Crl.A. 202/2014
BEFORE
HON'BLE MR. JUSTICE P.K. SAIKIA
AND
HON'BLE DR. (MRS.) JUSTICE INDIRA SHAH

This appeal is directed against the judgment and order dated 16.05.2014, passed by the learned Addl. Sessions Judge, FTC, Darrang, Mangaldoi, in Sessions Case No. 58(D-M)/2007 convicting the appellants, namely, 1) Sri Premadhar Hazarika, 2) Sri Thaneswar Hazarika and 3) Sri Danda Hazarika of offences u/s 302/149 IPC and sentencing them to imprisonment for life with a fine of Rs. 5,000/- each i/d R.I. for another one year for the offences aforesaid.

2. Being aggrieved by and dissatisfied with the aforesaid judgment, the appellants, namely, 1) Sri Premadhar Hazarika, 2) Sri Thaneswar Hazarika and 3) Sri Danda Hazarika (herein after referred to as accused persons) had preferred this appeal citing several infirmities in the judgment under challenge.

3. We have heard Mr. A. Chamuah, learned counsel for the appellants and also heard Ms. S. Jahan, learned Addl. PP, Assam.

4. The brief facts necessary for disposal of the present appeal are that on 09.08.2003 at about 2:30 pm, Sarat Saharia since deceased, (herein after referred to as victim), a resident of Kachuagaon, was tethering his cow in the nearby filed. Around the same time, one Gitu Hazarika came there to tether his cattle on the same plot of land where Sarat had already tethered his cattle. Since Gitu Hazarika tried to tether his cattle on the land on which the victim had already tethered his cow, the later asked him to tether his cattle in another plot of land.

5. Since Gitu did not take away his cattle from the aforesaid land, a quarrel took place for between Gitu and the victim for which Gitu raised hue and cry drawing attention of appellants and their other family members who too reside in the vicinity of the place where the victim with his family had resided during the time under consideration.

6. On hearing hue and cry , raised by Gitu, appellants herein along with Khiteswar Deka, Rudra Kt. Deka, Naba Hazarika, Bhupen Hazarika, Binay Saikia and Hirakjyoti Hazarika, all armed with various weapons arrived at the courtyard of the victim and started beating him with deadly weapons inflicting grievous wounds on him which occasioned his death instantaneously at the PO itself.

7. An FIR to that effect on being lodged by Sri Bul Saharia, (PW1) and the son of the victim with the O/C, Mangaldoi PS same day in the evening, O/C, registered a case vide Mangaldoi P.S. Case No. 227/2003 u/s 147/148/149/447/302 IPC and ordered one Sri Keshab Chetia, SI of police, to investigate the case.

8. Being so required, Sri Chetia visited the PO, held inquest on the dead body, sent the same to hospital for post mortem examination, examined the witnesses but before he could complete the investigation, he was transferred and accordingly, he handed over the case dairy to the O/C for doing further needful. There after, one Sri Kartik Baruah, SI of police was entrusted to complete the remaining part of the investigation.

9. Accordingly, Sri Kartik Baruah completed the remaining part of investigation and thereafter, he submitted charge sheet u/s 147/148/149/447/302 IPC against the appellants herein and other 8 persons showing accused Thaneswar, Hirakjyoti, Bhupen, Binoy and Maheswar as absconder. The Magistrate before whom charge sheet was so laid, committed the case to the Court of Session since the offence u/s 302 IPC is exclusively triable by the Court of Session.

10. The learned Sessions Judge on receipt of the case on commitment and after hearing both the parties was pleased to frame charge u/s 302/149 IPC against a

ll the accused persons and charges, so framed, on being read over and explained to accused persons, they pleaded not guilty and claimed to be tried. During trial, the accused Gitu and Hirokjyoti are found to be juvenile in conflict with law and therefore, the case against them was segregated and they were sent to Juvenile Justice Board to face trial in accordance with law.

11. During the course of trial, the prosecution side had examined as many as 9 witnesses including the informant, the MO and IO of the case. The statements of accused persons u/s 313 CrPC were also recorded. Their plea was of total denial. The accused persons also adduced the evidence of as many as 6 DWs in support of their plea that they are innocent.

