. Section 134 of the Indian Evidence Act lays down that no particular number of witnesses shall in any case be required for the proof of any fact. Evidence is to be weighed and not counted

35. P. W. 2 was severely assaulted. He stated that Nur Muhammed, Danesh. Kurpan Ali, Fazar Ali and some of his nephews came to the place of occurrence and thereafter Danesh. Nur Muhammed, Kurpan, Harichandra and Dhaneswar carried Sashi home, P. W. 3 clearly stated that hearing shouts Ranjan, Fazar. Nur Muhammed. Kurpan and himself came running and on seeing them the accused

persons ran away. After a while. Dhaneswar and Harichandra reached. P. W. 4 also stated that during the course of the occurrence Danesh, Kurpan. Fazar, Ranjan and himself reached the place of occurrence. Thereafter. Danesh fetched some water and applied on the head and mouth of Sashi and thereafter Sashi was carried home by Danesh. Kurpan. Harichandra, Fazar and Nur Muhammed.

36. On a careful consideration of the evidence of these eye witnesses, it is found that Harichandra and Dhanesh-war arrived at the place of occurrence after the accused had left. Fazar was cutting thatch with P. W. 6. Since the prosecution has examined 4 of the eye witnesses to the occurrence and if their evidence may be legally relied upon non-examination of other witnesses in our opinion would not in any way affect the prosecution case.

37. P. W. 2 stated that P W. 3, P. W. 4, P. W. 6. Harichandra alias Mono and Dhaneswar carried Sashimohan home. P. W. 3 stated that hearing the shouts. P. W. 4. P. W. 6 and he (P. W. 3) Ranjan and Fazar came running to the place of occurrence and seeing them the accused ran away. After a while Dhaneswar and Harichandra reached there, and then all of them helped in carrying Sashi home. P. W. 4 stated that P. W. 3, P. W. 6. Harichandra Fazar and himself (P. W. 4) carried Sashi home catching hold of him physically. He also stated in cross-examination that Dhaneswar and Harichandra came after the accused fled away. P. W. 6 stated that P. W. 3 brought some water and gave on the head and mouth of Sashi and several persons carried Sashi home.

38. On examination of the evidence of the eye witnesses on the point of carrying Sashi home after the assault we find that out of the persons who carried Sashi home, only the name of Dhaneswar which was mentioned by P. W. 2 was not mentioned by the other P. Ws. but at the same time they stated that all the persons present immediately after the occurrence carried Sashi home. In the facts and circumstances of the case and the evidence of the eye witnesses it cannot at all be said that non-mentioning of the name of Dhaneswar specifically by some of the P. Ws. is a material discrepancy. At the most it may be said to be an omission and for this reason it cannot be legally concluded that the P. Ws. were not present at the time of occurrence or they have not stated the truth or have suppressed the same.

39. The learned Sessions Judge also observed that the independent eye witnesses were day labourers, and they had no land of their own, but at the same time he has also observed that it did not appear from the evidence that any other independent and reliable witnesses were present at the time of occurrence. The evidence shows that some persons from the Kirtanghar came to the place after the occurrence. In the circumstances the other persons who came to the place of occurrence after the occurrence could not have stated anything about the actual occurrence and non-examination of them does not raise any adverse presumption against the prosecution in the facts and circumstances of the case.

40. From the evidence of the Investigating Officer, it is found that the village of Bamun Baradi which is the village of the complainant and the accused persons, situated at a distance of about 2½ furlongs from the place of occurrence towards the west and other homesteads were about 4 to 6 furlongs off. The learned Sessions Judge has observed that P. W. 1 Uma Kanta stated in his evidence that P. W. Danesh Ali, Nur Muhammed and Kurpan and 2 or 3 persons carried injured Sashi to his house after the occurrence. But in his statement before the Investigating Officer, he stated that Prasanna. Daval Pathak and Mohananda carried injured Sashimohan to his house. We have examined the evidence of P. W. 9 Investigating Officer, who stated that Uma Kanta P. W. 1 stated before him that when he came he found his co-villagers Prasanna Sarma. Dayal Pathak, Mohananda and others carrying Sashimohan and Gopi nath towards home in injured condition

