

(2024) 01 GAU CK 0015
In the Gauhati High Court
Case No : Criminal Appeal No. 415 Of 2019

Zakir Hussain And 2 Ors.

APPELLANT

Vs

State Of Assam And Anr

RESPONDENT

Date of Decision : 24-01-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 154, 154(1), 162, 169, 170, 173, 173(2), 173(8), 313, 374(2)
Indian Penal Code, 1860 — Section 34, 147, 148, 149, 302, 307, 326, 448

Citation : (2024) 01 GAU CK 0015

Hon'ble Judges : Suman Shyam, J; Mridul Kumar Kalita, J

Bench : Division Bench

Advocate : Z. Kamar, A. Rahman, B. Bhuyan, P. Bora

Final Decision : Disposed Of

Judgement

1. Heard Mr. Z. Kamar, learned Senior Counsel, assisted by Mr. A. Rahman, learned counsel for the appellants. Also heard Ms. B. Bhuyan, learned Senior Counsel-cum-Additional Public Prosecutor, Assam, assisted by Ms. P. Bora, learned counsel appearing for the State of Assam.

2. This appeal under Section 374(2) of the Code of Criminal Procedure, 1973 has been preferred by the appellants, namely, 1. Zakir Hussain, 2. Sopior Rahman and 3. Soleman Seikh impugning the Judgment and Order dated 16.09.2019 passed by the learned Additional Sessions Judge, Bilasipara in Sessions Case No. 30/2014 whereby, the appellants were convicted under Section 448 of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for 3(three) months. The appellants were also convicted under Section 326 of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for 1(one) year and to pay a fine of Rs. 2000/- each and in default of payment of fine to undergo rigorous imprisonment for 1(one) month. The appellants were also convicted under Section 302 of the Indian Penal Code and were sentenced to undergo rigorous imprisonment for life with a fine of Rs. 5,000/- and in default of

payment of fine to undergo further rigorous imprisonment for 3(three) months. The conviction of the appellants under Section 448/326/302 of the Indian penal code was with the help of Section 149 of the Indian Penal Code.

3. The facts relevant for consideration of the instant appeal, in brief, are as follows:-

i. On 22.01.1997, one Jalibar Rahman had lodged an FIR before the Officer-in-Charge of Bagribari Police Station, inter-alia, alleging that on 22.01.1997 at about 5:30 PM, Anowar Hussain, Kapiluddin Ahmed and Jumar Ali were having Iftar at the house of Anowar Hussain at Chalbandagaon and at that time the accused persons named in the FIR, namely, 1. Khalek Seikh, 2. Soleman Seikh, 3. Azibar Rahman, 4. Amir Hussain, 5. Zakir Hussain, 6. Lalbabu Seikh, 7. Meher Ali and 8. Sopior Rahman entered the house of Anowar Hussain and dragged him out to the courtyard and assaulted him with sharp weapon, causing severe injuries on his face, chest, neck and hand and as a result of the injuries sustained during the assault, he died. It is also alleged in the FIR that the accused persons named in the FIR had also assaulted Kapiluddin Ahmed by hacking him on his neck with a sharp weapon. However, Jumar Ali escaped from there.

ii. On receipt of the said FIR, the Officer-In-Charge of Bagribari Police Station registered Bagribari P.S. Case No. 09/1997 under Section 147/148/149/448/326/302 of the Indian Penal Code and initiated the investigation. Ultimately, after completion of the investigation, charge-sheet was laid against the accused persons namely, Soleman Seikh, Azibar Rahman, Amir Hussain, Zakir Hussain, Meher Ali, Lalbabu Seikh and Sopior Rahman under Section 147/148/149/448/326/302 of the Indian Penal Code.

iii. Out of the 7(seven) accused persons against whom the charge-sheet was laid the attendance of 3(three) accused persons could not be secured during the trial. They are Amir Hussain, Lalbabu Seikh and Meher Seikh. After issuing orders of proclamation as absconder and attachment of the property of the said accused persons, and after issuing non-bailable warrant of arrest against the aforesaid accused persons, the case of Amir Hussain and Meher Seikh was filed by order dated 26.04.2012 and similarly, the case of Lalbabu Seikh was filed by order dated 26.09.2020.

iv. Only 4(four) accused persons namely, Soleman Seikh, Azibar Rahman, Zakir Hussain and Sopior Rahman appeared before the court to face trial. By order dated 11.07.2014, charges under Section 147/148/149/447/326/302 of the Indian Penal Code were framed against the accused persons namely, Soleman Seikh, Zakir Hussain, Azibar Rahman and Sopior Rahman. However, later on, the accused Azibar Rahman was found to be a juvenile on the date when the offence was committed, and therefore, by order dated 05.09.2014, his case was sent to the Juvenile Justice Board, Dhubri, for inquiry, and the remaining 3(three) persons namely, Soleman Seikh, Zakir Hussain and Sopior Rahman had faced the

trial.

v. During the trial, the prosecution side examined 15 numbers of prosecution witnesses. The accused persons were examined under Section 313 of the Code of Criminal Procedure, 1973 during which, they pleaded their innocence and denied the truthfulness of the testimony of the witnesses for the prosecution side. However, the accused persons declined to adduce any evidence in their defence.

vi. Ultimately, by the judgment, which has been impugned in this appeal, the petitioners were convicted and sentenced in the manner as already described in paragraph No.2 hereinabove.

vii. Learned counsel for the appellants has also informed this Court that during the pendency of this appeal one of the appellants, namely, Soleman Seikh, had expired. Hence, this appeal qua the said appellant has abated.

4. Before considering the submissions made by learned counsel for both the sides, let us go through the evidence which is available on record.

5. PW-1 Durbaksh Seikh deposed in his testimony that the incident occurred about 15-16 years before his deposing before the Court as a witness. He has deposed that on the date of occurrence of the incident he heard hue and cry in his area coming from the side where the house of Anowar Hussain was situated and he proceeded there and saw Anowar Hussain lying dead on the floor, with many people gathered there.

