

IN THE GAUHATI HIGH COURT

(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

PRINCIPAL SEAT AT GUWAHATI

(CRIMINAL APPELLATE JURISDICTION)

Crl. Appeal No.205 of 2019.

Abdul Kadir & 4 others Appellants

-Versus-

The State of Assam & another ... Respondents

For the appellants : Mr. R. P. Sarmah, Sr. Advocate.
Mr. M. R. Adhikari, Advocate.

For the respondents : Ms. B. Bhuyan, Addl. P.P., Assam.
Mr. K. M. Haloi, Advocate.

BEFORE

**HON'BLE MR. JUSTICE SUMAN SHYAM
HON'BLE MR. JUSTICE ROBIN PHUKAN**

Dates of hearing : **29.07.2021 & 05.08.2021.**

Date of judgment : **13.09.2021.**

JUDGMENT AND ORDER (CAV)

(Suman Shyam, J)

Heard Mr. R. P. Sarmah, learned senior counsel assisted by Mr. M. R. Adhikari, learned counsel appearing for the appellants. We have also heard

Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam, appearing for the State/respondent No.1 and Mr. K. M. Haloi, learned counsel representing the informant/ respondent No.2.

2. This appeal against conviction has been preferred by the five appellants assailing the judgment and order dated 11.03.2019 passed by the learned Additional Sessions Judge, Sonitpur, Tezpur in connection with Sessions Case No.251/2014.

3. The prosecution case, as unfolded from the materials available on record, is to the effect that on 03.02.2013, at about 4.00 p.m. the appellant No.1, Abdul Kadir, had picked up the victim Sahab Uddin Choudhury from his residence and took him to Bhojkhowa Chapori Bazar. Later on, at about 8.00 p.m. in the evening, the appellants, in association with some others, had killed the victim behind the Bhojkhowa Balipara L.P. School, by assaulting him with sharp weapon resulting to his death.

4. On 04.02.2013 the son of the victim viz., Md. Akhtar Hussain Choudhury (PW-1) had lodged an ejahar before the In-charge of Borghat Police Outpost reporting the incident. Based on the said ejahar, Tezpur P.S. Case No.141/2013 was registered under Sections 120(B)/302/34 of the I.P.C. and the matter was taken up for investigation. Upon completion of investigation, the I.O. had submitted charge-sheet against 8 accused persons viz. 1) Abdul Kadir, 2) Tahir

Uddin, 3) Ala Uddin, 4) Rustam Ali, 5) Abdul Kadir Gilani, 6) Momruj Ali, 7) Nur Islam and 8) Nurul Islam under sections 120(B)/302 of the I.P.C which included the present appellants. Based on the charge sheet submitted by the I.O., charges were framed against the accused persons under sections 302 read with section 149 of the IPC. The charges were read out and explained to them but the accused persons had pleaded not guilty and claimed to be tried. Hence, the matter went up for trial.

5. In order to bring home the charges, the prosecution had examined as many as 11 witnesses including the Medical Officer (PW-8) who had conducted the post-mortem examination on the dead body of the deceased and the Investigating Officer (PW-11). PW-4 Md. Saidur Ali had claimed to have seen the occurrence and therefore, he was examined as an eye-witness. By the impugned judgment and order dated 11.03.2019, the learned Additional Sessions Judge, Sonitpur, Tezpur had convicted the appellant Nos.1 to 5 viz., Abdul Kadir, Alaluddin, Abdul Kadir Gilani, Nur Islam and Nurul Islam and sentenced each of them to undergo rigorous imprisonment for life and also to pay fine of Rs.5000/- each and in default, to suffer rigorous imprisonment for three months each. However, the two accused persons, viz., Momruj Ali and Tahir Uddin were acquitted by giving them the benefit of doubt. Accused Rustam Ali had died before conclusion of the trial and hence, the proceeding stood abated against him.

6. By the impugned judgment and order dated 11.03.2019 the learned trial court had held that the prosecution has succeeded in establishing the charges brought against the appellants beyond reasonable doubt, both by direct evidence of the eye-witness (PW-4) as well as by the circumstantial evidence. The learned trial court was also of the opinion that the deceased was last seen together with the accused persons and therefore, the circumstance of "last seen together" would also be an additional link in the chain of circumstances which would support the prosecution case. By rejecting the arguments advanced by the learned defence counsel to the effect that the testimony of the prosecution witnesses were full of inconsistencies and material contradictions raising serious doubt on the prosecution story, the learned court below has held that those were minor discrepancies which would have no bearing in the prosecution case. It has also been held that the defence side had failed to prove the contradictions in the testimony of the prosecution witnesses by following the due procedure laid down by the law.

7. Assailing the impugned judgment and order dated 11.03.2019 passed by the learned Additional Sessions Judge, Sonitpur, Tezpur, Mr. R.P. Sarmah, learned senior counsel appearing for the appellants has argued that the PW-4 had failed to state many relevant facts to the police while recording his statement under Section 161 of the Cr.P.C and therefore, this witness was not reliable. Mr. Sarmah has further argued that at the time of the occurrence it

was dark and therefore, it was not possible for the PW-4 to witness the occurrence. On such ground, Mr. Sarmah has argued that PW-4 is not an eye-witness in this case. Mr. Sarmah has also invited the attention of this Court to the discrepancies and/or improvement in the version of the prosecution witnesses to contend that the prosecution case is almost entirely based on the testimony of those witnesses who are the close relatives of the deceased. Since their testimonies were full of contradictions which have been duly proved during cross-examination of the I.O. (PW-11), the learned Addl. Sessions Judge has committed manifest illegality in holding that the charges brought against the accused persons had been established beyond reasonable doubt. The learned senior counsel has also submitted that in criminal law jurisprudence, when two views are possible on an issue, it would give rise to some doubt as regards the prosecution case and benefit of doubt, if any, must always go in favour of the accused persons.

8. Responding to the arguments advanced by the appellants' counsel, Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam, has argued that minor inconsistencies/discrepancies in the testimony of witnesses would not weaken the prosecution case unless those are found to be material contradictions, proved by the defence side, in accordance with law. In the present case, submits Ms. Bhuyan, although there are some discrepancies in the version of the prosecution witnesses, yet, such discrepancies do not create any doubt about

the fact that it was none other than the accused persons who had fatally assaulted the deceased Sahab Uddin Choudhury by sharp weapon and killed him by acting in an unlawful assembly with a common object. Ms. Bhuyan further submits that the prosecution has succeeded not only in establishing the motive behind the crime, which is an old pending land dispute between the deceased and the assailants, but has also succeeded in establishing the charges brought against the appellants beyond reasonable doubt on the basis of testimony of the eye-witness (PW-4). Moreover, the medical report which indicates presence of as many as nine incised injuries on the dead body also goes to establish beyond doubt that the deceased was attacked by sharp weapon by an assembly of persons resulting into his death. Such being the position, Ms. Bhuyan submits that the learned Sessions Judge has rightly convicted the appellants under Section 302 read with Section 149 of the I.P.C. Therefore, the impugned judgment and order does not call for any interference by this court. In support of her above argument, Ms. Bhuyan has relied upon the following decisions :-

1. 1989 (20) GLJ 320 [*Ghanakanta Das & ors. Vs. State of Assam*].
2. (2016)10 SCC 537 [*Bhagawan Jagannath Markad and others vs. State of Maharashtra*].
3. (2017) 11 SCC 195 [*Yogesh Singh Vs. Mahabeer Singh & others*].
4. (2020)7 SCC 237 [*Mustak alias Kanio Ahmed Shaikh Vs. State of Gujarat*].