The learned Sessions Judge failed to observe the significance of the word "and others" in the statement of P. W. 1 before Police. On consideration of the evidence regarding carrying of Sashimohan home in a seriously injured condition it is found that he was carried by P Ws. 3. 4. 6 along with others who were present at the moment. P. W. 1 was not a witness to the occurrence. The fact remains that a number of persons including the P. Ws, 3. 4. 6 carried Sashi home in a seriously injured condition. The discrepancy in the evidence of P. W. 1 in his evidence and statements before Police is not at all material.

41. The learned Sessions Judge has further observed that the "Kharahi" and mustard seeds were not seized by Police. P. W. 2 stated that on the date of occurrence at about 7 A. M. Sashimohan started from home with some mustard seeds in a "Kharahi" for sowing. P. W. 3 stated that he saw Sashimohan going along the path with kharahi in hand. There is no doubt that on the date of occurrence immediately before the assault. Sashi was carrying a Kharahi with some mustard seeds in it. In his cross-examination P. W. 2 stated that he could not say who took the Kharahi from the place of occurrence. P. W. 6 in his cross-examination stated that Sashi had a Kharahi with mustard seeds in hand and after the occurrence the kharahi was lying there. The kharahi was made of brass. The occurrence took place at about 7 A. M. in a cultivable field on 10-11-67 (in the month Of Kati).

The F.I.R. was lodged at Barpeta Police Station at about 9.30 A. M. on the same day and the case u/s 326/34. Indian Penal Code was registered by S. I. of Police, who was "in charge in the absence of the Officer-in-charge, and the F.I.R. was endorsed to one Assistant Sub-Inspector of Police P. W. 9 for investigation. P. W. 9 stated that at the place of occurrence he did not find any Kharahi nor did he find any mustard seeds or lentil. The evidence on record shows that while Sashi was going along the path with the Kharahi containing mustard seeds, he was chased by the accused persons and Sashi ran towards the place where Gopi was tethering cattle. In the circumstances he must have thrown the Kharahi somewhere and run out of fear of his life. Sashi was assaulted, in the field of

Mohodar and in that field nobody was ploughing.

It is quite possible that no mustard seeds could be seen there, when the Investigating Officer went there. The Kharahi was made of brass and it is not known who took away the tharahi and no adverse presumption can be drawn for non-seizure of the Kharahi. because it was not found there by the Assistant Sub-Inspector of Police, who must have gone there after some hours of the occurrence, and the kharahi was not a thing which was used as a weapon for assault or it. contained any blood mark etc. In the circumstances it is not understood, what particular importance can be given to the non-seizure or non-finding of the kharahi and the mustard seeds at place of occurrence and this is not a circumstance which detracts the value of the eye-witnesses regarding the prosecution story.

42. It may be observed here that P. Ws. 1 and 2 stated that at the relevant time Sashi carried some mustard seeds in a Kharahi, P. W, 3 also stated in examination-in-chief that he saw Sashimohan going along the path carrying a Kharahi in his hand. In cross-examination, however, P. W, 3 stated that the mustard seeds were in a bag and kharahi was in his hand and that in the bag there were lentil seeds also. P. W. 6 in his cross-examination stated that Sashi had a Kharahi with mustard seeds in his hand and the kharahi which was made of brass was lying there after the occurrence. He further stated in cross-examination that Sashi had also a bag in his hand. P, W. 6. however, did not mention anything about lentil seeds. There is some discrepancy on this point but on a careful examination of the evidence of these witnesses, It is quite clear that Sashi at the relevant time had a Kharahi made of brass with some mustard seeds in it.

