

Cr1.A. 171/2013

BEFORE

HON'BLE MR. JUSTICE UJJAL BHUYAN

HON'BLE MR. JUSTICE AJIT BORTHAKUR

JUDGMENT & ORDER (CAV)

(Ajit Borthakur, J)

Heard Mr. HRA Choudhury, learned senior counsel assisted by Ms. S. K. Nargis, learned counsel appearing for the accused appellants and Mr. K. Konwar, learned Additional Public Prosecutor, Assam.

2. The above 5 (five) appeals under Section 374 (2) of the Cr.P.C., have been preferred against the judgment and order, dated 27.05.2013, passed by the learned Sessions Judge, Morigaon, Assam in Sessions Case No.95/2006, whereby the appellants are convicted and sentenced to suffer rigorous imprisonment for 6 (six) months and to pay a fine of Rs.1,000/- (Rupees One Thousand only), in default of payment of fine to undergo simple imprisonment for a further period of 01 (one) month under each Sections of 147 & 148 IPC respectively. The appellants are further sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.10,000/- (Rupees Ten Thousand only) under Sections 302/149 of the IPC in default, to undergo rigorous imprisonment for a further period of 01(one) year and to pay a fine of Rs.1,000/- (Rupees One Thousand only) under each count of law under Sections 149/201 IPC of the IPC, in default of payment of fine to undergo simple imprisonment for a further period of 01 (one) month each.

3. The prosecution case, in brief, is that one Md. Baharul Islam, s/o late Newajuddin, a resident of Chitalmari Char, Morigaon, Assam lodged an FIR on 02.07.1997, with the Officer-in-Charge, Moirabari P.S., alleging that on the previous day, i.e., on 01.07.1997 at about 03.00 pm, the appellants and 30(thirty) others named therein, held a secret meeting on the backside of the mill of accused Md. Giasuddin Mukter aided by accused Md. Kutubuddin Mukter and appellant Md. Nazrul Islam. In the said meeting, it was decided to attack Chitalmari char on 02.07.1997. Pursuant to the aforesaid decision, the accused-persons armed with deadly weapons such as guns, knives, spears etc. came in 2 (two) machine boats at about 10.00 O'clock in the morning on that day, i.e., 02.07.1997 and initially attacked the house of Newazuddin, the father of the informant, situated at Chitalmari char. When Newazuddin attempted to run away, on the order of one Md. Abdul Mazid, the accused persons named in the FIR, apprehended him after a chase in the house of one Hamed Ali. Md. Ajgar Ali shot dead Newazuddin. When Hamed Ali stepped forward to help him, he too was shot dead by accused Khazul Hoque. In the meantime, when from the said house, the wife of Kamaruddin came forward, appellant Abdul Salam assaulted her to death with sharp weapon. Thereafter, all the accused persons, looted the house of Newazuddin and took away their cattles, paddy, garlic and other stuff, approximately valued at Rs.70,000/- (Rupees Seventy Thousand only). At the time of leaving, the accused persons took away the dead bodies of Newazuddin and Hamed Ali in the machine boats and left a lot of people wounded with sharp weapons.

4. Based on the above FIR, Moirabari P.S. Case No.53/1997 under Sections 147/ 148/ 149/ 109/ 302/ 326/ 325/ 379/ 201 of the IPC, dated 03.07.1997 was registered and the Officer-in-Charge SI Rabin Bezbaruah (since expired) himself took up the investigation into the case.

5. It is pertinent to mention here that before the aforesaid written FIR was received, verbal information about the occurrence was received from one Md. Lalu Maral, the Mahaldar of Moirabari, and accordingly Moirabari P.S. GD Entry No.22, dated 02.07.1997 was made and thereupon, the Police forthwith launched investigation.

6. After completion of investigation, the investigating officer, SI Ghanakanta Saikia submitted the Charge-Sheet under Sections 147/148/149/209/379/302/201 of the IPC against 27(twenty seven) accused persons inclusive the convicted 6(six) appellants showing 15(fifteen) of them absconders. Subsequently, the case was

s registered as G.R. Case No.455/1997. After furnishing copy as required under Section 207 of the Cr.P.C., the case was committed by the learned Sub-Divisional Judicial Magistrate (S), Morigaon under Section 209 of the Cr.P.C., to the Court of learned Sessions Judge, Morigaon vide order, dated 07.08.2006, passed in G.R. Case No.455/1997. Thereafter, the said case was registered as Sessions Case No.95/2006 in the Court of learned Sessions Judge, Morigaon. After perusal of the materials on the case diary and hearing the learned counsel of both the sides, the learned Sessions Judge framed charges under Sections 147/148/149/302/201/379/34 of the IPC against all the accused persons inclusive the appellants vide order, dated 01.03.2007. The charges were read over and explained to the accused persons to which they pleaded not guilty and claimed to be tried.

7. In course of trial, the prosecution examined as many as 15(fifteen) witnesses including the investigating officer and the doctor. After closing the evidence of the prosecution side, the learned Sessions Judge recorded the statements of the accused persons under Section 313 of the Cr.P.C. The appellants pleaded not guilty and appellant Nazrul Islam inclined to examine witnesses in defence. The appellant, namely, Nazrul Islam took the plea of alibi and in support of this plea examined himself and 2(two) other witnesses. The learned Sessions Judge after hearing the arguments advanced by the learned counsel of both the sides and appreciation of evidence adduced by both the sides, convicted and sentenced the appellants, as stated above.

8. By the above appeals, the appellants have assailed the impugned judgment and order, dated 27.05.2013, passed by the learned Sessions Judge, Morigaon in Sessions Case No.95/2006 on the common grounds, inter alia, that-

(i) The learned Court below failed to appreciate the relevant laws and evidence from proper perspective;

(ii) The evidence of the prosecution witnesses reveal inherent inconsistencies and contradictions in material particulars and exaggerations by way of improvement over their statements given under Section 161 Cr.P.C.;

(iii) There are apparent inconsistencies between the ocular evidence and the medical evidence;

(iv) The learned Court below overlooked the Moirabari P.S. GD Entry, dated 02.07.1997, recorded on verbal information given by P.W.4, wherein no name of miscreants was mentioned and failed to appreciate that it was the first information report (FIR) received before the written FIR, dated 02.07.1997, was received from P.W. 1 Md. Baharul Islam, wherein the names of the miscreants were mentioned in his hit by Section 162 Cr.P.C.;

(v) The learned Court below has taken into consideration of certain incriminating evidence, which were omitted to be put to the appellants in their statements, recorded under Section 313 of the Cr.P.C. as per requirement affording them opportunity to explain those circumstances.