5. (2015) 3 SCC 138 [*Vinod Kumar Vs. State of Haryana*].
6. (2007) 13 SCC 31 [*Ramappa Halappa Pujar & others Vs. State of Karnataka*].
7. (2015) 11 SCC 52 [*Jodhan Vs. State of Madhya Pradesh*].
8. (2015) 7 SCC 148 [*Pawan Kumar alias Monu Mittal Vs. State of Uttar Pradesh and another*].
9. (2007) 14 SCC 627 [*State of Maharashtra Vs. Tulshiram Bhanudas Kamble and others*].

9. Mr. K. M. Haloi, learned counsel for the respondent No.2, has adopted the arguments advanced by the learned Additional Public Prosecutor and has also submitted that the impugned judgment and order dated 11.03.2019 does not call for any interference from this Court.

10. We have considered the submissions advanced by the learned counsel for both the sides and have also carefully gone through the materials available on record. At the very outset, it would be apposite to mention herein that the appellants viz., Abdul Kadir, Nurul Islam, Alal Uddin, and Nur Islam are the accused persons named in the F.I.R. whereas the appellant Abdul Kadir Gilani was included in the charge-sheet on the basis of statement made by the witnesses during the course of investigation.

11. PW-1, Akhtar Hussain Choudhury, i.e. the informant in this case is the son of the deceased Sahab Uddin Choudhury. PW-1 has deposed that on 03.02.2013, at about 4.00 p.m. one person viz., Abdul Kadir (appellant/ accused No.1) had picked up his father from home and took him to Bhojkhowa Chapori Bazar. At about 8.00 p.m. on that day, Abdul Kadir, along with Nur Islam, Alaluddin, Nurul Islam, Kazimuddin *alias* Ahid, Abdul Kadir Gilani and 2/3 other persons had killed his father by assaulting him with sharp weapons behind the Bhojkhowa Balipara L. P. School. This witness has also stated that on that day, he had returned home at about 7.00 p.m. and around 8/8.30 p.m. he had gone to Bhojkhowa Chapori Bazar to make some purchases. He went there riding a motorbike and in the flash of the headlight of the motorbike, he saw Nurul Islam, Alaluddin, Tahir Uddin, Nur Islam, Abdul Kadir Gilani and Abdul Kadir leaving the place on a motorbike after hacking a person. The number of the motorbike was AS-12J-7259. He then got down from his motorcycle and found his father lying dead. He had seen cut injuries in the neck, forehead and from the ear to the nose of his father and stab injuries on his chest. Two passersby had gathered there and then information was given to the police whereafter, the police had arrived at the place of occurrence and seized a shirt, a white plastic bag and a pair of sandals lying near the dead body. PW-1 has also stated that Ext-1 is the seizure list and Ext-1 (1) is his signature. Mat. Ext-1 is the seized shirt, Mat. Ext-2 is the pair of sandals and Mat. Ext-3 is the white plastic bag. Later on, the police

took away the dead body. On 04.02.2013 he had lodged an ejahar with the Borghat Police Outpost. Ext-2 is the ejahar and Ext-2(1) is his signature. PW-1 has also deposed that he suspects that his father was killed as there was a land dispute. During his cross-examination, PW-1 has stated that he is an employee of the Police department and he had mentioned in the ejahar that he suspected that the rest of the accused persons had committed the incident along with the accused No.1. During his cross-examination PW-1 had reiterated his earlier statement that he came in a motorbike and in the flash of the headlight of the motorbike he saw Nurul Islam, Alaluddin, Tahir Uddin, Nur Islam, Abdul Kadir Gilani and Abdul Kadir leaving on a motorbike after hacking a person. This witness has, however, clarified that he did not inform the police and he has also denied the suggestion to the effect that without witnessing the incident, he has falsely deposed before the Court.

12. PW-2, Md. Asaraful Islam is one of the grandsons of the deceased Sahab Uddin. He has deposed to the effect that the incident took place on a certain day in the year 2013 at about 8/8.30 p.m. when he was in a shop at Bhumuraguri. At that time, one person of their village was murdered in Bhojkhowa L.P.School. Then he rushed to the place of occurrence and on his arrival, he found his grandfather dead with his neck cut. This witness was later declared as a hostile witness. During his cross-examination by the prosecution side, PW-2 has denied that he had stated before the police that at about 8.30

p.m, on the 3rd day of February, 2013, when he was coming to his house from Bhojkhowa centre with his friend Md. Anisul Hoque, he saw a fight and heard a hue and cry at a place adjacent to Bhojkhowa Girls'LP School; that he saw 1) Md. Abdul Kadir, 2) Md. Nurul Islam, 3) Md. Alaluddin, 4) Md. Samruj Ali, 5) Md. Tahiruddin alias Tahir, 6) Md. Nur Islam and 7) Rustam Ali, residents of Bhumuraguri together killing Sahabuddin Choudhury, the VDP Secretary of village Bhumuraguri by cutting his neck by means of sharp weapon and fleeing from the place of occurrence; that he made an effort to inform the police immediately with the assistance of the public. During his cross-examination by the defence side, PW-2 has stated that he did not see informant Akhtar Hussain Choudhury at the place of occurrence and that Anisul Hoque also did not go with him.

13. PW-3, Md. Afazuddin Choudhury is another son of the deceased and the younger brother of informant Akhtar Hussain Choudhury. PW-3 has also deposed in similar lines by stating that at about 4.00 p.m. on 03.02.2013, the accused Abdul Kadir came to their house in a motorcycle and asked him whether his father was available at home and told him to call his father. Abdul Kadir then took away his father in his motorcycle by saying that there was a meeting at Chapori Center. At about 6.30 p.m. accused Kadir brought his father. He followed them riding a bicycle. He had heard a hue and cry from about 30 meters away from the Bhumuraguri L.P. school. Going ahead for

about 20 meters he saw Nurul Islam in the flash of the headlight of a motorcycle, running away towards the road near the school with a sharp weapon in his hand. PW-3 has also stated that he saw Kadir leaving in his motorbike. Then he came close to the school and saw his father lying dead on the road in front of the school. He had seen cut injuries on the head, face and neck of his father and blood was oozing out. PW-3 has also deposed that Alaluddin, Nur Islam, Tahir Uddin and Nurul threatened to kill his father when a difference with regard to land of "char" (riverine area) had taken place about two years back. After the occurrence, police came there and seized a white shirt, sandal and a bag by seizure list Ext-1 which he had signed and Ext-1(3) was his signature. During his cross-examination PW-3 has stated that the incident had taken place during the time of Panchayat Election and that his father was an influential leader of Congress. In his cross-examination this witness had denied the suggestion that he had not stated before the police that while coming back from the meeting on a bicycle he had seen in the flash of the headlight of a motorbike Nurul running away with a weapon in his hand and that going 20 meters ahead he had seen in the flash of headlight of a motorbike from a distance of about 10 meters that Nurul was leaving the place with a weapon in his hand and Kadir was leaving on a motorbike and that his father was lying dead on the road. PW-3 has also denied the suggestion of the

defence counsel that he had neither gone to the place of occurrence nor had he seen the incident.