During cross-examination, he deposed that it was a dark evening when he reached the place of occurrence and he cannot say as to how the deceased died.

6. PW-2 Sopiari Ali @ Rahman deposed that he came to know that Anowar Hussain was killed by some persons and he went to the place of occurrence and saw the dead body of Anowar Hussain in his home and blood was oozing out from his body and many people had gathered there.

During cross-examination, he deposed that he cannot say as to who had killed the deceased. He has also deposed that several cases were pending against the deceased.

7. PW-3 Abu Bakkar Seikh deposed that on the day of occurrence of the incident, he heard hue and cry in the house of Anowar Hussain and immediately went to the house of Anowar Hussain where he saw the accused persons were assaulting Anowar Hussain and one Kapiluddin Ahmed. He identified the accused persons in the Court and stated that they were present at the time of the incident and caused the incident. He also stated that the accused persons caused several stab injuries on Anowar Hussain's body with dagger, knife, etc. He also stated that at the time of the incident, Kapiluddin Ahmed and Jumar Ali were present in the house of Anowar Hussain. He has also stated that the accused persons had assaulted and hit on the shoulder of Kapiluddin Ahmed as a result of which Kapiluddin Ahmed fell down and received deep cut injuries on his shoulder. He

has also stated that the accused person could not assault Jumar Ali as he escaped from there by hiding himself. PW-3 has also stated that the accused persons had thrown handmade bombs in order to escape from that place, and therefore, they could not be caught. He has also stated that they could capture one of the accused, namely Meher Ali, on the road. He has also stated that he witnessed the entire incident along with Joynal, Jarina, Anju, and Chatu. He has also stated that the police recorded his statement and he told about the incident to the police. He also stated that he saw Soleman Seikh, Zakir Hussain, Azibar Rahman, Amir Hussain, Meher Ali, and others. He has also stated that before the said incident, the accused persons had also killed the son of the deceased in another incident.

8. During cross-examination, PW-3 has stated that the occurrence took place at the time of Iftar. He has also stated that his house is about five houses apart from the house of the deceased. He has also stated that when he reached the place of occurrence, he saw deceased Anowar lying on the ground in the courtyard and the accused persons were running away from there after committing the incident. He has also stated that they chased the accused persons in order to catch them and followed them for about one to one and a half kilometres. He has also stated that the deceased was his brother. PW-3 answered in negative to certain suggestive questions put to him by the learned defence counsel.

9. PW-4, Joynal Seikh, has deposed that the incident occurred about 18 years prior to his deposing before the Court and on the date of the incident, on hearing hue and cry, he came out of his room and rushed to the place of occurrence and when he was going towards the place of occurrence, he was hit by somebody on his backside causing him to fall down on the ground and he could not go to the place of occurrence. Later on, he came to know that his brother, Anowar, was killed in the incident. It is also stated by PW-4 that his spinal cord was broken in the said incident. He also heard that in the said incident, Kapiluddin Ahmed and Jumar Ali received injuries.

During cross-examination, PW-4 has stated that he could not say as to who caused the incident and as he was hit from behind, he could not say what had actually happened.

10. PW-5, Atibur Rahman, has deposed that the incident occurred about 17 to 18 years prior to his deposing before the Court and at that time, he was 10 to 11 years old. On the date of the incident, some people came to his house for Iftar, and his father, i.e., late Anowar Hussain, asked him to bring betelnut for them. Thereafter, commotion took place in their house and fighting took place inside their campus and his father died in the said incident. He saw his father lying on the ground. However, he could not say as to what had exactly happened as the incident occurred in the darkness.

11. During cross-examination, PW-5, has deposed that at the time of the

incident, he was too young and therefore, he could not recognise the assailants who caused the murder. He also stated that the incident occurred in darkness.

12. PW-6, Jalibar Rahman, has deposed that he is the complainant of the case and the incident occurred about 17 to 18 years prior to his deposing before the Court. He has deposed that the deceased Anowar Hussain was his uncle and injured Kapiluddin Ahmed was also from his village. He has deposed that at the time of the occurrence, he was in his house, which is situated about half a kilometre away from the house of deceased Anowar Hussain. On the date of the incident, he heard a hue and cry in their locality and he came to know that some incident has occurred in the house of his uncle, Anowar Hussain and thereafter, he immediately proceeded to the house of his uncle. He has further deposed that after coming to the house of Anowar Hussain, he saw Anowar was lying dead in his compound and there was profuse bleeding from his body. He also saw deep cut injury on the neck of the deceased. PW-6 has further deposed that he also saw one Jumar Ali in the house of the deceased who was also injured in the incident. It is further deposed by the PW-6 that Jumar Ali told him that the accused persons came to the house of Anowar Hussain and killed his uncle, Anowar Hussain, with sharp weapons. He has also stated that one Kapiluddin was also injured in the incident. He also stated that Kapiluddin Ahmed, Jumar Ali, Abu Bakkar Siddique, Asma Bibi and Joynal Seikh witnessed the incident and they had told him that Anowar Hussain was killed by the accused persons with sharp weapons. He has further deposed that on the next morning, he lodged the FIR before Bagribari Police Station against the accused persons. The said FIR is exhibited as Exhibit-1 by the PW-6. He has also stated that the police came to the place of occurrence on the date of the incident itself and inquest was conducted on the dead body. He also exhibited the inquest report as Exhibit-2.

13. During cross-examination, the PW-6 has deposed that he arrived at the place of occurrence after 5 minutes of the incident and he witnessed about 40-50 people at the place of occurrence. He has also stated that before the incident, one Azibar Rahman, who was the son of the deceased Anowar Hussain, was also killed and that incident had occurred about six months prior to the said incident. He has also stated that the FIR was written by one Advocate clerk of Bagribari Police Station as per his instructions.