9. Section 146 of the IPC defines the term 'rioting' as whenever force of violence is used by an 'unlawful assembly' defined in Section 141, or by any member composing such assembly in prosecution of the common object, which is punishable under Section 147 of the IPC. When such 'unlawful assembly' is guilty of rioting, being armed with deadly weapons or with anything which, used as a weapon of offence, is likely to cause death is made punishable under Section 148 of the IPC. Section 149 of the IPC per se constitutes a substantive offence based on the common object and principle of vicarious liability. Section 148 conceives of direct liability, while Section 149 of the IPC focuses on constructive liability of 'unlawful assembly'. Therefore, an accused can be convicted of offence under Section 302 with the aid of Section 149 of the IPC as the factum of direct or overt act of the accused is not always relevant, when he is roped in with the aid of Section 149 of the IPC. Further, Section 299 of the IPC defines the expression 'culpable homicide' and it consists of in the doing of an act-(a) with the intention of causing death;(b) with the intention of causing such bodily injury as is likely to cause death; or (c) with the knowledge that the act is likely to cause death. On the other hand, Section 300 of the IPC defines what is 'murder', which is an unlawful homicide with malice aforethought and satisfies any

of the requirements of the 4 (four) circumstances defined therein. Culpable homicide is not murder if the alleged criminal act of the accused proved to have committed under any of the 5 (five) Exceptions to Section 300 of the IPC. Moreover, when the act of an offence committed by the accused is proved, but he intentionally or knowingly caused disappearance of evidence of such offence in any manner to screen himself from legal punishment is punishable under Section 201 of the IPC.

10. In view of the above legal requirements to be proved by evidence under the charges framed against the appellants, let us briefly look to the evidence on record.

11. P.W. 1 Md. Baharul Islam, s/o Md. Abbash Ali, is a resident of Chitalmari Char. His evidence is that on a day at about 09.10 am, the occurrence had taken place. He noticed from a distance of about 30/35 fathoms that about 100-150 persons being armed with guns, spears, dao etc. getting down from 2 (two) motor boats in their village. Amongst those persons, he recognized Giasuddin Mukter, Kutubuddin Mukter, Nazrul, Abdul Mazid, Abdul Salam, Ajgar Ali, Mofizuddin and Khajaluddin and also noticed them and others chasing after Newajuddin, Malek, Baharul Islam and Jahirul Islam. The said persons, who were chased after entered for shelter in the house of Hamed Ali. Baharul Islam managed to sneak away from the aggressors and hid himself in the nearby jute field. The said aggressors caused damage to the walls. Ajgar fired gun shots at Newajuddin. Newajuddin sustained bullet injury and he was dragged to the courtyard. Mojid and Giasuddin had inflicted injuries on him by dao. Thereafter, initially they attempted to assault the owner of that house namely Hamed Ali, but Khajaluddin fired gun shots at him resulting in his instantaneous death on the spot. The brother of Hamed Ali, Kamaruddin, who came forward to save Hamed was also thrashed on his head by Giasuddin. Thereafter, the wife of Kamaruddin came out of house and she was also assaulted by Giasuddin and Mojid. Nazrul had thrust the spear on Malek causing injuries on his abdomen and leg. Wife of Kamaruddin succumbed to her injuries on the spot. The dead body of Newajuddin and Hamed Ali were carried away by them and cut the dead bodies into pieces and threw off the body parts into the river. He was observing the aforesaid entire incident from his hiding place in the nearby jute field.

In the afternoon, the dead body of the wife of Kamaruddin was taken away by the police. Before retreating, the accused persons looted the houses of Newajuddin, Abdul Malek and Hamed Ali. Jahirul Islam also saw the occurrence. In cross-examination, he deposed, inter-alia, that few days before the incident, Giasuddin Mukter went there and attempted to strike a deal in respect of the landed property occupied by the people in that village, but Newajuddin disagreed to the proposal. He denied the defence suggestion that he did not state the aforesaid facts in his statement recorded under Section 161 of the Cr.P.C. He further deposed that they had information on the previous day that the dacoits would attack their char (riverine village), but he did not inform anybody.

12. P.W. 2 Md. Abdul Malek is a resident of Chitalmari Char. His version is that on a Wednesday at about 09.10 am, he noticed Giasuddin, Kutubuddin, Nazrul, Abdul Mojid, Ajgar, Hamed, Khajal running towards the west by the embankment of the river Brahmaputra and they were raising 'hullah'. He ran to the house of Newaj and called him out. He along with Newaj, Baharul and Jahirul ran to the house of Hamed. At the house of Hamed, they saw other persons by the side of his house and as such, Newaj, himself and Hamed entered the house of Hamed Ali for shelter. Mukibur caught hold of Jehirul and then caused damage to the walls of the house, where they were taking shelter. Ajgar fired shots from his gun piercing through the body of Newaj. Newaj fell down on the ground. Then, accused Giasuddin, Nazrul, Kutub, Nazrul, Mojid, Manash Ali and Salem assaulted Newaj by dao. He saw the incident from a distance of about 10 ft from Newaj. He was hit on his head, left hand and right leg and also in his abdomen causing injuries. He even sustained a spear blow on the left side of his waist. Hamed and Samsuddin assaulted him by spear and dao. Giasuddin Muktar pulled Newaj by his legs. They assaulted Hamed Ali too. Fajrul fired gun shots at Hamed. At that moment, he sneaked into the nearby jute cultivation area and saved himself. Kamaruddin arrived at that moment and he was also assaulted. Moment thereafter, the wife of Kamaruddin arrived.

ived and she was given thrust by single pronged spear. Then they looted the properties inclusive the live stocks of Abdul Malek, Newaj and Hamed Ali. Mofizuddin assaulted him (PW.2) by a dao. Hamed, Mojid and Samsuddin claimed the land of Newaj and therefore, there was land dispute. In cross-examination, he, inter alia, deposed that Giasuddin and Nazrul are residents of Moirabari Bazar. The house of Newaj is situated at a distance of about 8 Nals from his house and the house of Hamed is situated at a distance of about 7-8 nals from his house. On the previous day, he came to know about the plan of dacoits from Moirabari Bazar to attack their char, but it was not informed to the Police. The dacoit party went to Chitalmari Char on 2(two) motor boats, one from the eastern side and another from the western side and there were about 100-150 persons. At the relevant time, most of the inhabitants of the char were away at the Wednesday market, there was no befitting attempt to resist the dacoits. He was brought to the Court premises to identify some of the suspects, but he could not identify any of them. He denied a number of defence suggestions by way of drawing attention to the contradictions between his evidence and his statement under Section 161 Cr.P.C.

13. P.W. 3 Md. Baharul Islam, s/o late Newajuddin is a resident of Chitalmari Char and one of the informants in this case. According to him, on a day, at about 10.00 am, the incident took place and at the relevant time, he was at home, situated about 50-20 nals away from the house of Hamed Ali, where the incident had initially taken place. The house of Jahirul Islam is situated between his house and the house of Hamed. On the previous day, there was Moirabari bazar. Kasem and he were in the said bazar and they noticed Giasuddin Muktar, Abdul Mojid Bepari, Abdul Salam, Mofizuddin, Samsuddin, Abdul Hamed, Allaboxa, Mannan and Others in the courtyard of Giasuddin Muktar. They were discussing if the land of Chitalmari Char was not surrendered to them, they would attack the occupants of the said char and Newajuddin and Hamed Ali should be killed. They could hear all these discussions from a distance of about 4-5 nals. Both of them informed Lal Miya and Newaj about the aforesaid plan of attack. Thereafter, he, Newaj, Hamed Ali, Abdul Malek, Abdul Kasem, Jahirul Islam, Khajaluddin, Kamaruddin disclosed the plan of attack to the people of the char.