14. PW-4, Md. Saidor Ali, is an important witness in this case. This witness has claimed to have seen the occurrence. PW-4 has deposed before the Court that he knew the complainant. Deceased Sahab Uddin was the son of the elder brother of his father. One day, about 2 ½ years back, when he, along with Ainul Hoque, was going to Bhojkhowa Chapori Center to make some purchase, a ruckus broke out on the road of Bhojkhowa Chapori L.P. School. Then he had seen about 8/10 people including Alaluddin, Nur Islam, Nurul, Kadir and Gilani assaulting Sahab Uddin by means of "dao". Then Ainul and he raised an alarm whereupon, they (assailants) fled away. Abdul Kadir had left in a motorcycle. Thereafter, the VDP Secretary Ainul dialled up the Police Station and the police arrived there. Shab Uddin died. He saw cut injuries on the head, neck and forehead of Sahab Uddin. At about 11.00 p.m. Abdul Kadir surrendered in the Police Station.

15. PW-5, Md. Hafijuddin, is the younger brother of deceased Sahab Uddin Choudhury and he has deposed to the effect that the incident took place in the year 2013 at about 8.00 p.m. On that day, he had gone to Bhojkhowa Chapori and while returning back home, he saw deceased Sahab Uddin Choudhury, Alal, Nur Islam, Nurul, Ahir and Kadir conversing on the road near Bhojkhowa Girls school. At that time, Sahab Uddin had asked him to carry his

shopping bag to his house saying that he would go for the campaign seeking vote. This witness has stated that at about 8.30 p.m. he had heard a hue and cry raising an alarm that a murder had been committed in the village. Then he rushed towards the Girls school and on arriving there, he found the dead body of Sahab Uddin lying beside the road to the school. PW-5 has also stated that he saw cut injuries on the neck and various parts of the body of the deceased. At that time they were searching for Kadir as some people had said that Sahab Uddin was with Kadir. Kadir surrendered in the Police Station at about 11.00 p.m. During his cross-examination PW-5 has stated that his elder brother was the VDP Secretary and a Congress leader and that there had been dispute between the accused persons and his elder brother (deceased) with regard to sale of Government land. This witness has remained firm during his cross-examination. From the testimony of PW-5 it has also come out that the place where the dead body was found lying was the same place where he had earlier seen deceased Sahab Uddin and the other accused persons together.

16. PW-6, Mustt. Hasen Banu, is the wife of the deceased and this witness has categorically deposed that on 03.02.2013, at about 4.00 p.m. accused Abdul Kadir took her husband Sahab Uddin Choudhury to Bhojkhowa Chapori on his motorcycle. In the evening on that day, her son Akhtar Hussain Choudhury (informant) had gone to the bazaar to buy medicines for her and at about 7.30 p.m. he had informed her over phone that her husband has been killed. Her son

had also informed her over phone that he saw Kadir, Alal and Nur Islam running from the place of occurrence. On receiving the aforesaid information, she had rushed to the place of occurrence and saw that her husband was lying dead in front of Bhojkhowa Balika LP school. PW-6 has also stated that she had seen cut injuries on the back of the head, face and chest of her deceased husband. According to this witness, 14 years prior to the incident, a land dispute occurred between her husband and the accused persons and the said dispute continued till the time of the occurrence. PW-6 has also stated that once her deceased husband had lodged a complaint before the police against the accused persons alleging that they had dispossessed them from their land and sold out the land. The testimony of this witness also could not be shaken during her cross-examination.

17. PW-7, Md. Sultan Ali, is the nephew of deceased Sahab Uddin Choudhury and he has deposed that on the date of occurrence, at about 8.10 p.m. when he was getting ready to bring food from his house for the boy who works in his shop situated at Bhojkhowa Chapori Center, he had noticed that Abdul Kadir was riding on a pillion of Sahab Uddin Choudhury's motorcycle. He had also proceeded behind them and saw one Jilani standing in front of Bhojkhowa L.P. School who had called Kadir. PW-7 has stated that he had also noticed some persons near the school on the road side. Then he went to his house at about 8.30 p.m. and returned back to his shop through a different road. After coming

back to his shop he had heard from people that a man had been killed and his dead body was lying in front of Bhojkhowa Chapori L.P. School. Then he went there and found Sahab Uddin Choudhury lying dead on the ground and also saw cut injury on his neck.

18. PW-8, Dr. Atul Kumar Kalita was the doctor on duty at the Kanaklata Civil Hospital, Tezpur on 04.02.2013 and he had conducted post-mortem examination on the dead body. As per the post-mortem report (Ext-4) following injuries were found on the dead body :-

"Description of injuries:

- 9" long transverse incised wound involving left ear, mastoid inferior to the left eye involving lower eye lid, nose, nasal bone, temporal bone.
- 5.5" long oblique incised wound over left anterior occipital area.
- 10" long incised wound involving upper lip, jaw, left maxilla, lower margin of the left ear.
- 6" incised wound involving scalp, bone, brain matter vertically placed on left temporal area.
- 8" long incised wound involving scalp temporal, occipital bones, meninges and brain on left.

- *8" transverse incised wound involving skin soft tissue and trachea on left side.*
- *10" long incised wound below and posterior to the right ear to 1.5 cm below and posterior to the left ear involving skin soft tissues C2 and C3 vertebrae, spinal cord separating the head from the vertebral column.*
- *8" long incised wound on right posterior on the neck from right angle of the mandible to right side of the spinal column involving skin soft tissue and bone.*
- *6 cm oblique cut and incised wound over left scapular area involving soft tissue."*

The doctor had opined that the death was due to shock and haemorrhage as a result of injuries sustained which were ante mortem in nature.