14. PW-7, Sabeda Bewa, has deposed that the complainant is her nephew and the deceased was her husband. She has deposed that she knows the accused persons. She has stated that the incident took place about 15-16 years ago. She has stated that at the time of the incident, the accused persons went to their house in the evening and accused Zakir Hussain, and other accused persons had assaulted and hit her husband with a dagger. She has also stated that all the accused persons had dragged out her husband and hit him with sharp weapons on his body and she had seen the incident herself. She has also stated that she tried to save him but the accused persons had shown them sharp weapons. The PW-7 has also deposed that the accused persons inflicted several cut injuries on

the body of the deceased. She has also stated that the accused persons also inflicted injuries on one Kapiluddin Ahmed by giving him blows of dao. She has stated that her husband died as a result of the injuries sustained by him. It is also stated that after killing her husband the accused persons ran away from the spot.

15. During cross-examination, PW-7 has deposed that she is the second wife of the deceased. She has stated that the incident took place about 20 years ago. At the time of the incident, she was a lactating mother and therefore, she was inside the house. She has stated that she lived in the same house and there were two rooms in their house, one was the kitchen and another room where they resided together. She has also stated that the incident took place in the month of Ramzan and at that time they were having Iftar. She has also stated that it was dark at the time of the incident. She has also stated that at the time of the incident, some people were talking to her husband and amongst them was one Dilip, who hails from their village. She has also stated that one of her children had died earlier, and in that case also the accused persons were the same. She has also stated that Joynal, Atibar, Mir Kasim, Siddique and many other persons were present there. She has also stated that the police came to the place of occurrence about half an hour after the incident. She has also denied the suggestion given by the defence side that she has deposed falsely.

16. PW-8, Anjuma Bibi, has deposed that she is the daughter of the deceased and the incident took place about 17 to 18 years ago. She has deposed that she knows the accused persons. She has deposed that she saw the incident which took place in the evening. She has deposed that at the time of the incident she was in her residence. She has stated that the accused illegally entered into their house and assaulted her father and thereafter forcefully took him out. She has also stated that the accused persons had assaulted her father and inflicted several blows by sharp weapon on the body of her father. She has deposed that her father sustained several cut injuries and he died as a result of the said injuries. She has deposed that she saw that the accused persons were armed with deadly weapons. She has also deposed that the accused also threatened them and therefore they could not do anything. She has also deposed that after killing her father, the accused persons left the place.

17. During cross-examination, PW-8 has deposed that she was about 10 to 12 years of age at the time of the incident. She has further deposed that at that time she had two mothers, namely Ayesha Bibi and Sabeda. She has stated that at the time of the incident she was studying in class- "ka". She has also stated that the incident occurred in the month of Ramzan. She has also stated that Jainal, Atibar, Siddique, Moharuddin and Mir Qasim were also present there. PW-8 has also deposed that there were many people present there and at that time she was in the kitchen and was cooking. Hearing the sound of knocking at the door, she came out and saw that her father had fallen down on the ground. She has also deposed that there was no electricity in their house and they used

kerosene lamp. She had denied the suggestion that she has deposed falsely.

18. PW-9, Asma Bibi, has deposed that on the day of the incident, the accused persons entered their house and started assaulting her husband. She has deposed that she knows the accused persons. She also deposed that the accused persons stabbed her husband with a dagger. She has also deposed that she witnessed the entire incident. Her husband was dragged out of her house by the accused persons who had inflicted blows by sharp weapon. She also deposed that the accused persons also threatened them.

19. During cross-examination, PW-9 has deposed that the deceased was her husband and she has seven children. She has deposed that at the time of the incident, many people had arrived at the place of occurrence. She has deposed that on hearing hue and cry, she came out and witnessed the incident and raised an alarm and on hearing the alarm other villagers also came there.

20. PW-10 Jumar Ali has deposed that the incident occurred about 18 years ago at about 5:30 PM. He has deposed that he knows the accused persons. He has deposed that eight persons had entered the house of Anowar Hussain. They were Soleman, Sopior, Azibar, Zakir, Khalek, Lal Babu, Amir Hussain and Meher. He has deposed that all the accused persons caused injury to Anowar by assaulting him with bamboo sticks. He has also deposed that accused Azibar hacked him with a Dao. He has also deposed that the deceased was brought outside his house and accused Azibar held his head and accused Sopior hacked Anowar. Other accused persons also assaulted Anowar. Thereafter, the accused persons fled from there, however, they were chased by the villagers and accused Meher was apprehended.

21. During cross-examination, PW-10 has deposed that earlier he was made an accused in connection with the murder case of the son of the deceased. He has deposed that the incident occurred in the month of Ramzan. He has also deposed that at that time there was no one else in the house except him and Anowar. He deposed that other people arrived after half an hour. He has deposed that Asma, Manjur, Siddique, Azibar and Dilip were present there. He has also deposed that about 10 minutes later, police from Bagribari Police Station arrived and examined the witnesses including the PW-10. He has deposed that the police had arrested Meher and took him away. He has denied the suggestion that the accused persons had not killed Anowar.

22. PW-11, Kapiluddin Ahmed, has deposed that on the day of the incident he was present in the house of Anowar along with the other accused persons. He has deposed that he knows the accused persons. He has deposed that Azibar has assaulted him with a Dao on the backside of his head. He has also deposed that the accused persons brought Anowar out of his house and assaulted him. He has deposed that Soleman had hacked the neck of Anowar and Azibar cut on his head. He also stated that the other accused persons also assaulted Anowar with lathi when he fell on the ground.

23. During cross-examination, PW-11, Kapiluddin Ahmed has deposed that the

police recorded his statement 15 days after the incident. He has also deposed that when he resisted the accused persons, he was hacked on his back. He has also stated that one Afjal took him to his house. PW-11 has also deposed that he was in hospital for about 15 days. He answered in the negative to certain suggestive questions put to him by the learned defence counsel.

24. PW-12 Syed Muktabar Rahman has deposed that on 22nd January 1997, he was posted as 2nd Officer at Bagribari Police Station. On that day at about 9:15 PM, one Jalibar Rahman had lodged a written FIR which was registered as Bagribari P.S. Case No. 9/97 under Section 147/148/149/448/326/302 of the Indian Penal Code and one Giasuddin Ahmed was entrusted to conduct the investigation. After the transfer of the said Giasuddin Ahmed, PW-12 was entrusted to conduct the remaining part of the investigation. After completion of the investigation, PW-12 had laid the charge-sheet under Section 147/148/149/448/326/302 of the Indian Penal Code.