14. P.W. 4 Lal Mia is a resident of Chitalmari village. His evidence is that on Wednesday Moirabari bazar day, while he was at his PCO, Baharul, Newaj and Kasem informed him at about 04.00 pm that Giasuddin, Kutubuddin Muktar, Mojid, Salam, Ajgar and some others gathered in the courtyard of Giasuddin Muktar and planned to attack Chitalmari Char and as such, he went to see them. He found them sitting in the courtyard of Giasuddin Muktar. He advised Newaj, Malek, Baharul to go back to Chitalmari Char and to keep their char guarding to prevent any attack. On the following day after the midday prayer, Sahidul informed him that there was an attack at Chitalmari Char by the accused persons and Newaj, Hamed Ali and Sar Banu @ Sarban Nessa were killed and many others were injured and it was further informed that Malek was injured badly. He talked to the injured Malek. Baharul was also with Malek and he was informed by Malek that accused persons arrived at Chitalmari Char by two launches (motor boats) and attacked the villagers and they also looted their household items and livestock. He informed the incident at Moirabari P.S. verbally. Subsequently, Baharul filed the written FIR. In cross-examination, he deposed, inter-alia, that Newaj is his nephew. He was initially convicted in Moirabari P.S. Case No.26/07 u/ss. 147/148/149/447/324/325/326/307/379 of the IPC read with Section 25 (i) (a) of the Arms Act. Accused Najrul is a Teacher. His father was a doctor. His elder brother Harun is an Officer in the Excise Department. There are about 80-90 families consisting of about 200-250 people at Chitalmari Char. He did not witness the occurrence. Newaj did not have any litigation with Giasuddin Muktar. He denied the defence suggestions so far his above evidence is concerned.

15. P.W. 5 Md. Kamaruddin is a resident of Chitalmari Char. According to him, on the Moirabari bazar day, Newaj, Hamed and Malek returned home at about 06.00-07.00 pm and called him (PW. 5) and informed that there was a meeting in the house of Giasuddin Muktar and they planned to attack Chitalmari Char and wanted to keep the Char guarding. After waiting till 10.00/11.00 pm, he went to sleep. On the following day, at about 09.00/10.00 am, he heard 'hulla' on the western si

de of the char accompanied by sound of firing. He noticed Newaj and Malek being chased by Hamed, Mukter, Mozid Ali, Salam, Ajgar Ali, Allal, Jalal, Kasem, Sorhab, Samsuddin, Farzul, Abul Hussain, Mojibur, Mokibur to the house of Hamed. Out of fear, he entered into his house. He could hear 'hulla' in the house of Hamed from all directions, but still he went out and his wife Saharbanu followed him. He could see dao in the hands of Mojid and Giasuddin Muktar. He went a little ahead and noticed Hamed and Newaj lying outside the house of Hamed and at that moment, he was assaulted by Mojid by a dao and in the result, he sustained injury on his shoulder. When his wife attempted to save him, accused Jalal assaulted his wife by a spear. She sustained 2 (two) injuries, one on the groin and the other by the side of upper portion of the chest. Salam hit him by a spear on his head. He fled into the jute cultivation area. Later on, he was removed for medical treatment. Subsequently, he heard that Newaj, Hamed and his wife died. He found his wife lying dead inside his home sustaining bleeding injuries. In cross-examination, he reinforced his evidence in-chief admitting the defence suggestion that he stated before Police to the effect that on 02.07.1997 at about 08.00/09.00 am, while he was at home, he saw his co-villager Newajuddin being chased by a party consisting of 50-60 persons armed with weapons like ballam, gun etc. He saw a crowd of assailants consisting of 50-60 persons coming from the side of the western side of the Char and another group consisting of 30-40 persons coming to the said char at the same time.

16. P.W. 6 Md. Jahirul Islam is a resident of Chitalmari Char. His version is that on a Wednesday at about 09.00/10.00 am, while he was on the bank of river Brahmaputra, he noticed 02(two) motor boats with 100-150 persons coming from the east and stopped near Chitalmari Char. At that time, he was along with Newaj, Malek and Baharul and they rushed to the house of Hamed. He along with the said 3 persons entered into the house of Hamed. Jalal, Allal, Mojid, Hazrat, Abdul Hussain, another Mojid, Giasuddin Muktar and Mohi assaulted Newaj by spear, dao and lathi. Ajgar and Farjul carried guns and they fired in the air. Newaj and Hamed were assaulted by Ajgar and others. Being assaulted, Hamed fled to the nearby jute cultivation area. Newaj was taken out from his house and his dead body was left in the courtyard. Ajgar and others removed the dead body of Newaj to the boat. He (PW. 6) was also dragged to the boat by Fajrul, but on reaching the boat, he released him by slapping three times rendering him deaf. The accused had also looted the household commodities, livestock, paddy etc. He denied the defence suggestion that he did not mention the name of Abdul Mojid in his statement given before the I.O. He knows many of the assailants by their names and face. He was caught off and tied by Khajlul, Matibur and Majibur in the house premises of Hamed. He saw the entire incident. He was also assaulted. The assailants rounded up him, Newaj, Malek and Baharul in the house of Hamed. He could not remember who slapped and assaulted him.

17. P.W. 7 Md. Sahidul Islam deposed that at noon time, Abdul Malek and Jahirul came to his house and informed about the occurrence. Malek was in injured condition and he was brought in a 'Thela' (pull-cart) and thereafter, they were sent to Moirabari Hospital. He along with his father, namely, Md. Lal Mia went to the police station and reported the incident verbally to the effect that Newaj and Hamed Ali were murdered. Police seized two large sized boats used for looting and murder in Chitalmari Char. One boat was seized by Ext. 2, the seizure memo and another boat by Ext. 3, another seizure memo. From his personal knowledge, he knew that one of the boats belonged to Hamed and the other belonged to Abdul Salam.

18. P.W. 8 Md. Safiqul Islam did not stand as witness to the seizure of any boat.

19. P.W. 9 Md. Jahirul Islam deposed that he owns a shop in Chitalmari Char and on a Wednesday at about 09.00/ 10.00 am, he noticed 50-60 people armed with dao, lathi etc., coming by the river Brahmaputra on machine boats and anchored on the side of the house of Newaj and others near the house of Hamed. Newaj, Baharul and Abul Malek entered the house of Hamed, when he was at home. Thereafter, Giasuddin Muktar, Abul Mojid, Abdul Salam, Nazrul Islam, Mafiz, Fajruluddin, Ajgar Ali, Jalaluddin, Allaluddin, Abdul Kasem and Sorhab Ali rounded up them. They

cut and removed the boundary fencing of the house. Ajgar had a gun and Kasem and Fajruluddin also carried guns. Malek was injured on head by inflicting injury by the said group of people. Malek survived even after sustaining gun shots, while Newaj and Hamed died. The wife of Kamaruddin were attacked by 5 persons, namely, Giasuddin Muktar, Abdul Salam, Nazrul Islam, Mofizuddin and Mojid by using dao and spear. She succumbed to her injuries. The dead bodies of Hamed and Newaj were carried away by a machine boat. The members of the said 02(two) groups also looted the livestock and other items including items of his grocery shop. He further noticed that Newaj and Hamed were cut into pieces and thrown from a machine boat into the river Brahmaputra. He could see the entire incident from near to his shop. In cross-examination, he deposed inter alia that there is one Nazrul Islam at Chitalmari Char and the accused Nazrul Islam is a resident of Moirabari. He is a service holder and his father was a doctor, who retired as a Civil Surgeon. His brother is an Excise Superintendent. He denied the defence suggestion that he did not mention the name of Nazrul in his statement given under Section 161 Cr.P.C. He also denied the defence suggestion that at the relevant time of the occurrence Nazrul was on duty as Teacher in Sahariagaon senior Madrassa. He was present in the Madrassa from 10.00 am - 3.00 pm.

