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PULEN PHUKAN & ORS.

v.

THE STATE OF ASSAM

(Criminal Appeal No. 906 of 2016)

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MARCH 28, 2023

[B. R. GAVAI, VIKRAM NATH AND SANJAY KAROL, JJ.]

- Penal Code, 1860 : ss. 302, 326, 147, 148, 149, 447 and 34 – Murder – Unlawful Assembly – Complainant-PW 1's case that 13 persons entered her house and caused grievous injury to her brother-in-law PW 2 and three of them assaulted the victim with sharp cutting weapons resulting in his death – Trial conducted against 11 of them – Courts below convicted them u/s. 147/148/ 447/323/302/149 and sentenced them to imprisonment for life u/ss. 302/149 along with other punishment for the charged offences –*
- D On appeal, held: Prosecution is not to accept the complainant's version as truth but the investigation must be made in a fair and transparent manner and must ascertain the truth – No explanation has come forward to explain the presence of the police personnel throughout the incident – Entire version of the prosecution witnesses that the police personnel accompanied the accused and were standing outside the house of the deceased creates a serious doubt on the very genesis of the prosecution story – Eye-witnesses have not taken names of the 13 accused persons – No statement by the eye-witnesses that all the accused persons had come with a common object of committing murder and assaulting the injured PW-2 – It cannot be said that all members of the unlawful assembly were aware of the common object – It cannot be said that there was unlawful assembly – Furthermore, material inconsistency in the statement of the eye witnesses – No recovery at the instance of any accused – Injuries of PW2 not proved as there was no injury report – Scribe of the FIR also not produced nor the signatures proved – It is quite possible that it was a complete set-up by the police – Although the death was homicidal but the prosecution has not established the case beyond reasonable doubt against the appellants, thus, entitled to benefit of doubt – Order passed by the High Court set aside.*

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Allowing the appeal, the Court

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HELD: 1.1 The prosecution is not to accept the complainant's version as Gospel Truth and proceed in that direction but the investigation must be made in a fair and transparent manner and must ascertain the truth. The evidence collected during investigation should then be analysed by the Investigating Officer and accordingly a report under Section 173(2) of the CrPC should be submitted. Further, the duty of the trial court is to carefully scrutinise the evidence, try to find out the truth on the basis of evidence led. Wherever necessary the trial court may itself make further inquiry on its own with regard to facts and circumstances which may create doubt in the minds of the Court during trial. If the investigation is unfair and tainted then it is the duty of the trial court to get the clarifications on all the aspects which may surface or may be reflected by the evidence so that it may arrive at a just and fair conclusion. If the trial court fails to exercise this power and discretion vested in it then the judgment of the trial court may be said to be vitiated. [Para 13][628-F-H]

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1.2 In the instant case, the informant- PW-1, the injured eye-witness PW-2, eye-witness PW-3 and PW-4 have categorically stated that police personnel had accompanied the accused and they were there throughout the incident. This fact is noticed by the trial court in its judgment but it fails to get this clarification from the prosecution as to what occasioned the presence of the police personnel accompanying the accused and standing outside the house of the deceased to watch the accused assault PW-2 and commit the murder of his brother. The trial court had simply brushed aside the argument of the defence on this count without giving a serious thought. [Para 14][629-A-B]

1.3 If the police personnel were present at the time of commission of the offence, they should have immediately acted upon to set the criminal machinery in motion by first apprehending the accused from the spot itself rather than allowing them to get way by accompanying the police to the Police Station while continuing to assault the injured PW-2 on the way. The entire version of the prosecution witnesses that the police personnel accompanied the accused and were standing outside the house

- A of the deceased creates a serious doubt on the very genesis of the prosecution story. [Para 15][629-C-D]

1.4 According to Section 149 IPC every member of the unlawful assembly must know the common object of their assembly and also the offence likely to be committed in

- B prosecution of the common object. [Para 24][631-D]

1.5 None of the eye-witnesses have taken names of all the accused persons who are said to be 13 in number. Only names of 3-4 accused persons are taken who are said to have assaulted the deceased and the injured PW-2. None of the eye-witnesses

- C have stated that all the accused persons had come with a common object of committing murder and assaulting the injured PW-2. It is also not stated by any of the eye-witnesses that there were any utterances by one or many or all the accused that they must eliminate the deceased and cause injuries to the injured PW-2.