25. During cross-examination, PW-12 has deposed that he had not re-visited the place of occurrence of the offence after getting the charge of investigation. He has deposed that he submitted the charge-sheet on the basis of the investigation done by his predecessor.

26. PW-13 Dr Gobinda Mohan Das has deposed that on 22.01.1997, he was working at Dhubri Civil Hospital as Sr. M & H.O. On that day at about 09.00 PM, he medically examined the patient Md. Kapiluddin Ahmed, Male, 30 years S/O Md. Durbaksh Seikh of village - Fakiranirjhar Pt-1 under reference Bagribari PS. Case No. 9/1997. Patient was admitted at the hospital on 22.01.1997 at about 08.40 PM vide Registration number 93/97 and discharged on 06.02.1997 at about 10.00 AM. During examination he found following –

Injuries

i. Gross sharp cut injury over back of neck and lower scalp 8" X 4" X 2" deep with active bleeding. All muscles are divided patient is having head injury. Skull bone over the occipital region is cut.

In his opinion, the Injury was fresh, grievous and caused by sharp weapon. He had exhibited the Medical report as Ext.4.

During cross-examination, PW-13 has stated that he had examined the patient on police requisition. He did not mention in the medical report as to who had escorted the patient to the hospital. The patient was not referred to the Dhubri Civil Hospital or other hospital. The patient was admitted on 22.01.1997 and discharged on 06.02.1997. He also deposed that the injury sustained by the injured may have occurred to him in standing position or in sitting position, but if the offender is more in height than the victim, the injury might also be caused while the victim was in standing position. of more

27. PW-14 Giasuddin Ahmed has deposed that on 22.01.1997 he was posted as second officer at Bagribari P.S. On that day Jalibar Rahman lodged a written

ejahar before the Officer-in-Charge of Bagribari Police Station who registered Bagribari P.S. Case No. 9/1997 under Section 147/148/149/448/326/302/307 of the Indian Penal Code and the same was endorsed to him to investigate the case. He has also deposed that in connection with this case at about 06:45 PM, VDP Secretary Durbaksh Sheikh informed the Officer-in-Charge of the Bagribari Police Station over phone that Soleman Ali, Abdul Khalek and 6 other persons committed the murder of Anowar Hussain at his house and also stabbed Kapiluddin. Accordingly, G.D. Entry No. 453 dated 22.01.1997 was made in the Police Station General Diary, and the Officer-in-Charge along with PW-14 and other staff went to the house of Anowar Hussain. He also deposed that while they were proceeding towards the place of occurrence, they met injured Kapiluddin and he was taken to the Hospital, after making necessary arrangement for his treatment and sending him to the Dhubri Civil Hospital. PW-14, Officer-in-Charge of Bagribari Police Station and other staff went to the house of Anowar Hussain where the incident of murder took place. After reaching the place of occurrence, PW-14 saw the dead body of Anowar Hussain and conducted an inquest in the presence of witnesses. PW-14 also deposed that thereafter the dead body was sent to Dhubri Civil Hospital for post mortem examination. PW-14 has also deposed that on the same date, he drew the sketch map of the place of occurrence and recorded statements of Sopiari Ali, Durbaksh Sheikh, the VDP Secretary who had given the information over phone, Jumar Ali and Jalibar Rahman. PW-14 also deposed that on the date of the incident when accused Meher Ali tried to flee away from the place of occurrence after the commission of the murder of Anowar, the villagers apprehended him and handed him over to the police. PW-14 also deposed that in connection with this case Jalibar Rahman lodged a written ejahar before the Officer-in-Charge of Bagribari P.S. on 22.01.1997. PW-14 also deposed that after the registration of the Police case the Officer-in-Charge of Bagribari entrusted him to do the investigation and accordingly during the investigation PW-14 recorded the statements of other witnesses, seized two numbers of kerosene lamps and one hurricane lamp. PW-14 also deposed that during the investigation he arrested accused Soleman Sheikh, Azibar Rahman, Amir Hussain, Meher Ali, Zakir Hussain, Sopiari Rahman and produced them before the Magistrate. PW-14 also deposed that he collected the injury report of Kapiluddin and the post mortem report of the deceased Anowar Hussain. PW-14 also deposed that as the accused Lalbabu was absconding he could not arrest him and thereafter he was transferred so he handed over the case diary to the Officer-in-Charge of Bagribari Police Station. PW-14 also deposed that S.I. Muktabur Rahman submitted the charge sheet under supervision of senior police officer. PW-14 also exhibited the extract copy of G.D. Entry as Exhibit-5.

28. During cross examination, PW-14 also deposed that on 22.01.1997 Officer-in-Charge of the Bagribari Police Station received one information of murder over phone. PW-14 also deposed that the incident took place on 22.01.1997 at 05:30 PM and verbal information was received at 06:45 PM on 22.01.1997. PW-14 also

deposed that after receiving the verbal information and after making G.D. Entry no 453 dated 22.01.1997, PW-14 and Officer-in-Charge of Bagribari Police Station along with other staff visited the place of occurrence, sent injured Kapiluddin to the hospital, recorded the statements of Sopiari Ali, Durbaksh Seikh, the VDP Secretary who had given the information over phone, Jumar Ali and Jalibar Rahman, did inquest of the body and sent the dead body to Dhubri Civil Hospital for post mortem examination. PW-14 also deposed that during recording of the statement of the witnesses they stated that Jumar Ali, Kapiluddin and the deceased were talking in the house of the deceased. PW-14 also deposed that as per the sketch map present in the case diary there were 5 houses shown at the place of occurrence. PW-14 also deposed that the statement of Mir Qasim was not recorded. PW-14 also deposed that the place of occurrence was inside the house from where the deceased was dragged to the courtyard of the compound. PW-14 also deposed that it is not a fact that without making proper investigation he collected material from the family members of the deceased only to implicate the present accused persons whose names were given in an earlier case of murder of the son of the deceased.