20. P.W. 10 Md. Jalaluddin was a resident of Chitalmari Char at the relevant time of the occurrence. He has shifted his residence to Moirabari. On a Wednesday in the year 1997, Newaj, Hamed and one lady were killed in the occurrence. The assailants also took away his boat, in which he collected milk by Hamed, Ajgar and Kasem, who were armed with dao and other weapons. They arrived by 2 (two) other boats. He filed an FIR for forcibly taking away his boat.

21. P.W. 11 Egan Ali deposed that on a Wednesday in the year 1997, the informant Baharul Islam stated before the villagers that his father, namely, Hamed Ali and one lady were taken away by the miscreants in a motor boat and then killed. He disclosed the names of some of the miscreants and among them were the accused Nazrul, Mofizuddin and Salam. Accused Nazrul is a teacher and stays near his house. At the time of disclosure about the incident by Baharul, there were his father Liakat Ali, village headman Syed Ali, Lalu Maral etc. numbering about 100 people.

22. P.W. 12 is Md. Jinnatul Islam. His evidence is that on 02.07.1997 at about 10.00 am, the occurrence took place. At that time, he was away at Moirabari. A group of 30-40 dacoits looted of cows, goats, paddy and jute etc. at Chitalmari Char. They also killed Newajuddin (his father), Hamed Ali and a lady. He does not know who were the dacoits. His brother Baharul Islam filed an FIR. They did not recover the dead bodies of his father and Hamed Ali. The dead body of the lady was found in the house of Hamed Ali. The dead body of his father and Hamed Ali were taken away in the motor boat by the assailants. Police seized cows in the Char area in his presence by Ext. 5, the seizure memo.

23. P.W. 13, DSP Thuleswar Bora was the then Sub-Inspector of Police attached to Moirabari P.S. On 07.07.1997, the Officer-in-Charge, SI Robin Bezbaruah directed him to raid and search at Chitalmari Char, in connection with Moirabari P.S. Case No. 53/1997 as there was information that some miscreants were hiding themselves and kept hiding of looted articles. He took the help of the Gaon Burah Sahidul Islam and other villagers, namely, Jamiruddin, Jahirul Islam, Safiqul Islam etc. In course of search, he recovered and seized the boat of accused Abdul Hamed by Ext.2, the seizure memo. He also seized some looted utensils, paddy and goats etc. by Ext.4, the seizure memo. The seized boat was given in the custody of one Amiruddin. He seized cows by Ext.5, the seizure memo. He recognized the other seizure memos vide Exts.6-14, whereby various other articles were also seized. He seized the goats by Exts. 15-18. By Ext.19, he seized one wooden box.

24. P.W. 14 SI Premananda Bhuyan deposed on behalf of SI Rabin Bezbaruah (since expired) of Moirabari P.S., who was the Investigating Officer of this case. He recognized his handwriting through correspondence. He has, inter alia, stated that from the Case Diary, it appears that SI Robin Bezbaruah registered Moirabari P.S. Case No. 53/1997 and took up the investigation himself. On his transfer SI Tukheswar Bora took up the investigation and on completion of investigation SI Ghana Kanta Saikia filed the Charge-Sheet. So far he knows SI Robin Bezbaruah

s now dead and SI Ghana Kanta Saikia retired from service and his present address is not known. He recognized Ext.20 the Charge-Sheet and Ext.21 the inquest report. In cross-examination, he, inter-alia, stated that on the basis of the information given by Lalu Maral, General Diary Entry (GDE) No.22, dated 02.07.1997, at 02.10 pm vide Ext. 'A' was made, wherein the names of the assailants were not mentioned. In cross-examination, the defence besides eliciting certain contradictions to the evidence of some PWs also elicited that in connection with this case, no test identification parade (T.I.P.) was held. He deposed that it is noticed from the Case Diary that the Investigating Officer recorded the statements of the witnesses twice.

25. P.W. 15 Prema Nath Bora was the Doctor, who performed the Post-Mortem examination on the body of the deceased Sarban Nessa on 03.07.1997 and found as follows:-

A dead body of adult female. There was razor mark on the mouth of the body. Abrasion on the right shoulder and swelling on the abdomen. The blood found on the injuries dark red in colour. Inside the abdomen, the peritoneum cavity contains dark red blood. On the stomach undigested food particles are present. Spinal canal, brain and spinal cord found healthy. Scalp also healthy. Liver found ruptured on the right lobe of the liver. Spleen, Kidney are healthy. Bladder is empty. Small intestine and large intestines are healthy. Thorax, left lung, right lung, heart and vessels are healthy and empty. Disease or deformity-Nil. Fracture-Nil Dislocation-Nil. Injuries are anti-mortem in nature .

26. In the opinion of the doctor, the cause of death was due to haemorrhage as a result of injuries sustained. He recognized Ext.21 the post-mortem report.

27. D.W. 1 Md. Nazrul Islam is one of the accused persons/appellant herein. His evidence is that on 02.07.1997 at 10.00 am, he was present at Sahariagaon Senior Madrassa till 03.15 pm. The distance from his house to the Sahariagaon Senior Madrassa is about 7-8 km and was not a motorable road during the relevant period. He used to come to the Madrassa on bicycle. On the day of occurrence, he put his signature in the teachers attendance register. Chitalmari Char is situated about 15-16 km from his house.

28. D.W. 2 Md. Nuruddin is the in-charge Superintendent of Sahariagaon Senior Madrassa. According to him, accused Nazrul Islam is a Science Teacher of their Madrassa. On 01.07.1997 and 02.07.1997, accused Nazrul attended duty in Madrassa from 10.00 am to 03.00 pm. He recognized Ext. 'B', the teachers attendance register for the month of July, 1997, where Exts. 'B' (1) and 'B' (2) are the initials of accused Nazrul Islam. Accused Nazrul Islam attended his duty from his house in Tatikata village situated about 7 kms away. He attended the Madrassa on bicycle as the road was not motorable. It took about an hour to reach the Madrassa. Md. Mofizuddin (D.W.3) was the Superintendent of Sahariagaon Senior Madrassa in 1997. In cross-examination, he stated that in the teachers attendance register, signature of the Head Master is not available in the column meant for his signature on 01.07.1997 and 02.07.1997. He denied the defence suggestion that Ext. 'B' is a false and manufactured document.

