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Gauhati High Court

Case No: Criminal Appeal No. 113 Of 2019

Mustt Monowara Begum		APPELLANT
	Vs	
Md Moinul Haque And 8 Ors		RESPONDENT

Date of Decision: Feb. 2, 2024

Acts Referred:

- Constitution Of India, 1950 - Article 21
- Indian Penal Code, 1860 - Section 141, 142, 147, 148, 149, 201, 302, 341
- Code Of Criminal Procedure, 1973 - Section 154, 161, 162, 164, 313, 372, 378, 384, 482
- Evidence Act, 1872 - Section 145, 155, 157

Hon'ble Judges: Michael Zothankhuma, J; Malasri Nandi, J

Bench: Division Bench

Advocate: N Dhar, A S Tapader

Final Decision: Allowed

Judgement

1. Heard Mr. TU Laskar, learned counsel for the appellant. Also heard Ms. S Jahan, learned Additional Public Prosecutor, Assam appearing for the State respondent No.9 and Mr. AS Tapader, learned counsel for the respondent Nos.1 to 8.

2. This appeal has been preferred by the informant against the judgment and order dated 26.11.2018 passed by the learned Sessions Judge, Karimganj in Sessions Case No.30/2015, whereby the learned trial court had acquitted the respondent Nos.1 to 8 from the charges framed under Sections 147/341/302/201 IPC.

3. The brief facts of the case is that the informant, who is the wife of the deceased, Badar Uddin, lodged an FIR on 23.06.2013 before the Officer-in-Charge of Patharkandi Police Station stating, inter alia, that on 22.06.2013 at around 7.30 A.M., someone called her husband on his mobile phone regarding purchase of firewood from his shop.

Her husband was dealing with the business of firewood. On that day, at around 8 A.M., her husband left their house without taking food. After a while, she along with her brother-in-law, Fakar Uddin, also came out from their house to visit a Doctor. After going for about half a kilometer from their house, when her husband reached No.3 Dohalia, some miscreants armed with sharp weapons attacked him. Having heard the screaming of her husband, they rushed to the spot and saw that the accused No.1 Jakir Hussain was hacking her husband's neck with a sharp long dao. Immediately her husband fell on the ground. There were 7/8 other persons who were with the accused Jakir Hussain, who also assaulted her husband who was lying on the ground. Another accused, Moinul Hoque, also inflicted injury on her husband's throat with a dao.

Witnessing the incident, she and her brother-in-law raised alarm and as a result, the accused persons fled away from the scene and some neighbouring people came to the spot. It is also alleged in the FIR that when the accused persons left the place, she and her brother-in-law could identify six of the accused persons who were named in the FIR namely, (1). Jakir Hussain, (2). Moinul Hoque, (3). Asad Uddin, (4). Samsul Hoque, (5). Jabrul Hoque, and (6). Abdul Basir. Further, her husband was shifted to the hospital, but he died on the way.

4. On receipt of the complaint, a case was registered vide Patharkandi P.S. Case No.118/13 under Sections 147/148/341/302 IPC and investigation was initiated.

5. During investigation, the Investigating Officer visited the place of occurrence, recorded the statement of the witnesses, and after the inquest was conducted, the dead body of the deceased was forwarded for post mortem examination.

6. During investigation, the informant and the witness Subuddin were produced before the Magistrate for recording their statements under Section 164 Cr.P.C. After completion of investigation, charge sheet was submitted against the accused Md. Moinul Hoque, Md. Asad Uddin, Abdul Basir @ Abdul Basit, Md. Giash Uddin, Md. Jakir Hussain, Md. Jabrul Hoque, Md. Faizul Hoque (Islam) and Samsul Hoque under Sections 147/341/302/201 IPC before the Court of the learned Chief Judicial Magistrate, Karimganj. As the offence under Section 302 IPC was exclusively triable by the Court of Session, the same was committed accordingly.

7. During trial, charges were framed under Sections 147/341/302/149 IPC, which were read over and explained to the respondent Nos.1 to 8, to which they pleaded not guilty and claimed to be tried.

8. To substantiate the case of the prosecution, six witnesses were examined by the prosecution and two witnesses were examined as court witnesses. After completion of trial, the statement of the respondent Nos.1 to 8 were recorded under Section 313 Cr.P.C., wherein incriminating materials found in the evidence of the witnesses were

put to them, to which they denied the same and pleaded their innocence.

9. After hearing the arguments advanced by the learned counsel for the parties, the learned trial Court acquitted the respondent Nos.1 to 8. Hence, this appeal has been preferred by the informant under Section 372 read with Section 378 and 482 of the Cr.P.C.

10. The learned counsel for the appellant submitted that though there were two eye witnesses to the incident, but the trial court ignoring the FIR dated 23.06.2013, which was proved by the scribe Ashab Uddin Talukdar (CW-1) and was also corroborated by the ocular testimony of the other prosecution witnesses i.e. PW-1 and PW-3. Thus, the acquittal of the respondents resulted in failure of justice.

11. It is also the submission of the learned counsel for the appellant that PW-1 and PW-3 proved the fact that they were present when the incident occurred. The post mortem report has also corroborated the fact that the deceased died a homicidal death. The finding of the learned trial court that the investigation suffered from certain flaws and thereby brushing aside the entire prosecution case was arbitrary and illegal.

12. The learned counsel for the appellant also argued that the trial court has not discussed the evidence of any other witnesses, except the evidence of the investigating officer and CW-1 and CW-2 and on the basis of their evidence, the learned trial court had come to the conclusion that the investigating officer had manipulated the FIR and as such, the case against the respondent Nos.1 to 8 had not been proved beyond reasonable doubt. The trial court, accordingly, acquitted them, which is against the principles of natural justice. According to the learned counsel for the appellant, the impugned judgment passed by the learned trial court dated 26.11.2018 is bad in law and as such, is liable to be set aside.

In support of his submission, the learned counsel for the appellant has placed reliance on the following case laws:

(i) (2012) 8 SCC 263 (Dayal Singh & Ors. Vs State Of Uttaranchal).