- D There is no evidence to the effect that any of the accused exhorted the others saying that they have to eliminate the deceased and assault the injured (PW-2). Further, it is clearly stated by the eye-witnesses PW-1, PW-2 and PW-3 that at least five police personnel were accompanying the accused and that they were standing outside and did not interfere in the commission of the

- E alleged crime. Thus, it is difficult to decipher that all the members of the unlawful assembly were aware of the common object. [Para 25][631-E-H]

1.6 PW-2 and PW-3 have stated that the police along with the accused had come to arrest the deceased and the injured. If

- F that was the object and the police were taking help of the accused persons then also the factum of common object of committing the crime of murdering the deceased is not borne out. It could be that the common object known to the accused was of apprehending the deceased and the injured PW-2 as there was some criminal case registered against them lodged by PP, one of

- G the accused. In view thereof it cannot be held that there was an unlawful assembly and further to uphold the conviction under Section 149 IPC. [Para 26][632-A-C]

1.7 In the FIR, K and PP have not been assigned any role of assault. The role assigned is to MP, DP and HS. PW-1 has

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taken the name of K assaulting on the leg with an iron rod and PP assaulting on the neck. In the cross-examination, she has stated that DP assaulted on the neck. PW-2 has stated that K hit the deceased with a dao then he says that he did not see who assaulted PRP and later on says that it was PP who dealt a blow on the neck. PW-3 has stated that K assaulted with an iron rod and DP assaulted on the neck with an axe. PW-4 has stated that K dealt a blow on the leg with an iron rod and then DP dealt a blow on the neck of the deceased with an axe. There is no recovery at the instance of any accused under Section 27 of the Evidence Act. The axe, according to the evidence, was left on the dead-body of the deceased. What is evident is that K's name was not included in the FIR but his name has been consistently taken by the eyewitnesses of first assaulting the deceased with an iron rod. In so far as PP is concerned, his name has been taken by PW-1 and PW-2 for assaulting on the neck and whereas PW-3 and PW-4 have taken the name of DP striking on the neck. Thus, there is material inconsistency in the statement of the eye-witnesses. [Para 27][632-C-G]

1.8 Another important aspect to be noted from the evidence of PW-1, PW-2, PW-3 and PW-4 is that after being hit by K with an iron rod, PRP, the deceased struggled to enter the room and there he was assaulted on the neck. When according to the prosecution story itself PRP, the deceased had entered the neighbour's house it would be very difficult for the eye-witnesses to also have entered the house of PW-4 and PW-5 and to witness the assault. PW-1 and PW-3 have not stated that they also entered the room where the assault took place. PW-2 has clearly stated that when he tried to follow PRP he was stopped by the accused and the police personnel who were standing outside. [Para 28][632-H; 633-A-B]

1.9 The evidence creates a very serious doubt on the entire prosecution story. It is quite possible that the police personnel of the concerned Police Station were there to arrest the deceased and his brother and in that process some resistance may have resulted into the incident causing the death of the victim. The injuries of PW2 have not been proved as admittedly there was no injury report. Even the scribe of the FIR has not been produced

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- A nor the signatures have been proved. It is quite possible that it was a complete set-up by the police. They having committed the murder in the process of arresting the deceased, and thereafter, knowing the enmity between the two parties, set-up a false case against the accused. Apparently, no explanation has come forward to explain the presence of the police personnel of the Police Station throughout the incident. [Para 29][633-C-E]