12. On the conclusion of trial, learned Sessions Judge while acquitting other accused persons on holding that the prosecution could not make out the charges against them, convicted accused Danda, Thaneswar and Premananda, who are appellants herein, of offences u/s 302/149 IPC and sentenced them to punishment as aforesaid vide judgment dated 10.11.2009. Said judgment was challenged in an appeal before this court which was registered as Crl. A. No. 11/2010.

13. This court on hearing both the parties was pleased to set aside the judgment dated 10.11.2009 and was further pleased to remand the case to the trial court under its judgment dated 16.09.2013, passed in Crl. A. No. 11/2010. On such remand of the case, learned trial court again found the accused guilty of offence u/s 302/149 IPC and therefore, it convicted the appellants herein of those offences and sentenced them to punishment as aforesaid. It is that judgment which has been assailed in the present appeal.

14. Mr. A. Chamuah, learned counsel for the appellants vehemently submits that the judgment under challenge cannot be sustained for reasons more than one. In support of such contention, it has been contended that star prosecution witnesses are PW 1 Sri Bul Saharia, PW 2 Smti. Kanchan Saharia and PW 3 Smti. Namita Deka. Therefore, learned trial court had placed heavy reliance on the testimonies of such witnesses in concluding that accused/appellants were guilty of offence u/s 302/149 IPC.

15. However, in doing so, learned trial court remains blissfully unmindful to the fact that those 3 witnesses contradicted one another on some very vital aspects of the prosecution case which makes their testimonies wholly unsafe for reliance. Being so, the learned trial court could not have convicted the appellants, herein, of offence U/s 302 IPC with the aid of application of principles of vicarious liability, as contemplated in section 149 of the IPC.

16. Referring to the evidence of the PW 1 to the effect that he (PW 1) left the PO out of fear, moments after it commenced, took shelter in the house of one Biren Das, hide himself there in a place beyond the gaze of miscreants and remained there till the incident was over, it has been submitted by learned counsel for the appellant that such a state of affair is very clear testimonies to the fact that PW 1, son of the victim, could not be a eye witness to the incident under consideration.

17. But then, he is found rendering evidence as if he were witness to such an incident which the learned trial court believes to be the gospel truth and relied on such evidence in convicting the appellants of offence U/s 302 of the IPC on applying the principle of vicarious liability as enunciated in section 149 of the IPC. Such an approach of the learned trial court in ascertaining the allegation against the appellants has no approval of the law and on this count alone, the judgment in question is required to be interfered with.

18. It has again been contended that there are serious discrepancies in the evidence tendered by PWs in so far Place of Occurrence is concerned which is evident from the testimonies of various witnesses, more particularly, the testimonies, rendered by PW 1, PW 2 and PW 3. Since the prosecution could not establish the place where the incident in question occurred, it was not proper for the learned trial court to believe that accused persons had assaulted the victim at such place occasioning his instantaneous death.

19. Referring to the evidence of Sri Nagendra Nath Saharia, (PW 4), it has been stated that according to PW 4, he wrote the FIR in regard to alleged incident on his own information. But police did not accept such FIR and as such, the FI

R, he had written was torn by police and in its place, a new FIR was written as per dictation of police and on the basis of such an FIR, the case in question was registered. According to learned counsel for the appellants, such a revelation unmistakably demonstrates that prosecution case was founded, not on facts, but on concoction.

20. Learned counsel for the appellants again submits that the incident in question had caused a huge commotion at the PO and it reportedly continued for a pretty long period of time. But not a single person who lives in the vicinity of the PO was examined to support the prosecution case. What is worse, the prosecution tried to project its case only through the witnesses who are enormously partisan towards the prosecution.

21. It is also the case of the appellants that since the relation between the victim and his family and the accused persons was far from cordial long before the alleged incident due to some domestic and social disputes, therefore, PW 1 and his other family members falsely implicated the present appellants and others with the crime in question in order to satisfy the grudge which they harbored against the appellants and their other family members.

22. Learned counsel for the appellants again submits that in order to convict some persons with the aid of section 149 IPC, the prosecution must also establish that (I) there was an assembly of minimum 5 persons, (ii) the assembly must have a common object, (iii) the common object of such an assembly is to commit any of the illegalities, so specified in section 141 of the IPC, (iv) the commission of such assembly an illegality by one or more members of such an assembly and (v) such illegalities must be committed by one or more members of such an assembly in furtherance of common object of all.