29. D.W. 3 Haji Md. Mofizuddin is the retired Superintendent of Sahariagaon Senior Madrassa. In 1997, the accused Nazrul Islam was working in the said Madrassa as Science Teacher. He recognized Ext. 'B', the teachers attendance register of the said Madrassa covering the period from 01.11.1996 to 30.11.1997. On 01.07.1997 and 02.07.1997, accused Nazrul Islam attended his duty as per attendance register. During that period, he was the Superintendent of the said Madrassa. The accused attended the Madrassa from 09.50 am to 03.00 pm. He put his initials in the teachers attendance register. He recognized Ext. 'B' (3) and 'B' (4) his signatures on the aforesaid 2 (two) dates. He further recognized Ext. 'B' (5) and 'B' (6), the signatures of the then Assistant Teacher Nuruddin (D.W. 2). He rec

ognized Ext. 'B', the certificate issued by him pertaining to attendance of accused Nazrul Islam. In cross-examination, he stated that he was the Head Master and Superintendent of the said Madrassa and he did not put his signature in the column meant for signature of the Head Master in the attendance register. He denied the defence suggestion that Ext. 'B' was not issued on 09.04.2007 and it was issued subsequently.

30. Mr. HRA Choudhury, learned senior counsel appearing on behalf of the appellants, submitted that the prosecution has relied on Ext. 1, dated 02.07.1997, as the First Information report (FIR), based on which admittedly police launched investigation although it is hit by Section 162 Cr.P.C. in view of admission of P.W.-14, the police officer, that prior to receipt of the said Ext. 1, Moirabari P.S. launched investigation on the basis of information given by one Md. Lalu Maral about the occurrence, which was recorded in the General Diary of the police station vide Ext. 'A'. In this regard, Mr. Choudhury has relied on the ratio of the judgment rendered by the Supreme Court in Ashok Debbarma Vs. State of Tripura, reported in (2014) 4 SCC 747. Mr. Choudhury further submitted that the investigating officer failed in duty to forward the FIR to the concerned Magistrate within 24 hours as per provision of Section 157 Cr.P.C., and thereby clouded the very foundation of the allegations set up by the prosecution against the accused/appellants. Learned senior counsel in this regard, laid emphasis on the decisions of the Supreme Court in Sudarshan & Anr. Vs. State of Maharashtra reported in (2014) 12 SCC 312; State of Gujarat Vs. Kishanbhai & Ors, reported in (2014) 5 SCC 108 and Bijoy Singh & Ors. Vs. State of Bihar, reported in (2002) 9 SCC 147. Further, Mr. Choudhury, drawing attention to the evidence of the defence witnesses, submitted that the appellant Nazrul Islam was not present at the place of occurrence at the relevant time as there is clear evidence that he, who is a Science Teacher of Sahariagaon Senior Madrassa, was attending his duty on 01.07.1997 and 02.07.1997, in the said Madrassa and in this regard, relied on a decision of the Apex Court rendered in Jayantibhai Bhenkarbhai Vs. State of Gujarat, reported in (2002) 8 SCC 165. According to Mr. Choudhury, learned senior counsel for the appellants, apart from those infirmities, apparent on evidence, all the alleged eye witnesses, the prosecution examined in the case, have contradicted their statements given under Section 161 Cr.P.C., in material particulars rendering their evidence wholly unreliable and on the other hand, there is no consistency in evidence regarding the individual overt acts committed by each of the appellants in the incident. Moreover, Mr. Choudhury submitted that the learned Court below has taken into consideration of purported incriminating evidence against which no explanation was sought from the appellants while recording their statements under Section 313 Cr.P.C. Therefore, Mr. Choudhury emphatically submitted that the appellants deserve to be acquitted of the charges setting aside the impugned judgment and order of conviction under the charges framed against them and others.

31. Refuting the above argument advanced by Mr. HRA Choudhury, learned senior counsel for the appellants, Mr. K. Konwar, learned Addl. Public Prosecutor submitted that the police launched investigation to the occurrence, where about 150 people got involved in attacking the unarmed villagers of a riverine village in broad day light rendering 3 persons dead and many others injured. Pursuant to the said information received at Moirabari P.S., GD Entry was made and police accordingly swung into investigation by proceeding to the place of occurrence, which is situated at a distance.

32. Mr. Konwar further submitted that it is well settled that FIR is not an encyclopaedia of the entire case and is even not a substantive evidence and as such, non examination of the first informant cannot have the effect of discrediting the prosecution case, which is proved by evidence beyond reasonable doubt. Mr. Konwar submitted that the police after preliminary investigation found the incident to be true and accordingly, recorded finding was recorded in the General Diary of the police station and therefore, the defence cannot claim the benefit of



f doubt on the prosecution story of the case.

33. According to Mr. Konwar, although the appellant has taken the plea of alibi, and examined three witnesses including himself, the fact remains that the evidence is cogent and convincing enough establishing the identity of him and other appellants and that they apparently associated with other assailants numbering approximately 150 in total and further, in view of the teachers attendance register, whereon the Head Master of the Madrassa (D.W. 3) did not put his signature in the relevant column meant for his signature as per rule, the same cannot be relied on as an evidence that appellant Nazrul, who is a teacher of the said Madrassa attended his Madrassa duty, on 01.07.1997 and 02.07.1997 indicating thereby that at the relevant time of the occurrence, he was not present at the place of occurrence. According to Mr. Konwar, there is absolutely no evidence to show that the eye witnesses examined by the prosecution had any inimical relation to justify any possibility of them falsely implicating the appellants in the alleged offences. Therefore, Mr. Konwar, learned Additional Public Prosecutor submitted that the Court below rightly held the appellants guilty of the charges on proper appreciation of evidence of both the sides and accordingly convicted.

34. The first information report (FIR), dated 02.07.1997, vide Ext.1 lodged by PW-3 Baharul Islam, son of victim the deceased Newajuddin revealed, inter alia, that the appellants namely, Suraj Ali, Abdul Kasem, Mofizuddin, Jalaluddin, Nazrul Islam, Abdul Salam and 28 others, pursuant to a plan adopted in a secret meeting held on the previous day, that is, on 01.07.1997 (Tuesday) in the courtyard of Giasuddin Muktar, being armed with deadly weapons, attacked Chitalmari Char on the following day, that is, on 02.07.1997 at about 10 am, Wednesday, and in course of ransacking in the houses of the inhabitants, caused death to Newajuddin, Hamed Ali and the wife of Kamaruddin, namely, Sarban Nessa. The assailants took away the dead bodies of Hamed and Newajuddin in launches, in which they came to Chitalmari char. Perusal of cross-examination of P.W.-14, SI Premananda Bhuyan of Moirabari P.S. reveals that the said F.I.R., dated 02.07.1997 vide Ext. 1 was received on 03.07.1997 at 8 am, and prior to receipt of the said written F.I.R., one Md. Lalu Maral, who was not examined in the case, gave verbal information about the occurrence, which was duly entered in the General Diary of the Police Station vide Ext. 'A', the extract copy thereof and based on the aforesaid information received at 2.10 pm, the Officer-in-charge, SI Rabin Bezbaruah (since expired) accompanied by staff rushed to Chitalmari char, where the alleged occurrence had taken place. It is noticed that Ext. 1, the FIR, was shown to the learned Chief Judicial Magistrate, on 04.07.1997. Perusal of Ext. 'A', the G. D. Entry on the other hand, revealed, in a nutshell, that 'some miscreants' killed Lalu Maral's nephew Newaj Ali @ Newajuddin and one Hamed Ali in Chitalmari char and looted in their houses. Out of the aforesaid two informations given to the police station, Ext 'A', the verbal information recorded in G.D. Entry being the earliest one which disclosed commission of cognizable offences. The Prosecution ought to have treated the same as the FIR in the case, based on which the police, admittedly initiated prompt investigation. This Ext. 'A' did not disclose the name of the assailants, but as emphasized by the learned Senior counsel for the appellants, the subsequent G.D. Entry made at 3.40 pm at Chitalmari Char on 02.07.1997, revealed in some detail about the alleged occurrence, mentioning the names of some of the miscreants. As this G.D. Entry made at 4.30 pm of 02.07.1997 is exhibited by the defence through the evidence of P.W. 14, with specific reference to Ext. 'A', we have preferred to look for oral testimony into the facts and circumstances leading to the occurrence disclosed in brief in Ext. 'A' aforementioned keeping in cautious consideration harmoniously to the written report vide Ext. 1.

