

GAHC010024842015



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

Case No. : Crl.A./276/2015

KOBBAD ALI @ KOBAT ALI @ KOBAT MASTER and 12 ORS
S/O LATE SHAHAD MONDOL @ SAYED ALI MONDAL

2: KAMAL UDDIN @ KAMAL MANDAL
S/O LATE KOBEJ ALI

3: SOMESH ALI @ SOMEJ ALI
S/O KASEM ALI

4: ABDUL WAHAB @ AFA
S/O LATE GOLAP MANDAL

5: DILADAR HUSSAIN

S/O KOBBAD ALI @ KOBAT ALI @ KOBAT MASTER

6: ATOWAR RAHMAN @ ATABOR ALI

S/O LATE ABED MANDAL

7: LOKMAN ALI
S/O LATE SAYED MANDAL

8: SAINUDDIN

S/O LATE JALAL MUNSHI

9: NUR HUSSAIN

S/O LATE SAYED MANDAL

10: MOINUL HOQUE

S/O KOBBAD ALI @ KOBAT ALI @ KOBAT MASTER

11: AYUB ALI

S/O ATOWAR RAHMAN @ ATABOR ALI

12: KAJIM UDDIN

S/O LATE KOBEJ ALI

13: MONTAZ ALI

S/O LATE JABED MANDAL
ALL ARE OF VILL. MOIRADIA
P.O. KHOLABANDA
P.S. KACHUMARA
DIST. BARPETA

VERSUS

THE STATE OF ASSAM and ANR

2:AZIZUR RAHMAN
S/O LATE ABDUL KHALEQUE
VILL. MOIRADIA
P.O. KHOLABANDA
P.S. KACHUMARA
DIST. BARPETA
ASSAM
PIN 78112

Advocate for the Petitioner : MR.A AHMED

Advocate for the Respondent : PP, ASSAM

Linked Case : CrI.A./62/2016

SULTAN MAHMUD @ SULTAN @ SULTAN MAMUD
S/O ABDUL HAMID
R/O VILL. and P.O. PATHIMARI
P.S. KACHUMARA
DIST. BARPETA
ASSAM

PIN 781127

VERSUS

THE STATE OF ASSAM and ANR
REPRESENTED BY PUBLIC PROSECUTOR

2:AZIZUR RAHMAN
S/O LT. ABDUL KHALEQUE R/O VILL- MOIRADIA P.O. KHOLABANDHA
P.S. KACHUMARA DIST. BARPETA
ASSAM
PIN - 781127.

Advocate for : MR.S P CHITTAWAT
Advocate for : appearing for THE STATE OF ASSAM and ANR

Linked Case : CrI.A./107/2016

ABUL HUSSAIN @ HUSSAIN and ANR
S/O RAHIMUDDIN MONDAL
VILL. MOIRADIA
P.S. TARABARI
DIST. BARPETA
ASSAM.

2: AMAN ALI

S/O RAHIMUDDIN MONDAL
VILL. MOIRADIA
P.S. TARABARI
DIST. BARPETA
ASSAM.
VERSUS

THE STATE OF ASSAM and ANR

2:AJJUR RAHMAN

S/O ABDUL KHALEQUE
VILL. MOIRADIA
P.S. TARABARI
DIST. BARPETA
ASSAM.

Advocate for : MR.S U AHMED
Advocate for : appearing for THE STATE OF ASSAM and ANR

Linked Case : CrI.A./61/2016

MOTIUR RAHMAN and 2 ORS
S/O SUKUMUDDIN
R/O MAIRADIA
P.S. KASUMARA
DIST. BARPETA

2: SAMSUL HOQUE
S/O LATE SAHAT MANDAL
R/O MAIRADIA
P.S. KASUMARA
DIST. BARPETA

3: SUKUMUDDIN
S/O LATE FAZAL HOQUE
R/O MAIRADIA
P.S. KASUMARA
DIST. BARPETA
VERSUS

THE STATE OF ASSAM and ANR

2:AZIZUR RAHMAN
S/O ABDUL KHALEQUE
R/O MAIRADIYA
P.S. TARABARI
DIST. BARPETA
ASSAM.

Advocate for : MR.A CHOUDHURY
Advocate for : appearing for THE STATE OF ASSAM and ANR

Linked Case : CrI.A./266/2015

RAFIQUL HAQUE and 4 ORS
S/O MD. KOBAT ALI

2: KAFILUDDIN @ KAFEL
S/O LATE HIKMAT ALI

3: HAJIBAR RAHMAN
S/O MAMTAZ ALI

4: SHOWKAT ALI
S/O MD. LUKMA ALI
ALL ARE OF VILL. MOIRADIA
P.S. KACHUMARA
DIST. BARPETA.

5: SHAHIDUL ISLAM

S/O JAMAL UDDIN
VILL. PUTHIMARI
P.S. KACHUMARA
DIST. BARPETA.
VERSUS

THE STATE OF ASSAM and ANR

2:AZIZUR RAHMAN

S/O LATE ABDUL KHALEQUE
VILL MOIRADIA
P.O. KHOLABANDA
P.S. KACHUMARA
DIST. BARPETA
ASSAM
PIN 781127

Advocate for : MR.A AHMED

Advocate for : PP

ASSAM appearing for THE STATE OF ASSAM and ANR

BEFORE
HONOURABLE MR. JUSTICE SUMAN SHYAM
HONOURABLE MR. JUSTICE PARTHIVJYOTI SAIKIA

JUDGMENT & ORDER (CAV)

Date : 17-09-2021

(Suman Shyam, J)

By this common judgment and order, we propose to dispose of five Criminal

Appeals preferred by as many as 24 (twenty four) appellants, assailing the judgment and order dated 31-08-2015 passed by the learned Sessions Judge, Barpeta, in connection with Sessions Case No. 57/2006. The 13 (thirteen) appellants in Crl. A. No. 276/2015, viz. 1. Kobbad Ali @ Kobat Master, 2. Kamaluddin @ Kamal Mandal, 3. Somesh Ali @ Somej Ali, 4. Abdul Wahab @ Afa, 5. Dildar Hussain, 6. Atowar Rahman @ Atabor Ali, 7. Lukman Ali, 8. Saimuddin @ Sainuddin, 9. Nur Hussain, 10. Moinul Haque, 11. Ayub Ali, 12. Kazimuddin, 13. Montaj Ali; the 2 (two) appellants in Crl. A. No. 107/2016, viz. 1. Abul Hussain @ Hussain, 2. Iman Ali; the 3 (three) appellants in Crl. A. No. 61/2016, viz. 1. Motiur Rahman, 2. Samsul Hoque, 3. Sukumuddin as well as the sole appellant in Crl. A. No. 62/2016, viz. Sultan Mahmud have all been convicted under Section 302/ 149 of the Indian Penal Code (IPC) for committing the murder of Moslemuddin, Alebuddin and Mukam Ali and sentenced each of them to undergo rigorous imprisonment for life and also to pay fine. However, the 5 (five) appellants in Crl. A. No. 266/2015, viz. 1. Rafikul Haque, 2. Kafiluddin @ Kafel, 3. Hajibur Rahman, 4. Showkat Ali and 5. Sahidul Islam have been convicted under Sections 326/ 149 IPC and sentenced to undergo rigorous imprisonment for 07 years and also to pay fine. It appears from the record that out of these five appellants, Sahidul Islam is already out on bail and the remaining four appellants, viz. Rafikul Haque, Kafiluddin @ Kafel, Hajibur Rahman and Showkat Ali have already served their jail sentences during the pendency of the appeal. It also appears from the record that by the order dated 27-02-2017 passed in I.A.(Crl.) 62/2017 and I.A. (Crl.) 63/2017 arising out of Crl. Appeal No 276 / 2015 the five appellants i.e. 1. Kobbad Ali, 2. Atowar Rahman, 3. Lukman Ali, 4. Sainuddin and 5. Nur Hussain were granted bail

and accordingly they are also out on bail. Besides, appellant Sukumuddin in Crl. Appeal No. 61/2016 was granted bail by the order dated 07-06-2017 passed in I.A.(Crl) No 229 / 2017 arising out of Crl. Appeal No 61/2016.