(ii) (2015) 9 SCC 588 (V.K.Mishra & Anr. Vs. State Of Uttarakhand & Anr).

(iii) (2015) 11 SCC 69 (Sanjeev Kumar Gupta Vs. State of Uttar Pradesh (Now State of Uttarakhand).

(iv) (2015) 1 SCC 323 (State Of Karnataka Vs. Suvarnamma & Anr).

13. Per contra, learned counsel Mr. AS Tapader and Mr. DK Bhattacharya representing the respondent Nos.1 to 8 submitted that the well merited judgment of the learned trial court ought not to be reversed by this Court, by substituting the view of the learned trial court. The judgment of acquittal passed by the learned trial court is a

plausible view and, there is no scope to convict the respondent Nos.1 to 8 on the basis of the evidence rendered by the so called eye witnesses.

14. It is also submitted that PW-1 and PW-3, though projected by the prosecution as eye witnesses to the incident, but from their cross-examination, it is crystal clear that they were not present when the incident occurred. It is a case of no witness and political murder as per the statement of the Investigating Officer. It is further submitted that the persons who were present on the spot, were not properly identified, as no test identification parade was held during investigation. Under such a backdrop, the suspicion that the respondents were not the perpetrators of the crime has not been dispelled.

15. According to the learned counsel for the respondents, in case of appeal against acquittal, it is a settled position of law that interference by the appellate court is warranted only when there is perversity of fact and of law. Further, presumption of innocence reinforces the acquittal of the accused. As it appears in the instant case, there is no perversity in the decision of the learned trial court, and as such, the reversal of the impugned judgment at the hands of this Court does not arise.

16. Another point raised by the learned counsel for the respondent Nos.1 to 8 is that the two eye witnesses PW-1 and PW-3 stated that Jakir Hussain and Moinul Hoque inflicted injuries to the neck of the deceased, which creates doubt regarding presence of the PW-1 and PW-3 on the spot at the relevant time of the incident, as because the medical evidence does not support the ocular evidence.

17. The learned counsel for the respondents also cited the following case laws:

(i) (2019) 2 SCC 303 (State of Uttar Pradesh Vs. Wasif Haider).

(ii) (1987) 2 SCC 529 (Tota Singh & Anr vs State Of Punjab).

18. The learned Additional Public Prosecutor, Assam appearing for the State respondents being the respondent No.9 also submitted that the power of the High Court in deciding the appeal against acquittal is rather wide. The High Court may re-appreciate the evidences of the witnesses, if required. In the case in hand, there are two eye witnesses to the incident and the learned trial court did not discuss anything as to why the learned Sessions Judge had discarded the evidences of the two eye witnesses. The learned Additional Public Prosecutor also pointed out that it is true that the investigation was not properly done by the Investigating Officer in the case. However, as there were eye witnesses to the incident, the improper investigation of the Investigating Officer cannot be a ground to acquit the respondents No.1 to 8.

19. We have considered the submissions of the learned counsel for the parties and also perused the judgment of the learned trial court. We have given our conscious thought

on the judgment of the learned trial court. It is seen that the learned trial court did not appreciate the evidence of the witnesses, except, the evidence of the investigating officer as well as the CW-1 and CW-2. It appears that prior to lodging of the FIR by the informant, one general diary entry was recorded in the police station on the information given by one Azizur Rahman which was registered as Patharkandi P.S. GDE No. 605 dated 22.06.2013. As per the said GD Entry, it was informed by one Azijur Rahman to the police over phone that at around 8/8.30 A.M., someone killed his cousin brother Badar Uddin and left his body at Sarapar in Ratanpur. According to the learned counsel for the respondent No.1-8, the said Azizur Rahman was not examined by the prosecution which is fatal to the prosecution case. It is not mentioned in the GD Entry No.605 who had committed the murder of the deceased. The learned trial court also stressed its judgment on the point that "the said Azijur Rahman, who being the brother of the deceased, is a material witness to the incident, as he had informed the police about the incident over phone. Definitely the said Azizur Rahman had also reached the place of occurrence".

The observation of the learned trial court is that "the information given by the said Azizur Rahman makes it clear that he would definitely have the information about the names of the culprits and, therefore, it was highly unnatural of him to have not stated their names to the police, by not giving the information about the incident."

20. The learned trial court in its judgment also mentioned that "as per PW-2, he had seen the accused Jakir Hussain inflicting a blow on the deceased, felling him to the ground and, therefore, the other accused had come forward, grasped the deceased and then on instruction from Jabrul Hoque, Moinul Hoque, had slit the deceased's neck. Neither did PW-2, nor the PW-4 state that they had seen Azizur Rahman at the place of occurrence. At the instance of the defence, the Investigating Officer had confirmed that unlike his testimony in the Court, PW-2 had not stated to him that he had seen Jakir Hussain hacking the deceased and Moinul Hoque slitting the deceased's throat".

The learned trial court also held that "non-examination of Azizur Rahman as the prosecution witness during investigation and also during trial, goes against the prosecution, as it raises a presumption and suspicion that had he been examined by the Investigating Officer and the prosecution, he would have told a different story not favouring the case of the prosecution."

21. It is seen that from paragraph 9 of the judgment of the learned trial court that the learned trial court had discussed only the evidence of the Investigating Officer, CW-1 and CW-2. The learned trial court further held that "the Investigating Officer manipulated the case diary and the same was intended to effect the outcome of the case and further the same was done in association with CW-1, by substituting the same with exhibit-1 in order to implicate the accused persons in the case".

It was also held that “the informant was also involved in the said act, as she proved her signature in exhibit-1 and therefore, the said replacement could not have been done without her cooperation”. Due to such fault in the investigation, the learned trial court acquitted the respondent Nos.1 to 8.