23. But then, in the case in hand, learned trial court in para 60 of the judgment in question clearly held that the object of unlawful assembly in question was not to kill the victim at the PO on 09.08.2003. If that be so, it is not permissible in law to convict some of the members of alleged unlawful assembly of offence u/s 302 IPC with the aid of section 149 IPC while acquitting other members of such alleged unlawful assembly of offence u/s 302 IPC. However, it is a matter, different altogether that any member or some of the members of such an unlawful assembly could still be convicted of offence u/s 302 IPC if it is found that such member/ members are individually liable for such offence.

24. But, in the case in hand, learned Trial court did not opine that the appellants herein are individually guilty of offence u/s 302 IPC since the trial court was pleased to convict the appellants of such an offence with the aid of section 149 IPC. In simple words, the trial Court had convicted the accused/ appellants of offence U/s 302 IPC on invoking the principle of vicarious liability .The above revelations are far too forceful testimonies to the fact that the judgment under challenge is wholly unsustainable in law.

25. Still worse is that the trial court never tried to ascertain what was object such an assembly and if so, what that object was. As such, it could not have convicted the appellants under any of the provisions of penal law, much less its convicting the appellants of offence u/s 302 IPC on application of vicarious liability, so incorporated in section 149 IPC----------argues Mr. A. Chamuah, learned counsel for the appellants.

26. In support of his contention learned counsel for the appellant has relied on the decisions in the following cases:--

1) Bhudeo Mandal Vs. State of Bihar reported in AIR 1980 SC 573
2) (1994) 4 SCC 549 Marwadi Kishor Paramananda and Another v. State of Gujarat
3) Bharat Soni and Ors. vs. State of Chattisgarh, reported in (2012) 12 SCC 657

On the applicability of section 149 IPC, Hon’ble Apex Court in Bhudeo Mandal (supra) observed as follows:--

Section 149 IPC create a special offence and deals with punishment of such offence. Whenever the High Court convicts any person or persons of an offence with the aid of section 149 IPC, a clear finding regarding common object of the assembly must be given and the evidence discussed must show not only the nature of common object but also that the object was unlawful. Before recording conviction u/

s 149 IPC, the essential ingredients of offence u/s 141 IPC must be established.

27. For all those reasons learned counsel for the appellant urges this court to acquit the accused person of the offences they were charge with.
28. Controverting such submissions, advanced by the learned counsel for the appellants, Ms. S. Jahan, learned Addl. PP, submits that the evidence of PWs, more particularly, the evidence of PW 1, PW 2 and PW 3 cannot be brushed aside easily as claimed by the learned counsel for the appellants. This is precisely for the reason that PW 1, PW 2 and PW 3 are not only the witnesses to the incident in question but also victims of such a crime in one way or other.
29. In that connection, she draws our attention to the evidence of PW 1. In his evidence, PW 1, son of the victim, has stated that on the noon in question, a quarrel took place between his father and one Gitu at field nearby their house over tethering of the cattle there which soon took a turn for worse since said Gitu started crying saying that he had been assaulted by his father which drew the attention of other accused persons who immediately came to the PO being armed with various weapons.
30. On hearing hue and cry coming from the PO, he went thereto and saw those persons dragging his father from their courtyard to a place near the coconut tree where they beat his father badly on different parts of his body, thereafter dragged his body to the land of one Binoy Saikia and left him there in an extremely injured conditions. According to him, his mother tried to save his father but in vain .He further deposes that he could not go near his father out of fear for which he took shelter in the house of one Biren Das.
31. The evidence of PW 2 and PW 3 supports such claims made by PW 1 since these two PWs are found saying that on the fateful day, the appellants along with accused persons had brutally assaulted the victim with various weapons in their hands near the coconut tree in their compound. PW2 tried to save her husband from such assault but without any success. The evidence, so rendered by those three PWs are found to be consistent on the main and as such ,the evidence of PW 1, PW 2 and PW 3 is required to be relied upon in ascertaining the allegation against the accused persons.
32. In regard to contention that there were discrepancies in describing the PO, it has been stated that a cursory reading of the evidence of witnesses would reveal that there are some discrepancies in describing the PO but when one reads very carefully the evidence of those PWs in between the lines, it would be clear that such discrepancies are not at all serious. Rather such discrepancies are peripheral in nature and therefore, far too inconsequential in demolishing the prosecution case. Therefore, prosecution case cannot be overthrown on this count as prayed for.
33. In regard to the contention, that the first FIR was torn and a second FIR was lodged in place of first one on the basis of which case in question was reportedly registered, it has been stated that such evidence of PW 4 should not be given to much importance since the informant, PW 1 did not tell a word about the first FIR, lodged by him being torn by the police where upon a second FIR was prepared on the basis of which the case is question was registered and investigated. The fact that the IO too did not support such a contention makes a conclusion inevitable.
34. In regard to the contention that the people from neighborhood were not examined, it has been stated that there was serious animosity between the family of the victim and nearby people over some domestic and social disputes. Therefore, it is quite but natural for the prosecution not to rely on those witnesses, more so, when there is nothing on record to show that very many persons of the locality concerned came to the PO to witness the incident in question and when the defence could not show any serious infirmity in the evidence, rendered by PWs.
35. Coming to the allegation that prosecution could not establish that there was an unlawful assembly at the PO on the noon in question or that the object of such an assembly was to kill the victim, it has been submitted by the Addl. PP that if one reads the evidence on record in their entirety, he would find that all the accused persons, which included the appellants herein, came to the PO,