2. The prosecution case, as unfolded from the materials available on record, is to the effect that on 28-03-2004, at about 10:00 a.m. Md. Moslemuddin, along with the President of Kasumara Gaon Panchayat viz. Md. Kalimuddin, was going to Nagarbera Bazar on a motorcycle. On their way, the accused persons viz. 1. Moinal Hoque, 2. Lokman, 3. Dildar, 4. Sainuddin, 5. Rahijul Hoque, 6. Kabbat Ali Master, 7. Samsul Hoque, 8. Kafaluddin, 9. Sames Ali, 10. Nur Hussain, 11. Montaz, 12. Dildar Hussain, 13. Hazi Mandal, 14. Soukat Ali, 15. Kamaluddin, 16. Afa Sheikh, 17. Amjal Ali, 18. AbulHussain, 19. Imam Ali, 20. Sukumuddin, 21. Matiar, 22. Abbar Ali, 23. Ayub, 24. Atabor Rahman, 25. Kajimuddin, 26. Mahidul and 27. Sultan, forming an unlawful assembly and on being armed with deadly weapons such as Dao, Phala, Dagger, Khukri, Kerech, Lathi, Holonga etc; had restrained them. On being attacked, Md. Muslem Ali and Kalimuddin ran away from that place and took shelter in the house of a relative Md. Abdul Hamid whose house was located nearby. However, the above-named accused persons had chased them and entered into the house of Md. Abdul Hamid. They had killed Muslem Ali by stabbing him with deadly weapon. The accused persons had also caused grievous injuries on Kalimuddin. On receipt of information about the incident the brothers of Muslem Ali, viz. Mukam Ali, Akram Ali, Alebuddin, Moinul and Altab came to the place of occurrence. Then the accused persons had attacked them also and killed Alebuddin and Mokam by using deadly weapons and had also caused grievous injuries on the person of Akram Ali, Moinul

and Altab Hussain. The owner of the house Md. Abdul Hamid and his son Saukat Ali had tried to resist the assailants but both the father and son were also attacked by the accused persons, as a result of which, they had also suffered grievous injuries. After the occurrence, the village people came to the spot and took the dead bodies of Muslemuddin, Aleb and Mukam to their houses, while the injured Akram and Moinul were taken to the Nagarbera Hospital for treatment, where-after, both the injured persons were shifted to the Gauhati Medical College & Hospital for better treatment. Injured Altab Ali was sent to Bahari for treatment.

3. On 28-03-2004, Md. Azizur Rahman s/o Abdul Khaleque, who is a resident of village Moiradia falling under Tarabari Police Station, in the district of Barpeta, had lodged an ejahar before the Officer-in-Charge, Tarabari Police Station reporting the incident. In the ejahar, 27 (twenty seven) accused persons *viz.* 1. Moinal Hoque, 2. Lukman, 3. Dildar, 4. Sainuddin, 5. Rahijul Hoque, 6. Kubbal Ali Master, 7. Samsul Hoque, 8. Kafaluddin, 9. Sames Ali, 10. Nur Hussain, 11. Montaz, 12. Billal Hussain, 13. Hazi Mandal, 14. Soukat Ali, 15. Kamaluddin, 16. Afa Sheikh, 17. Amjal Ali, 18. Abul Hussain, 19. Imam Ali, 20. Sukumuddin, 21. Matiur, 22. Abbar Ali, 23. Ayub, 24. Atabor Rahman, 25. Kazimuddin, 26. Mahidul and 27. Sultan have been named. On the basis of the said ejahar, Tarabari P.S. Case No. 38/2004 was registered under Sections 147/ 148/ 149/ 341/ 302/ 325/ 326 of the IPC and the usual police investigation had commenced. Upon completion of investigation, the Investigating Officer (I/O) had submitted charge-sheet against all the accused persons under Sections 147/ 148/ 341/ 149/ 325/ 326/ 323/ 302 IPC. Accordingly, charges were framed against the accused persons which were also read over

and explained to them. Since the accused persons had denied the charges and claimed innocence, the matter went up for trial.

4. During the course of trial, the prosecution had examined as many as 25 witnesses including the doctors who had conducted the post-mortem examination and had examined the injured. The I/O Safur Ali was examined as PW- 25. It appears that as many as nineteen witnesses were examined by the prosecution as eye witnesses to the occurrence.

5. In their statements recorded under Section 313 of Cr.P.C. the accused persons had denied all the incriminating circumstances put to them. The defence side, however, did not adduce any evidence before the trial court. Upon appreciating the evidence available on record, the learned trial court had convicted the above-named appellants/ accused persons and sentenced them as aforementioned.

6. The impugned judgment and order dated 31-08-2015 has been primarily assailed on three counts. Firstly, that there are material contradictions in the evidence adduced by the prosecution witnesses, which have been duly proved by the I/O and therefore, the learned trial court ought not to have relied upon their evidence to hold that the charges framed against the accused persons have been proved beyond reasonable doubt. Secondly, the prosecution has failed to prove that the accused persons were in an unlawful assembly or that they shared a common object to commit offence under Sections 302/ 326 of IPC and therefore, Section 149 IPC would not be attracted in this case. Thirdly, save and except Kobad Ali, there is no evidence available on record to prove the charge brought against the other appellants under Sections 302 IPC or 326 IPC. In

order to appreciate the above contentions advanced by the appellants, it would be necessary for us to briefly discuss the evidence brought on record.

7. PW-1 Md. Ajijur Rahman is the informant in this case. He is also the nephew of deceased Md. Moslemuddin. PW-1 has deposed before the court that on 28-03-2004, when his uncle Moslemuddin was going to Nagarbera Bazar along with Md. Kalimuddin, the accused persons had assaulted him. The occurrence took place on 28-03-2004, at around 10:00 – 10:30 a.m. in the house of Abdul Hamid, who is also his paternal uncle. The house of Abdul Hamid is situated at a distance of less than ½ k.m. from his house. PW-1 has deposed that at the time of occurrence, he was sitting inside his house. At that time, he heard 'hulla' towards the west-south of his house and then ran towards the 'hulla' and reached the house of uncle Hamid. There he saw his uncle Moslemuddin, Alebuddin Akan, Mukam Ali and Akram Ali were lying with injuries. This witness has also stated that Moslemuddin was lying in front of the south door in the courtyard, whereas Mukam Ali was lying in front of the western door. Alebuddin was lying in the courtyard in between the two houses and Akram Ali was lying in the courtyard of the house of Hamid. At that time, he had seen Kobat Ali, Moinal Haque, Dildar, Sukumuddin, Lukman Ali, Nur Hussain, Montaj Ali, Hozzi Mandal, Amzad Ali, Saimuddin, Kamaluddin, Aiyub Ali, Atowar Rohman rushing towards him so as to assault him. He then ran away from the place. When the accused persons had left the place, he again went to the place of occurrence and found that Alebuddin and Mukam Ali had expired. After sometime, Moslemuddin also died in his presence. PW-1 has further stated that Moinul had sustained injuries in his stomach and his intestine came out. He took injured Ajimuddin, Motiur, Hamid, Moinul

and Akram Ali to Nagarbera and on the same day, Hamid, Moinul and Akram Ali were referred to Guwahati. When he returned home, he came to know that the dead bodies had been sent to Tarabari Police Station. This witness had confirmed that Exhibit-1 was the ejahar lodged by him and Exhibit-1(1) was his signature. During his cross-examination, this witness has, however, stated that before his arrival, the occurrence was over.

8. PW-2 Musstt. Hansi Khatun is the wife of Md. Abdul Hamid, in whose house, the incident took place. At that time, she was present inside the house and saw the incident. Therefore, she is a key eye witness in this case. PW-2 has deposed that on the day of the incident, at around 10:00 a.m. she was cooking food at home. At that time, she heard 'hulla' and came out. Then she saw 15/ 16 persons coming from the eastern side and 8/ 10 people coming from the western side chasing Muslemuddin. Muslemuddin came in a motor bike and Kalimuddin was on his pillion. Both of them had entered their house. At that time, her husband and her son Saukat Ali were at home. This witness has deposed that her house was surrounded by Kobat Master, Moinal, Kazimuddin, Kamal, Lukman, Nur Hussain, Aiyub, Ata, Safar, Rofizul, Dildar, Saimuddin, Iman Hussain, Hussain, Anidul Munsu, Ofa, Kajel and Semes. According to the PW-2, Kazimuddin, Kobat and Aiyub had brought out Muslemuddin by breaking open the door whereas the rest of the people broke the 'berra' (fencing) of the house. She along with her husband had requested all the persons to release Muslemuddin. Muslemuddin had also begged for his life. But immediately, the accused persons had assaulted Muslemuddin with sharp weapon on his chest, shoulder, stomach etc. and threw him near the door. Accused Akman, Saimuddin,

Aiyub, Nur Hussain had assaulted her husband on his head and broke his hand. When she tried to save her husband, she had also sustained cut injuries in the finger of her left hand.

9. PW-2 has further deposed that at that time, Alebuddin came from the western side and Mukam had entered from the eastern side. Aleb was assaulted on the west of Muslemuddin. Saimuddin, Motiur, Ofa, Ayub, Kafel, Kazimuddin, Sames and Samsul had assaulted Mukam towards the eastern side in front of the cook shed. This witness has also stated that Akram was assaulted on his head, Moinul was assaulted in his stomach with a dagger and his intestine came out. Motiur and Azimuddin were assaulted when they came to save her husband and Muslemuddin. After the assault, the accused persons left the place. PW-2 has also stated that Muslemuddin could not move but before leaving the place, Kobat Master had assaulted him in the chest with an iron rod. Muslemuddin, Mukam and Aleb died on the spot. Thereafter, the near relatives took away the injured for treatment and the dead bodies were also taken away.

10. During her cross-examination, PW-2 has stated that she knew the names of all the accused persons and Ofa, Sames, Moidul Munsu, Hussain, Kalimuddin and Atob were not the accused. PW-2 has, however, denied the suggestion put to her by the defence counsel that she did not know anything about the occurrence nor did she see the occurrence; that she did not specifically state the names of the accused who had assaulted the injured and the deceased.