The statement of P. W. 3 in cross-examination regarding the bag and lentil is out of some confusion which is also clear from the original deposition where the words "in a brass kharahi" ["Ata Pitlabh Khabahit"] have been penned through. This discrepancy however in our opinion is not a material discrepancy creating any doubt in the evidence of the witnesses on the main occurrence of assault.

43. On consideration of the entire evidence on record, we find that there is no legal ground for disbelieving the evidence of the eye-witnesses, because some of the eye-witnesses are day labourers, Though they are day labourers and landless, that cannot by itself be a ground for not relying upon their evidence. On the other hand their presence near about the place of occurrence immediately before the occurrence is proved by the fact that they were ploughing fields of some persons either as day labourer or as Adhiar and some of the P. Ws. were cutting thatch in the nearby field. They are therefore found to be natural witnesses who immediately on hearing the hulla came to the place of occurrence and found what they have stated in their evidence.

The occurrence took place in broad day light and there is no question of wrong identification. The accused persons were well known to the eye-witnesses from

before and P. Ws. 3, 4, and 6 are not found to have any interest in deposing falsely against the said persons in a serious murder case, On consideration of the entire evidence on record we are satisfied that there is no reasonable ground for disbelieving the eye-witnesses in the case and the prosecution has been able to establish beyond reasonable doubt that Bhabananda caught hold of Sashi from behind. Phanidhar gave a blow on the head of Sashi with a Dali-bari and when he fell down. Haren struck Sashi on his head and other parts of the body with iron rod. Thereafter Bhabananda came and caught hold of Gopi and Haren assaulted him, with iron rod and Bhabananda with a lathi.

44. Mr. K. M. Lahiri, the learned Counsel for the respondents has submitted that the story given in the F.I.R. was different from the story disclosed by the prosecution witnesses in evidence. The learned Counsel has pointed out that in F, I, R. there was no mention of the Dalibari and there was no mention of mustard seeds being carried. It must, however, be noted that the F.I.R. was lodged not by an eye-witness to the occurrence and it is also not necessary that the entire evidence in detail should be stated in the F.I.R. The F.I.R. was lodged by P. W. 1, who is the elder brother of Sashi and younger brother of Gopi. The substance of the facts stated in the ejahar is that while Sashi and Gopi were going to the field to tether cattle. Bhabananda, Phanidhar and Harendra of the same village attacked his brothers with iron rod, lathi, Tokon, dao etc. and assaulted them seriously on their heads and other parts of their bodies, and there was no hope of his brother Sashi being alive. Both the injured persons were lying in the hospital and he lodged the ejahar on hearing from Gopi. The occurrence as disclosed in the evidence of the P. Ws. cannot be said to be contradicted by the facts stated in the ejahar. though the ejahar did not contain full details of the occurrence and accurate description of the weapons.

In considering the ejahar it may be further observed that the word "lathi" and "Tokon" were both mentioned though Dalibari which is something like a "Tokon" with a wooden hammer at one end is not mentioned. Another objection raised by the learned Counsel is that the injured was taken to hospital before lodging ejahar. It may be observed that Sashi was severely injured, blood was coming out from his nose, mouth and head and he was taken to the police station at Barpeta wherefrom he was immediately taken to the Barpeta Civil Hospital and it is quite natural that after keeping the injured in hospital, the ejahar was lodged. When a brother finds his two brothers with severe bleeding injuries on heads and other parts of the body, it is quite natural that after taking them to the Police station on the way he would naturally take them to the nearby Civil Hospital and then come to lodge the ejahar. There was no delay in lodging the ejahar and the ejahar was lodged immediately after keeping the injured in the hospital. The learned Counsel also made his submissions on the lines of the grounds given by the learned Sessions Judge for acquitting the accused persons on benefit of doubt and we have already discussed those points.