all armed with various deadly weapons and having arrived at the PO, they brutall y assaulted the victim occasioning his instantaneous death.
36. Such evidence makes two things more than clear. First, there was an unla wful assembly at the PO and secondly and more importantly, the object of such as sembly was to kill the victim and nothing else. The evidence of Doctor who found several grievous injuries on the body of the victim being caused by blunt and s harp instrument makes such a conclusion inevitable.
37. Learned Addl. PP further submits that section 149 IPC consists of two li mbs. While first limb speaks of commission of an offence in prosecution of commo n object of the assembly whereas the second limb takes within its fold the knowl edge of likelihood of commissions of that offence/offences in prosecution of com mon object and such knowledge may be gathered from the nature of the assembly an d the surrounding circumstances in which the offence/offences in question was co mmitted.
38. According to learned Addl. PP, when one reads entire evidence on record, he would invariably find that the number of persons in such an unlawful assembl y was more than 5 and they must have knowledge about the object of such assembly . In the facts and circumstances of the present case, therefore, it needs to be concluded that object of such an assembly was to kill the victim aforementioned.

39. Being so, the allegation that since the object of common assembly was no t established and as such, the appellants could not have been convicted of offen ces u/s 302/149 IPC is also without any substance, according to learned Addl. PP . she therefore, urges this court to dismiss the present appeal on affirming the judgment under challenge.
40. We have considered the rival submissions having regard to the judgment u nder challenge and the evidence on record. However, before proceeding further, w e find it necessary to have a look at the evidence of doctor, who conducted auto psy on the dead body. He is Dr. Alakananda Goswami who was examined as PW 7. Acc ording to him, on 10.08.2013, he was posted at Mangaldoi Civil Hospital as SDMO.
41. On that day, he conducted autopsy on the body of the one Sarat Chaharia and found the following:

A male dead body aged about 71 years with eyes and mouth closed. Rigor-mortis absent with the following injuries.

(1) Stab wound over back near inner border of left scapula 1 ‰ inch x ‰ inch x 3 inches depth with bleeding.
(2) Stab wound over middle border of the right scapula ‰ Inch x ‰ inch x 3 inches depth with bleeding.
(3) Lacerated injury over scap over right perital region 2 inch x 2 inch x ‰ Inch depth with bleeding.
(4) Stab wound over right side of chest near right side of the sternum 2 in ch x 2 inch x 3 inches depath.
(5) Stab injury over left side of chest below the left clavicle 1 inch x ‰in ch x 3 inches depth with bleeding.

Clothes are stained with blood. Injuries are ante-mortem.

OPINION
In my opinion, the cause of death is due to shock and hemorrhage due to injuri es sustained. Ext. 4 is my report, wherein, Ext. 4 (1) is my signature.