11. PW-12 Kalimuddin is an injured eye witness to the occurrence. He was travelling with Moslemuddin on a bike when the incident took place. PW-12 has deposed that while

he was going along with Moslemuddin in a motor bike, 4/5 persons chased them, as a result of which, he and Moslemuddin had to take shelter in the house of Hamid. Then, he and Nur Jaman had resisted the assailants. This witness had identified accused Kobat Master in the dock. PW-12 has also deposed that Kobat Master had ordered to catch hold of Moslemuddin. In the meantime, around 30/40 persons came to the house of Abdul Hamid and they also attacked Moslemuddin. This witness has deposed that the accused Kobat Master had assaulted Moslemuddin by means of a dagger and he died on the spot. He himself was also assaulted by the people and subsequently, he came to know that Aleb and Mukam had also died. PW-12 has stated that accused Kobat Master, Dildar, Sainuddin, Sukumuddin, Lukman and Nur Hussain had taken part in the occurrence. He fell unconscious and therefore, was taken to his own house. During investigation, the police had taken him to the hospital. During his cross-examination, PW-12 has remained firm. This witness had also denied the suggestion that the accused persons were not present at the time of occurrence.

12. PWs 3, 4, 5, 6, 8, 8(a), 9, 10, 11, 12, 13, 16, 17, 18 and 19 were also examined by the prosecution side as eye witnesses to the occurrence. Let us, therefore, briefly examine the evidence adduced by these witnesses.

13. PW-3 Shaukat Ali is the son of Mf. Abdul Hamid and he has deposed that the occurrence took place about three years back in their house at about 10:00 a.m. At the time of occurrence, he had returned home from the cultivation field. On his return, he saw Moslemuddin and Kalimuddin had come to their house in a motor bike and behind them, Kobat Master, Moinal, Kazimuddin, Lukman, Nur Hussain, Sukur, Samsul, Motiur

Rahman, Dildar, Rafijul, Sakat, Montaj, Haji Mandal, Amjad Ali Munsji, Sainuddin, Kamal, Ayub, Afa, Iman Hussain and Sultan had come to their house. At that time, he had requested those people not to enter the house but they did not pay heed to such request. When Kalimuddin (PW-12) had folded his hands, at that time, someone gave him a kick and Kalimuddin fell down. Moslemuddin ran and entered inside the house where his father and mother lived. When Moslemuddin went inside the house, Kobat Master told others to surround the house and to break it. Saying so, Kobat Master gave a blow to the wall of the house with a 'fala'. In the meantime, his father (Hamid) had arrived there and requested the mob not to break the house and took upon himself, the responsibility for holding a 'bichar'. PW-3 has further stated that when his father had said so with folded hands, at that time, Saimuddin gave a rod blow on the right hand of his father and broke it. Lukman gave a blow on the head of his father (Hamid) with a lathi, as a result of which, his father had sustained lacerated injury on the head. Nur Hussain gave a blow on the nose of his father with a 'khanti', as a result of which, he started bleeding. At that time, the mob started to break the fencing of the house and somebody also started to break the door. Kobat, Moinal and Kazimuddin entered into the house by breaking the door. They caught hold of Moslemuddin inside the house and started assaulting him. Moslemuddin had requested them not to kill him by addressing Kobat as a "dharma bap", but Moslemuddin was dragged out to the courtyard. Those persons then removed the chain, wrist watch, gold ring of Moslemuddin. Moslemuddin had also offered money. But Kobat Master caused puncture wound on the back side of the neck of Moslemuddin with an iron rod. Moinul and Ayub had caused injury on the person of Moslemuddin with a

sharp weapon. Iman and Hussain both brothers had also assaulted Moslemuddin with 'lathi'. Thereafter Montaj also assaulted him. Around that time, Mukam came from the eastern side and immediately, Lukman, Samsul, Sakat, Nur Hussain had assaulted him, as a result of which, Mukam fell down on the ground. Puncture wounds were caused on the chest of Mukam by Sakat, Lukman and Dildar. This witness has also stated that when he had proceeded towards Mukam, at that time, Moinul had chased him with a "mit dao" and he ran towards the bamboo grove. After the accused persons had left, he returned and saw that Motiur Rahman had sustained cut injuries on his back (2 Nos.), Akram was lying with injuries in the courtyard, Moinul had sustained cut wounds on the stomach. Ajimuddin had sustained cut injury, Mukam, Aleb and Moslemuddin were lying dead. He had also seen his father lying there. Later on, Motiur, Ajimuddin, Moinul, Akram and Hamid were taken to the Nagarbera hospital and thereafter, to the Gauhati Medical College & Hospital. The dead bodies were also taken away. In his cross-examination, PW-3 stated that he along with his father were jointly ploughing a plot of land which was about 80 yards away from his house and he had come to his house ahead of his father and just after his arrival, Moslemuddin and Kalimuddin came there. At that time, he had seen about 25/30 people at a distance but he had not seen when Aleb came there. This witness had denied the suggestion that Aleb, Mokam and Moslemuddin were dacoits and they had committed atrocities on many people of the locality, as a result of which, they were killed. PW-3 had also denied the suggestion that he did not see the occurrence as he was at the field. The PW-3 has remained un-shaken during his cross-examination.

14. PW-4, Musstt. Amina Begam lives in the neighborhood of Hamid. Her house is

situated about three houses away from the house of Hamid. PW-4 has deposed that the occurrence took place at about 10:00 a.m. and at that time, she was at home. She had heard 'hulla' near the house of Hamid and ran to the place of occurrence. When she arrived at that place, she saw that Kobat Master, Moinal, Kazimuddin, Lukman, Nur Hussain, Sukur, Iman, Hussain, Ayub, Semes, Dildar, Afa, Kamal, Saimuddin, Ofa, Sahidul, Sultan, Sakat, Samsul and Jahar were there and she had also seen Moslem enter the house of Hamid from outside in a running condition. Moslemuddin closed the door but Kobat, Kazimuddin and Moinul told others to bring out Moslemuddin. At that, Kazimuddin, Moinal, Lukman and Nur Hussain broke down the door and dragged Moslemuddin outside the house. At that time, the other persons in the mob started to strike the wall of the house and pushed pointed bamboo (fala) into the wall. Moslemuddin was brought out to the courtyard and Kobat Master, Moinal, Lukman, Nur Hussain, Kazimuddin, Iman and Hussain started to assault Moslemuddin with dagger. Kobat Master pushed an iron rod on the left side of the neck of Moslemuddin, although Moslemuddin had made a request not to kill him. At that time, Aleb Ali also came there and begged for the life of his brother (Moslemuddin). But Montaj and Hoji gave blows on the head of Aleb with 'banka'. Kazimuddin, Sukur and Kamal had also assaulted Aleb and felled him on the ground. When Aleb fell down, Sukur caught his neck and Iman and Hussain gave more 'lathi' blows on Aleb. At that time, they cried and tried to restrain the assailants but they were also assaulted and laid on the ground. Around that time, Mukam came there from the eastern side and Ofa and Ayub assaulted him. Lukman, Nur Hussain and Sakat assaulted Mukam with a 'khukri' on the chest, head, mouth and near the eyes. When Mukam

opened his mouth and brought down his tongue, Nur Hussain had cut his tongue. At that time, she cried and fell down. This witness has also deposed that she had seen injuries on Altab, Akram, Hamid, Moinul, Ajimuddin and Motiur. Moslemuddin, Mukam and Aleb died there. During her cross-examination, she has stated that Lukman, Nur Hussain, Kazimuddin and Kobat Master were armed with dagger and they had assaulted Moslemuddin with the dagger; that Moslemuddin had requested them not to kill him, but Kobat caused puncture wound at the base of neck of Moslemuddin; that while her father Aleb came and begged for the life of his brother, at that time, Hoji and Montaj had also assaulted her father on his head with a 'banka'.

15. PW-5, Musstt, Nur Jahan Begum is the wife of deceased Moslemuddin. This witness has stated that on the day of occurrence her husband took his meal at home along with Kalimuddin and thereafter, went to Nagarbera in a motorcycle taking Kalimuddin on the pillion. After their departure, she had heard 'hulla' and ran. When she arrived at the house of Hamid, she had seen that her husband was being assaulted in the courtyard of Hamid by Kobat Master, Moinal, Kazimuddin, Lukman, Nur Hussain, Sainuddin, Sukumuddin, Kamaluddin, Sahidul, Sultan, Ayub Ali, Hoji, Sakat Ali, Motiur, Ata, Biul, Imam, Montaj, Ofa, Samsul, Somes and Rafijul. This witness had also deposed that Kobat Master had punctured the neck of her husband with an iron rod, Moinal had assaulted him with a dagger and Kazimuddin had assaulted him with a 'khukri'. Alfuddin had also assaulted her husband where-after he fell down. At that time, Mukam came there and he was also assaulted by Amjad, Saket and his tongue was also cut by Nur. She had given water to her husband and saw that there were fifty-five numbers of injuries on the front

side on her husband. PW-5 has also stated that when her husband was being assaulted, she went to save him and at that time, she had sustained cut injuries in her left hand finger. Her husband Moslemuddin as well as Aleb and Mukam were taken to Bahari but all of them died on the spot. Injured Moinal, Akam, Hamid, Ajimuddin and Altaf, Mofi were taken to Nagarbera. In her cross-examination, PW-5 has admitted that her husband was earlier arrested by the police and he was sent to jail on several occasions but has denied the suggestions that her husband was a dacoit and robbed other people. She has also denied the suggestion to the effect that her husband was a 'MULTA' activist.