45. After refusing to place any reliance on the evidence of the eye-witnesses

examined in the case the learned Sessions Judge found that it was a case of exercising the right of private defence and the accused person, namely. Bhabananda did not exceed the right of private defence. The learned Sessions Judge has come to the conclusion regarding the self defence on the basis of the fact that one of the accused, namely. Bhabananda sustained grievous injury, as stated by D. W. 1. Dr. Mukherjee. The evidence on record clearly establishes that Sashi sustained grievous injuries as described above to which he succumbed and Gopi also sustained some simple injuries. This is not disputed by defence. But Bhabananda's defence is that he was first chased and attacked by Sashi and Gopi and he was assaulted and, therefore, being helpless he brandished the Dalibari. We have already examined the nature of the so-called grievous injury in the right index finger. The evidence of D. W. 1 shows that the dislocation in the right index finger might be due to fall as well. The plea of accused Phanidhar and Harendra is that of alibi and that they came to the place of occurrence after the assault took place.

The evidence on record, however, as discussed above clearly shows that these two accused persons were very much present at the time of assault. From the prosecution evidence or the defence evidence or any other material on record there is nothing to show that at the time of occurrence Sashi and Gopi chased Bhabananda with any weapon in their hands. On the other hand the evidence on record is very clear that the accused persons chased Sashi with weapons in hand and assaulted him and Gopi as discussed above. From the prosecution evidence or from the defence evidence, no case of self defence for Bhabananda or the other two accused appear even prima facie. In any view of the matter, the evidence on record does not even raise any doubt that there might be a case of self defence of the accused persons. The learned Sessions Judge also observed that though Harendra and Phanidhar did not receive any injury on their persons, the fact that accused Bhabananda received injury would give them right of private defence if they took part in the assault because u/s 97 of the Indian Penal Code every person had a right of private defence of his own body and the body of any other person against any offence affecting human body.

If the right of private defence was available to Phanidhar and Haren in the instant case as observed by the learned Sessions Judge, their presence cannot be denied and thus their plea of alibi stands negated on that very ground. Whatever that may be. the evidence on record clearly establishes that all the 3 accused persons, namely. Bhabananda. Harendra and Phani were present at the time of the assault. Let us first consider the question of right of self defence of Bhabananda. The injuries on Bhabananda are 3 ecchymoses and one abrasion at the root of the right index finger and the evidence on this point does not disclose that he received any serious injuries as discussed above. The point, therefore, arises for consideration is as to who were the aggressors in the instant case. The evidence on record shows that Sashi and P. W. 2 proceeded along the path to the field one carrying a Kharahi of mustard seeds and the other with some cattle to tether along the path to some distance and thereafter P, W, 2 sidetracked and left

the path and went towards the field to tether the cattle and Sashi was proceeding along the path with the kharahi in hand.

The eye-witnesses stated that they found all the 3 accused chasing Sashi with weapons in hand, as described above and Sashi ran back towards his brother Gopi and as soon as Sashi arrived in the field of Mohodar. the accused persons overtook him and Bhabananda clasped around Sashi from behind and Phani gave a blow on the head of Sashi with a Dalibari, whereupon Sashi fell down and thereafter also assault took place, as discussed above. In the examination in-chief or in cross-examination of the evidence of the prosecution witnesses or in the evidence of the defence witness, we do not find anything which shows that Bhabananda was chased by Sashi and P. W. 2 and they or any one of them assaulted Bhabananda after having so chased. Mere suggestions in cross-examination which are denied carry no weight or doubt. The learned Sessions Judge has observed that Bhabananda was given blows on the back. On a careful examination of the evidence on record, it is found that Sashi and Gopi did not carry any weapon.

Sashi carried a kharahi and if the blows were given with that kharahi. it would not have certainly caused mere ecchymoses. The dislocation in the right index finger, the D. W. 1 has stated, might be caused by fall as well. The evidence on record does not raise even any doubt that the accused persons might have been chased by Sashi and Gopi. It is not at all justified in law to brush aside the evidence of the eyewitnesses and to jump upon a conclusion of right of self defence, because there were a few ecchymoses and abrasion on the persons of Bhabananda as discussed above.