22. Before venturing into the merits of the case, we would like to reiterate the scope of Section 372/378 Cr.P.C., while deciding an appeal by the High Court, as the position of law is rather settled. We would like to mention the judgment of the Hon’ble Supreme Court in Jafarudheen Vs. State of. Kerala reported in 2022 SCC OnLine SC 495 which reads as follows:

“While dealing with an appeal against acquittal by invoking Section 378 of the Cr.P.C. the appellate court has to consider whether the trial court’s view can be termed as a possible one, particularly when evidence on record has been analyzed. The reason is that an order of acquittal adds up to the presumption of innocence in favour of the accused. Thus the appellate court has to be relatively slow in reversing the order of the trial court rendering acquittal. Therefore, the presumption in favour of the accused does not get weakened, but only strengthened. Such a double presumption that enures in favour of the accused has to be disturbed only by thorough scrutiny on the accepted legal parameters.”

23. In the case of Mohan @Srinivas @ Seena @Tailor Seena Vs. State of Karnataka reported in 2021 SCC OnLine SC 1233 which reads as under:

“Section 378 Cr.P.C. enables the State to prefer an appeal against an order of acquittal. Section 384 Cr.P.C. speaks of the powers that can be exercised by the appellate court. When the trial court renders its decision by acquitting the accused, presumption of innocence gathers strength before the appellate court. As a consequence, the onus on the prosecution becomes more burdensome as there is a double presumption of innocence. Certainly, the Court of first instance has its own advantages in delivering its verdict, which is to see the witnesses in person while they depose. The appellate court is expected to involve itself in a deeper, studied scrutiny of not only the evidence before it, but is duty bound to satisfy itself whether the decision of the trial court is both possible and plausible view. When two views are possible, the one taken by the trial court in a case of acquittal is to be followed on the touchstone of liberty along with the advantage of having seen the witnesses. Article 21 of the Constitution of India also aids the accused after acquittal in a certain way, though not absolute. Suffice it is to state that the appellate court shall remind itself of the role required to play while dealing with a case of acquittal.”

24. In the case of Vijay Mohan Singh Vs. State of Karnataka reported in (2019) 5 SCC 436, the Hon’ble Supreme Court had an occasion to consider the scope of Section 378 Cr.P.C. and the interference by the High Court in an appeal against acquittal. In the said

case, it was observed and held as under:

“An identical question came to be considered before this court Umedbhai Jadavbhai Vs State of Gujarat reported in (1978) 1 SCC 228. In the case before this Court, the High Court interfered with the order of acquittal passed by the learned trial court on re-appreciation of the entire evidence on record. However, the High Court, while reversing the acquittal did not consider the reasons given by the learned trial court while acquitting the accused. Confirming the judgment of the High Court, this Court observed and held in paragraph 10 as under:

“Once the appeal was rightly entertained against the order of acquittal, the High Court was entitled to re-appreciate the entire evidence independently and come to its own conclusion. Ordinarily, the High Court would give due importance to the opinion of the Session Judge, if the same were arrived at after proper appreciation of the evidence. This rule will not be applicable in the present case where the Sessions Judge has made an absolutely wrong assumption of a very material and clinching aspect in the peculiar circumstance of the case.”

25. In N. Vijayakumar vs State Of Tamil Nadu, reported in (2021) 3 SCC 687, considered the following general principles regarding power of the appellate court, while dealing with an appeal against an order of acquittal:

(i). An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.

(ii). The Code of Criminal Procedure puts no limitation, restriction of condition on exercise of such power and an appellate court on the evidence before it may reach its on conclusion, both on questions of fact and of law.

(iii). Various expressions such as ‘substantial and compelling reasons’, ‘good and sufficient grounds’, ‘very strong circumstances’, ‘distorted conclusions’, ‘glaring mistakes’ etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of ‘flourishes of language’ to emphasis the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence to come to its own conclusion.

(iv). An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Per se, the presumption of innocence is available to him under the fundamental principles of criminal jurisprudence that every person shall be presumed to be innocent, unless he is proved guilty by a competent court of law, secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthen by the trial court.

(v). If two reasonable conclusions are possible on the basis of the evidence on record the appellate court should not disturb the finding of acquittal recorded by the trial court.

26. By applying the aforesaid principles and the evidence on record, in the case in hand, we are to consider the matter whether the judgment of the trial court falls under the category of possible and plausible view.

27. PW-1 is the informant, who is the wife of the deceased. She deposed in her evidence that on the date of incident at about 7.30 a.m. her deceased husband received a phone call regarding firewood. Her husband was running a business in firewood. On receiving the call, her husband went out and she also left her house along with her brother-in-law Fakaruddin to visit a Doctor. They proceeded about half a kilometer, her husband was ahead of them. They went through a lonely patch in the jungle. After half a kilometer, suddenly the accused Jakir appeared from the road side bushes and attacked her husband with a long dao and dealt a blow. As a result of the blow, the deceased fell to the ground. Thereafter, Jabrul, Asad, and Samsul caught hold of her husband. Jabrul directed Moinul to behead her husband and Moinul slit her husband's throat. Though they tried to resist them but Basit, Faizul and Gyas threatened them by showing a dao. Thereafter, the accused persons flung her husband's body about 15 feet below the road into the jungle. At that time, she saw Subuddin and another person on a bike. They too witnessed the incident. She raised an alarm. After sometime, police arrived and took away her husband's body. On the following day, she lodged the FIR vide exhibit- 1.
In her cross-examination PW-1 stated that she was wearing a burkha at that time and her clothes were stained with blood. She did not hand over the blood stained cloth to the police. Her husband did not have a fixed time of going out, but usually he went out in the morning at about 8.30 A.M.

PW-1 specifically stated that the first blow was dealt on the backside of the neck of the deceased, but she could not say from which side the accused emerged from the jungle.

28. PW-2 is an independent witness, not related to the informant or the deceased. From his deposition, it reveals that on the date of incident at about 8.15 A.M., he went to the house of one Enam Uddin and while returning from his house at Dohalia-Ratanpur road near a bamboo grove, he saw the accused Jakir inflicting a dao blow on the deceased Badar Uddin. Then Badar Uddin fell on the ground. Accused Jabrul, Samsul and Asar came forward and grabbed the deceased who was on the ground. Then Jabrul asked Moinul to slit Badar Uddin's throat and accordingly Moinul slashed Badar Uddin's neck. At that time, Basit, Faizul and Gyas were also present. Though he, Fakaruddin, Sahabuddin and another person, along with Badar Uddin's wife tried to protect Badar Uddin, but Basit Faizul and Gyas threatened them. Then the accused persons lifted the

body of Badar Uddin and threw away the body about 15 feet below the road near one Borchala Nala. Thereafter, all the accused persons left the place. They went towards Badar Uddin and found him dead and they informed the police. Police came and took away the dead body. He was forwarded to the Magistrate, to record his statement under Section 164 Cr.P.C., vide exhibit-2.