Cross for Danda, Prema, Thandswar, Bhupen and Naba

Injury Nos. 1 and 2 are not fatal. But it is difficult to say, whether the de ath was not caused by the same injuries. Injury Nos. 1 and 2 are not affected an y vital part of the deceased. Injury No.3 has also not caused any grievous hurt. It is not exactly mentioned that the injury No.4 and 5 touched the vital part o f the deceased. I did not mention in my report that the injuries are of grievous in nature. The death was caused not due to the above 5 Nos of injuries but due to the psychological shock. I do not agree with the above suggestion because the

death was caused due to the cumulative effect of all the injuries .

42. Form the evidence of doctor, it is found that injury No. 1 and 2 are not fatal since such injuries did not hurt the vital part of the body. Similarly, injury No. 3, according to Doctor, was not grievous in nature. Injury No. 4 and 5 did not touch the vital part but it cannot be said whether such injuries are fatal or not. But according to Doctor, all those injuries in their cumulative effect could cause the death of the victim.

43. It is in these backdrops, let us consider the testimonies of other witnesses and evidence of Sri Bul Saharia, (PW 1), Sri Kanchan Saharia (PW 2) and Smt. Namita Deka (PW 3), who claim themselves to the eye witnesses, are first taken up for consideration. PW-1 deposes that on the fateful afternoon, he was in his house. His father went to the nearby field to tether their cattle there. When his father was doing so, one Gitu Hazarika, a young boy, came to such place and tried to tether his cattle in the same place where his father had already tethered his cattle.

44. Therefore, his father advised Gitu to take his cattle to somewhere else. Gitu Hazarika refused to do so for which a verbal duel occurred. Soon thereafter Gitu started shouting calling his father to the PO (place of occurrence) saying that he was assaulted. Due to such cry of Gitu Hazarika, appellants herein along with Naba, Bhupen, Hirakjyoti, Maheswar Saikia, Binay, Khiteswar Deka and Rudra Deka came to such place running. All accused persons carried various weapons in their hands.

45. Thereafter, accused persons entered into the compound of PW 1 and caught hold of his father, dragged him from their courtyard towards the southern side and brutally assaulted him under the coconut tree in their compound. While accused Danda hit his father with a dao, the appellant Prema Hazarika injured his father by planting a spear blow on the chest of his father for which his father fell down on the ground then and there.

46. According to him, the other accused persons too assaulted his father with the weapons in their hand. When his mother tried to save his father, she was also threatened by the accused persons with dire consequences for which she could not render any help to her husband. It is also his evidence that out of fear, he could not go to his father to save him from the assault of the accused persons. According to him, he saw the incident in question from some distance. After killing his father, accused persons threw the dead body of his father to the land of one Binoy Saikia.

47. According to PW 1, accused persons also tried to kill him for which he fled the scene and took shelter in the house of one Biren Das. In that connection, he lodged the FIR which he proved as Ext.1. In his cross examination, he confirmed that as the incident was going on, he left the PO and then he took shelter in the house of Biren Das. He also admitted that he came out of the house of Biren Das only when the incident was over.

48. PW 2 deposes that on the fateful day, she was in her house. One Namita Deka (PW 3), her grand-daughter and PW 1 were also in their house at the time of incident. Her husband took their cattle to the nearby field to tether. However, a quarrel between her husband and Gitu Hazarika occurred over the right of tethering of their cattle at the place where her husband had already tethered his cattle. Due to such quarrel, Gitu raised hue and cry.

49. Such hue and cry brought appellants Prema, Thaneswar, Danda, Naba, Bhupen, Hirakjyoti , Binay and Maheswar as well as the son of Maheswar to such place. While Prema and Thaneswar were carrying iron rod, Danda was carrying a dao and the rests were carrying sticks in their hands. After arriving at the PO, all of them started assaulting her husband. She saw that accused Danda giving a blow on her husband on the head of her husband with a dao.

50. Being assaulted, her husband fell down on the ground. Rest of the accused started to beat her husband with iron rods and lathis which they were yielding at that point of time. Thereafter, accused persons dragged her husband to a nearby coconut tree. She went to the place of occurrence and requested accused Danda not to assault her husband. Accused Danda taking the dao in his hand charged at her. Out of fear, she fled the scene.