16. Musstt. Hawa Khatun is the wife of deceased Mukam and claims to have seen the occurrence that took place on 28-03-2004 in the house of Abdul Hamid in which, her husband was killed. She was examined as PW-6. In her deposition, PW-6 has stated that on the day of the incident, she was at her house. On hearing 'hulla' and on being informed by a boy that Moslemuddin, i.e. the elder brother of her husband, was being assaulted, she ran to the place of occurrence and saw that Moslemuddin was being assaulted in the courtyard by Moinal, Kazimuddin, Lukman, Kamal, Sukumuddin, Ayub, Nur Hussain, Amjad Ali, Sakat, Afa, Saimuddin, Dildar, Sultan and Ofa. PW-6 has also deposed that after Moslemuddin was assaulted, her husband came to the place of occurrence and Moinul and Kazimuddin had assaulted him by a dagger. She had seen the occurrence and fell down on her husband and lost her senses. Her husband (Mukam Ali) had died there. PW-6 has also stated that Mukam, Moslemuddin and Aleb had died.

17. Auna Khatun was called as PW-7 but since her husband's name did not tally, the evidence of this witness was not recorded.

18. Musstt. Joynab Begum (PW-8) was another witness who had claimed to have seen the occurrence. PW-8 had also stated that on hearing 'hulla' she came out of her house and saw that Moslemuddin was being assaulted by Kobat Master, Moinal, Kazimuddin, Lukman, Nur Hussain, Sainuddin, Ata, Ayub, Sukumuddin, Sahidul, Sultan, Iman, Hussain and Somes in the courtyard. PW-8 has also stated that Somes and Ofa had chased her with a dagger for which she had entered into the house and lost her sense.

19. PW-8(a) Musstt. Afaton Nessa is the wife of deceased Alef Ali. PW-8(a) has deposed that the incident took place about three years ago in the house of Hamid at about 09:30 – 10:00 a.m. According to PW-8(a), her house is situated about seven houses away from the house of Hamid. On hearing a 'hulla', she went to the place of occurrence and saw that Moslemuddin, Mokam and her husband Alebuddin were being assaulted. She has stated that Kobat Master, Moinal, Kazimuddin, Rafiqul, Dildar, Sainuddin, Ayub, Sahidur, Sultan, Afa, Mojibar, Samsul Hoque, Mastan had assaulted Moslemuddin with dagger, kiris, inside the house of Hamid after bringing him out into the courtyard. PW-8(a) has also stated that Mukam was assaulted by Nur Hussain, Sakat Ali, Lukman and Ofa. She has categorically deposed of having seen her husband being assaulted by Mumtaj with a 'banka' and Iman Ali with a 'lathi'. On that, her husband fell down on the ground. Then Sukur and Munsu both father and son, had pressed the neck of her husband and he died. Seeing the occurrence she fell down and lost her senses.

20. PW-9 Musstt. Mofida Khatun has also claimed to have seen Moslemuddin enter the house of Hamid on being chased by 10/12 people from both sides. She has deposed that the house of Hamid and her house is the same. Hamid had requested those people with

folded hands not to create 'hulla'. However, Kobat Master, Moinal, Samsul, Dildar, Samej, Lukman, Nur Hussain, Saket, Momtaj, Hoji, Amjad Ali, Ofa, Sainuddin, Kamal, Kazimuddin, Ayub, Sukumuddin, Motiur, Iman Ali, Hussain Ali, Sultan and Sahidul had entered the house. Those people broke open the door of the house of Hamid and Moslemuddin was brought out after assaulting Hamid. She has stated that Moslemuddin had requested the assailants not to kill him and delivered the gold chain, wrist watch etc. to the assailants but they did not agree and Moslemuddin was killed. During her cross-examination, PW-9 has stated that when Moslemuddin was assaulted, at that time there was no hue and cry in the place and she had seen the occurrence alone. After that, Aleb and Mukam came from the northern side.

21. PW-10 Md. Altab Hussain is the son of Aleb. He has deposed that on the day of occurrence upon hearing 'hulla', his father, Mukam, Moinul and Akram ran towards the house of Hamid Ali and he had followed them. When he arrived at the place of occurrence, Kobat Master, Moinal, Sainuddin had assaulted him with 'khukri' on his head and on his back and he was also chased. He then ran towards the backside of the house of Hamid. When he returned, he had seen his father Aleb and uncle Mukam were lying dead and Akram, Moinul, Hamid and Moslemuddin were lying with injuries. The assailants had left the place. Moslemuddin was then taken home but after about an hour and half he died. PW-10 has also stated that the injured persons were taken to Nagarbera and he took treatment at Bahari. He had gone to the police station with others along with the dead bodies.

22. PW-11 Somar Ali Munshi has deposed that on the day of the occurrence, he along

with Nur Jaman, had gone to the house of Kalimuddin and upon arriving there, came to know that President Kalimuddin had gone to Moiradia Bazar. Accordingly, both of them went to Moiradia Bazar. While they were going back home, on the way they heard hue and cry. In the meantime, Kalimuddin and Moslemuddin came in a motorbike and entered the house of Hamid Ali. Around 70/80 persons including the accused persons carrying deadly weapons like dao, lathi, fala etc. had assaulted Moslemuddin causing death to him on the spot. Thereafter, he had lost his sense and did not know what happened later. When he regained his senses, he came to know that Aleb and Mukam were also murdered

23. PW-13 Nur Jamal was the person accompanying PW-11 and he has also deposed to the effect that on the date of occurrence while he was returning from the market he saw Kalimuddin and Moslemuddin going on a motorcycle. He also saw around 40/45 persons, being armed with various weapons, had chased them. Moslemuddin and Kalimuddin took shelter in the house of Abdul Hamid. PW-13 has stated that the accused persons had gheraod the house and attacked Moslemuddin together and killed him. He had also seen the dead bodies of Alef Ali and Mukam Ali. He had also seen three injured persons, viz. Moinul, Abdul Hamid and Akram Ali. Thereafter, the villagers had gathered there and carried the dead bodies to the Tarabari Police Station. PW-13 has further stated that he did not know who the assailants were but could identify Kobat Ali, Moinal, Dildar, Ayub Ali, Lukman, Nur Hussain and Sukumuddin.

24. PW-14 Santosh Mandal is an inquest witness. He had deposed that he did not see the occurrence but later on, heard that Moslemuddin, Aleb and Mukam had died. PW-14

had proved his signature, Exhibit-5(i) in the inquest report.

25. PW-15 Jangser Ali is a co-villager and knew all the accused persons. PW-15 has deposed that on the day of the incident, he had heard hue and cry and then went to the spot and came to know that three persons, viz. Moslemuddin, Alef Ali and Mukam Ali had been killed by Kobat Master and his brothers and nephew niece and other relatives. PW-15 has stated that he had also heard that the dispute started over a land situated in char area. Police came and took away the dead bodies to Tarabari Police Station.

26. PW-16 Atowar Rahman had seen Md. Kalimuddin going towards Nagarbera being accompanied by Moslemuddin in a motorbike. PW-16 has stated that the accused Kobat Master, Moinal, Kazimuddin, Lukman, Nur Hussain, Sainuddin, Sahidul, Sultan, Sukur, Kofel, Motiur, Rafijul, Dildar, Samej and Ofa, along with the remaining accused persons, had restrained Moslemuddin and Kalimuddin on the way and obstructed the motorbike by placing bamboo on the road. Thereafter, the accused persons chased Kalimuddin and Moslemuddin to the house of Hamid Ali, kept them confined inside the house and thereafter, killed Moslemuddin by inflicting blows with spear, fala, iron rod, chain etc. Kalimuddin was released after assaulting him. This witness has also stated that upon hearing the hue and cry, Aleb, Mukam, Akram, Moinul and Ajijur went to the house of Hamid Ali. He had seen the accused persons assaulting Moslemuddin. At that time, he along with Mukam, Aleb, Akram, Hamid, Moinul, Ajijur and some others had attempted to restrain the accused persons but the accused persons started assaulting Aleb and Mukam by means of dagger, fala, lathi etc. and killed both of them in the house of Hamid Ali. Thereafter, the accused persons had left the place. In the meantime, neighbouring people

had assembled there and carried the dead bodies of Aleb Ali, Moslemuddin and Mokam to Tarabari along with police.

