

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.66 of 2019

Aftab Uddin @ Aftab Ali & another Appellants

-Versus-

The State of Assam & another Respondents

For the appellants : Mr. A. Ahmed, Advocate.

For the respondents : Ms. B. Bhuyan, Addl. P.P., Assam.
Mr. B. Haldar, Advocate for respondent No.2.

BEFORE

**HON'BLE MR. JUSTICE SUMAN SHYAM
HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA**

Dates of hearing : 24.08.2021 & 25.08.2021

Date of judgment : 04.09.2021

JUDGMENT AND ORDER (CAV)

(Suman Shyam, J)

Heard Mr. A. Ahmed, 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. B. Haldar, learned counsel appearing for the informant/respondent No.2.

2. This appeal has been preferred by the two appellants viz., Aftab Uddin and Intaz Ali assailing the judgment and order dated 28.11.2018 passed by the court of Additional District & Sessions Judge, Hojai in connection with Sessions Case No.14(N)/2011 whereby, both the appellants have been convicted under Sections 120-B/302 of the Indian Penal Code (IPC) for committing the murder of Md. Abdul Latif and sentenced to undergo rigorous imprisonment for two years each for committing the offence under Section 120-B of the IPC and to suffer rigorous imprisonment for life for committing the offence under Section 302 of the IPC and also to pay fine of Rs.10,000/- each, in default of which, to undergo simple imprisonment for 3 (three) months each.

3. The prosecution case, in brief, is that on 12.07.2007, at around 5.30 p.m. the appellant No.2, Intaz Ali came to the house of the deceased and asked him to accompany him to the Kaki No.3 Moinapur Market. Accordingly, the victim, accompanied by Intaz Ali, went to the market and while he was moving around in the market, the accused persons had attacked the deceased Md. Abdul Latif in front of the shop of Niranjana Paul with sharp weapons such as daggers and daos and caused grievous injuries upon the victim and left him unconscious on the road. The victim was then shifted to the hospital for treatment but later on, he had succumbed to his injuries.

4. On 14.07.2007 Md. Abdul Haque i.e. the brother of the victim had lodged an ejahar with the Officer-in-Charge, Kaki Police Station reporting the incident. In the F.I.R. 10 accused persons viz., 1) Md. Intaz Ali, 2) Md. Aftab Uddin, 3) Md. Samsul Hoque, 4) Md. Mamtaz Ali, 5) Md. Jaser Ali, 6) Md. Terab Ali, 7) Md. Jakir Hussain, 8) Md. Ajai Miah, 9) Md. Akel Ali and 10) Md. Azim Ali had been named. Upon receipt of the ejahar, Kaki P.S. Case No.58/2007 was registered under Sections 147/148/149/120-B/302 of the I.P.C. and the matter was entrusted to S.I. Dilip Kumar Bora for carrying out investigation in the case. Upon completion of investigation, the I.O. had filed charge-sheet against 8 (eight) accused persons under Sections 147/148/149/120-B/302 of the I.P.C. whereas, Final Report was submitted against two accused Md. Momtaz Ali and Md. Akel Ali. Based on the charge-sheet, charges were framed against all the 8(eight) accused persons including the present appellants, i.e. 1) Md. Intaz Ali, 2) Md. Aftab Uddin, 3) Md. Samsul Hoque, 4) Md. Jaser Ali, 5) Md. Terab Ali, 6) Md. Jakir Hussain, 7) Md. Ajai Miah, and 8) Md. Azim Ali. Since the accused persons had pleaded innocence and claimed to be tried, the matter then went up for trial.

5. In order to bring home the charges framed against the accused persons, the prosecution side had examined as many as 16 witnesses including the I.O. as PW-15 and the doctor who had conducted the autopsy as PW-16. PW-6, Sri Narahari Nath, was examined as an eye-

witness to the occurrence. The defence side did not adduce any evidence. Upon appreciation of the evidence adduced on record, the learned trial court was of the view that the prosecution had succeeded in establishing the charges brought against the two appellants Aftab Uddin and Intaz Ali beyond reasonable doubt and accordingly, convicted them under Sections 120-B/302 of the IPC and sentenced them as aforesaid. However, the other six accused persons i.e. 1) Md. Samsul Haque, 2) Md. Jafar Ali, 3) Md. Terab Ali, 4) Md. Jakir Hussain, 5) Md. Azad Hussain and 6) Md. Tazim Ali were acquitted by holding that the charges brought against them could not be proved by the prosecution beyond reasonable doubt.