51. Thereafter accused persons dragged her husband from a place near the coc onut tree and threw the body in the field of one Binay. After the incident, his son, PW 1, asked her to go and see whether his father was alive or not. Going th ere, she found that her husband did not respond to her query. According to her, her husband died in the meantime. Thereafter she and her other family members ra ised hue and cry.

52. In her cross examination, she is found saying that about 15/20 neighbors had also witnessed the incident under consideration but she could recognize one Amit only by name and face among the people assembled there on that eventful af ternoon. In her cross examination, she further states that she is about 65 years of age and as such, she could not see everything clearly. According to her, her vision is further hampered when she is to face bright light.

53. PW-3 deposes that on the fateful day in the afternoon, she was in the ho use of her grandfather (deceased). She states that on the day of incident, her g randfather went to the nearby field to tether his cattle there. Around the same time, Gitu also came there and wanted to tether his cattle in the same field whe re her grandfather had already tethered his cattle. Therefore, there was a quarr el between Gitu and grandfather.

54. Owing to such quarrel, Gitu called out his parents. Immediately, Gitu's parents and other family members came to the place of occurrence running armed w ith different weapons in their hands. According to PW 3, the accused Danda came there with a dao in his hand whereas Prema came with a pointed iron rod. On the other hand, Thaneswar came there armed with an iron rod and the rest too carried bamboo sticks etc. Immediately on arriving at the PO, they started assaulting h er grandfather with the weapons for which her grandfather fell down on the groun d being injured.

55. Thereafter his body was taken to nearby field and was thrown at such pla ce. Doing all those mischief, accused persons left the PO. When her grandmother protested the conduct of appellants and other persons, she was threatened by the m. According to her, as the incident was going on, PW 1 had fled from such place and kept himself hidden in the house of a person living nearby the PO. It is in her evidence that police came to the PO in the evening and took the dead body .

56. During the course of investigation, her statement was recorded which she proved as Ext.3. In her cross examination, she stated that PW 1 went to hiding soon after the commencement of the incident in question. In her cross examinatio n, she further admitted that she told the police that she did not have the acqua intance with the miscreants who gathered at the PO on the eventful afternoon, bu t would be able to recognize them as and when she could see them.

57. PW 4, Nagendra Nath Saharia deposes that the deceased was his elder brot her who was killed on 09.08.03. On that day, he was in his house situated at som e distance from the place of occurrence. On the fateful day at about 4.30 PM, a person informed his nephew Dr. Bhupen Saharia over phone that the victim was kil led by neighbors. In the meantime, he also came to know from one Bhuban Ch Deka that a quarrel had taken place between his elder brother and the people of Kacho mari village for which his elder brother got killed.

58. According to him, at about 5 P.M. PW 1 came to his house and informed th at Gitu Hazarika, Premananda, Danda, Thaneswar, Naba, Bhupen, Hirakjyoti Hazarik a, Binay, Maheswar Saikia, Gaonburah Khiteswar Deka and his son Rudra Deka unite dly killed his elder brother by assaulting him with weapons like, spike, dao, la thi, knife etc. After knowing this, he took Bul Saharia (PW 1) to the police sta tion where PW 1 lodged an FIR. Since it was not properly written, the FIR lodged by PW 1 was torn and a new FIR was written and on the basis of which a case was registered.

59. Same day towards the night, he went to the PO and noticed pool of blood under the coconut tree. He also saw at a little distance there-from, a bamboo ga te in a broken condition. He also saw the dead body of his elder brother lying a t such place. In his cross examination, he admitted that the First FIR was torn since it was not written properly.

60. PW 5 is one Gajen Deka, UDA in the office of CJM, Darrang. According to

him, one Seema Das, the then SDJM, Darrang, Mangaldoi, recorded the statement of PW 3 u/s 164 CrPC. Smti. Seema Das, SDJM, Darrang, Mangaldoi (PW 6), deposes that on 13.08.2003, she recorded the statement of Namita Deka u/s 164 CrPC. In her cross examination, she stated that she did not put any question to the witness aforesaid to ascertain as to the maturity of her mind although the witness stated before her that her age was 11 years on that day.