In his cross-examination, PW-2 denied the suggestion that he did not state before the police that he saw Jakir hacking the head of Badar Uddin and that Badar Uddin fell on the ground. Further, he denied the suggestion that he did not tell the police that Jabrul, Samsul and Asad grabbed Badar Uddin and Jabrul directed Moinul to slit Badar Uddin's throat and Moinul slit Badar Uddin on his neck. Also, when they tried to save Badar Uddin, Basit Faizul and Gyas threatened them.

Though, the trial court recorded the statement of PW-2 that he did not state before the police that he saw Jakir hacking the head of Badar Uddin, but in the examination-in-chief, it appears that PW-2 stated that he saw the accused Jakir inflicting a dao blow on the deceased Badar Uddin. PW-2 nowhere stated in his examination-in-chief that Jakir inflicted a dao blow on the head of the deceased Badar Uddin. Thus, there is no contradiction in the evidence of PW-2, as recorded by the trial court.

29. PW-3 is the brother of the deceased. According to PW-1 and 2, PW-3 was present when the incident occurred. PW-3 deposed in his evidence that on the day of the incident at about 8.10 A.M., he was about to go to the Bazar on business purpose regarding his firewood business. Badar Uddin also wanted to go to the Bazar, but as he was in a hurry, he told him (PW-3) to accompany his wife and he went ahead of them and they followed him. Badar Uddin also had firewood business. About half kilometer away from his house, on a lonely patch of the road, suddenly Jakir came out from the nearby jungle armed with a dao and dealt a blow on Badar Uddin. Badar Uddin fell on the ground. Immediately Asad, Jabrul and Samsul grabbed Badar Uddin and Jabrul directed Moinul to slit the throat of Badar Uddin. He and Badar Uddin's wife tried to save him, but Basit, Gyas Uddin and Faizul Hoque threatened them by showing a dao and resisted them from proceeding further. When they raised alarm, the accused persons lifted the body of Badar Uddin and flung him about 15/16 feet down the road, near a drain and fled away. At that time, Sabuddin, Abdul Hoque were also present. They informed the police. Police arrived at the place of occurrence and by that time Badar Uddin had died.

In his cross examination, PW-3 replied that he did not know the witness Liakat Ali or Biswajit Nath. When Badar Uddin was a student of Class VII, there was a case against him and he was acquitted by the High Court. At that time he was at Mizoram. Sabuddin and Abdul Hoque were at a distance of 7 cubit behind him. Azizur Rahman is his cousin.

30. PW-4 is also an eye witness to the incident. From his deposition it discloses that on the date of the incident at about 8/8.15 AM, he was proceeding for work towards Dohalia-Shibbari Bazar. At that time, he saw Badar Uddin, his wife and his brother Fakar Uddin come out from his house and they were also proceeding towards Dohalia. He also followed them. He heard a commotion from the bamboo bushes. Meanwhile, Abdul Hoque crossed him on his motor cycle and reached the place of occurrence. When he reached the spot, he noticed Jakir, Samsul Hoque, Moinul Hoque, Asar Uddin, Basit, Faizul, Gyas Uddin and others. They lifted the body of Badar Uddin and when he went towards them, they threatened him by showing a dao. They flung Badar Uddin's body about 15/16 feet below the road and then went towards the jungle. Then, he, Abdul Hoque, Fakaruddin and Monowara went ahead towards Badar Uddin and found him dead. He noticed injury on the deceased's neck. There was also a slit on his throat. After sometime, police arrived on the spot and recorded their statement. He was also forwarded to the Magistrate for recording his statement under Section 164 Cr.P.C vide exhibit-3.

In his cross-examination, PW-4 replied that the police recorded his statement after two days. He was called to the police station to record his statement. One unknown person informed him that police has summoned him to the police station. He went to the police station accompanied by his uncle Fakaruddin and Abdul Hoque. All the three gave statements before the police.

31. The medical officer who conducted autopsy on the dead body of the deceased was examined in the case as PW-6. He deposed in his evidence that on 22.06.2013, he was at Karimganj Civil Hospital. On that day, he conducted post mortem examination on the dead body of the deceased on police requisition and found the following injuries:

"An average built male, aged about 35 years whose rigor mortis present, eyes-closed, mouth-closed. One incise wound size 3"(L) X 2 ½" (W) X 2" (d) seen over the front and left side of neck cutting trachea into two pieces and cutting blood vessels, muscles and other subcutaneous tissues. Blood seen over face, arms and upper chest interiorly.

Heart: right side containing dark blood & left side empty. Small intestines and its contents – containing mucoid substance. Large intestine and its contents – containing fecal matter. Others are pale and healthy."

Doctor opined that the death was due to hemorrhage & shock resulting from the injuries sustained.

The Medical Officer proved the post mortem report vide exhibit-8.

32. PW-5 is the Investigating Officer (for short, IO). He deposed in his evidence that he received information over phone about a homicidal death and accordingly he recorded a GD Entry vide Patharkandi PSGDE No.605 dated 22.06.2013 vide exhibit-4. Then he

went to the place of occurrence along with his staff and noticed one body lying in the place of occurrence. The wife of the deceased and his elder brother were also present there. He conducted inquest on the dead body of the deceased. Thereafter, the dead body was forwarded for post mortem examination. He recorded the statement of the witnesses and prepared the sketch map of the place of occurrence vide exhibit-5. On the following day, he received a written FIR, which was registered as Patharkandi P.S. Case No.118/2013 under Sections 147/148/341/302 IPC. During investigation, he seized one pair of chappal and one mobile handset belonging to the deceased from the place of occurrence vide exhibit-6 seizure list. After completion of the investigation, he submitted charge sheet against the accused persons under Sections 147/341/302/201 IPC vide exhibit-7.