6. Mr. Ahmed, learned counsel for the appellants has assailed the impugned judgment and order dated 28.11.2018 primarily on three counts. Firstly, that there are serious omissions and improvements in the testimony of witnesses bringing on record material contradictions in their evidence. The prosecution witnesses, more particularly PWs-1, 5, 6 and 11 were not at all reliable and therefore, their evidence could not have been relied upon by the learned court below so as to convict the appellants. Secondly, although the allegation brought against all the accused persons were similar in nature, yet, based on the same materials 6(six) out of the 8(eight) accused persons have been acquitted by the learned trial court while convicting the two appellants thereby acting in a wholly arbitrary and illegal manner. Thirdly, that the learned trial court has erred in law in placing

reliance on the oral dying declaration of the deceased which was not proved in accordance with law. In support of his aforesaid arguments, Mr. Ahmed has relied on the following decisions :-

(1) (2010)13 SCC 657 [Sunil Kumar Sambhudayal Gupta (Dr.) and others Vs. State of Maharashtra.

(2) (2016)12 SCC 389 [Ram Laxman Vs. State of Rajasthan]

(3) 2021 (1) GLT 89 [Robial Hoque Vs. State of Assam & another]

7. Refuting the above submissions, Ms. B. Bhuyan, learned Addl. P.P., Assam, appearing for the respondent No.1, has argued that while it may be correct that there are some defects and lapses in the investigation and some discrepancies in the testimony of the witnesses but the same cannot be the sole ground for acquittal of the accused persons by ignoring the totality of evidence brought on record which was sufficient to establish the charges beyond reasonable doubt. Supporting the impugned judgment and order dated 28.11.2018 Ms. Bhuyan has argued that the learned Sessions Judge has meticulously gone through the evidence and on proper appreciation of the same, has convicted the two appellants by a reasoned order. Under the circumstances, submits Ms. Bhuyan, no case is made out for interference with the impugned judgment and order dated 28.11.2018.

8. Mr. Haldar has supported the arguments advanced by the learned Addl. P.P. and has further argued that minor contradictions in the testimony

of some witnesses was but natural and therefore, it cannot be a ground to set aside the conviction of the appellants, if the entire evidence read in conjunction establishes the charges brought against the appellants. In support of his above argument Mr. Haldar has placed reliance on the decision of the Hon'ble Supreme Court in the case of **Ramesh Harijan vs. State of Uttar Pradesh** reported in **(2012)5 SCC 777**.

9. We have considered the submissions advanced by the learned counsel for both the parties and have also gone through the materials available on record.

10. PW-1, Md. Abdul Hoque is the informant in this case and had lodged the ejarah before the Kaki Police Station on 14.07.2007 based on which, Kaki P.S. Case No.58/2007 was registered. In his deposition, PW-1 has stated that on the date of the incident he had gone to Moina Pathar Bazar but on hearing a hue and cry in the Bazar, he went to the place of occurrence and saw that the accused persons viz. Intaz, Aftab, Samsul, Jakir, Jour and Azai had felled his brother Latif on the ground in front of the tea stall of Niranjana Paul and they were assaulting him with "dao" and "dagger". The other accused persons viz., Momtaz, Azimddin, Terab and Aquil were standing nearby carrying daos and daggers in their hands. When he raised alarm, members of his family had arrived at the spot and then the accused persons fled the scene. He then rang up Kaki Police Station from a PCO and took Latif in a vehicle to Lanka Police Station and then to Lanka

Hospital. After that, Latif was taken to a hospital in Hojai and then to the Nagaon Civil Hospital wherefrom, he was taken to Guwahati Medical College & Hospital (GMCH) where he died. This witness has confirmed that he had lodged the ejahar Ext-2. In his cross-examination, PW-1 has stated that while making the phone call to the Police Station from the PCO he did not mention the names of the accused persons. This witness has also stated that at the time of the incident, the shop of Niranjan Paul was open and around 30/40 villagers had gathered there but he did not know their names.