29. PW-15 Dr. S.M. Emdadullah has deposed that on 23-01-1997, he was posted at Dhubri Civil Hospital as Sr. M & HO. On that day, Dr. K. M Das was also working at Dhubri Civil Hospital as Sr. M & HO, and on that day at about 02.00 PM, he had conducted post mortem examination on the dead body of Anowar Hussain, Male, 40 years, resident of village Chalbandha, Chotogirair under Bagribari PS, Dist- Dhubri, under reference Bagribari PS case No. 09/1997. The dead body was escorted by UBC 428 Sankar Roy, UBC 326 L. Z. Sailo and identified by relatives Jalibar Rahman, Jumar Ali and by UBC 428 Sankar Roy, UBC 326 L. Z. Sailo. On examination of the dead body, the following was found:-

1. A male body of about 40 years of age with rigor mortis.
 2. The neck is severed anteriorly, only the cervical vertebrae are intact.
 3. Muscles of the left side of the face along with vessels and nerves are severed with sharp weapon extending from the angle of the mouth to the neck.
 4. Muscles of the face along with skin are separated by sharp weapon from the upper jaw.
 5. Cut injury over scalp along with bone over left temporoparietal region.
 6. Scalp is incised over 4 areas.
 7. Neck is lacerated upto the bone posteriorly.
 8. Six Nos. of penetrating wounds over the right chest and right shoulder.
 9. Right hand is lacerated.
 10. One penetrating wound over the left loin (4" X 2" deep into the left kidney)
- Right lung is lacerated; Membrane, Brain and spinal cord, Liver, Spleen- Pale;

Left kidney is penetrated; Bladder- healthy; Organs of generation extrema and internal intact.

The injuries are anti-mortem in nature. The death was due to shock and hemorrhage as a result of the injuries inflicted upon the deceased. Ext.7 is PM report. Ext.7 (1) is the signature of Dr. K. M. Das, which is known to PW-15. The PM report is countersigned by the then Joint Director of Health Services, Dhubri

30. During cross examination, PW-15 Dr. S.M. Emdadullah has deposed that the post mortem examination was conducted by Dr. K. M. Das. The name of the father of the deceased is not mentioned in the P.M. report. The dead body was dispatched on 22.01.1997, arrived at Morgue on 23.01.1997 and the PM examination was done on 23.01.1997. The time of dispatch and the time of arrival at Morgue are not mentioned in PM report. PW-15 Dr. S.M. Emdadullah has deposed that as he did not conduct the P.M. examination, he can't say the time of death of the deceased. PW-15 has deposed that the injury sustained by the deceased cannot be caused by falling on hard substance. The post-mortem examination report pointed out that the deceased sustained injury from sharp weapon.

31. During the examination under Section 313 of the Code of Criminal Procedure, 1973, the appellants have pleaded innocence and have denied the truthfulness of the testimony of the witnesses for prosecution side. Though the appellants during their examination under Section 313 of the Code of Criminal Procedure, 1973, stated that they would be adducing evidence in defence, however, no defence evidence was adduced by the appellants.

32. Mr. Z. Kamar, learned Senior Counsel for the appellants has submitted that in the instant case, the evidence of PW-14 shows that on the date of the incident itself, at about 06:45 PM, the VDP Secretary Durbaksh Seikh informed the Officer-in-Charge of the Bagribari Police Station about the incident over the phone and accordingly, G.D. Entry No. 453 dated 22.01.1997 was made in the Police Station General Diary. It is also submitted by the learned Senior Counsel for the appellants that as the investigation was also started on the basis of the aforementioned G.D. Entry, the formal FIR which was lodged later on by the PW-6 in this case which is exhibited as Exhibit 1, is hit by Section 162 of the Code of Criminal Procedure, 1973. Learned Senior Counsel for the appellants has also submitted that as there was previous enmity between the parties, the FIR lodged by the PW-6, which is exhibited as Exhibit-1, is a result of an afterthought, and hence, the same may not be relied upon.

33. Learned Senior Counsel for the appellants has also submitted that in the impugned judgment, the trial court had failed to mention any reason for coming to the conclusion that the accused persons were guilty of the offence alleged in prosecution of common object of the unlawful assembly of which they were members. Learned Senior Counsel for the appellants has submitted that the trial court, in the impugned judgment, has failed to show any material on the basis of

which common object amongst the accused persons could be deduced. Learned Senior Counsel for the appellants has also submitted that in the instant case charges, inter alia, under Section 149 of the Indian Penal Code were framed against four accused persons including the present appellants. However, a minimum of five persons is required for framing a charge under Section 149 of the Indian Penal Code. Learned Senior Counsel for the appellants has submitted that the prosecution side has failed to prove the membership of the appellants of any unlawful assembly, hence, they could not have been convicted for an offence under Section 302/149 of the Indian Penal Code. However, learned Senior Counsel for the appellants has fairly submitted that in a given case if it is proved that the accused persons have shared common intention to commit murder of the deceased, they could be convicted under Section 302 read with Section 34 of the Indian Penal Code even though the charges were framed under Section 302 read with Section 149 of the Indian Penal Code.

34. Learned Senior Counsel for the appellants has also submitted that the prosecution side had examined only interested witnesses as the witnesses who have implicated the appellants in this case are either related to the deceased Anowar or were well known to him. Learned Senior Counsel for the appellants has submitted that the eyewitness PW-3 Abu Bakker Sidique is the brother of the deceased. The eyewitnesses PW-7 Sabeda Bewa and PW-9 Asma Bibi are the wives of the deceased, whereas, eyewitness PW-8 is the daughter of the deceased. Learned Senior Counsel for the appellants has also submitted that the PW-11 Kapiluddin Ahmed was assaulted on the back, hence he could not have identified the assailants of the deceased Anowar. Learned Senior Counsel for the appellants has also submitted that while deposing before the trial court, the witnesses have made general statement against all the accused persons and no specific imputation against individual accused persons were made by the witnesses. Learned Senior Counsel for the appellants has submitted that the trial court erred in relying on the generalized statements of interested witnesses to come to the finding of guilt of the present appellants.