PW-5 stated in his cross-examination that GD entry was made on the basis of the information given by one Azijur Rahman. He informed that his cousin was murdered by someone. He did not mention in the case diary whether he met Azijur Rahman in the place of occurrence. He did not record the statement of Azijur Rahman under Section 161 Cr.P.C.

PW-5 in his cross examination specifically stated that Monowara Begum did not state before him that Sahabuddin and other persons witnessed the incident, while they were proceeding on their bike. But from the cross examination of PW-1, it reveals that there was no contradiction taken by the defence counsel on that point while cross examining the PW-1. Only suggestion was given to PW-1 that she did not witness the incident and she came to know about the incident regarding death of her husband from police. It was also suggested that she did not know how her husband died.

33. It appears from the record that the investigating officer was examined first on 26.02.2016 and on that day, further cross examination of PW-5 was kept reserved and subsequently, the PW-5 was cross examined on 07.09.2016. After completion of recording of statement of PW-5 he was discharged. Subsequently, PW-5 was recalled. It is not clear from record or order-sheet why PW-5 was recalled on 26.07.2018, i.e., after two years of the closure of the evidences. Further examination-in-chief of PW-5 was recorded on 01.09.2018 and he was again cross-examined on the same date and on 14.09.2018. We do not understand as to why the IO was summoned so many times to adduce his evidence after closure of his evidence, i.e. in examination-in-chief and in cross examination respectively. It is also not understood from the sequence of the case as to why the making of improvement of the story given by the IO on subsequent dates of his examination was accepted by the trial court. It appears from the conduct of the trial court that the summoning of the IO several times was to prove the loop holes in the investigation of the case which led to the acquittal of the respondents.

34. Admittedly, there are three eye witnesses to the incident. Though PW-5 stated that PW-1 did not state before him that Sahabuddin and other persons had witnessed the incident, while they were proceeding on a bike. But the witness had not contradicted during her cross examination. Hence, whatever stated by the Investigating Officer that was not recorded in the case diary, but from his own imagination. In the evidence of PW-3 and PW-4 also, no contradictions have been noticed on the material point. If we discard the evidence of PW-2, the prosecution has considerably proved the fact that PW-1, PW-3 and PW-4 were present when the incident occurred and they had seen the incident of murder being committed of the deceased by Jakir and Moinul, with the help of other accused/respondents.

35. In a recent case of Birbal Nath Vs. State of Rajasthan, reported in 2023 SCC Online SC 1396, it was held that statement given to police during investigation under Section 161 cannot be read as an 'evidence'. It has a limited applicability in the Court of Law as prescribed under Section 162 of the Code of Criminal Procedure. No doubt, statement given before police during investigation under Section 161 are 'previous statement' under Section 145 of the Evidence Act and therefore can be used to cross examine a witness. But this is only for a limited purpose to 'contradict' such a witness. Even if the defence is successful in contradicting a witness, it would not always mean that the contradiction in her two statements would result in totally discrediting these witnesses. It is here that we feel that the learned Judges of the High Court have gone wrong. The contradiction in the two statements may or may not be sufficient to discredit a witness.

36. In Rammi Vs. State of MP, reported in (1999) 8 SCC 649, the Hon'ble Supreme Court has held as under:

"When an eye witness is examined at length, it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps, an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But the Court should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny."

In the same case, how far a contradiction in the two statements can be used to discredit a witness has also been discussed, which reads as follows:

"It is a common practice in the trial Courts to make out contradictions from the previous statement of the witness for confronting him during cross examinations. Merely because there is inconsistency in evidence it is not sufficient impair the credit of the witness. No doubt Section 155 of the Evidence Act provides scope for impeaching

the credits of a witness by prove of an inconsistent former statement. But a reading of the Section would indicate that all inconsistent statement are not sufficient to impeach the credit of the witness. The material portion of the Section is extracted below:

“……155 impeaching credit of witness: the credit of a witness may be impeached in the following ways by the adverse party or with the consent of the Court by the party who calls him.

1… 2….

3. By prove of former statements inconsistent with any part of his evidence which is liable to be contradicted;”

A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Only such of inconsistent statement which is liable to be contradicted would affect the credit of the witness. Section 145 of the Evidence Act also enable the cross examiner to use any form of statement of the witness, but it cautions that if it is intended to contradict the witness, the cross examiner is enjoined to comply with the formality prescribed therein. Section 162 of the Code also permits the cross examiner to use the previous statement of the witness (recorded under Section 161 of the Code) for the only limited purpose i.e. to contradict the witness.

37. In Tahsildar Singh and Another Vs. State of Uttar Pradesh, reported in AIR 1959 SC 1012, it was held that to contradict a witness would mean to discredit a witness. Therefore, unless and until the former statement of the witness is capable of discrediting a witness, it would have little relevance. A mere variation in the two statements would not be enough to discredit a witness. This has been followed consistently by the Hon’ble Supreme Court in its later judgment including Rammi (supra).

38. Moreover, in this case, the learned trial Court has relied much more on the evidence of PW-5, the Investigating Officer and the CW-1 and CW-2 and lost sight of other more relevant factors such as the evidence of three eye witnesses whose evidence have not been discussed by the learned trial court.

39. However, the fact that the incident happened is also not in doubt. There is no doubt that the incident took place which resulted in the death of the deceased Badar Uddin. It may not have happened exactly as narrated by PW-2, yet for this discrepancy the entire testimony of the PW-2 cannot be discarded.

40. Regarding defective investigation, the following decisions deal with the certain kinds of defects in investigation. In the case of Union of India Vs. Prakash P Hinduja and another, reported in AIR 2003 SC 2612, Hon’ble Supreme Court has held that as a

general principle, it can be stated that mere defective investigation cannot have any impact unless miscarriage of justice is brought about or serious prejudice is caused to the accused.