11. PW-2, Md. Nazimuddin and PW-3 Md. Ainuddin are the two witnesses who did not see the occurrence but reached the place of occurrence after getting the information and saw that Latif was lying in an injured condition. These witnesses had taken the victim to the hospital. However, both these witnesses were declared as hostile witnesses.

12. PW-4, Md. Fazar Ali is another witness who had arrived at the place of occurrence after he had heard a hue and cry and saw Latif lying in front of Promode's shop. He had seen cut injuries in the hand and head of Latif. PW-4 has deposed that he had lifted Latif and brought him on the road in front of Niranjan's shop. When he asked him, Latif had told him that Aftab had hacked him. Thereafter, he left the place. PW-4 was also declared as a hostile witness.

13. PW-5, Md. Sarafat Ali was apparently examined as an eye-witness to the occurrence. PW-5 has deposed that at the time of the incident he was

collecting credit from the market when he heard hue and cry. Coming near, he saw that Latif was lying on the ground. PW-5 has stated that Latif had asked him to save him saying that Aftab and others had assaulted him. He then lifted Latif with the aid of Fazar Ali (PW-4) and took the injured for treatment. In his cross-examination, PW-5 has stated that Latif himself had told him that Aftab and others had assaulted him. If the aforesaid statement of PW-5 is accepted then it is apparent that there is an oral dying declaration of the victim. However, surprisingly enough the PW-5, did not mention about the oral dying declaration to the I.O. while recording his statement under Section 161 Cr.P.C. Moreover, from the testimony of PW-5 it is also apparent that he did not actually see the occurrence but had reached the place after the incident and only saw injured Latif lying there. Therefore, it is apparent that PW-5 is not an eye-witness to the occurrence.

14. PW-6, Sri Narahari Nath was also examined as an eye-witness. This witness has deposed that on the day of the incident, at about 7.00 p.m., the victim Latif came to his shop and asked him to give him "pan & supari" (betel nut) saying that he was home bound. As he was about to give betel nut to Latif, Aftab had dealt cut blow on Latif's shoulder with a dao. PW-6 has deposed that Aftab had dealt two cut blows. Witnessing that, he asked Latif to get up, whereupon, he got up but fell down again near Promode Nath's tea stall. Then PW-6 had scolded Aftab. According to PW-6, the handle of the "dao" came out and remained on the spot. Aftab had

dealt another cut blow on Latif's hand near Promode's shop and he was smeared all over with blood. Then he called two persons viz. Kutu (Tutu) and Lambu and sent Latif to the doctor's house along with them. PW-6 has stated that as he was shutting his shop Aftab appeared again with a dao and threatened him. When he also threatened Aftab, both of them left. On the following morning he had heard that Aftab and his party had hacked Latif again and Latif died under treatment at Guwahati.

15. From a close scrutiny of the testimony of PW-6 we find that this witness has categorically deposed that Aftab and his associates had hacked Latif. He has also stated that Aftab and his associates had hacked Latif again after the incident that took place before his shop and he came to know about it on the following morning. Therefore, PW-6 has only seen the first incident but is evidently not an eye-witness to the second incident where the deceased had received fatal injuries. Moreover, in his cross-examination, this witness has deposed that it was dark in the night and he was in the shop by lighting a lamp. This witness has, however, stated that he had witnessed Aftab dealing another cut blow on Latif near Promode Nath's shop.

16. PW-7, Sri Angad Rajbanshi was serving as an ASI of Police posted at Guwahati Medical College Hospital Outpost and he had held inquest on the dead body of Abdul Latif and submitted inquest report Ext-4. This witness

has stated that after conducting the inquest he had sent the dead body for post-mortem examination.

17. PW-8, Sri Sadhan Barma was known to the deceased and he has stated that on the day of the incident, he went to his shop to collect money and on coming back, he found a person Abdul Latif lying in a pool of blood at a tea stall belonging to Promode Nath (Kumud Nath). PW-8 has also stated that when the injured Latif was lying at the tea stall, he was shouting that Aftab had cut him. This witness had made the same statement before the police and had remained firm during his cross-examination.