27. PW-17 Md. Abdul Hamid is the person in whose house the occurrence took place. He had deposed that on the day of occurrence, since morning he was ploughing his land situated nearby. At that time, he heard a hue and cry on the back side of his house and came to the place and saw the accused persons armed with dao, dagger, sword, iron rod, 'banka' (pointed bamboo) were chasing Moslemuddin. In the meantime, Moslemuddin entered into his house and took shelter. Then he made an earnest request to all the accused persons not to cause any harm to his house and said that Moslemuddin has taken shelter in his house. But the accused persons did not pay any heed to his request. They entered into his house and the accused Kobat Master had ordered the remaining accused persons to find out Moslemuddin. In the meantime, the accused Kobat Master had struck a blow on his nose with a 'khanta'. PW-17 has stated that he had again requested the accused persons not to cause any harm to his house and also to Moslemuddin. Hearing that, the accused Dildar Ali struck a blow on his hand and upon his right shoulder by means of a dagger. Then the accused persons entered into his house, took away gold chain, wrist watch, cash amount from Moslemuddin Ali. Thereafter, the accused persons assaulted Moslemuddin by means of dagger, sharp bamboo and iron rod and dragged him out from the house to the courtyard. Then he again requested the accused persons for releasing the injured Moslemuddin, but the accused Sainuddin struck a blow on his right hand and caused injury on his right wrist. Then accused Kobat Master caused a puncture injury in the chest of Moslemuddin by means of a sharp iron rod.

Seeing this, he become senseless. Subsequently, he was taken to the Gauhati Medical College & Hospital (GMCH) for treatment. In the meantime Moslemuddin died. During his cross-examination, PW-17 stood firm in his testimony but had admitted that he could not say as to who had assaulted Mukam and Aleb Ali. This witness has denied the suggestion made to the effect that he had not seen the occurrence and he had gone on to depose that the accused Rafijul present in the courtyard was not at the place of occurrence and neither Rafijul the son of Amjad Ali Munshi was present.

28. PW-18, Moinul Haque is an injured eye-witness. He had also reached the place of occurrence upon hearing due and cry. PW-18 has deposed that on reaching the house of Abdul Hamid (PW-17) he saw the accused Nur Hussain, Moinul, Lukman, Saukat, Amjad, Atowar, Rahman, Hojibur, Dildar Hussain, Sukumuddin, Motiur Rahman and Samsul Haque together assaulting Moslemuddin with 'khukri', dagger, spear etc. in the house of Abdul Hamid. PW-18 has further stated that the accused persons had also assaulted Aleb, Mukam and due to the injuries sustained by them Aleb, Mukam and Muslemuddin died on the spot. This witness has also stated that he had made an attempt to rescue Moslemuddin but the accused Dildar struck a dagger blow on his stomach and he fell down and become unconscious. Thereafter, he was taken to the GMCH for treatment where he had regained his sense.

29. PW-19 Md. Akram Ali appears to be another injured eye witness. He has deposed that he had rushed to the house of Hamid upon receiving the information that his brother Moslemuddin had been restrained in the Moiradiagaon in front of the house of Hamid Ali. On arriving at the place, he saw accused Kobat Master, Dildar, Somej, Lukman, Nur

Hussain, Saket, Amjad Ali Munshi, Ofa Sheikh, Kamal, Kazimuddin, Sainuddin, Atowar Rahman, Ayub Ali, Kafel, Sukur, Motiur and other accused persons assaulting Moslemuddin, Mukam and Aleb by means of dagger, dao and iron rod. He tried to protect the injured Moslemuddin, Mukam and Aleb but the accused Lukman had struck a blow on his head by means of a dagger. PW-19 has stated that the accused person had also caused another injury on his face and below the right eye. This witness has deposed that the accused persons had killed Moslemuddin, Aleb and Mukam at the courtyard of Hamid Ali. He had lost his senses and on regaining the same at the GMCH at Bhangagarh, he was treated for about two months.

30. PW-20 Samad Ali is another inquest witness. He has deposed that on arriving at the place of occurrence after seeing some people running at a distance he saw many people and dead bodies of the victims. He had also seen injury marks on the dead bodies. PW-20 has also confirmed that the occurrence took place in the house of Hamid Ali. This witness has proved his signature in the inquest report.

31. PW-21 Dr. Balen Medhi had examined Md. Altaf Hussain (PW-10) on 18-11-2004 while working as the Medical and Health Officer at Bahari Mini PHC and found bruise on the left buttock about 3X2 c.m. PW-21 has deposed that the injuries were about 15 days old and was caused by blunt weapon and was simple in nature.

32. PW-22 Dr. Dwijen Chandra Sarma was the doctor on duty at the Barpeta Civil Hospital on 29-03-2004. He had performed postmortem examination on the three dead bodies. The injuries found during the postmortem examination along with the opinion of the doctor regarding the cause of death, as per the deposition of PW-22, are extracted

herein-below for ready reference.

“External appearance, injuries noted are:-

One cut injury present over occipital region of scalp size 4"X ½" into up to bone.

Stab injury present over right side of back below the inferior angle scapula size 1 ½"X ½"X4". Multiple bruises seen all over his body. They are of different sizes.

Pleurae – Ruptured. Punctured on right blood clot seen in pleural cavity.

Right lung lacerated. Large amount of blood clot present.

Heart – All chambers are empty.

The injuries are ante mortem.

Opinion :- In my opinion, death is due to shock and hemorrhage as a result of injuries sustained in his person. Ext. 8 is the post mortem report. Ext. 8(1) is my signature. Ext. 8(2) is the signature of Joint Director of Health Services, Barpeta which is known to me.

In the same sitting I performed the post mortem examination on the dead body of Moslem Uddin, a 38 yeas male who was identified by Mrinal Talukdar and constable Santosh Ali and found the following:-

External Injuries:-

Cut injuries are seen over:-

- *Right supra orbital region, size 2"X ½" into up to bone.*
- *Left parietal region of scalp 3"X1" into up to bone.*
- *Left side of neck 4"X1"X1". Both fore arms on posterior aspect size 2"X ½"X ½"and 1½"X ½"X ½".*

Front of left chest 3"X1"X ½".

Left scapular region 3"X ½"X ½".

Lateral aspect of left leg 5"X1"X1".

All chambers of heart are empty carolic vessels on left side are severed.

Opinion:- In my opinion, death is due to shock and haemorrhage as a result of injuries sustained in his person.

Ext. 9 is the post mortem. Ext. 9(1) is my signature. Ext.9(2) is the signature of Joint Director of Health Services, Barpeta which is known to me.

Again on the same sitting in connection with the same G.D. Entry indentified by the same person I performed the post mortem examination of on the dead body

of Mokam Ali, a 34 years male Muslim and found the following:-

Injuries are:-

- *Cut injury present over right supra orbital region 2"X ½"X up to bone deep and nape of neck 4"X1"X1".*
- *Stab injury present right side of chest at 5th intercostals space size 1½"X ½"X3".*

Stab injury over anterior abdominal wall on left lumber region 1"X ½"X2½", back of left chest below inferior angle of scapula, 1 ½"X1"X3".

Both the lungs are lacerated and the amount of blood clot seen.

Heart: All chambers are empty.

Multiple punctured injuries noted over the intestines.

Opinion:- In my opinion, death is due to shock and haemorrhage as a result of injuries sustained in his person."

PW-22 has confirmed that Exhibit- 10 is the postmortem report and Exhibit-10(1) is his signature.

33. PW-23 Sunil Kumar Das was working as the Officer-in-Charge (O/C) of Tarabari Police Station. PW- 23 has deposed that on 15-10-2004, he had received Case Diary from Tarabari Police Station due to the transfer of the Officer-in-Charge SI Safur Ali (PW-25). PW-23 has deposed that on receipt of the Case Diary, he has found that the investigation was almost complete. As such, after collecting the medical reports of Altaf Hussain and recording the statement of the scribe of the FIR Safiruddin under Section 161 Cr.P.C. he had submitted charge sheet against the accused persons.

34. PW-24 Dr. Bijit Gogoi was the Registrar of Surgeries in the GMCH on 28-03-2004 and he has deposed that on that day, he had examined Abdul Hamid (PW-17) and found cut injuries over the scalp sized 7X2 inches, cut injury over the root of nose, 4X1 inch, tenderness and swelling on right wrist, both bone of right forearm fractured including

small bone phalanx and metacarpals. The injuries were considered to be grievous.

35. PW-25 Safur Ali is the Investigating Officer (I/O) who had carried out investigation in connection with Tarabari P.S. Case No. 38/2004. As is apparent from the testimony of PW-23, the I/O (PW-25) was transferred at the stage when the investigation was almost complete. PW-25 had handed over the Case Diary to the PW-23 for completing the process. The I/O (PW-25) has confirmed on 28-03-2004, while he was working as the O/C of Tarabari Police Station, on that day, at around 10:40 a.m. he had received information on the VHF that Aleb and Mukam Ali had been murdered in a fight that took place in Moiradia Chor and Moslemuddin was seriously injured. After receiving the information he made G.D. Entry No. 504 dated 28-03-2004 at the Tarabari Police Station and proceeded to the place of occurrence. While he was on his way, at Bhelengimari Ghat, he saw one boat coming from the western side carrying three dead bodies. He had conducted inquest on the dead bodies of Moslemuddin, Alebuddin and Mukam Ali. PW-25 has further deposed that he had found one injured person by the name Aftab Hussain (PW-10). He then sent the dead bodies along with the injured persons for medical treatment and for performing postmortem examination and proceeded to the place of occurrence by the boat in which the dead bodies had been brought. On reaching the place of occurrence, he had recorded the statements of the available witnesses, prepared a sketch map of the place of occurrence, seized three wooden sticks, one khukri stained with blood, one cycle chain, one pointed bamboo stick stained with blood, one Yamaha motorcycle used by the deceased Moslemuddin. He then searched the house of the accused persons so as to arrest them but could not find those persons since they were absconding. On the next

day, i.e. 29-03-2004 one Ajijur Rahman, i.e. the nephew of the deceased Moslemuddin had lodged a formal FIR, based on which, Tarabari P.S. Case No. 38/2004 was registered and he himself had conducted investigation in the case. During his cross-examination, the I/O has brought on record, contradictions in the testimonies of PWs 2, 4, 6, 8, 9, 10, 12, 16, 17, 18 and 19 by saying that:-

“PW-2 Hansi Khatun did not state before me that names of Atob, Shaukat, Rafique, Iman Ali, Amidul Munchi, Kophil, Alauddin Hussain, but she stated before me the name of Ofaj, Atobor Ali, Somej Ali, Nur Hussain and Iman Ali.