35. In Damodaran P. & Ors. Vs. State of Kerala reported in AIR 2001 SCC 2637, the Supreme Court explaining the scheme of the Cr.P.C. relating to an FIR in the real sense and the procedure of investigation to be followed, pursuant thereto as herein below extracted-

18. An information given under sub-section (1) of Section 154 CrPC is commonly known as first information report (FIR) though this term is not used in the Code. It is a very important document. And as its nickname suggests it is the earliest and the first information of a cognizable offence recorded by an officer in charge of a police station. It sets the criminal law in motion and marks the commencement of the investigation which ends up with the formation of opinion under Section 169 or 170 CrPC, as the case may be, and forwarding of a police report under Section 173 CrPC. It is quite possible and it happens not infrequently that more informations than one are given to a police officer in charge of a police station in respect of the same incident involving one or more than one cognizable offences. In such a case he need not enter every one of them in the station house diary and this is implied in Section 154 CrPC. Apart from a vague information by a phone call or a cryptic telegram, the information first entered in the station house diary, kept for this purpose, by a police officer in charge of a police station is the first information report FIR postulated by Section 154 CrPC. All other informations made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first information report and entered in the station house diary by the police officer or such other cognizable offences as may come to his notice during the investigation, will be statements falling under Section 162 CrPC. No such information/statement can properly be treated as an FIR and entered in the station house diary again, as it would in effect be a second FIR and the same cannot be in conformity with the scheme of CrPC. Take a case where an FIR mentions cognizable offence under Section 307 or 326 IPC and the investigating agency learns during the investigation or receives fresh information that the victim died, no fresh FIR under Section 302 IPC need be registered which will be irregular; in such a case alteration of the provision of law in the first FIR is the proper course to adopt. Let us consider a different situation in which H having killed W, his wife, informs the police that she is killed by an unknown person or knowing that W is killed by his mother or sister, H owns up the responsibility and during investigation the truth is detected; it does not require filing of fresh FIR against H the real offender who can be arraigned in the report under Section 173(2) or 173(8) CrPC, as the case may be. It is of course permissible for the investigating officer to send up a report to the Magistrate concerned even earlier that investigation is being directed against the person suspected to be the accused.

19. The scheme of CrPC is that an officer in charge of a police station has to commence investigation as provided in Section 156 or 157 CrPC on the basis of entry of the first information report, on coming to know of the commission of a cognizable offence. On completion of investigation and on the basis of the evidence collected, he has to form an opinion under Section 169 or 170 CrPC, as the case may be, and forward his report to the Magistrate concerned under Section 173(2) CrPC. However, even after filing such a report, if he comes into possession of further information or material, he need not register a fresh FIR; he is empowered to make further investigation, normally with the leave of the court, and where during further investigation he collects further evidence, oral or documentary, he is obliged to forward the same with one or more further reports; this is the import of sub-section (8) of Section 173 CrPC.

36. Having regard to the above scheme of the Cr.P.C., succinctly illustrated by the Apex Court in the above noted case and in the case of Ashoke Debbarma (Supra), we are of the opinion that Ext. 'A', the GD Entry dated 02.07.1997 was the FIR in the instant case within the meaning of Section 156 of the Cr.P.C., based on which the police officer of Moirabari PS exercised his statutory right of investigation into the aforesaid cognizable offences, therefore, Ext. 1, the written FIR although shown lodged on the same day, i.e., 02.07.1997 is hit by Section 162 of the Cr.P.C. and non registration of another written FIR subsequently lodged by P.W.- 10, Jalaluddin, on the same occurrence and non-reporting of the same to the Magistrate under Section 173 (2) of the Cr.P.C. was no way can be considered as a lapse on the part of the police. Therefore, Ext. 'A' is treated as the F.I.R. in the case.

37. The evidence of the prosecution witnesses throws light on the conduct of

the appellants and others, subsequent and antecedent, to the occurrence. This aspect of the case is very relevant under Section 8 of the Evidence Act in the context of the facts and circumstances in which the incident involved in this case had taken place. The evidence of P.W. 1 Baharul Islam reveals that few days before the incident, accused Giasuddin Muktar, who had no landed property at Chitalmari Char approached the inhabitants of the said char (the riverine village) and attempted to strike a deal in this regard. However, Newajuddin did not agree to his request. This piece of evidence shows that the motive behind the gruesome sudden attack on the inhabitants of Chitalmari Char in the morning hours, on 02.07.1997 incepted in an ill-motive to grab the land of the said char forcibly, which was followed by preparation from the previous day, that is, 01.07.1997, was known to many villagers as has come in the evidence of the remaining witnesses. From the evidence of P.W. 2, Abdul Malek, P.W. 3, Baharul Islam, s/o Newajuddin, P.W. 4 Lal Miya and P.W. 5, Kamaruddin, it is noticed that a secret plan was hatched up in a meeting held in the courtyard of accused Giasuddin Muktar, situated near Moirabari bazar, on the previous day of the day of occurrence, which was attended by, among many others, the appellants viz. Abdul Kasem, Abdul Salam, Jalaluddin and Mofizuddin. Their deliberations in this secret meeting was seen and heard by P.W.-3, Baharul Islam and P.W. 4, Lal Miya. In cross-examination of P.W. 2, Abdul Malek, the defence has elicited that on the previous day of the occurrence, he came to know at Moirabari bazar that dacoits would attack their char, but none of the persons, who knew about this secret plan informed the police. This fact has come in the evidence of P.W. 3 Baharul Islam, P.W. 4 Lal Miya and P.W. 5, Kamaruddin, the villagers of Chitalmari char and the knowledge of this secret plan made them to pass the previous night guarding their char, but as no attack had taken place during that period, the villagers went to bed. On the following day, they left for respective work places and as such, there was no sufficient number of villagers capable of resisting the deadly assailants, who rendered the unarmed 3(three) persons dead inclusive an woman and left many others injured. The evidence reveals that 2(two) persons were cut into pieces and took away the cut pieces in two launches, and threw off to the river Brahmaputra and consequently, the body parts of the victims could not be recovered. Although strict proof of motive for any crime is not always a condition precedent to hold the accused guilty of offence, in the instant case, it is established that being motivated by a strong collective desire to grab the fertile land area of Chitalmari char, the accused persons prepared in concert to attack the villagers of the said char and accordingly, committed the offences in a most dastardly manner and then remained absconding till some of them were arrested by police. The said conduct of the assailants, antecedent and subsequent, to the occurrence has their close pertinence to the facts of the case narrated above beyond reasonable doubt.