18. PW-9, Sri Ratan Chandra Sutradhar is another shop owner in that market and he has deposed before the Court that on the day of the incident, at around 7.30 p.m., he had closed down his tailoring shop with the intent to go home and after he had crossed about 40 fts. something had happened in the shop of Narahari Nath. Then he asked Narahari Nath as to what had happened. Then someone told him that Latif had been cut by Aftab. It appears that PW-9 was talking about the first incident which took place before the shop of PW-6 when Aftab had assaulted the deceased.

19. PW-10, Musstf. Badarun Nessa is the wife of the deceased. She has deposed that some people from the market came and told her that Intaz, Jafur, Samsul Haque, Ajai, Tazir, Jakir and Terab had killed her husband. She then went and saw her husband lying near a tea stall in the market. When

she asked her husband, he told her that the accused persons had attacked him. PW-10 has also deposed that the left hand of her husband was cut and severed. She also saw injury on his right hand.

20. PW-11 (who was cited as PW-12), Md. Abdul Kadir is actually an inquest witness. His statement was not recorded by the police under Section 161 Cr.P.C. However, while deposing before the Court, PW-11 has stated that on the day of occurrence he had seen Latif going with Intaz. Aftab Uddin was following them. He had heard a hue and cry in the market. After a while, he saw Aftab, Intaz, Jafur, Samsul Haque, Jakir, Ajai, Tazim and Terab assaulting Latif. He saw Aftab attacking Latif by means of dao, Intaz attacking him by means of dagger, Jafur attacking him by means of dao, Samsul attacking him by means of dagger, Jakir attacking him by means of dao, Ajai attacking him by means of dao, Tazim attacking him by means of dao and Terab attacking him by means of dao. PW-11 has also stated that the incident took place in front of the tea stall of Niranjana. He found Abdul Haque, Ainuddin, Nazim Uddin and others at that place. Those persons took Latif to Lanka Government Hospital, then to HAMM Hospital, Hojai, then to Nagaon Civil Hospital and finally to GMCH. Latif died on the way. PW-11 has also stated that he had seen injuries on the hand and back side of the head of Latif. During his cross-examination, this witness has stated that the incident took place in front of the tea stall of PW-6. He did not see the

incident. He had gone to the market after two hours of seeing Latif going with Intaz.

21. From the evidence adduced by PW-11 it can be seen that this witness had initially claimed to have seen the occurrence and had given a vivid description as to which of the accused persons had attacked the deceased and with what weapon. However, during his cross-examination he has denied of having seen the occurrence. Besides, the statement of this witness was not recorded by the police under Section 161 Cr.P.C. and therefore, his version was recorded for the first time before the court. The testimony of this witness is also full of material contradictions. As such, the testimony of this witness is not at all reliable.

22. Sri Ananta Narayan Choudhury i.e. the I.O. in this case was examined as PW-15. The I.O. has confirmed that he had completed the investigation in this case, arrested the accused persons and forwarded them to the Jail custody. The I.O. has deposed that he had seized a "dao" from the accused and sent the same for FSL examination and also collected the FSL report. He also got the statement of the witness Abdul Haque recorded in the court of SDJM, Hojai under Section 164 of the Cr.P.C. Finally, on completion of the investigation, he had submitted charge-sheet (Ext-9) against the accused persons.

23. In his cross-examination, the I.O. has confirmed that PW-4 Fazar Ali alias Lambu did not state before him that upon asking, Latif had stated that

Aftab had assaulted him; that PW-5 Sarafat Ali did not name Fazar in his statement; that PW-6 Narahari Nath did not state before the police that he had heard on the next day that Aftab and his party had again assaulted Latif; that PW-6 did not state in his police statement that he told Tutumia and Lambu to take Latif to doctor; that PW-6 did not state before the police that when Latif fell down near the shop of Promode, Aftab again assaulted him; that Aftab was carrying a dao in his hand and assaulted Latif in the shoulder by the dao and Latif fell down and walked to the shop of Promode Nath. The I.O. (PW-15) has further deposed that the PW-6 did not implicate Aftab in his police statement and he also did not state that Aftab had assaulted Latif on his shoulder by a dao.

24. PW-15 had also confirmed that the statement of Abdul Kadir (PW-11) was not recorded by the police and there is nothing in the Case Diary to show that PW-11 (PW-12) had made any statement before the police stating that he had seen the occurrence or the assault upon Latif. PW-15 has also stated that the FSL report gave a negative finding as regards presence of blood in the dao.