19. PW-9, Md. Abdul Haque, is a resident of the same village and is known to the informant. From the statement of the PWs-4 & 9 recorded under Section 161 Cr.P.C. it transpires that Md. Abdul haque and Ainul is the same person. This witness has deposed that on the day of the incident at about 8.00 p.m. he was going to Bhojkhowa Chapori in the motorcycle of Saidor (PW-4) and noticed "hulla" and "marpit" near Bhojkhowa Balika L.P. School where he had seen Abdul Kadir and Abdul Kadir Gilani leaving the place. This witness has stated that he had noticed Sahab Uddin Choudhury lying on the road in an injured condition. He then telephonically informed the In-charge of Borghat O.P. and thereafter, to the Officer-in-Charge of Tezpur Police Station. On receiving

information the O/C, Tezpur P.S. and other police officers along with dog squad visited the place and investigated the matter. He had accompanied the dead body of Sahab Uddin Choudhury to the hospital for post-mortem examination. During his cross-examination this witness has stated that he is the VDP Secretary of Bhomoraguri Village. This witness has denied any relationship with the deceased and had remained firm during his cross-examination.

20. PW-10, Md. Anisul Haque, has deposed that on the day of the occurrence, at about 8.30 p.m. while he was in the market at Bhojkhowa Chapori Center, he had heard that a murder had been committed behind the Bhojkhowa Balika School. He then went to the place of occurrence and saw many people had gathered behind the Bhojkhowa Balika School. He had noticed that Sahab Uddin was lying dead on the ground with cut injuries on his body and neck and blood was oozing out of the dead body. PW-10 has also stated that VDP Secretary Ainul was there and he had informed the police over phone. Thereafter, the police came and took away the dead body. This witness was later declared as a hostile witness. During his cross-examination by the prosecution side PW-10 has denied having stated before the police that on 03.02.2013 at about 8.30 p.m. while he, along with his friend Md. Asaraful Islam, was coming back from Bhojkhowa Chapori Center towards his house, he saw the VDP Secretary Sahab Uddin was being assaulted by Md. Abdul Kadir, Md. Nurul Islam, Md. Alal Uddin, Md. Momruj Ali, Md. Tahir Uddin alias Ahir, Md. Nur

Islam and Md. Rustam Ali by means of sharp cutting weapons on his neck and then fled away from the place of occurrence.

21. PW-11, Sri Bidyut Bikash Baruah, was the In-charge of Borghat Police Outpost on 03.02.2013 and he has stated in his evidence that on the day of occurrence, at about 8.30 p.m. one Md. Akhtar Hussain Choudhury had telephonically informed that some unknown miscreants had killed Sahab Uddin Choudhury by means of sharp weapon near the Bhojkhowa Balika L.P. school. Accordingly, Borghat OP GD entry No.44 was made by him whereafter, he had proceeded to the place of occurrence i.e. Bhojkhowa Balika L.P. School. On reaching the place of occurrence he had seen the dead body lying there. He had seized, in presence of witnesses, one white and blue full sleeve shirt, one rubber sandal and one white plastic bag which was lying near the dead body and took photograph of the deceased. PW-11 has also stated that as it was dark at night, the inquest could not be performed at that time. So he had engaged one constable Dil Bahadur Chetri to guard the dead body. He had recorded the statements of the witnesses and seized the items and prepared a sketch map of the place of occurrence. On the next day i.e. 04.02.2013 at 10.00 a.m. he had conducted inquest over the dead body and noticed sharp cut injuries on the head and back of the neck of the deceased. He then sent the dead body to Kanaklata Civil Hospital, Tezpur for post-mortem examination. He had again visited the place of occurrence and recorded the statements of a

few witnesses. Based on the information received from the witnesses he had enquired about the accused and apprehended Abdul Kadir Gilani, Habibur Rahman, Md. Abdul Ali, Md. Momruj Ali, Md. Saidul Islam and brought them to the Outpost. In the meantime, the Officer-in-Charge, Tezpur Police Station, had telephonically informed him that the FIR named accused Md. Abdul Kadir had surrendered before the Tezpur P.S. with one motorcycle bearing Registration No.AS-12/J 7259. He had recorded the statement of the accused persons and seized the motorcycle vide Ext-7. The I.O. had stated that he had arrested the accused persons namely, Abdul Kadir Gilani, Habibur Rahman, Md. Abdul Ali, Md. Momruj Ali, Md. Saidul Islam and Md. Abdul Kadir and forwarded them to the Court. During investigation, he came to know about the other accused persons viz., Md. Nurul Islam, Md. Alal Uddin, Md. Tahhir Uddin alias Ahir and Mr. Nur Islam but in spite of his best efforts, he could not apprehend those accused persons as they were not found.

22. During his cross-examination the I.O. (PW-11) had brought on record certain contradictions in the testimonies of PW-1, PW-3, PW-4, PW-5, PW-6, PW-7 and PW-9. Since such contradictions in the testimony of these witnesses have been heavily relied upon by the defence side so as to impeach the prosecution case, we propose to deal with them in greater details in the later part of our judgment.

23. The accused persons had denied all the circumstances put to them while recording their statements under Section 313 Cr.P.C. but the defence side did not lead any evidence.

24. Upon analysing the materials brought on record, the learned trial court was of the view that the prosecution side had succeeded in establishing the charges brought against the appellants on the basis of the evidence adduced by the sole eye-witness PW-4 as well as the other circumstantial evidence, which go to show that the appellants had acted in an unlawful assembly and with a common object to murder the deceased Sahabuddin Choudhury and killed him.

25. We have carefully gone through the evidence available on record and find that the homicidal death of deceased Sahab Uddin Choudhury is well established from the post-mortem report Ext-4 as well as the testimony of the doctor PW-8. The post-mortem report also shows that the victim had died due to multiple incised injuries inflicted on different parts of his body by sharp cutting weapon. The evidence brought on record also establishes the fact that the incident took place on 03/02/2013 at about 8/8.30 pm near the Bhojkhowa Chapori Girls L.P.School.

26. We also find from the materials available on record that PW-4 Md. Saidor Ali and PW-9 Abdul Hoque alias Ainul are the two most important witnesses in

this case. Let us, therefore, first examine as to whether, the evidence adduced by these two witnesses have been correctly appreciated by the learned court below.

27. As noticed above, PW-4 has categorically deposed that he had seen 8/10 people including Alaluddin, Nurul Islam, Nurul, Kadir and Gilani assaulting Sahabuddin by means of "dao". The evidence of PW-4 could not be shaken during his cross –examination. However, it is also seen from his statement recorded by the Police under section 161 Cr.P.C that the PW-4 did not mention the name of Abdul Kadir Gilani as one of the persons whom he had seen to have assaulted the victim. The name of Gilani has been added by PW-4 for the first time while deposing before the court. From the above it is evident that there has been some exaggeration and embellishment in the testimony of this witness. The question is, should the evidence of this witness be discarded due such exaggeration and embellishment ?

28. In the case of **Leela Ram v State of Haryana** reported in **(1999) 9 SCC 525**, the Supreme Court had observed that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment but the court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. The evidence of such witnesses are to be considered from the point of view of trustworthiness. Total repulsion of the evidence would be unnecessary.