38. It is not disputed by the defence side that the occurrence took place on 02.07.1997 at about 10.00 am at Chitalmari char, where about 70 families lived. The investigating officer did not, however, draw up a sketch map of Chitalmari char, which is situated on the bank of river Brahmaputra. There is also no dispute from the defence to the consistent case of the prosecution that two groups of assailants consisting of about 200/250 persons, being armed with deadly weapons such as machete, sticks, guns, spears etc. arrived the char by 2 (two) launches and started perpetrating attack on the villagers, who were available at that time in the char. The evidence reveals that the assailants materialised their secret plan of aggression of char people during day hours, when most of the poor villagers were away either at their work places or in bazar so that there would be no resistance to their attack.

39. The most relevant question that needs to be answered is the identity of the assailants and the nature of the weapons used in commission of the offences against the villagers of Chitalmari char, in broad day light. The FIR vide Ext. 'A', the GD Entry does not disclose the name of the assailants and the informant Md. Lalu Maral, who is the Mahaldar of Moirabari, was not examined in the case obviously for being not cited as a witness in the charge-sheet vide Ext. 2. His

non-examination does not appear to be significant in view of availability of testimony of eye witnesses, namely, P.W. 1, Baharul Islam, P.W. 2, Abdul Malek, P.W. 3, Baharul Islam, s/o late Newajuddin, P.W. 5, Kamaruddin, P.W. 6, Jahirul Islam and P.W. 9, Md. Jahirul Islam to the occurrence, who were subjected to extensive cross-examination by the defence and further, when there was no indication in his information relating to commission of a cognizable offence given to Police under Section 156 Cr.P.C. turned out to be true during investigation. This presumption is further strengthened by the fact that the prosecution relied on the F.I.R. vide Ext. 1, dated 02.07.1997, aforementioned, which contained the names of the assailants, and which was placed before the learned Chief Judicial Magistrate, Morigaon, Assam, 02(two) days after the occurrence on 04.07.1997 by the investigating officer. The delay in reporting the occurrence to the nearest Magistrate under Section 173 (2) of the Cr.P.C. cannot be considered as inordinate delay without explanation, in view of elicitation by the defence in cross-examination of PW. 14 SI Premananda Bhuyan, the then attached police officer of Moirabari P.S. that the place of occurrence, that is, Chitalmari Char is situated at a distance of about 10/12 km from the said Police Station, without connecting road and it takes 2 to 3 hours to reach the place, crossing the river Brahmaputra, indicating thereby that the police had to undertake difficult journey, to and fro, to investigate into the case taking recourse to the procedure for investigation prescribed in Section 157 of the Cr.P.C. The G.D. Entry vide Ext. 'A' was not shown to the learned Chief Judicial Magistrate, Morigaon, Assam, although it is treated as F.I.R. as stated above, does not suffer from any procedural material lapse as subsequently the investigation revealed the information to be true and as such, it is respectfully submitted that in the backdrop of facts the mandate of the judgments laid in the cases of Sadarshan (supra), Krishnabhai (supra) and Bijo Singh (supra) are not breached. Therefore, in our view, no adverse inference can be drawn on credibility of the prosecution version of the occurrence. A conjoint reading of the detail account of the occurrence contained in Ext. 1 and the evidence of its maker P.W. 3, Baharul Islam, it is revealed that the present appellants were clearly recognized to be among the assailants as at the relevant time, he was at home, located at the place of occurrence, that is, at Chitalmari Char. His (PW-3) claim of presence at the place of occurrence at the relevant time has remained unshaken in his cross-examination. According to him (PW-3), the assailants being armed with machete, sticks, guns and other weapons came by motor boats from the east and west directions to Chitalmari char, situated on the bank of river Brahmaputra to attack the villagers.

40. Turning to the eye account of the occurrence, given by PW-1, Baharul Islam, son of Abbash Ali, who was in the jute cultivation area at the relevant time, it is noticed that he has corroborated the evidence of PW-3, Baharul Islam, s/o late Newajuddin, another eye witness, so far the identity of those assailants, among whom there were the appellants are concerned, who came armed with deadly weapons. His (PW-1) evidence further indicates that P.W-5 Kamaruddin and P.W. 9 Jahirul Islam might have also witnessed the occurrence. At the relevant time of the occurrence, PW-5 Kamaruddin, who lost his wife in the incident, was at home at Chitalmari char and saw the crowd of assailants inclusive Abdul Salam and Abdul Kasem being armed with deadly weapons such as machete, guns, spears etc. assaulting to death of Newajuddin, Malek and his wife. He (PW-5) also sustained injuries due to assault by those assailants. P.W-9 Jahirul Islam, who was present at his shop at the place of occurrence, witnessed the occurrence and recognized, amongst others, the appellants namely, Abdul Salem, Nazrul Islam, Mofizuddin and Abdul Kasem, being armed with deadly weapons attacking the villagers of Chitalmari char. Apart from their evidence, P.W-2 Abdul Malek, who was at home at the relevant time, also witnessed the appellants namely, Nazrul, Abdul Salem, and others numbering 100-150 people, armed with deadly weapons attacking the villagers and in the incident, he also sustained injury due to their organised assault on him. The evidence of P.W. 4, Lal Miya shows that at the relevant time, he was at Moirabari bazar and came to know about the incident from Sahidul (PW-7), Abdul Malek (PW-2) and Baharul (PW-1). From the evidence of PW-6 Jahirul Islam, another eye witness, it appears that about 100-150 assailants coming to their Chitalmar

i char with deadly weapons in two boats and thereupon, he, Newaj, Malek and Baharul rushed to the house of Hamed from the bank of river Brahmaputra for safety and implicated the accused persons other than the appellants with commission of the alleged offences. The remaining unofficial witnesses, namely, P.W. 4, Lal Miya, P.W. 7, Sahidul Islam, P.W. 10, Jalaluddin, P.W. 11, Egan Ali and P.W. 12, Jinnatul Islam did not witness the occurrence. Therefore, based on the testimony of the eye witnesses, we find that the identity of the appellants as associates of the other assailants is established beyond doubt.

41. It needs to be kept in mind that in a case like rioting, omissions, contradictions and discrepancies in the evidence of the witnesses are inevitably crept in due to withering of memory, when evidence is recorded in trial of the case, after many years and on the other hand, the power of observation of some aspects of an incident may vary from witness to witness, although they were present at the place of occurrence. Therefore, even if there are omissions, contradictions and discrepancies, in the evidence of the witnesses, the entire evidence of such witnesses cannot be brushed aside. In such a fact situation, the Court is to shift the evidence to separate the truth from untruth, exaggeration and improvements to come to an acceptable conscientious conclusion to do away with justice.

42. Further, in cases, where there are a large number of assailants, it can be difficult for a witness to identify each assailant and attribute a specific role to him in the occurrence. In *Masalti Vs. State of U.P.*, reported in (1965) 1 Cr. LJ 226, the Supreme Court observed as under:

Where a crowd of assailants who are members of an unlawful assembly proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants. Besides, if a large crowd of persons armed with weapons assaults the intended victims, it may not be necessary that all of them have to take part in the actual assault. .... Appreciation of evidence in such complex case is no doubt a difficult task; but criminal courts have to do their best in dealing with such cases and it is their duty to sift the evidence carefully and decide which part of it is true and which is not.