61. PW 8, Sri Keshab Chutia is the IO of the case. According to him, on 09.08.2003, while he was working as second officer at Mangaldoi police station, O/C, received an FIR at about 5.30 pm. On the basis of such an FIR, a case was registered and he was entrusted with the investigation. During the course of investigation, he visited the PO and found the body of Sarat Saharia, since deceased, in an open field at a distance of 50 meters from his house.

62. He, thereafter, prepared a sketch map of the PO and conducted inquest on the dead body and prepared a report in that connection which he proved as Ext. 2. As the investigation progressed from stage to stage, he arrested the accused person. During the course of investigation, he also got the statement of Namita Deka (PW 3) recorded by Magistrate u/s 164 CrPC. But before he could complete the investigation, he was transferred and as such, he handed over the case diary to the O/C for doing further needful.

63. The suggestion put to him that the first FIR, written by PW 1, was not accepted by OC concerned, as it was not properly written by the informant (PW 1) and in its place a new one was written and on the basis of which the case in question was registered was denied by him. He also admitted that he did not cite any person living in an around the PO as witnesses to the incident in question.

64. Above being the evidence on record, let us see how far such evidence makes out the charges, leveled against appellants. A perusal of the evidence on record reveals that on the fateful afternoon, there was a quarrel and such quarrel took place over tethering the cattle by one Gitu in the land in which the victim too had already tethered his cattle. Since Gitu felt afraid that he might be assaulted by the victim, he raised hue and cry which brought other accused persons, including present appellants, to the PO, most of whom were armed with various weapons.

65. Further perusal of the evidence of the PWs again reveals that those persons started assaulting the victim by the weapons in their hands inflicting injuries on his person. The materials on record also demonstrate that appellants herein along with other persons, their number being more than 5, had participated in the incident in question. The evidence of Doctor who conducted autopsy on the dead body reveals that the victim sustained several injuries on his body being caused by both blunt and sharp object.

66. Now, the question, is, if on the basis of above revelations, the appellants herein could be convicted of offence u/s 302/149 IPC? But before addressing such a question, we need to find answer to several allegations leveled against the prosecution case or for that matter, against the judgment which is questioned in the present appeal. It has been alleged that prosecution could not properly describe the place where the incident in question actually took place on the eventful afternoon. On the perusal of the record, it is found that the incident had occurred in places more than one.

67. As per evidence on record, the incident first occurred in the field where the victim had tethered his cattle in the afternoon in question. Then, the incident spilled over to nearby area, more particularly, to a place near the coconut tree in the compound of the victim and thereafter, the miscreants dragged the body of the victim to the field nearby and left it there before leaving such place. Being so, the allegation that PO was not properly described is found to be without any substance.

68. In regard to the allegation that PW 1 could not have seen the incident in question for his taking shelter in the house of nearby people right from the commencement of alleged incident till such incident was over and as such, he, not being an eye witness to the incident in question, could not have seen the incident aforesaid and therefore, he could not have been relied on, we have found that such allegation too has little substance in it.

69. It is true that there is evidence to show that PW 1 did take shelter in the house of nearby person, to be precise in the house of one Biren Das where th e PW 1 hide himself over a greater period of time during which incident in quest ion took place. But then, there is indisputable evidence on record to show that he was the first person who witnessed the incident in question and he did so up to certain length. But at some point of time, he felt frightened and therefore, he left the PO and took shelter in the house of person aforesaid.

70. Therefore, it cannot be said that PW 1 was not at all an eye witness to the incident aforesaid. Rather, he was a witness to a major part of the said inc ident and his evidence gives more and more credence to the other principal PWs s ince his evidence on the main is found to be in tune with the evidence of PW 2 a nd PW 3. Being so, the evidence of PW 1 also cannot be brushed aside as prayed f or by the learned counsel for the appellants.

71. In regard to the serious inconsistencies in the evidence of principal PW s, particularly, in the evidence of PW 1, PW 2 and PW 3, it is found that it is true that there are some inconsistencies in narrating the incident aforesaid by the PWs. However, such inconsistencies occurred, not, on the main but in the per ipheral aspects of the prosecution case since all the PWs are found saying that the appellants herein along with others had brutally beaten the victim at the pl aces aforesaid.