29. Likewise, in **Subal Ghorai v State of W.B.** reported in **(2013) 4 SCC 607** the Apex Court had taken note of the fact that sometimes witnesses do exaggerate and held that evidence of witnesses need not be discarded on account of embellishments if it is corroborated on material aspect by other evidence on record.

30. In another subsequent decision of the Apex Court in the case of **Yogesh Singh (supra)**, by taking note of the law laid down in **Leela Ram (supra)** and **Subal Ghorai (supra)** it has further been held that an omission or discrepancy which goes to the root of the matter and ushers in incongruities may create a dent in the prosecution version but minor discrepancies are not to be given undue emphasis. The evidence is to be considered from the point of view of trustworthiness.

31. In the present case PW-4 has narrated the incident by naming the accused persons who had assaulted the deceased. PW-9 Md. Abdul Hoque *alias* Ainul has substantially corroborated the version given by the PW-4 and has stated that on the day of the incident, he was going to Bhojkhowa Chapori at about 8 p.m. in the motorcycle of Saidor (PW-4). He had seen Abdul Kadir and Abdul Kadir Gilani leaving the place and also saw Sahab Uddin Choudhury lying on the road. This witness had also stated that he had informed the police telephonically. Although the I.O. had stated that it was Md. Akhtar Hussain Choudhury i.e. the informant, who had informed the Police, yet it has come out

from the evidence adduced by the PWs-1 and 4 that it was actually PW-9 who had informed the Police.

32. By referring to the statement of the PW-4 in his cross-examination to the effect that it was night and there was no light on the road and that they did not have a torch in their hands, Mr. Sarmah has strenuously argued that in the absence of any light, the PW-4 could not have seen the accused persons as claimed by him and therefore, he is not an eye-witness. Mr. Sarmah has also made an attempt to derive support to his aforesaid argument from the fact that neither the PW-4 nor the PW-9 had stated before the police that they came to the place of occurrence at 8.00 p.m. on the night of the incident in a motorbike. However, on a close scrutiny of the evidence adduced by these two witnesses i.e. PW-4 and PW-9 we are unable to accept the aforesaid argument of Mr. Sarmah for the following reason. The PW-4 did not say in his cross-examination that it was dark so nothing was visible. PWs-4 and 9 were evidently travelling in a motorbike. Therefore, even if there was no street light and the PW-4 was not carrying a torch, the witness could have easily seen the accused persons assault the victim and fleeing from the place of occurrence in the headlight of the motorbike which he was riding.

33. It is also to be noted herein that the PW-9 had categorically stated in his examination-in-chief that on the day of the incident he went to Bhojkhowa Chapori in the motorcycle of Saidor but there is no cross-examination of the

said witness on the aforesaid point. On the contrary, it has come out from the cross-examination of PW-9 that on that day he was the pillion rider in the motorcycle of Saidor (PW-4). Since the above fact has come out during the cross examination of PW-9, the learned counsel for the appellants cannot now be permitted to take a plea that there is no evidence to show that the PW-4 was travelling in a motor bike or that he did not have the assistance of light coming from the motorbike under which he could have seen the assailants.

34. It must be noted herein that PW-9, who was the VDP Secretary, is an independent witness. If there was any motive to falsely implicate the appellants, there was nothing preventing this witness from naming all the accused persons in the manner as has been done by the PW-4. However, he did not do so. It appears that on that night, the PW-9 was riding on the pillion in the motorcycle driven by the PW-4 and therefore, he might not have seen the other accused persons. It was on such count that the PW-9 had merely stated that he could recognise only two persons viz., Abdul Kadir and Abdul Kadir Gilani under the light of the motorcycle. This witness PW-9 appears to be truthful and his testimony inspires the confidence of this Court. PW-9 has also corroborated the version given by PW-4. Therefore, we are of the considered view that notwithstanding some exaggerations and embellishment in his evidence, as noticed here-in-before, PW-4 is an eye-witness to the occurrence and has rightly been held so by the trial court.

35. Having observed as above, we have also noted that in his statement recorded under section 161 Cr.P.C, PW-9 had stated that 1) Md. Abdul Kadir, 2) Md. Nurul Islam, 3) Md. Alal Uddin, 4) Md. Momruj Ali, 5) Md. Tahir Uddin, 6) Md. Nur Islam and 7) Md. Rutam Ali had together killed Sahab Uddin Choudhury by cutting his neck with sharp weapon. However, Md. Abdul Kadir Gilani, Md. Habibur Rahaman, Md. Abdul Ali and Md. Saidul Islam were not involved in committing the murder of the deceased but had merely gathered at the place of occurrence after hearing the commotion.

36. PW-1 i.e. the informant in this case, has stated that he has seen Nurul Islam, Alaluddin, Tahir Uddin, Nur Islam, Abdul Kadir Gilani and Abdul Kadir leaving the place in a motorbike after hacking the person. It appears from the testimony of PW-1 that he did not see the occurrence but had arrived at the place of occurrence after the incident took place and saw some of the accused persons as well as Abdul Kadir Gilani leaving the place. PW-9 has also stated that he had seen Abdul Kadir Gilani leave the place after the incident. That apart, PW-4 had not named Abdul Kadir Gilani as one of the persons assaulting the victim in his statement made before the IO. We are therefore, of the considered opinion that although Abdul Kadir Gilani might have been present at the place of occurrence and might have been seen by these witnesses, yet, his involvement in the incident appears to be very

doubtful. Under the circumstances, we are of the view that the benefit of doubt must go to the appellant Abdul Kadir Gilani.

37. Having observed as above, we also find from a cursory glance at the Case Diary that the statement of accused Md. Abdul Kadir was recorded by the police under section 161 Cr.P.C on 04.02.2013 and he had also stated before the police that Md. Abdul Kadir Gilani, Md. Habibur Rahaman Md. Abdul Ali and Md. Sidul Islam were not involved in the incident but that they had gathered in the place of occurrence only after hearing the commotion.

38. PW-5 had also deposed that just before the incident, he had seen deceased Sahabuddin Choudhury, Alal, Nurul Islam, Nurul, Ahir and Kadir conversing on the road near Bhojkhowa Girls LP school when Sahabuddin asked him to carry his shopping bag back home. There is no cross-examination of PW-5 on the aforesaid point. Therefore, the testimony of this witness on the above point stood firm even in his cross-examination.

39. It has also come out from the evidence of PW-3 and PW-6 that on the day of the incident at about 4.00 p.m. accused Abdul Kadir came to their house in a motorcycle and asked the deceased Sahab Uddin to accompany him so as to attend a meeting at Chapori Center. Accordingly, the deceased went away in a motorcycle along with Abdul Kadir. Later in the evening, Abdul Kadir had surrendered in the Police Station. The aforesaid fact also constitutes a

strong link in the chain of circumstances which goes to show that the accused persons had acted with pre-meditation and as per a plan to murder the victim Sahab Uddin Choudhury by taking him to a secluded place i.e. behind Bhojkhowa Balika L. P. School.