25. PW-13 (mentioned as PW-12), Dr. Monalisha Choudhury has deposed that on 22.08.2008, she had received a completely rusted dao, without handle, suspected to contain stains of human blood and on testing, it gave negative result for test of blood.

26. PW-16 (mentioned as PW-17), Dr. Dipak Kumar Das, was the Medical Officer on duty at the Guwahati Medical College Hospital (OPD) on 14.07.2007 and had conducted autopsy on the dead body of deceased Abdul Latif. As per the post-mortem report, following injuries were found in the dead body:-

“1. One chop wound present over upper part of neck started from front part of left ear extended upto 12cm back of ear (left). Size 16 x 3 x 1.5cm cutting skin muscles nerves and vessels.

2. One chop wound present over upper part of face left side started from 1cm lateral to outer canthus of left eye towards posteriorly- horizontally. Size 7 x 1.5 x 1cm. cutting skin muscle nerves and vessels.

3. One chop wound present over right side of face 3cm in front of right tragus longiradantly extends towards skull. Size 10 x 3cm x bone deep.

4. One chop would present over right parieto-occipital region horizontally 4cm above upper border of right ear. Size 10 x 3cm x bone deep.

5. One chop wound present over right parietal region horizontally 7cm above upper border of right ear. Size 7 x 1cm x bone deep.

6. One incised wound present over upper lip. Size 4 x 1 x 0.5 cm.

7. One chop wound present over back of lower abdomen 14cm right to midline. Size 4 x 1 x 1cm.

8. One chop wound present over left elbow postereously size 4 x 1 x 0.5cm.

9. One chop wound present over mid yard of fore arm of postereo-lateral aspect. Size 8 x 4 x 1cm.

10. One chop wound on posterior aspect of right forearm mid third size 5 x 2 x 1cm.

11. One chop wound present on lower 1/3 of left forearm and hand (part of lower forearm and hand missing) only little finger of left hand and lateral aspect of the hand present. Cutting both bone of forearm and bones of hand.

12. One chop wound present on lower 1/3 of right forearm. Cutting skin muscle and both bones of forearm. Only skin and small part of muscle attached to the deceased. Size 11 x 3 x 3cm.

13. One chop wound present on right knee. Size 10 x 4 x 1cm.

14. One chop wound present on upper part of leg lateral aspect. Size 9 x 2 x 2cm.

15. One chop wound present on left knee. Size 7 x 1 x 1cm.

16. One abrasion present over left thigh mid third. Size 10 x 5cm."

27. The doctor (PW-16) has opined that the cause of death was due to shock and haemorrhage as a result of injuries sustained. The injuries were ante-mortem, caused by heavy sharp cutting weapon and were homicidal in nature.

28. PW14, Sri Anadi Das was working as the Officer-in-Charge, Kaki Police Station on 12.07.2007. He had received the information about the occurrence and made G.D. Entry No.183 dated 12.07.2007. PW-14 has

stated that after making the G.D. Entry he had sent S.I. Dilip Kumar Bora to the place of occurrence who had conducted investigation in the case.

29. From a scrutiny of the evidence available on record, we find that the victim was taken to the Kaki Bazar in the evening hours on the day of the incident by a person called Intaz i.e. appellant No.2. After reaching the market, the victim was attacked by sharp weapons as a result of which, he had sustained multiple grievous injuries on his body, ultimately leading to his death. The medical evidence also clearly establishes the fact that the deceased had died a homicidal death. However, the question that would arise in the appeal is as to whether, the evidence adduced by the prosecution side proves the chain of circumstances so as to establish the charge brought against both the appellants beyond reasonable doubt.

30. From a careful examination of the testimonials of PWs-1, 5, 6 & 11, we find that there are serious contradictions in their testimonies, which may be briefly noticed as follows :-

(a) PW-1 has deposed that on hearing the hue and cry in the Bazar he went to the place of occurrence and saw the accused persons Intaz, Aftab, Samsul, Jakir, Johur and Ajad had felled his brother Latif on the ground in front of the tea stall of Niranjana Paul and were assaulting him with dao and dagger. However, in the ejahar, PW-1 has mentioned that on hearing the hue and cry of persons from the market, he along with his companions, had gone to the market and

raised an alarm. At that, the accused persons ran away from the market. If that be so, it is evident that the PW-1 had reached the market after the occurrence and he did not see the incident as deposed before the court. The aforesaid contradiction assumes great significance in view of the fact that the F.I.R. in this case was evidently lodged on the third day of the incident and there is no proper explanation for the delay in lodging the F.I.R.