41. In the cases of Amar Singh Vs. Balwinder Singh and another reported in AIR 2003 SC 1164, Sambhu Das and another Vs. State of Assam reported in AIR 2010 SC 3300, the Hon'ble Supreme Court has observed that if the prosecution case is established by the evidence produced, any failure or omission on the part of the IO cannot render the case of the prosecution doubtful.

42. In Ram Bihari Yadav Vs. State of Bihar and others reported in AIR 1998 SC 1850, Parash Yadav Vs. State of Bihar reported in AIR 1999 SC 644, Dhanraj Singh and others Vs. State of Punjab reported in AIR 2004 SC 1920, Ram Bali Vs. State of UP reported in AIR 2004 SC 2329, Hon'ble Supreme Court has observed that if direct evidence is credible, failure, defect or negligence in investigation cannot adversely affect the prosecution case, though the Court should be circumspect in evaluating the evidence.

43. If investigation is illegal or suspicious, the rest of the evidence must be scrutinized independent of the impact of faulty investigation, otherwise criminal trial descends to the IO ruling the roost. Yet, if the Court is convinced that the evidence of eye witnesses is true, it is free to act upon such witness though the role of the IO in the case is suspicious (Abu Thakir & Others Vs. State, represented by Inspector of Police, Tamil Nadu, reported in AIR 2010 SC 2119). An accused cannot be acquitted on the sole ground of defective investigation; to do so would be playing into the hands of the IO, whose investigation was defective by design vide Dhanraj Singh (supra). Mere defective investigation cannot vitiate the trial. (Paramjit Singh Vs. State of Punjab AIR 2008 SC 441).

44. On the point of not sending blood stained clothes to the FSL, the Hon'ble Supreme Court has held that cogent evidences of eye witnesses cannot be rejected on account of the failure of the IO to send blood stained clothes for chemical examination, as rendered in Nirmal Singh and another Vs. State of Bihar, reported in AIR 2005 SC 1265.

45. In the case of Sheo Shankar Singh Vs. State of Jharkhand and Another, reported in AIR 2011 SC 1403, the Hon'ble Supreme Court has held that failure to forward the alleged blood stained clothes to FSL is a deficiency which, however, does not necessarily lead to the conclusion that the prosecution case is unworthy of credit. In such a case, the Court is required to be more circumscribed in evaluating the evidences.

46. Coming to the point on manipulation of the FIR, the learned counsel for the respondents contended that on the information given by one Azijur, one GD entry was recorded vide GD Entry No. 605 dated 22.06.2013, which should be treated as FIR,

wherein it was not reflected as to who had committed the crime. The subsequent FIR lodged by the PW-1, alleging the names of the respondents cannot be treated as an FIR, as it is hit by Section 162 Cr.P.C. According to the learned counsel for the respondents, the fact of manipulation of FIR was proved by PW-5, CW-1, and CW-2 and the trial Court had believed their evidences and had rightly acquitted the respondent Nos. 1 to 8 accordingly.

Let us evaluate the evidence of PW-5, CW-1, and CW-2 who deposed before the trial court on the point of manipulation of the FIR. According to PW-5, he had received the first information report (FIR) on 23.06.2013 and had registered a case vide Patharkandi Police Station Case No.118/2013. The name of the informant was Monowara Begum who proved the FIR vide exhibit-1. One Asab Tapader of Patharkandi had written the said first information report. But he did not record his statement. He had recorded the statement of one Jilul Ahmed, son of Abdul Rekib vide exhibit-9. He had recorded his statement by mistake. In exhibit-9, the name of Jilul Ahmed has been struck off and the name of Asab Tapader has been inserted by him vide exhibit-9(2).

47. PW-5 has subsequently given the clarification that the FIR vide exhibit-1 was actually scribed by Asab Tapader and he had recorded his statement, but as usually Jilul Ahmed used to write FIR at the police station, due to inadvertent mistake he had written the name and description of Jilul Ahmed in exhibit-9 in place of Asab Tapader.

48. CW-1 is Ashab Uddin Talukdar. He deposed in his evidence that he had seen exhibit-1 in the case record of Sessions Case No.30/2015. The same was in his handwriting and after he wrote the FIR, he put his signature thereon as scribe vide exhibit-1(2). A person named Fakar Uddin had come with a lady Monowara Begum and two/three others for the purpose of scribing the FIR. They narrated the incident and accordingly he had written the same. Thereafter, he had read over the same to them and had taken the signature of the informant Monowara Begum in the said FIR.

49. In his cross examination, the CW-1 replied that he did not know Monowara Begum personally. His name is Asab Uddin Talukdar. In his school certificate, his name is mentioned as Asab Uddin. He did not write his surname as Tapader.

CW-2 is Jilul Ahmed. This witness claimed that in the year 2013, Monowara Begum had come to him at around 9.30 A.M. along with 4/5 persons and stated that someone had killed her husband and requested him to write an FIR in connection with the murder of her husband. His shop is located near the Patharkandi Police Station. She had come to his shop. He had scribed the FIR as per her version. On the next day, the Officer-in-Charge of Patharkandi Police Station had called him in the police station and had recorded his statement. He had seen the case record of Sessions Case No.30/2015. He had seen the exhibit-1 in the case record, wherein the first informant was Monowara Begum, but he had not scribed the said FIR.

50. In his cross examination, CW-2 had stated that he had not seen the FIR written by him at the police station. He used to write FIR almost every day for different persons.

51. From the statement of CW-2, it reveals that he was cross examined by the prosecution and subsequently by the defence. Usually the court witness is called by the court to assist the court on the point and issues. We do not understand as to why the CW-2 was cross examined by the prosecution and then by the defence. The witness was not declared hostile. It is also not clear before us as to why this witness was brought by the prosecution to prove the FIR or to fill up the lacunae in the investigation of the case.

52. The crucial question for consideration is the evidentiary value of such statement which culminated in registration of the FIR. It is settled law that the FIR cannot be used as a substantive piece of evidence. It can only be used as a previous statement for the purpose of either corroborating its maker under Section 157 of the Indian Evidence or contradicting him under Section 145 of the Indian Evidence Act. It cannot be used for the purpose of corroborating or contradicting other witnesses.