PW-2 did not state before me that Akram was assaulted on head, Moti was assaulted and Moinal came out with a dagger blow.

PW-4 Amina Begum stated before me that before her departure her father and both uncles went there.

PW-6 Hawa Khatun did not state before me the names of Sukumuddin, Ayub, Mir Hussain, Afaj, Chaukat Ali, Amzad Ali, Saimuddin, Sultan and Ofa.

PW-8 Musstt. Alaton Nessa did not state before me that occurrence took place in three different places and 3 persons were assaulted. PW-8 also did not state before me that Moslemuddin was brought out of the house of Hamed and was assaulted with dagger etc.

PW-9 Abdul Gofur did not state before me that hearing hulla she came out and saw Muslem and Kalimuddin were going towards Nagarbera; from both sides 10/12 persons from each chased Muslem, but he stated that Muslem went to the house of Hamed.

PW-10 Md. Altaf Hussain stated before me that Alef, Akram, Mokam and Moinal reached and he followed them; that they went to the house of Hamed and they were assaulted alongwith Muslem there.

PW-10 did not state before me that as soon as he arrived there Kobad, Moinal and Sainuddin assaulted him with a khukri, but he stated that he was chased and someone had assaulted him with a sharp weapon and he went behind the house of Hamed.

PW-10 did not state before me that he returned again and Alef and Mokam were lying dead and further he stated before me in the manner that he saw Alef and Mukam were lying dead and Muslem, Hamed, Akram and Moinal were lying with injuries.

PW-12 Kalimuddin did not state before me that accused Kobad Master had assaulted Moslemuddin by means of dagger and caused serious injuries.

PW-16 Atowar Rahman did not state before me that about 4/5 years ago one day at about 9:30 a.m. the President Kalimuddin accompanied by Moslemuddin had been proceeding towards Nagarbera by a motor bike and on the way the accused Kobat Master, Moinul, Kajimuddin, Lokman, Nur Hussain, Sainuddin, Sahidul, Sultan, Sukur, Kafel, Matiur, Rafijul, Dildar, Samej and Ofa restrained Kalimuddin by placing a bamboo on the road.

(Further cross-examination of PW-25 I/O Safur Ali reserved):-

Further cross-examination of I/O PW-25 Safur Ali dated 29th April/ 2013.

On S/A

PW-16 Atowar Rahman did not state before me that the accused persons gheraoed Kalimuddin and Moslemuddin and cut the wall of the house, but he stated before me that the accused persons chased Kalimuddin and Moslemuddin to the house of Hamid Ali and killed him by means of lathi, sword etc. This witness stated before me that when the accused persons left the place of occurrence, then he alone reached the place of occurrence and saw Moslemuddin, Alepuddin and Mokamuddin were lying dead there.

PW-16 did not state before me that which of the accused persons assaulted which of the deceased. This witness did not state before me the names of Kajimuddin, Sahidul, Sultan, Sukur, Kafil, Moti and Rafikul but he stated the name of one Samej along with other accused persons.

PW-17 Abdul Hamid did not state before me that the accused persons snatched away gold chain and wrist watch from Moslemuddin and assaulted Moslemuddin by means of a dagger. This witness did not state before me that the accused Kobbat Master caused injury on the person of Moslemuddin by means of a pointed iron rod. This witness also did not state before me that he heard that on hearing the information of death of Moslemuddin, Mokam and Alep came while the accused persons assaulted them. This witness stated before me that his wife reported him that the accused persons took away cash of rupees 20,000/-.

PW-18 Moynal Hoque did not stated before me that Alep and Mokam were present with the deceased at the time of occurrence and they were also assaulted by the accused persons. This witness stated before me that at the time of occurrence he attempted to rescue Moslemuddin while accused Dildar struck a dagger blow on his abdomen. This witness did not mention the names of Alep and Mokam in his statement recorded under section 161 Cr.P.C.

PW-19 Akram Ali did not mention the names of Dildar, Samej, Saukat, Kayemuddin and Kafiluddin in his statement. This witness did not state before me that accused caused injury below his right eye, but he stated before me that the accused persons caused injury on his head."

36. The PW-25 has also deposed that PW-4 Amina Begum had stated before him that after the accused persons had left, she went to the place of occurrence and saw that her father and uncles were lying dead. The PW-25 had further deposed that PW-5 Nurjahan Begum had stated before him that when she arrived at the place of occurrence, she did not see any of the accused persons but subsequently, she came to know the names of those persons who were involved in the killing of her husband.

37. As noted above, the defence side did not adduce any evidence before the trial court. However, during the course of hearing of the appeals before this Court, the appellants in Crl. Appeal No. 276/2015 had taken a plea that the statements of some of the accused persons recorded under Section 161 Cr.P.C. would reveal that the occurrence on 28-03-2004 was preceded by some other incident which, if brought on record, would have a bearing on the outcome of the appeal. The plea of the appellants was that one of the closed relatives of the accused persons was called by one of the deceased a day prior to the incident and subjected to some criminal acts. Taking note of such plea, this Court had passed order dated 15-12-2020 in Crl. Appeal No. 276/2015, requiring the learned trial court to record further evidence of the defence side and transmit the record back to this Court. Accordingly, evidence of three of the appellants, viz. Kazimuddin, Montaz Ali and Kobab Ali were recorded as DWs- 1, 2 and 3 respectively. DW-1 Kazimuddin has deposed in this manner:-

“On Oath

I am an accused of this case.

Neither me nor any other accused of this case was called by any of the deceased persons or any relative of the deceased persons prior to the incident

dated 28-03-2004 and no criminal acts were performed by us. Further, prior to the incident dated 28-03-2004, we also did not call any of the deceased person or their relatives.

Further none from our side impregnated any woman of the deceased's side prior to the incident dated 28-03-2004 and no incident occurred for the same. The deceased side leveled a false allegation against the accused Kobad Ali Master.

Prior to the incident dated 28-03-2004, one Malekuddin assaulted the accused Hajibur and his younger brother Helal Uddin. The deceased Muslem Uddin and Mokam Ali were younger brothers of the aforesaid Malekuddin. The younger brother of the accused Hajibur, namely Billal Hussain, lodged an FIR over the same with the Tarabari Police Station.

Ext. A (Three pages) is a certified true copy of the said FIR.

XXX

The informant Billal Hussain, who lodged the Ext. A FIR, is an accused of this case.

The case registered over the Ext. A FIR was amicably settled in a Lok-Adalat."

The DWs- 2 and 3 have dittoed the version of the DW-1 not only in the examination-in-chief but even in the cross-examination.

38. Referring to the evidence of the prosecution witnesses Mr. A. Ahmed, learned counsel for the appellants in Crl. Appeal No. 276/2015, Crl. Appeal No. 107/2016 and Crl. Appeal No. 266/2015 submits that the testimony of eye witnesses are full of contradiction and therefore, the same ought not to have been relied upon by the learned trial court. Contending that the so called eye witnesses in this case are all related to the victims and therefore, were interested witnesses. Mr. Ahmed submits that their testimonies were liable to be discarded.

39. By referring to the decision of the Supreme Court rendered in the case of **Kuldip Yadav & Ors. Vs. State of Bihar** reported in **(2011) 5 SCC 324** and **Joseph Vs.**

State represented by Inspector of Police reported in **(2018) 12 SCC 283**, Mr. Ahmed has argued that the prosecution has failed to prove that all the accused persons had committed some overt act so as to accomplish the common object or that they were a part of an unlawful assembly. Therefore, the appellants would not have been convicted in this case with the assistance of Section 149 of the IPC. By referring to the evidence available on record, Mr. Ahmed has further argued that the materials on record would at best indicate that it was Kobat Master who had acted in excess of the common object and killed Moslemuddin whereas the death of the two victims, viz. Alebuddin and Mukam were merely incidental and without any premeditation. Since the other accused persons, leaving aside Kobat Master, could not be implicated in the assault made to Moslemuddin, therefore, even if they are found to be guilty of assaulting Alebuddin and Mukam, even in such event, it would at best be a case coming under Section 304 Part –II of the IPC. In support of his above arguments Mr. Ahmed has relied upon a decision of the Apex Court rendered in the case of **Arumugam Vs. State represented by Inspector of Police, Tamil Nadu** reported in **(2008) 15 SCC 590**.