(b) In his deposition, PW-5 had stated that he had heard hue and cry and on going near, he had seen that Latif was lying on the ground. At that time Latif had asked him to save him saying that Aftab and others had assaulted him. However, in his statement recorded by the police under Section 161 Cr.P.C. this witness did not say so.

(c) PW-6, Narahari Nath, had deposed that he had seen Aftab had dealt a cut blow on Latif's shoulder with a dao but in his statement recorded under Section 161 Cr.P.C. he had stated that he could not recognise the person who had committed the incident due to darkness but had heard that he is the son of Aquilur of their village.

(d) In so far as the testimony of PW-11 is concerned, the same having been made before the court for the first time would not have any credibility.

31. In the case of **Sunil Kumar Sambhudayal Gupta (Dr.) and others** (supra) the Supreme Court has observed that in case, the complainant in the F.I.R. or the witness in his statement under Section 161 Cr.P.C. has not disclosed certain facts but meets the prosecution case for the first time before the court, such version lacked credence and was liable to be discarded. In view of the above, evidence adduced by PW-11 is liable to be discarded.

32. We have noticed that the contradictions, as noticed above, have also been brought on record by the I.O. during his cross-examination. Most significant of the contradictions in the deposition of the prosecution witnesses pertains to the testimony of PWs-5 and 6 which have been discussed in some details herein before. In our opinion, those are material contradictions and therefore, would certainly cause a dent in the prosecution case. It is to be noted herein that the witnesses have indicated that the incident took place before the tea stall of Niranjan Paul who was present there. If that be so, Niranjan Paul or his employees would be the natural eye-witnesses to the occurrence. However, neither Niranjan Paul nor any person present in his tea stall at the time of the occurrence had been examined as a witness and the reason for not doing so is also not discernible from the record.

33. The post-mortem report goes to show that there are as many as 16 incised wounds on the dead body. PW-6 had only mentioned about two

cut blows inflicted by Aftab upon Latif while the latter had come to his shop for betel nut. Therefore, it is evident that the PW-6 had not seen the entire incident. It appears from the testimony of PWs-6 and 8 and the sketch map prepared by the I.O. that on the day of the incident, the victim Latif was assaulted at two different places – first in the pan shop of PW-6 and thereafter, in front of the tea stall of Promode Nath. In other words, the deceased was attacked by the assailants at two different locations inside the Kaki market. However, the said fact has neither been mentioned in the F.I.R. nor has the I.O. recorded so in the Case Diary. As a matter of fact, there is no evidence on record to show that the victim was attacked twice by the assailants. Be that as it may, in view of the nature of injuries mentioned in the post-mortem report Ext-7 and the testimony of PW-6, it is evident that the victim had received multiple fatal injuries in the second attack which apparently took place in front of the tea stall of Promode Nath.

34. From the testimony of PWs-6 and 8 it also appears that after receiving the first round of assault in the shop of PW-6, the victim had moved and fell down near the tea stall of Promode Nath where he was attacked again by the assailants. However, Promode Nath has also not been examined as a witness by the prosecution side.

35. Although PW-10 has deposed that she went to the market and when she asked her husband he told her that the accused persons had attacked

him, yet, this witness has not stated so before the I.O. while recording her statement.

36. From the above, it can be seen that there are improvements, omissions and embellishment in the testimonies of the prosecution witnesses. However, it is to be borne in mind that merely because there are some discrepancies, exaggeration or embellishments in the testimony of the witnesses, their evidence need not be discarded altogether. In the case of **Leela Ram vs. State of Haryana** reported in **(1999) 9 SCC 525** the Supreme Court has observed that one hardly comes across a witness whose evidence does not contain some exaggeration or embellishment but the court can sift the shaft from the grain and find the truth from the testimony of the witnesses.