35. Learned Senior Counsel for the appellants has also submitted that though the Investigating Officer had drawn a sketch map of the place of occurrence of the offence, however, the same was not exhibited during the trial by any prosecution witness. It is also submitted that when the alleged incident occurred, it was dark and therefore it is unlikely that the witnesses could have identified the assailants. Learned Senior Counsel for the appellants has also submitted that the prosecution side did not exhibit the seizure list of lamps, etc, which were seized during the investigation, hence, it is submitted that the learned trial court could not have arrived at the finding of guilt of the present appellants.

36. Learned Senior Counsel for the appellants has submitted that though a charge under Section 148 of the Indian Penal Code was framed against the present appellants, however, no conviction was given under the said section and therefore Section 149 of the Indian Penal Code could not have been used against

them in this case.

37. Learned Senior Counsel for the appellants has also submitted that no dock identification of the appellants was made by the witnesses during trial, hence, the identity of the appellants by the witnesses regarding their involvement in the alleged offence is itself doubtful and the trial court had erred in convicting the present appellants without them having been identified by the witnesses in the court during trial.

38. Learned Senior Counsel for the appellants and cited following rulings in support of submissions made by him: -

- a. "Priyalal Barman vs State" reported in AIR 1970 Asm&Ngl 137.
- b. "Chittarmal vs State of Rajasthan" reported in AIR 2003 SC 796.
- c. "Mahadev Sharma & Others vs State of Bihar" reported in AIR 1966 SC 302.
- d. "Ajay Kumar Das vs State of Jharkhand" reported in (2011)12 SCC 319.
- e. "Malhu Yadav & Others vs State of Bihar" reported in (2002) 5 SCC 724.
- f. "Munna Chanda vs State of Assam" reported in 2006 CrL LJ 1632.

39. On the other hand, Ms. B. Bhuyan, learned Additional Public Prosecutor has submitted that the trial court has rightly convicted the present appellants on the basis of the testimony of eyewitnesses and injured eyewitness namely, PW-3, PW-7, PW-8, PW-9, PW-10 and PW-11. Learned Additional Public Prosecutor has submitted that PW-7, PW-10 and PW-11 have specifically deposed regarding the role attributed to appellants Zakir Hussain and Sopior Rahman. Learned Additional Public Prosecutor has submitted that the description of injuries on the deceased as well as on the injured witness i.e., PW-11, described by the witnesses corresponds to the injuries found by the examining doctors on the injured as well as on the deceased. Learned Additional Public Prosecutor has submitted that even when the motive or commission of the offence is not clearly established, when the account of the injured eyewitness is there and is well established, motive does not play an important role. In support of her submission, learned Additional Public Prosecutor has cited a ruling of the Apex Court in "Badru Ram & Others vs State of Rajasthan" reported in (2015) 11 SCC 476.

40. Learned Additional Public Prosecutor has submitted that in the case in hand, the PW-11 is an injured witness and his testimony must be given due weightage being stamped witness as his presence at the place of occurrence cannot be doubted. She has submitted that the testimony of such a witness is generally considered to be very reliable and it is unlikely that he would spare the actual assailant in order to falsely implicate someone else. In support of her submission, learned Additional Public Prosecutor has cited a ruling of the Apex Court in the case of "State of UP vs Naresh" reported in (2011)4 SCC 324.

41. Learned Additional Public Prosecutor has submitted that merely because the witnesses are related to each other, the same may not be a ground for disbelieving such witnesses. In support of her submission, learned Additional Public Prosecutor has cited a ruling of the Apex Court in "Ravasaheb Gouda vs State of Karnataka" reported in 2023 Live Law (SC) 225.

42. Learned Additional Public Prosecutor has submitted that in the instant case, VDP Secretary Durbaksh Seikh informed the Officer-in-Charge of the Bagribari Police Station, over phone, about the incident and accordingly, G.D. Entry No. 453 dated 22.01.1997 was made in the Police Station General Diary. She has submitted that the G.D. Entry which has been exhibited as Exhibit-5 may be treated as an FIR and that the Investigating Officer committed no error in initiating the investigation on the basis of the said G.D. Entry. In support of her submission, learned Additional Public Prosecutor has cited the ruling of the Apex Court in the case of "T.T. Anthony vs State of Kerela" reported in (2001)6 SCC 181.

43. Learned Additional Public Prosecutor has submitted that as the witnesses in this case have deposed after a long gap of time after the commission of the alleged incident, there is bound to be certain inconsistencies and discrepancies in the testimony of witnesses which is quite normal, however, such minor contradictions and embellishments do not affect the core of the prosecution case and should not be a basis for disbelieving the testimony of witnesses. In support of her submission, learned Additional Public Prosecutor has cited a ruling of the Apex Court in the case of "State of UP vs Naresh" reported in (2011)4 SCC 324.

44. Learned Additional Public Prosecutor has submitted that all the eye witnesses have deposed that the accused persons are known to them, and therefore identifying such assailants even in the darkness may not have been difficult for them. In support of her submission, learned Additional Public Prosecutor has cited a ruling of the Apex Court in the case of "Bharosi vs State of MP" reported in (2002)7 SCC 239. Learned Additional Public Prosecutor has submitted that the learned trial court has correctly convicted the present appellants, and their conviction and sentence does not warrant any interference by this Court.

45. We have considered the submissions made by the learned counsel for both the sides and have gone through the materials available on record meticulously. We have also gone through the rulings cited by learned counsel for both the sides in support of their submissions.