53. In the case of Sheikh Hasib Vs. State of Bihar reported in 1972 Criminal Law Journal 233, the Hon'ble Supreme Court has explained the purpose and value of FIR in the following language:

"The principle object of the first information report from the point of view of the informant is to set the criminal law in motion and from the point of view of the investigating authorities is to obtain information about the alleged criminal activity so as to be able to take suitable steps for tracing and bring into book the guilty party. The first information report, we may point out, does not constitute substantive evidence though its importance as conveying the earliest information regarding the occurrence cannot be doubted. It can, however, only be used as a previous statement for the purpose of either corroborating its maker under Section 157 of the Indian Evidence Act or for contradiction under Section 145 of the said Act. It cannot be used for the purpose of corroborating or contradicting other witnesses..."

Similar view was taken in Harkirat Singh Vs. State of Punjab, reported in 1997 Cri L.J. 3954 and Madhusudan Singh and another Vs. State of Bihar, reported in AIR 1995 SC 1437.

54. In the case of Yanob Sheikh Vs. State of West Bengal, reported in (2013) 6 SCC 428, the Hon'ble Supreme Court has held as under:

"An FIR normally should give the basic essentials in relation to the commission of the cognizable offence upon which the investigating officer can immediately start his investigation in accordance with the provisions of Section 154 of the Cr.P.C. A written complaint with such basic details was given by PW-1 under his signature with the police

officer who then made the endorsement as exhibit-1 and registered the FIR as exhibit-1(3). In the circumstances, we are unable to accept the contention that exhibit-7 was in fact and in law the FIR and that exhibit 1(3) was the second FIR for the said incident/occurrence which was not permissible and was opposed to the provisions of Section 162 of the Cr.P.C."

55. In the case of Sidhartha Vashist Alias Manu Sharma Vs. State (NCT of Delhi) reported in (2010) 6 SCC 1, the Court took the view that cryptic telephonic message could not be treated as FIR as their object is only to get the police to the scene of offence and not to register the FIR. The said intention can also be clearly culled out from the bare reading of Section 154 of the Cr.P.C., which states that information if given orally should be reduced to writing, read over to the informant, signed by the informant and a copy of the same be given to him free of cost. Similar view was also expressed in the case of State of Andhra Pradesh Vs. V V Panduranga Rao reported in (2009) 15 SCC 211 where the Court observed as under:

"Where the information is only one which required the police to move to the place of occurrence and as a matter of fact the detailed statement was recorded after going to the place of occurrence the said statement is to be treated as FIR. But where some cryptic or anonymous oral message which did not in terms clearly specify a cognizable offence cannot be treated as an FIR. The mere fact that the information was the first in point of time does not by itself clothe with the character of FIR. The matter has to be considered in the background of Section 154 and 162 of the Cr.P.C. A cryptic telephonic message of a cognizable offence received by the police agency would not constitute an FIR."

Thus, the purpose of telephone call made by one Azijur in the instant case, when admittedly he gave no details leading to the recording of the GDE No. 605 dated 22.06.2013, would not constitute the FIR as contemplated under Section 154 of the Cr.P.C. Thus, the submission of the learned counsel for the respondent Nos.1 to 8 cannot be stated to be well founded.

56. Regarding inconsistency between ocular evidence and medical evidence, according to PW-1, accused Jakir attacked her husband with a long dao and dealt a blow to her husband and he fell on the ground. Subsequently, on the direction of Jabrul, Moinul had slit her husband's throat. PW-2 also deposed in the same tune that Jakir inflicted a dao blow on the deceased Badar Uddin, as a result of which he fell on the ground. Thereafter, on the direction of Jabrul, Moinul slit Badar Uddin's neck. PW-3 stated that Jakir emerged from the jungle, armed with a dao and dealt a blow on deceased Badar Uddin and he fell on the ground. Then Moinul slit on Badar Uddin's neck. It is interesting to note that PW-1, 2 and 3 categorically stated that Jakir dealt a blow with a dao on the deceased and he fell on the ground. But none of the witnesses i.e. PW-1, 2

and 3 stated that due to the alleged dao blow, the deceased sustained any injury on his person. According to them, on getting hit by the dao, the deceased fell on the ground. Perhaps he might not have received any such grievous injury due to such dao blow. As per post mortem report, Doctor found one incised wound on the neck of the deceased causing his death. It transpires that the ocular evidence clearly corroborates the medical evidence.

57. As per post mortem report, blood is seen on the face, arm and upper chest of the deceased which suggests some injuries in that area, which may be due to the body of the deceased being flung by the respondent Nos.1 to 8.

58. According to PW-4, on hearing a commotion from the place of occurrence, he came to the spot and found the respondent Nos.1 to 8, lifting the body of the deceased Badar Uddin and flinging it around 15/16 feet below the road. He along with Monowara, Fakaruddin and Abdul found Badar Uddin dead. He had noticed injury on his neck. In a nutshell, the deceased had sustained injuries on his neck, which resulted in his death. The above being said, the Hon'ble Supreme Court has recently reaffirmed the paramount importance of an eye witness's account in criminal trials in the case of Rameshji Amar Singh Thakor Vs. State of Gujarat, reported in 2023 SCC Online SC 1321. In the said case, it was held that:

"On being taken through the depositions and the judgment of the trial court, we are satisfied that the trial court had ignored the deposition of the prosecution witnesses and referred to very minor contradictions in support of its judgment of acquittal. The contradiction in number of injuries was not fatal to the prosecution case. Nor can the prosecution case altogether be negated because the fatal injuries in the opinion of the autopsy surgeon could not have been caused by the recovered knife. The eye witness account is consistent that the deceased was stabbed by the appellant and on this count there is no inconsistency.....even if in the opinion of the autopsy surgeon there was mismatch of the knife with the injuries caused, the Doctor's evidence cannot eclipse ocular evidence. The evidence on post-occurrence is consistent....."