37. In **Subal Ghorai vs. State of W.B.** reported in **(2013) 4 SCC 607** it has been observed that sometimes witnesses do exaggerate but the evidence of such witnesses need not be discarded on account of embellishment if it is corroborated on materials established by other evidence on record.

38. In the present case, as noted above, as many as four witnesses viz., PWs-4, 5, 8 and 10 have deposed before the Court that the deceased had told them that it was Aftab i.e. the appellant No.1 who had assaulted him. PW-4 was declared as a hostile witness. However, in the case of **Himangshu vs. State (NCT of Delhi)** reported in **(2011) 2 SCC 36** as well as **Raja & others vs. State of Karnataka** reported in **(2016) 10 SCC 506** it has been held that

evidence of hostile witness remains admissible and is open for a court to rely on the dependable part thereof as found acceptable and duly corroborated by other reliable evidence available on record. The version of PW-4 to the effect that the deceased has told him that Aftab has assaulted him finds due corroboration from the testimony of PWs-5 and 10 who have said so in one voice. PW-8 is an independent witness and he has also categorically deposed that he had heard injured Latif shouting that Aftab had cut him. The evidence of PW-6 also goes to show that Aftab was the assailant of Latif. Six prosecution witnesses have implicated Aftab in the murder of Latif. There is nothing on record to show that these witnesses had any enmity with Aftab. Therefore, although there are some omissions, embellishments and contradictions in the testimony of these witnesses, as noticed herein above, yet, we do not find any compelling reason to discard the evidence adduced by these witnesses, in so far as it relates to the complicity of Aftab, since their evidence on the above point finds corroboration from the evidence of one another as well as the other evidence available on record.

39. Dealing with the question as to the manner in which a dying declaration was to be scrutinised by the court, the Supreme Court has made the following observations in the case of **Vijay Pal vs. State (Government of NCT of Delhi)** reported in **(2015)4 SCC 749 :-**

“17. The submission of the learned counsel for the appellant is that the oral dying declaration lacks intrinsic truth and it does not deserve acceptance. At this juncture we think it appropriate to refer to certain authorities how an oral dying declaration is to be scrutinized.

18. In the case of *Laxman v. State of Maharashtra*, the Constitution Bench has held thus:

“The juristic theory regarding acceptability of a dying declaration is that such declaration is made in extremity, when the party is at the point of death and when every hope of this world is gone, when every motive to falsehood is silenced, and the man is induced by the most powerful consideration to speak only the truth. Notwithstanding the same, great caution must be exercised in considering the weight to be given to this species of evidence on account of the existence of many circumstances which may affect their truth. The situation in which a man is on the deathbed is so solemn and serene, is the reason in law to accept the veracity of his statement. It is for this reason the requirements of oath and cross-examination are dispensed with. Since the accused has no power of cross-examination, the courts insist that the dying declaration should be of such a nature as to inspire full confidence of the court in its truthfulness and correctness. The court, however, has always to be on guard to see that the statement of the deceased was not as a result of either tutoring or prompting or a product of imagination. The court also must further decide that the deceased was in a fit state of mind and had the opportunity to observe and identify the assailant. Normally, therefore, the court in order to satisfy whether the deceased was in a fit mental condition to make the dying declaration looks up to the

medical opinion. But where the eyewitnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail, nor can it be said that since there is no certification of the doctor as to the fitness of the mind of the declarant, the dying declaration is not acceptable. A dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice provided the indication is positive and definite."

19. The aforesaid judgment makes it absolutely clear that the dying declaration can be oral or in writing and any adequate method of communication whether by words or by signs or otherwise will suffice, provided the communication is positive and definite. There cannot be any cavil over the proposition that a dying declaration cannot be mechanically relied upon. In fact, it is the duty of the Court to examine a dying declaration with studied scrutiny to find out whether the same is voluntary, truthful and made in a conscious state of mind and further it is without any influence.