46. In T.T. Antony v. State of Kerala, (supra) the Apex Court has observed as follows: -

"18. An information given under sub-section (1) of Section 154 CrPC is commonly known as first information report (FIR) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the

commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 CrPC, as the case may be, and forwarding of a police report under Section 173 CrPC. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 CrPC. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the first information report — FIR postulated by Section 154 CrPC. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 CrPC. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of CrPC. Take a case where an FIR mentions cognizable offence under Section 307 or 326 IPC and the investigating agency learns during the investigation or receives fresh information that the victim died, no fresh FIR under Section 302 IPC need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H — the real offender — who can be arraigned in the report under Section 173(2) or 173(8) CrPC, as the case may be. It is of course permissible for the investigating officer to send up a report to the Magistrate concerned even earlier that investigation is being directed against the person suspected to be the accused.”

47. In the instant case also, the evidence of PW-14, who is the Investigating Officer in this case, shows that the VDP Secretary, Durbaksh Seikh, informed the Officer-in-Charge of the Bagribari Police Station over phone about the incident and accordingly, G.D. Entry No. 453 dated 22.01.1997 was made in the Police Station General Diary. The extract of the said G.D. Entry has been exhibited as Exhibit-5. Whereas, the FIR which is exhibited as Exhibit-1 is later in point of time, and the Investigating Officer had already proceeded to the place of occurrence and initiated the investigation on the basis of the said G.D. Entry. Hence the G.D. Entry which is exhibited as Exhibit-5, in this case, may be treated as the FIR. The Exhibit-5 specifically mentions that “accused Soleman, Abdul Khalek along with six others killed Md. Anowar Hussain in his residence itself at Sal bandha (Chotogirai) and hacked Md. Kapiluddin, r/o Fadiranijhar, and caused severe injury to him”. It is no more res integra that an FIR need not be an

encyclopaedia of the entire case. Hence, not naming other appellants therein would not make such an FIR unreliable and the same may not be a ground for discarding the entire prosecution case, when otherwise credible evidence against the appellants is available on record.

48. As regards the framing of charges against the appellants under Section 147, 148 and 149 of the Indian Penal Code is concerned, it is apparent that for the commission of an offence under the aforementioned provisions, a minimum of five persons is required. However, in the instant case, the trial court had initially framed charges only against four accused persons. Out of the said accused persons, accused Azibar Rahman was later on found to be a juvenile and his case was forwarded to the Juvenile Justice Board. Though charges under Section 147, 148 and 149 of the Indian Penal Code could still be framed against the accused persons, who were fewer in numbers than five, had there been a clear mention in the memorandum of charges as to who were the other members of the unlawful assembly and were not before the court. However, in the instant case, there is no mention in the memorandum of the charges framed against the appellants as to who were the other members of the unlawful assembly of which the present appellants have been accused of being members. Therefore, we are of the considered opinion that the trial court had erred in framing charges under Section 147, 148 and 149 of the Indian Penal Code only against four accused persons without mentioning therein as to who were the other members of the unlawful assembly of which the appellants were accused to be members.

49. Thus, it appears that in the instant case the charges under Sections 147, 148 and 149 of the Indian Penal Code were not properly framed against the present appellants. Hence they could not have been convicted under the said provisions. However, the question remains as to whether the appellants could still be convicted under Section 302 read with Section 34 of the Indian Penal Code if the available evidence discloses the commission of such an offence in furtherance of common intention of the appellants.

50. The Apex Court has observed in the case of "Chittarmal v. State of Rajasthan," (supra) as follows: -

14. It is well settled by a catena of decisions that Section 34 as well as Section 149 deal with liability for constructive criminality i.e. vicarious liability of a person for acts of others. Both the sections deal with combinations of persons who become punishable as sharers in an offence. Thus they have a certain resemblance and may to some extent overlap. But a clear distinction is made out between common intention and common object in that common intention denotes action in concert and necessarily postulates the existence of a prearranged plan implying a prior meeting of the minds, while common object does not necessarily require proof of prior meeting of minds or preconcert. Though there is a substantial difference between the two sections, they also to some extent overlap and it is a question to be determined on the facts of each case whether the charge under Section 149 overlaps the ground covered by

Section 34. Thus, if several persons numbering five or more, do an act and intend to do it, both Section 34 and Section 149 may apply. If the common object does not necessarily involve a common intention, then the substitution of Section 34 for Section 149 might result in prejudice to the accused and ought not, therefore, to be permitted. But if it does involve a common intention then the substitution of Section 34 for Section 149 must be held to be a formal matter. Whether such recourse can be had or not must depend on the facts of each case. The non-applicability of Section 149 is, therefore, no bar in convicting the appellants under Section 302 read with Section 34 IPC, if the evidence discloses commission of an offence in furtherance of the common intention of them all. (See *Barendra Kumar Ghosh v. King Emperor* [AIR 1925 PC 1 : 26 Cri LJ 431] , *Mannam Venkatadari v. State of A.P.* [(1971) 3 SCC 254 : 1971 SCC (Cri) 479 : AIR 1971 SC 1467] , *Nethala Pothuraju v. State of A.P.* [(1992) 1 SCC 49 : 1992 SCC (Cri) 20 : AIR 1991 SC 2214] and *Ram Tahal v. State of U.P.* [(1972) 1 SCC 136 : 1972 SCC (Cri) 80 : AIR 1972 SC 254])

51. In the instant case, though no mention about Section 34 of the Indian Penal Code is there in the memorandum of charges, however, specific charge under Section 302 of the Indian Penal Code was framed against all the appellants. In "*Malhu Yadav & Others vs State of Bihar*" (supra) the Apex Court has observed that since the existence of common intention amongst the accused persons is established from the surrounding circumstances and from their conduct on the spot, the absence of charge under Section 34 of the Indian Penal Code against the accused persons would not make any difference. It was observed that failure to charge the accused persons under Section 34 of the Indian Penal Code, who stood charged under Section 149 of the Indian Penal Code, would not result in any prejudice to them. The accused persons can therefore, be convicted for the major offence read with Section 34 of the Indian Penal Code.