59. In view of the above discussion and the laws laid down by the Hon'ble Supreme Court, we have come to the conclusion that the trial court had placed undue emphasis relatively on minor contradictions in the statement of the witnesses, while ignoring the overall testimony of the prosecution witnesses. The contradictions in the number of injuries were not fatal to the prosecution case as observed above.

60. Now coming to the question whether respondent Nos.1 to 8 are all responsible for committing the murder of the deceased Badar Uddin. It is seen that charge was framed against the respondent Nos.1 to 8 under Sections 147/341/302/149 IPC. According to PW-1, 2 and 3, they had seen the accused Jakir had dealt a blow with a dao on the deceased and accused Moinul had slit the throat of the deceased. The other

respondents lifted the body of the deceased and flung it about 15/16 feet below the road. PW-4, who had come to the spot on hearing commotion, had also supported/corroborated the said fact.

61. It is essential to prove that the person who is sought to be charged with an offence with the aid of Section 149 IPC, is a member of the unlawful assembly at the time when the offence was committed. Admittedly, accused Jakir was armed with a dao and Moinul was armed with a sharp cutting weapon, by which he had slit the neck of the deceased. But there is no whisper in the evidence of the witnesses, as to whether the other accused persons had carried any weapon at the relevant time of the incident, though their presence in the place of occurrence is not in dispute and that they were also involved in the commission of the offence by creating an unlawful assembly.

62. What has to be proved against the person who is alleged to be a member of an unlawful assembly, is that he is one of the persons constituting an assembly and he entertained along with the other members of the assembly, the common object as defined by Section 141 IPC. Section 142 IPC provides that whoever, being aware of facts which render any assembly an unlawful assembly intentionally joins that assembly or continues in it, is said to be a member of an unlawful assembly. In other words, the assembly of the eight respondents, actuated by and entertaining one or more common objects specified by the five clauses of Section 141 is an unlawful assembly. The crucial question to determine in such a case is whether the assembly consisted of five or more persons and whether the said persons entertained one or more of the common objects as specified by Section 141 IPC.

63. In fact, Section 149 IPC makes it clear that if an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who at the time of committing of that offence is a member of the said assembly, is guilty of that offence. The same emphatically brings out the principle that the punishment prescribed by Section 149 IPC is in a sense vicarious and does not always proceed on the basis that the offence has been actually committed by which member of the unlawful assembly.

64. It is to be seen, therefore, that the essence of an offence under Section 149 of the IPC would be a common object of the person forming the assembly. It is necessary for constitution of the offence that the object should be common to the persons who compose the assembly i.e. that they should all be aware of it and concur with it. Furthermore, there must be some present and immediate purpose of carrying into effect the common object. A common object is different from a common intention in so far as in the former, no prior consent is required nor a prior meeting of minds before the attack would be required, as an unlawful object can develop after the people get

there and there need not be a prior meeting of minds. However, common intention refers to a prior meeting of mind or a shared purpose.

65. In the case in hand, having regard to the peculiar facts and circumstances of the case, we are of the view that the respondent No.6 Jakir Hussain came to the spot with a dao along with the other respondents and dealt a blow with the said dao on the deceased, as a result of which he fell on the ground. Subsequently, respondent No.7 Jabrul Haque directed respondent No.1 Moinul Hoque to slit the neck of the deceased and accordingly, Moinul Hoque slit his throat with a sharp cutting weapon. Thereafter, all the respondents lifted the body of the deceased and threw it below the road. The said acts on the part of the respondents show that they had common object to commit the murder of the deceased Badar Uddin, which may have developed on the spur of the moment on the spot.

66. We are conscious that in an appeal against acquittal, the appellate court would not ordinarily interfere with the order of acquittal. But, where the approach of the trial court suffers from serious infirmity, this Court can re-appreciate the evidence and reasoning upon which the order of acquittal is based. A miscarriage of justice which may arise from the acquittal of the guilty is no less a miscarriage of justice than from the conviction of the innocent. Upon re-appreciation of the evidence and the reasoning of the trial court, in our considered view, the judgment of the trial court suffers from serious infirmity. The trial court erred in doubting the version of PWs 1, 2 and 3, the eye-witnesses to the incident, whose evidence are corroborated by the medical evidence. The trial court did not appreciate the evidence of PW-1, 2, 3 and 4 in proper perspective and erred in disbelieving their version on the contradictions which are not material. The trial court erred in rejecting the credible evidence of PWs 1, 2, 3 and 4 which in our considered view resulted in miscarriage of justice.

67. Where the evidence has not been properly analyzed or the trial court has acted on surmises and the finding of the impugned judgment is unreasonable, it is the duty of the appellate court to set right the wrong. In the instant case, the trial court has ignored the credible evidence of PWs1, 2, 3 and 4 and unnecessarily laid emphasis on the minor contradictions and omissions. In view of the evidence on record, and the judgments referred to by the learned counsel for the parties, we find that judgment passed by the trial court granting benefit of doubt to the respondent No.1 to 8 is clearly perverse and untenable. Consequently, the judgment of acquittal passed by the learned Sessions Judge, Karimganj in Sessions Case No.30/2015 is hereby set aside. We accordingly find them guilty of the charge under Sections 302/149 IPC.

68. Accordingly, the respondent No.1 to 8 namely, Moinul Haque, Samsul Haque, Asad Uddin, Abdul Basir @ Abdul Basit, Giash Uddin, Jakir Hussain, Jabrul Haque and Faijul Haque are convicted under Sections 302/149 IPC and are sentenced to undergo

rigorous imprisonment for life for the offence under Sections 302/149 IPC and to pay a fine of Rs.5000/- each and in default, RI for six months each.

69. The respondent/accused No.1 to 8, namely, Moinul Haque, Samsul Haque, Asad Uddin, Abdul Basir @ Abdul Basit, Giash Uddin, Jakir Hussain, Jabrul Haque and Faijul Haque shall surrender themselves forthwith within a week from today before the learned trial court, who shall then send them to judicial custody, or else they should be arrested and sent to judicial custody.

70. In the result, appeal is allowed.

71. Send back the LCR.