72. The prosecution comes under fire also on the count that the original FIR was suppressed by a subsequent one in order to falsely implicate the accused/ap pellants herein and others with the crime in question. The appellants also tried to measure the strength of prosecution case stating that the prosecution case i s bad for being founded entirely on the evidence of interested witnesses to the total exclusion of neutral and natural witnesses, more particularly, the neighbo rs.

73. We have found that learned Addl. PP, has properly replied to those conte ntions. In our considered opinion, such replies are found to be cogent, consiste nt and convincing and as such, on the materials on record, such submissions, adv anced from the side of Addl. PP, refuting the aforesaid allegations from the sid e of appellants, in our considered opinion, deserve acceptance which we accordin gly do.

74. In regard to the allegation that prosecution could not prove that there was an unlawful assembly of 5 or more persons at the PO on the eventful afternoo n, it is found that materials on record clearly demonstrates that there were per sons more than 5 who came to the PO all armed with various weapons who participa ted in the crime in question. The evidence of doctor too confirms the same since he found several injuries caused by both sharp and blunt object.

75. Now, let us see what was the object of such an assembly? Was the object of such assembly was to kill the victim? On considering the evidence on record, it is found that the appellants and others came to the PO, all armed with variou s weapons, when Gitu, a young boy, started crying for help uttering that he was being assaulted by the victim. We have also found that the evidence of doctor re veals that though several stab wounds were found on the body of the deceased, mo st of those injuries were not fatal and most of those injuries did not hurt the vital body parts of the deceased.

76. On reading the evidence of doctor, more and more, it is also found that the deceased is a sufficiently old person, his age being about 71 years when he died. Equally importantly, there is also evidence on record to show that he was not in good health either when he met his death. A conjoint reading of all those testimonies, therefore, reveals that the object of unlawful assembly was not to cause death of the victim.

77. But in view of materials on record, it needs to be concluded that object of such an assembly was to cause grievous hurt by sharp object. Therefore, all the accused persons could not have been convicted u/s 302/149 IPC, rather they o ught to have been convicted u/s 326/149 IPC.

78. It is worth noting here that the appellants have adduced the evidence of 6 DWs to show that appellants herein were not there at the PO when the incident in question took place and as such, they were no way connected with crime in qu

estion. On considering such evidence of DWs in the light of evidence of PWs we have found that such evidence no way established the innocence of appellants herein.

79. Rather their evidence only serve to show that an incident in question did took place at the PO and appellants herein were the persons who along with others took part therein. The evidence of DWs, more particularly, the evidence they rendered in their cross-examination makes such position clear. Being so, we are of the opinion that the DWs could not establish the innocence of appellants.

80. We have already found that save and except present appellants other accused persons facing trial in Sessions Case No. 58(D-M)/2007 were acquitted of offence u/s 302/149 IPC and admittedly, State preferred no appeal against them. Being so, in absence any appeal against them, their order of acquittal cannot be interfered with.

81. But the present appellants in view of our foregoing discussions could not have been convicted u/s 302/149 IPC. Rather as stated above, they ought to have been convicted u/s 326/149 IPC.

82 Resultantly, the conviction of accused/appellants stands modified from a conviction u/s 302/149 IPC to a conviction u/s 326/149 IPC.

83. On considering materials on record, the accused persons are sentenced to suffer R.I. for 5 years and a fine of Rs. 5,000/- each i/d R.I. for another 2(two) months for the offences aforesaid. The periods which the accused appellants had already spent in jail are ordered to be set off against the period of sentence.

84. In view of above, this appeal is partly allowed as indicated above.

85. Return the LCR.

86. Since the victim aforesaid died a tragic death on 09.08.2003 leaving behind some legal heir(s), we are of the opinion that in terms of Section 357A, some amounts needs to be paid to the legal heir(s) of the deceased as compensation. Accordingly, we direct the State of Assam to pay an amount to the tune of Rs.50,000/- to the legal heir(s) of the deceased as being compensation.

87. The State of Assam is directed to pay such amount to the State Legal Services Authority (in short, the SLSA) within a period of 3 months from the date of receipt of certified copy of this judgment. On the receipt of such amount, the SLSA shall place such amount at the disposal of the District Legal Services Authority, Darrang, Mangaldoi.

88. On the receipt of the amount by DLSA, Darrang, Mangaldoi, same would be disbursed to the legal representative(s) of the deceased on proper identification in equal share.