52. In the instant case, all the eye witnesses, namely the PW-3, PW-7, PW-8, PW-9, PW-10 and PW-11 have deposed during the trial that they know the accused persons and they have seen the accused persons, including the present appellants, assaulting the deceased Anowar. The injured eye witness, namely PW-11 Md. Kapiluddin has categorically deposed that the accused persons brought the deceased Anowar out of his house and assaulted him and thereby killed him. He has specifically stated that Soleman hacked the neck of Anowar and other accused persons assaulted him with lathi when he fell down. During cross-examination also, he has stated that he had witnessed the incident in an injured condition. This testimony of the injured witness PW-11 could not be demolished during his cross-examination. The Apex Court has observed in the case of "*State of U.P. v. Naresh*", (supra) as follows: -

27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an

injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide *Jarnail Singh v. State of Punjab* [(2009) 9 SCC 719: (2010) 1 SCC (Cri) 107], *Balraje v. State of Maharashtra* [(2010) 6 SCC 673: (2010) 3 SCC (Cri) 211] and *Abdul Sayeed v. State of M.P.* [(2010) 10 SCC 259: (2010) 3 SCC (Cri) 1262])

In the instant case also, we do not find any justification for discarding the testimony of PW-11, who is an injured eyewitness. There is no doubt regarding his presence at the place of occurrence when the alleged incident had happened as he himself sustained injuries during the assault by accused Azibar (who was found to be juvenile later on) at the time of the incident.

53. From the testimony of PW-15, which has been discussed hereinbefore in paragraph number 29 of this judgment, it is clear that the deceased Anowar died due to shock and haemorrhage as a result of injuries inflicted upon him. The number of multiple injuries inflicted upon the deceased clearly shows that the accused persons, including the present appellants, intended to cause the death of Anowar.

54. As regards the conviction of the present appellants under Section 448 of the Indian Penal Code is concerned, we have seen hereinbefore that almost all the prosecution witnesses have deposed that the accused persons entered the house of the deceased and dragged him out from his house and thereafter assaulted him. The said testimony of the prosecution witnesses remained uncontroverted. Hence, we do not find any good ground to interfere with the finding of conviction of the present appellants under Section 448 of the Indian Penal Code. However, the conviction under Section 448 is not with the aid of Section 149 of the Indian Penal Code but with the aid of Section 34 of the Indian Penal Code.

55. As regards the conviction of the present appellants under Section 326 of the Indian Penal Code is concerned, the injured victim, namely, Kapiluddin Ahmed while deposing as PW-11 has stated that he was assaulted with a dao on the backside of his head by the accused Azibar (who was later on found to be a juvenile). However, PW-11 has not implicated the present appellants in causing grievous injury to him and it has been already discussed in the foregoing paragraphs that in the instant case, the trial court had erred in framing the charges against four numbers of accused persons under Section 149 of the Indian Penal Code. Hence, the present appellants could not have been convicted under Section 326 of the Indian Penal Code with the help of Section 149 of the Indian Penal Code. Accordingly, we set aside the conviction of the present appellants under Section 326 of the Indian penal Code.

56. The submission of learned Senior Counsel for the appellants that the accused persons were not identified in the dock by the witnesses does not appear to be factually correct as only three accused persons (present appellants) faced the trial and all the eyewitnesses have categorically stated that the accused persons are known to them. As the appellants were known to the witnesses, they could identify them even when it was dark at the time of the incident. Hence, we find no force in the submission of learned senior counsel for the appellants that the witnesses have failed to identify the assailants.

57. Moreover, as regards the submission of learned Senior Counsel for the appellants that some of the other persons, who according to the witnesses were present at the place of occurrence, were not examined as witnesses in this case, we are of the considered opinion that mere non-examination of such witnesses would not make the prosecution case weak if the testimony of available witnesses is otherwise reliable. The Apex Court, in this context has observed in the case of "Raja v. State of Haryana", reported in (2015) 11 SCC 43as follows :-

13. It is well settled in law that non-examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record, if the same is natural, trustworthy and convincing (see State of H.P. v. Gian Chand [State of H.P. v. Gian Chand, (2001) 6 SCC 71 : 2001 SCC (Cri) 980] . That apart, he was not such a witness who alone was the competent witness to depose about a fact and his non-examination would really destroy the version of the prosecution.

In the instant case, apart from the injured witness, the prosecution side also examined the family members of the deceased who would have normally been present in the house of the deceased at the time when the incident had occurred. Hence, non-examination of other witnesses who were also present at the place of occurrence of the incident at that time, by itself, would not make the prosecution case weak.

58. As regards non-recovery of weapon of assault in this case, we are of the considered opinion that though such non-recovery is a lacuna in the investigation, however, in view of unimpeachable ocular evidence corroborated by medical evidence, mere non-recovery of weapon of offence during investigation, by itself, does not affect the prosecution case.

59. Thus, for the reasons mentioned in the foregoing paragraphs we are of the considered opinion that the available evidence on record, as discussed hereinbefore, shows that the present appellants, in furtherance of their common intention, dragged the deceased Anowar out of his house and have assaulted him and thereby caused his death, hence, the conviction of the present appellants under Section 302 read with Section 149 of the Indian Penal Code is converted into conviction under Section 302 of the Indian Penal Code read with Section 34 of the Indian Penal Code. Further, the conviction of the present appellants under Section 326 of the Indian Penal Code is set aside for the reasons mentioned

hereinbefore. Further, the conviction of the present appellants under Section 448 of the Indian Penal Code read with Section 149 of the Indian Penal Code is also converted into conviction under Section 448 of the Indian Penal Code read with Section 34 of the Indian Penal Code.

60. Accordingly, the appellants named hereinabove are sentenced to undergo rigorous imprisonment for 3 months under Section 448/34 of the Indian Penal Code. They are also sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/- and in default of payment of fine to undergo further rigorous imprisonment for 3 months for committing the offence under Section 302/34 of the Indian Penal Code. The sentences imposed on the appellants shall run concurrently. The impugned judgment stands modified to the extent indicated hereinabove.

61. This appeal is accordingly disposed of.

62. Send back the LCR, along with a copy of this judgment.