40. Mr. N. Mahajan, learned counsel for the appellant in Crl. Appeal No. 61/2016 has argued that the prosecution has failed to establish by leading cogent evidence, that his clients were a part of the unlawful assembly or that they shared the common object to commit the offence under Section 302 IPC. Under such circumstances, the conviction of the three appellants represented by him was clearly unsustainable in the eye of law. In support of his above argument, Mr. Mahajan has relied upon a decision of the Supreme Court rendered in the case of **Nagesar Vs. State of Chattisgarh** reported in **(2014) 6**

SCC 672.

41. Mr. A.M. Bora, learned Sr. counsel appearing for the sole appellant in CrI. Appeal No. 62/2016 has argued that PW-17 is the only credible witness who had implicated his client but even the said witness did not ascribe any specific role to the appellant. Save and except mentioning about his presence at the place of occurrence PW-17 has said nothing against his client. Mr. Bora also submits that there is no credible evidence available on record to show that the appellant was a part of the unlawful assembly or that he did share the common object to kill the victims. Therefore, the mere presence of the appellant at the place of occurrence, in the absence of any other evidence to show his complicity in the matter, would not be sufficient to establish the charges brought against the said accused person. Mr. Bora submits that there is considerable doubt as to the role played by the appellant in the matter and such benefit of doubt must go in favour of the appellant.

42. Opposing the aforesaid submissions made by the learned counsel appearing for the appellants, Mr. M. Phukan, learned P.P. Assam has argued that out of the nineteen eye witnesses examined by the prosecution, even if it is accepted that there are some contradiction, omissions or embellishment in the testimony of some of those witnesses, yet, submits Mr. Phukan the evidence adduced by PWs- 2, 12 and 18 are consistent and could not be shaken during their cross-examination. From the testimony of these three witnesses it would be established beyond doubt that the accused persons were a part of an unlawful assembly and had shared the common object of assaulting and killing the deceased persons. Mr. Phukan has further submitted that the appellants in CrI. Appeal No.

266/2015 have been found to have inflicted injuries of grievous nature upon the injured persons and therefore, they have been convicted under Section 326 read with Section 149 of the IPC. However, in case of the remaining accused persons, their complicity in committing the offence under Sections 302/ 149 IPC has been conclusively established by the prosecution by leading cogent evidence.

43. Mr. Phukan further submits that Section 149 IPC is founded on constructive liability and if it is shown that the accused persons had acted with a common object and in an unlawful assembly in committing the offence under Section 302 IPC, their conviction with the aid of Section 149 IPC would be sustainable in the eye of law. In support of his arguments Mr. Phukan has relied upon three decisions of the Supreme Court (a) **Charan Singh & Ors. Vs. State of U.P** reported in **(2004) 4 SCC 205**; (b) **Sikandar Singh & Ors. Vs. State of Bihar** reported in **(2010) 7 SCC 477** and (c) **State of U.P. Vs. Kishan Pal & Ors.** reported in **(2008) 16 SCC 73**.

44. We have considered the arguments advanced by the learned counsel for all the parties and have also meticulously gone through the evidence adduced on record.

45. As noted above, the prosecution had examined as many as nineteen witnesses as eye witnesses. From the evidence of the I/O (PW-25), we find that there are some contradiction, omission and embellishment in the testimony of some of those witnesses. Be that as it may, on a careful analysis of the evidence adduced by the prosecution witnesses, we find that PW-1 has stated in his cross-examination that before his arrival the occurrence was over. Therefore, it is apparent that he did see the occurrence. Although PW-1 in his deposition has stated that he had seen the accused persons

assaulting the deceased, the testimony of this witness on such count does not appear to be very reliable.

46. PW-4 Amina Begum had stated before the police that she had gone to the place of occurrence and seen her father and uncles lying dead after the accused persons had left and such statement of the witness had also been proved by the I/O. Likewise, PW-5 had stated before the police that when she arrived at the place of occurrence, she had not seen any of the accused persons and aforesaid statement of PW-5 has also been proved by the I/O. It is to be noted herein that PWs- 4 and 5 have both stated that accused Nur Hussain had cut the tongue of deceased Mukam Ali. However, the postmortem report of Mukam Ali does not say so. Therefore, it is doubtful as to whether the PWs- 4 and 5 had seen the actual occurrence.

47. From the evidence of PW-6, it appears that on being informed by the PW-1 she came to the place of occurrence after the incident was over. Therefore, PW-6 also does not appear to have seen the occurrence.

48. The statement of PW-8(a) was apparently recorded by the police after two days of the incident and it appears that she had stated before the I/O that when she came to the place and touched the body of her husband Moslemuddin and Mokam they were already dead. Therefore, it is also doubtful as to whether PW-8(a) had at all seen the actual occurrence.

49. PW-9 has deposed that she had seen the occurrence alone, which appear to be highly improbable in view of the bulk of evidence available on record which suggests that

a large number of persons were present there at the time of the occurrence.

50. PW-10, who had claimed to be an injured eye witness to the occurrence, was examined by the doctor after about 10 days from the incident but the medical report does not support the ocular evidence of this witness on the nature of injuries claimed to have been sustained by him.

51. PW-13 had deposed that 40/50 persons had chased deceased Moslemuddin and Kamaluddin but he did not know who were the assailants.

52. From the evidence of PW-25, it appears that PW-16 had arrived at the place of occurrence after the accused persons had left and saw Moslemuddin, Alebuddin and Mokamuddin lying dead. Therefore, it is doubtful as to whether PW-16 had also actually seen the occurrence.

53. The statement of PW-19 was recorded by the police after about six months from the date of occurrence. Although this witness had claimed to be an injured eye witness, yet, there is no medical evidence on record to support the aforesaid claim. Therefore, the testimony of PW-19 is also not found to be very reliable.

54. We also find that there are some improvements/ contradictions in the evidence adduced by the witnesses PWs- 1, 4, 5, 6, 8(a), 10, 13, 16 and 19 giving rise to a reasonable doubt as to whether any of these witnesses had actually seen the occurrence. Rather, it appears to us that the above-named witnesses had arrived at the place of occurrence soon after the incident and some of them might have seen the gathering where many persons from the locality including some of the accused persons were

present.

56. However, from a close scrutiny of the evidence adduced by PWs- 2, 3, 12, 17 and 18, we find that those witnesses have deposed in a consistent manner and have remained firm in their cross-examination. Their testimonies also find due corroboration from the evidence adduced by one another. Although, PW-3 did not implicate Kazimuddin, Iman and Kamaluddin in his statement recorded under Section 161 Cr.P.C. but he did so while deposing before the court. If some minor contradiction in their evidence is ignored, there is nothing to doubt the credibility of these witnesses. The evidence of these witnesses also inspires the confidence of this Court. We are, therefore, of the view that PWs-2, 3, 12, 17 and 18 are the eye -witnesses to the occurrence.

57. PWs- 2, 3, 12, 17 and 18 have not only categorically deposed that they had seen the occurrence but have also mentioned the names of the accused persons involved in committing the offence by giving vivid description of the roles played by them. From a close scrutiny of the evidence adduced by PWs- 2, 3, 12, 17 and 18, we find that these witnesses have clearly implicated the appellants Kobat Master, Dildar, Sukumuddin, Nur Hussain, Lukman, Moinul, Sainuddin, Ayub Ali, Iman Ali, Kazimuddin, Kamal, Atowar, Ofa, Samsul, Montaj, Amzad Ali, Munshi and Somes Ali. Although the PW-2 had also named one "Kajel" as an accused person who had assaulted the victims with sharp weapon, yet, it is not clear from the evidence on record as to whether "Kajel" & "Kafel" are the same person. This is significant in view of the fact that accused "Kafel" has already been acquitted by the learned trial court of the charge framed under Section 302/ 149 IPC. We may also add here that one of the accused Amzad Ali, who was also named by these eye-

witnesses, had expired during the trial and therefore, the proceeding had abated against him.

58. We also find from that the evidence brought on record, more particularly, the version of PWs- 2, 3, 12, 17 and 18 that those accused persons had formed an unlawful assembly and/ or shared a common object to cause death and grievous injuries to the deceased persons.

59. It appears from the materials available on record that there was some old dispute between the two rival parties belonging to two families represented by Kobat Ali and Moslemuddin. On a closer look at the evidence brought on record, we find that the accused Kobat Ali @ Kobat Master took the lead in forming the unlawful assembly with the other co-accused persons with the common object of assaulting the victims and thereafter, cornered them in the house of Abdul Hamid and brutally killed them. We also find that the members of the unlawfull assembly were mostly close relatives of Kobat Ali and the primary target of the accused persons was Moslemuddin Ali and his brothers Alebuddin and Mukam. It has clearly come out from the evidence on record adduced by the eye witnesses that the perpetrators of the crime had acted mercilessly and had ruthlessly killed the victims with deadly weapons.