43. A similar view was taken by the Apex Court in *Kallu Vs. State of M.P.*, reported in (2006) 10 SCC 313 observing that in such complex cases, involving large number of assailants, it is often not possible that all the witnesses may specifically refer to the part played by each assailant. In *Bhag Singh Vs. State of Punjab*, reported in (1997) 7 SCC 712, while dealing with a similar contention, the Supreme Court observed:

It is a general handicap attached to all eyewitnesses, if they fail to speak with precision their evidence would be assailed as vague and evasive, on the contrary if they speak to all the events very well and correctly their evidence becomes vulnerable to be attacked as tutored. Both approaches are dogmatic and fraught with lack of pragmatism. The testimony of a witness should be viewed from broad angles. It should not be weighed in golden scales, but with cogent standards. In a particular case an eyewitness may be able to narrate the incident with all details without mistake if the occurrence had made an imprint on the canvas of his mind in the sequence in which it occurred. He may be a person whose capacity for absorption and retention of events is stronger than another person. It should be remembered that what he witnessed was not something that happens usually but a very exceptional one so far as he is concerned. If he reproduces it in the same sequence as it registered in his mind the testimony cannot be dubbed as artificial on that score alone.

44. In the instant case, it is clearly evident, as discussed above, that the appellants actively associated with other assailants, in furtherance of common object, being armed with deadly weapons such as machete, spears, guns, sticks etc., committed the gruesome act of murder of three persons namely, Newajuddin, Hamed Ali and Sarban Nessa and caused disappearance of evidence of murder of Newajuddin and Hamed Ali, after being shot them dead and their bodies were cut into p

ieces, and then threw off the body parts to the river Brahmaputra beyond all reasonable doubt. The dead bodies of those two persons, therefore, could not be recovered for post mortem examination. The circumstantial and direct evidence of their murder and disappearance of evidence of murder by throwing the dead bodies to the river Brahmaputra being proved by consistent evidence of the prosecution witnesses, non-recovery of dead bodies cannot stand in holding the appellants guilty of murder and disappearance of evidence of murder. This view is settled by the Apex Court in a catena of judgments such as in Rama Nand Vs. State of H. P., reported in (1981) 1 SCC 511, when the fact of homicidal death is proved as in the instant case. To speak it precisely, conviction does not depend upon corpus delicti being found. Similar view was reiterated by the Apex Court in Ramjee Vs. State, reported in (2006) 13 SCC 229, wherein it was held:

It is now a trite law that corpus delicti need not be proved. Discovery of the dead body is a rule of caution and not of law. In the event, there exists strong circumstantial evidence, a judgment of conviction can be recorded even in absence of the dead body.

45. So far the aspect of murder of Sarban Nessa is concerned, the crowd of assailants with whom the present appellants also associated caused her death by inflicting deadly blows and left her dead body inside her home, that is, the home of P.W. 5 Kamaruddin. As stated above, in such an incident of attack of crowd of assailants by means of deadly weapons, involving hundreds of people, we are of the view that it is not necessary to identify each of the assailants, who exactly caused the death to the person. It is sufficient to bind all the assailants for such homicidal act, provided their participation in the crowd of assailants is proved with the aid of Section 149 of the IPC. The dastardly act of murder committed by the appellants and their associates on Sarban Nessa can be guessed from the post mortem examination report itself vide Ext. 21, prepared by P.W. 15 Dr. Prema Nath Borah, the doctor, who found razor mark on her mouth and rupture of her liver on its right lobe and held the opinion that those injuries were ante-mortem in nature that caused her death due to haemorrhage. The defence declined to impeach the doctor's (P.W. 15) finding of injuries and his opinion as to her cause of death and as such, remained intact. Because, when a prosecution witness is declined to be cross-examined, a presumption can be drawn that whatever the witness has stated is true in its entirety. We have perused the statements of the appellants recorded under Section 313 Cr.P.C. and found that the learned Court below has put the relevant questions to the appellants enabling them to explain the incriminating circumstances appearing in the evidence against them. The defence has not clarified specifically as to the other relevant questions which the learned Court below omitted to put to the appellants whereby prejudiced their case.

46. In the instant case, in course of investigation, the police failed to seize the weapons of offence, used by the appellants and their associates in the commission of the offences, which inability in our opinion, in the context of violent large scale collective attack in no way belie the account of the eye witnesses, who have tendered direct evidence of undisputed murder of several persons and extensive looting of properties of the inhabitants of Chitalmari char. The barbarous proved acts of the assailants and recovery and seizure of parts of looted properties of the villagers such as one boat, many utensils, live stocks, paddy etc. from different surrounding areas of the place of occurrence, were duly identified by the respective owners of those seized properties, in course of investigation vide seizure memos Exts. 3 to 19. It is also noticed that the investigating officer seized one boat used by the assailants on being identified by witnesses, which was found submerged in a nullah (drain) of Chitalmari char by another seizure memo vide Ext. 2.

47. With regard to the plea of alibi set up by the appellant Nazrul Islam in his statement under Section 313 Cr.P.C. to the effect that on 01.07.1997 and 02.07.1997 from 10.00 am to 3.15 pm, he was on duty at Sahariagaon Senior Madrasa, situated at a distance of about 7/8 km from his house. According to him, he used to attend school duty everyday coming on bicycle, as during the relevant peri

od, the road was not motorable and on the date of occurrence, he put his signature in the teachers attendance register and further, that the place of occurrence, that is, Chitalmari char is about 15/16 km from his house. In this regard, the said appellant has examined himself as D.W-1 and two other witnesses, namely, D.W. 2, Md. Nuruddin, the Superintendent in-charge of the Madrassa and D.W. 3, Haji Mofizuddin, the then Head Master and Superintendent of the said Madrassa. Both D.Ws 2 and 3 have supported the evidence of D.W.-1. D.W.-2 exhibited the teachers attendance register vide Ext. 'B' and D.W. 3 exhibited a certificate, which he issued vide Ext. 'C'. D.W. 2 and D.W. 3, in their cross-examination, however, admitted that the signature of the Head Master and superintendant of the Madrassa (D.W. 3) is not available on Ext. 'B' in the column meant for his signature as per Rule indicating thereby that neither he nor in his absence any in-charge Head Master was on duty or present in the Madrassa on the aforesaid date of occurrence. Therefore, the plea of alibi is not proved with absolute certainty so as to completely exclude the possibility of the presence of the appellant Nazrul Islam at the place of occurrence at the relevant time. The presence of the said appellant at the place of occurrence is apparent on the evidence of the prosecution witnesses, who identified him as one of the assailants. Therefore, applying the principle enunciated by the Apex Court in Jayantibhai Bhenkarbhai case (Supra), it cannot be inferred that the plea of alibi of the said appellant is proved by way of discharge of burden of prove by the appellant under Section 11 and 103 of the Evidence Act. Hence, the plea of alibi of the appellant Nazrul Islam is rejected.

48. Having regard to the offences alleged and proved in th