40. The motive for committing the crime has also been established by the prosecution side through the testimony of witnesses PWs-1 and PW-6 who have deposed that there was a long standing land dispute between the deceased and the accused persons. The said testimony of the prosecution witnesses have remained unimpeached during their cross-examination. Therefore, upon reading their evidence as a whole, we are of the opinion that the prosecution side has succeeded in establishing each link in the chain of circumstances so as to establish beyond reasonable doubt that it was none other than the accused/appellants save and except appellant Abdul Kadir Gilani, who had murdered the deceased Sahab Uddin Choudhury.

41. In so far as the arguments pertaining to the contradictions/ omissions/improvements in the testimony of the prosecution witnesses are concerned, we find that there are, in fact, some discrepancies in their testimony and some of the facts deposed before the court were not stated by the prosecution witnesses to the police while recording their statements under Section 161 Cr.P.C. According to the learned counsel for the appellants, such contradictions in the statements of the key witnesses have been duly proved by

the defence side during the trial through the I.O. (PW-11). In order to drive home his point, Mr. Sarmah has drawn our attention to the relevant part of the cross-examination of the I.O. (PW-11) which is extracted herein below for ready reference :-

“PW-1 Akhtar Hussain Choudhury has not stated before me that on the date of occurrence at about 7 p.m. he came to his house and at about 8/8.30 p.m. he went to Bhojkhowa Cahpori for marketing in a bike and he saw through the light of the bike that Nurul Islam, Alaluddin, Tahiruddin, Nur Islam, Abdul Kadir Jilani giving blows to a person with sharp weapon and Abdul Kadir leaving the place with motorcycle and the registration No. of the bike was AS-12/J-7259. This witness has also not stated before me that he came down from the motorcycle and saw his father lying dead and there was cut injuries on the neck, forehead and from the ear to the nose.

In the FIR the name of Abdul Kadir Jilani was not mentioned.

It is not a fact that PW 2 Ashraful Islam and PW 10 Anisul Haque did not give any statement as I have narrated today. The statement of PW 2 and PW 10 are recorded in white sheets.

PW-3 Afazuddin Choudhury has not stated before me that he also went to attend the meeting. This witness has also not before me that at about 6:30 p.m. accused Kadir brought his father back from the meeting in a motor cycle and he also followed them after 10 minutes. This witness has also not stated before me that while he was returning in his bicycle he saw, in the light of bike, that Nurul was running with a weapon in his hand and Kadir left the place in his bike. This witness has also stated that

the occurrence took place about 8:30 p.m. This witness has stated before me that he saw the dead body of his father while he was going to market.

PW-4 Saidor Ali has stated before me that he saw hulla near L.P. School while he was returning from the market. This witness has not stated before me that he along with Ainul were going in a motor cycle. This witness has not stated before me that he saw accused Alaluddin, Nur Islam, Nurul, Kadir and Jilani assaulted Sahabuddin by means of dao. This witness has not mentioned the name of Abdul Kadir Jilani before me. This witness has stated before me the name of Rustam, Momrus and Tahir Uddin. This witness has not stated before me that Kadir surrendered before police station.

PW-5 Hafizuddin has not stated before me that at about 8 p.m. while he was coming from Bhojkhowa Chapori, near Bhojkhowa L.P. School he saw Kadir, Sahabuddin Choudhury, Alal, Nur Islam, Nurul, Ahir were gossiping at the road and Sahabuddin told him to take back his bag and hand over to his house and he told that he will go to village for canvassing for election. This witness has not stated before me that at about 8:30 p.m. he heard hulla in the village that a murder took place and then he went running near the Balika LP School where he met Sahabuddin and other and he saw that the dead body of Sahabuddin was lying on the road near LP School and he saw cut injury on the neck and various parts of his body. He also did not state before me that he then searched Kadir because some people told that Sahabuddin came to Kadir and at about 11 p.m. accused Kadir surrendered before police station.

PW-6 Mustt. Hasen Banu has not stated before me that on the date in the evening her son Akhtar Hussain went to Bazar for purchasing medicine and at about 7:30 p.m. he informed her over phone that her husband had been killed. She has also not stated that Akhtar had informed her that he saw Kadir, Alal, Nur Islam were running away from the place of occurrence. She has also not stated before me that on getting the information she rushed to the place of occurrence. She has also not stated that prior to the occurrence land dispute arose between her husband and the accused since 14 years back and it continues till the occurrence. She also did not state before me that after the occurrence she along with others went to the house of Kadir but he was not available in his house. She has also not stated before me that one pair of sandal, plastic bag and one shirt were found near the place of occurrence.

PW-7 Sultan Ali has not stated before me that at about 8:10 p.m. he got ready to go to his house to bring food for his employee. He has also not stated before me that Abdul Kadir was coming as a pillion rider in the motor cycle of Sahabuddin and seeing them he also followed them. This witness has also not stated before me that Jilani was standing in front of the LP school and he called Kadir and then Kadir stopped there. He has also not stated before me that turning back he noticed some persons standing near the road side and then he went to his house. He has also not stated before me that he came to his shop to a different road. This witness has not stated before me that after returning to his shop he heard from the people that a man had been killed and the dead body was lying in front of Bhojkhowa Saponi LP School. This witness has also not stated before me that he went there and saw cut injury on the neck of Sahabuddin Choudhury at the place of occurrence.

PW-9 Abdul Haque has not stated before me that he was coming as a pillion rider in the motor cycle of Saidar. He has also not stated before me that he saw, in the light of motor cycle, accused Abdul Kadir and Abdul Kadir Jilani. This witness has stated before me that Abdul Kadir Jilani is not involved in this case and he came to the place of occurrence only to see the occurrence along with other people. This witness has not stated before me that he saw cut injury on the face of the dead body. When any accused surrenders before police station, a GDE is made. I have not collected as to whether any GDE No. was made or not in respect of Abdul kadir and Alaluddin. It is not a fact that no accused were absconding in connection with this case. I do not remember as to how I came to know that the seized items, seized vide Ext.1, belongs to accused Alaluddin. It is not a fact that the said items does not belong to accused Alaluddin. There was no electric connection at the place of occurrence and therefore I could not inquest at night. I have not filled up column No.12, 13, 14 and 15 in the inquest. It is not a fact that without having any incriminating materials I have submitted the charge-sheet against the accused persons. It is not a fact that I have not investigated the case properly."

42. We, however, find from the Case Diary that PW-1 Akhtar Hussain Choudhury had, in fact, told the police that on the day of the incident the accused persons named by him had killed his father by cutting his neck with a sharp weapon and thereafter fled the place. It is no doubt correct that PW-1 did not mention before the police that he had arrived at the place of occurrence in a motorbike but there is also no statement of this witness which

throws light as to the means by which he had arrived at the place of occurrence along with his brother Afazuddin Choudhury (PW-3). Therefore, the omission to state the said fact before the I.O., in our view, cannot be termed as a material contradiction in the testimony of this witness.