20. At this juncture, we may quote a passage from *Babulal v. State of M.P.* wherein the value of dying declaration in evidence has been stated:-

"7. ... A person who is facing imminent death, with even a shadow of continuing in this world practically non-existent, every motive of falsehood is obliterated. The mind gets altered by most powerful ethical reasons to speak only the truth. Great solemnity and sanctity is attached to the words of a dying person because a person on the verge of death is not likely to tell lies or to concoct a case so as to implicate an innocent person. The maxim is "a man will not meet his Maker with a lie in

his mouth" (*nemo moriturus praesumitur mentiri*). Mathew Arnold said, "truth sits on the lips of a dying man". The general principle on which the species of evidence is admitted is that they are declarations made in extremity, when the party is at the point of death, and when every hope of this world is gone, when every motive to falsehood is silenced and mind induced by the most powerful consideration to speak the truth; situation so solemn that law considers the same as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice."

21. Dealing with the oral dying declaration, a two-Judge Bench in *Prakash V. State of M.P.* has stated thus:

"11. ... In the ordinary course, the members of the family including the father were expected to ask the victim the names of the assailants at the first opportunity and if the victim was in a position to communicate, it is reasonably expected that he would give the names of the assailants if he had recognised the assailants. In the instant case there is no occasion to hold that the deceased was not in a position to identify the assailants because it is nobody's case that the deceased did not know the accused persons. It is therefore quite likely that on being asked the deceased would name the assailants. In the facts and circumstances of the case the High Court has accepted the dying declaration and we do not think that such a finding is perverse and requires to be interfered with."

22. Thus, the law is quite clear that if the dying declaration is absolutely credible and nothing is brought on record that the deceased was in such a condition, he or she could not have made a dying declaration to a witness, there is no justification to discard the

same. In the instant case, PW-1 had immediately rushed to the house of the deceased and she had told him that her husband had poured kerosene on her. The plea taken by the appellant that he has been falsely implicated because his money was deposited with the in-laws and they were not inclined to return, does not also really breathe the truth, for there is even no suggestion to that effect."

40. From a careful reading of the testimony of PWs-4, 5, 8 and 10 in the light of law laid down in the aforesaid decision, we are of the view that the evidence of these witnesses pertaining to the oral dying declaration of the deceased appears to be credible and the unalloyed truth and therefore, can be relied upon by the court. We are, therefore, of the unhesitant opinion that the evidence led by the prosecution establishes the charge brought against the appellant No.1 Aftab beyond reasonable doubt and therefore, the learned trial court had rightly convicted him.

41. In so far as the appellant No.2, Intaz Ali is concerned, there is evidence on record to show that he is the one who had requested the deceased to accompany him to the Kaki market on the day of the incident. However, save and except the above, there is no evidence to clearly establish the chain of circumstances so as to prove the charges brought against the said appellant. From the evidence available on record, we find that the PW-1 is the only person who had named Intaz as one of the assailants. However, as noted above, PW-1 was not an eye-witness to the occurrence. He had also not named any of the accused persons including the appellant No.2 Intaz while calling the police from the P.C.O. soon after

the occurrence. Therefore, there is considerable doubt as to whether he had actually seen any of the assailant(s).

42. PW-11 has no doubt named appellant No.2 Intaz as one of the accused but for the reasons stated herein before, we have already held that his testimony was liable to be discarded. Therefore, it is clear that there is no evidence to implicate the appellant No.2 Intaz in the commissioning of the crime.

43. Besides the above, we also find that the evidence available on record with regard to the six accused persons, who had been acquitted by the learned trial court and the appellant No.2 Md. Intaz Ali is identical. The position is, however, different only in case of appellant No.1 Aftab. There is also an oral dying declaration implicating Aftab. Therefore, if Intaz Ali is on an equal footing as the six other accused persons who have been acquitted by the learned trial court, in view of the law laid down by the Supreme Court in the case of **Laxman** (supra) we are of the view that the same evidence cannot be split so as to grant benefit to some of the co-accused while maintaining the conviction to another, when all of them stand on the same footing in all other respect.

44. For the reasons stated herein above, this appeal succeeds in part. The conviction of appellant No.1, Aftab Uddin, is hereby affirmed. However, in so far as the appellant No.2, Md. Intaz Ali is concerned, his conviction is set aside. The appellant No.2 Md. Intaz Ali is hereby acquitted.

We are informed that the appellant No.2, Intaz Ali, is in jail. Therefore, we direct that he be released forthwith, if his custodial detention is not required in connection with any other case.

Appeal stands disposed of accordingly.

Send back the LCR.

JUDGE

JUDGE

T U Choudhury