46. It was suggested in cross-examination to P. W. 2 that while being assaulted Bhabananda held P. W. 2 between the teeth to save himself but the injuries found on the person on P. W. 2 do not corroborate this or raise even any doubt as to the truth of this allegation. A Dalibari. as it is commonly known, is not a thing to be found lying on the path. It must have been taken from some place, either from home or from the field.

47. P. W. 2 stated that on 9-11-67 afternoon he impounded a cow of Deben, the elder brother of the accused because the cow entered the field of lentil crops (Mahkheti) On that ground Deben and accused Bhabananda chased P. W. 2 to assault and he saved himself by running and entering his house.

48. Referring to this evidence, Mr. Lahiri the learned Counsel for the accused respondents has submitted that from the admitted occurrence of impounding the cow on the day preceding the day of occurrence, P. W. 2 would have the grudge against the accused and therefore P. W. 2 along with Sashi must have chased the accused on the date of occurrence. This submission of the counsel is not at all acceptable. The incident of the preceding day may be the motive why the accused persons chased and assaulted Sashi and P. W. 2. Whatever may be the motive the evidence is clear that Sashi was chased by the accused persons and

assaulted him and P. W, 2 in the manner unfolded in the prosecution evidence.

49. On consideration of the entire evidence in this regard we are constrained to hold that the evidence on record clearly shows that Sashi was chased by the 3 accused persons with weapons in hand and they assaulted him and Gopi, as discussed above. The evidence on record does not show nor even raise any doubt as to the suggestion of defence that the accused Bhabananda was chased and assaulted with any weapon, which might have raised the right of private defence. On very careful consideration of the entire evidence on record we are satisfied that the prosecution has been able to establish beyond reasonable doubt that the accused persons assaulted Sashj and Gopi. as described above and as a result of which Sashi died and it is not a case of exercising right of private defence by Bhabananda or by any of the other 2 accused persons. The question of exceeding or not exceeding the right of private defence does not arise at all in this case.

50. The nature and the locations of the iniuries caused on Sashimohan Sarma and the weapons used clearly bring the case u/s 302. Indian Penal Code. The evidence on record as discussed above also shows that the grievous injuries on Sashimohan Sarma and the simple injuries on Gopinath Sarma were caused in furtherance of the common intention of all the three accused persons. On consideration of the entire evidence on record we are clearly of opinion that in the instant case the prosecution has been able to establish the charges under Sections 302/34 and 323/34 Indian Penal Code against all the 3 accused Respondents. The reasons given by the learned Sessions Judge in his Judgment for acquitting the accused Respondents are not supported and warranted by the evidence on record and are found to be legally untenable. We have heard the learned Counsel for the respondents at length.

51. The settled law is that if there is any doubt as to the guilt of the accused, he must get the benefit of doubt and should be acquitted. But this doubt must be reasonable doubt arising from the nature of the evidence on record, as understood in law, If there is reliable evidence on record and such evidence establishes the charge against the accused without any reasonable doubt law does not permit acquittal on supposed or assumed doubt on minor and immaterial discrepancies in evidence. We are clearly of opinion that in the instant case the prosecution has been able to establish the charges under Sections 302/34 and 323/34 Indian Penal Code against all the 3 accused Respondents beyond reasonable doubt, We accordingly convict accused Bhabananda. Phanidhar and Harendra under Sections 302/34 Indian Penal Code and sentence each of them to imprisonment for life. They are also convicted under Sections 323/34 Indian Penal Code but no separate sentence under these sections is passed. In the result the order of acquittal passed by the learned Sessions Judge is set aside and the Government Criminal Appeal is allowed.

D.M. Sen, J.

52. I agree.