43. We also find that contrary to the statement of the I.O. made during his cross-examination the witness PW-4 had, in fact, stated before the police that he had seen (1) Md. Abdul Kadir, (2) Md. Nurul Islam, (3) Md. Alaluddin, (4) Md. Momruj Ali, (5) Md. Tahir Uddin alias Ahir, (6) Md. Nur Islam and (7) Md. Rustam Ali killing the victim Sahab Uddin Choudhury by sharp weapon and then ran away from the place. From a meticulous examination of the statements made by the witnesses PWs-1, 3, 4, 5, 6, 7 and 9 we find that although there are some omissions/improvements in the testimony of these witnesses, nevertheless, these witnesses had not deposed before the Court in any manner which contradicts their previous statements recorded under Section 161 Cr.P.C. In other words, it cannot be said that the omissions/improvements in the version of the witnesses makes their testimony untrustworthy due to contradiction therein. As a matter of fact, from a close scrutiny of the Case Diary we find that the statements of the witnesses had been recorded by the I.O. in a concise form by confining the same to the substance of the statement, without going into every details and therefore, it is possible that the minute details which the witnesses had deposed before the Court were not recorded by the police in the 161 Cr.P.C. statement.

44. By relying on several judicial pronouncements on the issue, the learned trial court had rejected such a plea of the learned defence counsel on the ground that the defence side had failed to prove the contradictions of the witnesses in accordance with law. Let us now examine the validity of such conclusion recorded by the learned trial court.

45. Section 145 of the Indian Evidence Act, 1872, lays down the manner in which cross-examination of the witnesses is to be made as to any previous statement made in writing. Section 145 of the Evidence Act is quoted herein below :-

“145. Cross-examination as to previous statements in writing.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.”

46. In a decision of a Division Bench of this Court rendered in the case of **Ghanakanta Das & others Vs. State of Assam** reported in **1989 (2) GLJ 320**, relied upon by the learned Additional Public Prosecutor, it has been held that the procedure to be followed in order to contradict the evidence adduced by the prosecution witnesses during trial with a statement made before the police

during investigation would be to draw the attention of the witness to that part of the contradictory statement and question him as to whether, he did in fact make the statement. If the witness admits to have made the particular statement before the Police then his admission would be recorded and would form part of his testimony and can be relied upon by the accused as establishing the contradiction. However, if the witness denies of having made such statement before the Police then the particular portion of the statement should be previously marked for identification and when the Investigation Officer (I.O.) comes to the witness box, he should be questioned as to whether the witness had made the particular statement before him during the course of investigation. The answer of the I.O would prove the contradiction. Unless the said procedure is followed and the witnesses are given opportunities for explanation, their previous statements made before the police cannot be used for contradictions. On such failure, it was held that the testimony of the witnesses could not have been thrown out on the ground that their evidence before the trial court has been contradicted by the previous statements made before the police.

47. In the case of **V. K. Mishra and another Vs. State of Uttarakhand and another** reported in **(2015) 9 SCC 588** the Hon'ble Supreme Court also had the occasion to consider the correct manner of proving contradictions as to any previous statement made by a witness. Upon interpretation of Section 145 of

the Evidence Act, the following observations have been made by the Supreme Court in paragraph 19 of the aforesaid decision which are as follows :-

“19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it become the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo motu make use of statements to police not proved in compliance with Section 145 of the

Evidence Act that is, by drawing attention to the parts intended for contradiction."

48. In the instant case, we find that the defence counsel had failed to invite the attention of the witnesses PWs-1, 3, 4, 6 and 9 as to any previous statements in writing so as to contradict the witnesses. On the contrary, an attempt has been made to prove such contradictions through the I.O. in the manner indicated above. Having regard to the ratio of the law laid down in the case of **V. K. Mishra** (supra) and **Ghanakanta Das** (supra) we are of the view that the learned trial court was correct in holding that the defence side had failed to prove the contradictions in the statements made by the prosecution witnesses as per the requirement of law and therefore, they could not be permitted to avail the benefit of such alleged contradictions, if any, in the testimony of the prosecution witnesses.

49. In so far as the omissions and discrepancies in the testimony of the prosecution witnesses are concerned, law is well settled, by means of long line of judicial pronouncements, that minor contradictions and discrepancies in the testimony of witnesses would not have a fatal bearing in the prosecution case unless the same goes into the root of the matter. In the case of **Ramappa Halappa Pujar & others** (supra) the Hon'ble Supreme Court has observed that there can be some contradictions in the deposition of witnesses since minor variations from their earlier statements are but natural. Again, in the case of

Mustak alias Kanio Ahmed Shaikh (*supra*) the Supreme Court has observed that minor discrepancies, if any, is to be ignored.

50. In **State of Uttar Pradesh Vs. Krishna Master and others** reported in **(2010) 12 SCC 324** the Supreme Court has observed that the Court should read evidence as a whole and on such reading if it appears to have ring of truth, then the discrepancies, inconsistencies, infirmities or deficiencies of minor nature not touching upon the core of the case can be ignored.

51. In the present case, we have noticed that there are some omissions such as failure on the part of the PWs-4 and 9 to state before the police that they had arrived at the place of occurrence in a motorcycle or that the PW-1 had failed to state that he came riding in a motorcycle and in the flash of headlight of the motorbike he had seen the assailants leaving the place. But such omissions, in our view, do not erode the credibility of these witnesses since the basic facts stated by them before the police do not contradict their earlier statements in a manner such that both their statements cannot co-exist. Moreover, as mentioned above, the defence side has also failed to prove the contradictions in the statement of these witnesses in the manner required by law. On the contrary, we find that the version given by PWs-1, 3, 4, 5, 6 and 9 broadly bears up the same story without any vital contradictions and therefore, their evidence is found to be trustworthy.

52. If the evidence of PWs-1, 3, 4, 5 and 9 are read in conjunction, then it becomes clear that on the night of the incident, at around 8 .00 p.m. deceased Sahab Uddin was seen together with the accused persons Alaluddin, Nur Islam, Nurul, Ahir and Kadir near the place of occurrence and soon thereafter, his deadbody was found lying there in an injured condition. The eye-witness (PW-4) had identified the accused persons. He had also seen them fleeing the place after assaulting the victim. The evidence available on record more particularly the testimony of PW-4 clearly establishes the fact that the accused persons Abdul Kadir, Alaluddin, Nur Islam, Nurul Islam and Rustom Ali had formed an unlawful assembly with the common object of murdering the victim due to some rivalry owing to a land dispute and in furtherance of such common object, they had fatally assaulted Sahab Uddin Choudhury by sharp weapon causing grievous injuries on his persons leading to his death. We are, however, of the opinion that the prosecution has failed to prove the charges under section 302/149 of the I.P.C. brought against Abdul Kadir Gilani (Jilani) beyond reasonable doubt. Rather, it appears from the materials on record that this appellant had reached the place of occurrence on hearing commotion after the incident took place and that is why he was seen in the place of occurrence.