60. Insofar as the application of Section 149 IPC is concerned, law is fairly settled through a long line of judicial pronouncements that the offence committed by the accused persons to accomplish a common object by forming an unlawful assembly to cause death to the victim must be clearly established by evidence brought on record. In ***Sikander Singh And Others (supra)*** the Supreme Court has held that the two essential

ingredients of section 149 IPC viz (i) the commission of an offence by any member of an unlawful assembly and (ii) such offence should be committed in prosecution of common object of the assembly, must be proved by the prosecution. In ***Charan Singh & Others (Supra)*** also a similar view has been expressed. However, in that case it has also been observed that proof regarding overt act would not be necessary.

61. In ***Joseph Vs. State (Supra)*** the Hon'ble Supreme Court, after considering number of previous decisions on interpretation of Section 149 IPC, has held that once the court finds that the ingredients of Section 149 IPC are fulfilled, every person who at the time of committing that offence was a member of unlawful assembly has to be held guilty of that offence.

62. Applying the ration laid down in the aforementioned decisions to the facts of this case, we are of the unhesitant opinion that the prosecution has succeeded in establishing the charges brought against Kobat Master, Dildar, Sukumuddin, Nur Hussain, Lukman, Moinul, Sainuddin, Ayub Ali, Iman Ali, Kazimuddin, Kamal, Atowar, Ofa, Samsul, Montaj, Amzad Ali, Munshi and Somes Ali under Sections 302/ 149 IPC beyond reasonable doubt. Therefore, the learned trial court, in our opinion, had rightly convicted those accused persons.

63. It is to be noted herein that in an incident of this nature, where a mob is involved and there are a number of accused persons, some variations in the testimonies of the witnesses, insofar as the occurrence is concerned, is bound to happen. Such variations in the statements of the witnesses, at times, may also give rise to contradictions in their testimonies. However, on an overall assessment of the evidence available on record, if the

Court finds a ring of truth in the evidence adduced by the prosecution witnesses, then such contradiction/ omission/ embellishment must be treated as minor contradictions, in which event, their testimonies need not be discarded as a whole. In such cases, it would be the duty of the Court to carefully examine the evidence to ascertain as to whether, those are material contradictions causing a dent in the prosecution case thereby, substantially eroding the credibility of the prosecution version or those are merely inaccurate descriptions in narrating the details pertaining to the occurrence without generally disrupting the version of the prosecution.

64. As noted above, from a threadbare evaluation of the evidence brought on record, we find that PWs- 2, 3, 12, 17 and 18 have clearly implicated appellants Kobat Master, Dildar, Sukumuddin, Nur Hussain, Lukman, Moinal, Sainuddin, Ayub Ali, Iman Ali, Kazimuddin, Kamal, Atawor, Ofa, Samsul, Montaj, Amjad Ali Munsu and Sames. Out of them accused Amjad Ali had died during trial. Based on the evidence available on record, the learned trial court had convicted the remaining accused persons/ appellants under Sections 302/ 149 IPC. Due to the forgoing discussions, we find ourselves in agreement with the conclusion of the learned trial court leading to the conviction of the above-named appellants under Sections 302/ 149 IPC.

65. Although the PW-2 had apparently stated during her cross-examination that Ofa, Sames, Moidul Munshi, Hussain, Kazimuddin and Atobar were not the accused persons, yet, we find that in her deposition, she had clearly implicated those accused persons and such evidence of PW-2 also finds corroboration from the other evidence on record. Moreover, no such statement exonerating those accused persons was made by the PW-2

before the I/O. Rather, the PW-2 had implicated them while recording her statement before the police. Therefore, the aforesaid statement of the PW-2, in our view, would not have any material bearing in the outcome of the appeal and can be safely ignored by this Court.

66. Coming to the case of the five appellants in CrI. Appeal No. 266/2015, as noticed above, all those appellants have been convicted under Section 326 of IPC read with Section 149 of IPC and sentence to undergo 07 years rigorous imprisonment.

67. From the evidence of PWs, 2, 3, 12, 17 and 18, we find that none of those witnesses have clearly implicated these appellants by ascribing any specific role to them. As a matter of fact, from the evidence available on record, it is not even clear as to whether any of those five appellants were part of the unlawful assembly formed with the common object to assault the victims. There is also little evidence to show that those appellants had actually assaulted the injured victims. Therefore, there is a genuine doubt in our minds as regards their involvement of these appellants in the incident.

68. In order to ascertain the basis on which these five appellants in CrI. Appeal No. 266/2015 had been convicted under Section 326 of the IPC whereas the charges against them were pertaining to Section 302 of the IPC, we have examined the relevant part of the impugned judgment and order passed by the learned trial court and find that there is no clear indication in the judgment as to why, these five accused persons/ appellants had been found to be not guilty under Sections 302/ 149 of IPC and were acquitted of the murder charge and instead, have been convicted under Sections 326/ 149 IPC.

69. In the above context it would be pertinent to mention herein that the five appellants in Crl. Appeal No. 266/2015 were also charge-sheeted under various sections of IPC including Section 302 of IPC after completion of investigation in connection with Tarabari P.S. Case No. 38/2004 and the evidence adduced against all the accused persons including these appellants are similar in nature and content. Under the circumstance, it is not clear as to on what basis, the learned trial court had bifurcated the evidence so as to convict the five appellants under Sections 326/ 149 IPC while convicting the remaining appellants under Sections 302/ 149 IPC. Be that as it may, since we have already held that there is no evidence to sustain the conviction of these five appellants under Sections 326/ 149 of IPC, it would not be necessary for us to go into the said aspect of the matter in further details.

70. Similar is the situation in case of the sole appellant in Crl. Appeal No. 62/2016. Here also, the evidence available on record does not, in our view, prove the charge under Sections 302/149 IPC against him beyond reasonable doubt. Although, there is evidence to show his presence at the place of occurrence, as noted above, it is doubtful as to whether he was a part of the unlawful assembly or had shared the common object to assault the victims. Therefore, the benefit of doubt must go in favour of the appellant Sultan Mahmud.

71. Likewise, even in the case of appellant Abul Hussain in Crl. Appeal No. 107/2016 and appellant Motiur Rahman in Crl. Appeal No. 61/2016 the evidence available on record does not conclusively establish their complicity in commissioning the crime. There is reasonable doubt as regards their actual involvement in the occurrence and therefore, we

are of the opinion that benefit of doubt must also go in favour of the aforementioned appellants.

72. By adducing evidence of DWs- 1, 2 and 3, the appellants in Crl. Appeal No. 276/2015 had made a belated attempt to give a twist to the prosecution case. However, as noted above, we find that the evidence of DWs- 1, 2 and 3 relates to some other incident that allegedly took place on an earlier date. There is also no suggestion from the defence side to the prosecution witnesses so as to lay the foundation during trial for them to lead such additional evidence bringing on record new facts at the appellate stage. The learned trial court also did have the occasion to deal with such evidence while rendering the impugned judgment and order dated 31-08-2015. Therefore, those new facts brought on record by the appellants through DWs- 1, 2 and 3 for the first time, in the opinion this Court, would not have any relevance in deciding the appeal preferred by them.

73. For the reasons stated hereinabove, we are of the considered opinion that the prosecution had succeeded in proving that the charges brought against the appellants Kobat Master, Dildar, Sukumuddin, Nur Hussain, Lukman, Moinal, Sainuddin, Ayub Ali, Iman Ali, Kazimuddin, Kamal, Atawor, Ofa, Samsul, Montaj, and Some beyond reasonable doubt. Therefore, their conviction under Section 302/ 149 of the IPC as well as the sentence awarded to them by the learned trial court is hereby affirmed. Consequently, Crl. Appeal No. 276/2015 is held to be devoid of any merit and the same stands dismissed. The appellants Kobbad Ali, Atowar Rahman, Lukman Ali, Sainuddin, Nur Hussain and Montaj Ali, who are out on bail, to surrender before the learned trial court on or before 20-09-2021, failing which, the learned Sessions Judge, Barpeta to take necessary action

for taking them into custody.

74. In view of what has been held hereinabove, the CrI. Appeal No. 266/2015 stands allowed. The conviction of appellants (i) Rafiqul Haque, (ii) Kafiluddin, (iii) Hajibar Rahman, (iv) Showkat Ali and (v) Shahidul Islam is hereby set-aside and these appellants are set at liberty.

75. For the reasons stated above, CrI. Appeal No. 62/2016 also stands allowed. Conviction of appellant Sultan Mahmud stands set aside and he is set at liberty.

76. CrI. Appeal No. 107/2016 and CrI. Appeal No. 61/2016 are allowed in part. Consequently, the conviction of the appellants, Abul Hussain and Motiur Rahman is hereby set-aside. We direct that those appellants be released from jail, if their custodial detention is not required in connection with any other proceeding. However, the conviction of appellants Iman Ali, Samsul Haque and Sukumuddin stand affirmed.

77. Accused Sukumuddin appears to be out on bail. Therefore, he is to surrender before the trial court on or before 20-09-2021, failing which, necessary steps for taking him into custody be initiated by the learned Sessions Judge, Barpeta.

Send back the LCR.

JUDGE

JUDGE

Comparing Assistant