53. Applying the ratio of the law laid down by the Supreme Court in the decisions noted above, we are, therefore, of the view that the basic story of the

prosecution as regards the time and place of occurrence, the presence of the assailants at the place of occurrence, the previous rivalry constituting the motive of the crime and the homicidal death of the deceased have been firmly established by cogent evidence brought on record. The sole exception is that there is no evidence to establish that accused Abdul Kadir Gilani had, in fact, joined the unlawful assembly to commit the murder of the victim. The discrepancies, inconsistencies, improvements and embellishments in the testimony of the witnesses examined by the prosecution side, in our opinion, do not go into the root of the matter so as to dent the prosecution case. Moreover, as noted above, the defence side has also failed to prove the contradictions in the evidence adduced by the prosecution witnesses in accordance with law. For the above reason, we are in agreement with the view expressed by the learned trial court that the defence has failed to prove the contradictions as per law.

54. In so far as the circumstances of last seen together is concerned, we find that the learned trial court had relied upon such circumstances in support of the conviction of the appellants. After the decision of the Supreme Court in **Satpal vs State of Haryana** reported in **(2018) 6 SCC 610** Law is well-settled that the circumstance of "last seen together" is a weak kind of evidence. One of the fundamental tenets of the aforesaid theory is that there should be very little gap between the time when the accused was last seen with the victim and

when the dead body was recovered. However, if the last seen together circumstance is established by cogent evidence and is duly corroborated by other evidence available on record then the same can be relied upon for convicting the accused persons.

55. In the case of **Kanhaiya Lal Vs. State of Rajasthan** reported in **(2014) 4 SCC 715**, after analysing the earlier decisions on the issue the Apex Court has held that the circumstance of last seen together does not, by itself, lead to the inference that the accused had committed the crime. There must be something more establishing the connectivity between the accused and the crime.

56. Relying on the previous decision of the Supreme Court including **Kanhaiya Lal** (supra) the rule of last seen together circumstance had been summarised in the case of **Ashok Vs. State of Maharashtra** reported in **(2015) 4 SCC 393** whereby it has been held that the initial burden of proof to bring sufficient evidence pointing towards the guilt of the accused is on the prosecution. However, in case of last seen together, the prosecution is exempted from proving the exact happenings of the incident as it is the accused who would have special knowledge of the incident and thus, would have burden of proof under Section 106 of the Evidence Act. It has further been observed that last seen together itself is not a conclusive proof but along with other circumstances surrounding the incident, may lead to presumption of guilt.

57. In **State of Rajasthan vs Kashi Ram** reported in **(2006) 12 SCC 254** it has been held that if a person is last seen with the deceased he must offer explanation as to how and when he had parted company with the deceased. He must furnish an explanation which appears to the Court to be probable and satisfactory.

58. Considering the facts of the present case, evidence adduced by PWs-1, 3 and 6 clearly goes to show that the accused No.1, Abdul Kadir had picked up the victim from his residence at around 4.30 p.m. on the day of occurrence and both of them had gone to Bhojkhowa Capori to attend a meeting. From the testimony of PW-5 it has come out that the victim was last seen together with the accused persons viz. Alal, Nur Islam, Nurul, Ahir and Kadir at about 8.00 p.m. on the day of the incident near Bhojkhowa Girls School which is the place of occurrence. This evidence of PW-5 was not specifically challenged by the defence side during his cross-examination. PW-4 had also seen the accused persons Md. Abdul Kadir, Md. Nurul Islam, Md. Alal Uddin, Md. Momruj Ali, Md. Tahir Uddin alias Ahir, Md. Nur Islam and Mr. Rustam Ali assaulting the victim at the place of occurrence. From the above, it is firmly established that the accused persons were last seen together with the victim immediately before the occurrence. Although accused Abdul Kadir had surrendered before the Police Station later in the evening, yet, he had offered no explanation as to the circumstances under which the victim had died. Rather, as mentioned above,

it appears that in his statement recorded under Section 161 Cr.P.C. accused Abdul Kadir has told the police that in the incident (1) Md. Nurul Islam, (2) Md. Alaluddin, (3) Md. Momruj Ali, (4) Md. Tahiruddin alias Ahir, (5) Md. Nur Islam, (6) Md. Rustam Ali and (7) Md. Kapil Uddin were with him and were involved in the occurrence.

59. It is also to be noted herein that the conviction in the present case is not solely based on the circumstance of last seen together but on the basis of evidence adduced by eye-witness PW-4 and other witnesses whereby the prosecution has succeeded in proving the homicidal death of the victim, the identity of the assailants, the time and place of occurrence as well as the motive behind the crime. Therefore, the last seen together circumstance find due corroboration from the other evidence available on record.

60. This brings us to the last point raised by the learned counsel for the appellant seeking to impeach the evidence adduced by PWs 1,3,4 5 and 6 on the ground that all of them were related to the victim and therefore, were interested witnesses. The question of reliability of the evidence adduced by close relatives of the victim was considered by the Hon'ble Supreme Court in the case of **Dalip Singh vs. State of Punjab** reported in **AIR 1953 SC 364** wherein, it was observed that ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It has further been observed that when feelings run high and when there is personal enmity, it is

true that there would be a tendency to drag an innocent person against whom a witness has a grudge along with the guilty but foundation must be laid for such a criticism and a mere fact of relationship, far from being a foundation, is often a guarantee of truth. In the present case, it is true that some of the witnesses are related to the victim and therefore, can be viewed as interested witnesses. However, their testimony finds due corroboration from the evidence of one another and also the evidence adduced by the independent witnesses examined by the prosecution. There is nothing on record to show any previous enmity against the accused persons and the witnesses. Moreover, the defence has also failed to lay the foundation to impeach the testimony of such witnesses on the ground that they being close relatives of the victim, had deposed falsely before the court. Under the circumstances, we are of the opinion that their evidence need not be discarded merely on the ground that they were close relatives of the victim, even if such evidence is otherwise found to be reliable.

61. From an analysis of the evidence available on record in its entirety, we are of the opinion that the prosecution had succeeded in establishing the charges brought against the accused persons viz. Abdul Kadir, Alaluddin, Nur Islam and Nurul Islam beyond reasonable doubt. Their conviction is therefore, affirmed.

62. In so far as appellant Md. Abdul Kadir Gilani is concerned, evidence on record no doubt indicates his presence in the place of occurrence but as

noted herein before, the evidence is not sufficient to indicate his involvement in committing the offence. Therefore, there is a genuine doubt as regards his actual involvement in commissioning the crime. As such, giving the benefit of doubt, the conviction of appellant Md. Abdul Kadir Gilani is hereby set aside and he is acquitted of the charges brought against him. Consequently, we direct that the appellant Md. Abdul Kadir Gilani be forthwith released from jail if his custodial detention is not required in connection with any other case.

The appeal is partly allowed

Send back the LCR.

JUDGE

JUDGE

T U Choudhury