- 1.10 The prosecution has not established the place of occurrence by any material exhibit of having collected the blood-stained earth from the place of occurrence. Even the material exhibit, the axe, which is said to have been taken into custody by the police whether on the date of the incident or two days thereafter has also not been produced nor any evidence led to that effect. It is still a mystery as to how the Investigating Officer in his statement has stated that he had filed a charge-sheet against eight accused as five were absconding and there is no further statement regarding three more accused being arrested and put to trial, how the trial court proceeded to convict 11 accused and only two were set to be absconding. Even the scribe of the FIR has not been examined. It was extremely relevant when PW-1 has stated that she had no knowledge of the contents of the FIR. [Para 30][633-E-G]

- E 1.11 Although the death of the victim was homicidal but it is not convincing that the prosecution has established the case beyond reasonable doubt against the accused appellants. The appellants would be entitled to benefit of doubt. The conviction and sentence are set aside. [Para 31][633-H; 634-A]

F CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.906 of 2016.

From the Judgment and Order dated 21.11.2015 of the High Court of Gauhati at Agarhala in CRLA No.113 of 2014.

G Sanjay R. Hegde, Sr. Adv., Azim H. Laskar, Bikas Kar Gupta, S.K. Biswal, Ms. Debarati Sadhu, Shahrukh Ali, Chandra Bhushan Prasad, Raghav Gupta, Ms. Debanjana Ray Choudhuri, Advs. for the Appellants.

Debojit Borkakati, Adv. for the Respondent.

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The Judgment of the Court was delivered by
VIKRAM NATH, J.

1. The Appellants have assailed the correctness of judgment and order dated 21.11.2015 passed by Gauhati High Court in Criminal Appeal No.113/2014 – Pulen Phukan and 10 others versus State of Assam whereby the appeal was dismissed confirming the judgment and order of Trial Court i.e. Sessions Judge at Dibrugarh passed in Sessions Case No.27 of 2000 whereby 11 accused were convicted under Sections 147/148/447/323/302/149 of Indian Penal Code, 1860¹ and sentenced to Rigorous Imprisonment for life under Section 302/149 IPC and Rigorous Imprisonment for six months under Sections 147/148/447/323 IPC. Further a fine of Rs.1,000/- was imposed on each of the 11 accused and in default of payment of fine, to undergo further one-month Rigorous Imprisonment.

2. It would be relevant to note here that although trial was conducted against 11 out of 13 accused and all of them were convicted and sentenced as above, all the 11 convicted accused had preferred an appeal before the High Court which had been dismissed. However, before this Court only four of such accused have preferred an appeal, namely, Pulen Phukan (accused no.1), Jiten Phukan (accused no.3), Mridul Saikia @ Midul Saikia (accused no.5) and Mozen Phukan (accused no.2). Two of the thirteen accused namely Dhajen Phukan and Muhibram Phukan remained absconded and there is no material on record regarding their arrest or trial.

3. The prosecution story begins with lodging of a First Information Report² on 13 June, 1989 at Police Station Chabua, District Dibrugarh, reported by Smt. Nareswari Phukan (PW1). It is a very short and crisp FIR which states that around 12 noon on 13.06.1989, thirteen residents of the village came to her house, cordoned off her house without any reason and caused grievous injury on the head of her brother-in-law Robi Phukan (PW 2) by giving blows with sharp weapons and three of the accused persons, namely, Mozen Phukan, Dulon Phukan and Haren Saikia committed murder of Pradip Phukan by assaulting him with sharp cutting weapons, necessary action may be taken regarding the said incident. This was registered as Chabua Case No.70/89 under Sections

¹ IPC

² FIR

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- A 147/148,149,447, 302, 326, 34 IPC. The police came to the spot, made the necessary enquiries and after completing the formalities sent the dead-body of the deceased for post-mortem. They also collected some material from the spot for which recovery memos were prepared and the material taken into custody. After completing the investigation, charge-sheet was submitted on 3rd May, 1991 against eight accused, namely,
- B Mozen Phukan, Mridul Saikia, Kuleshwar Chetia, Pulen Phukan, Baren Saikia, Dulen Phukan, Kiran Saikia and Harnath Saikia. Five accused could not be arrested as such they were not sent for trial being absconders, namely, Jiten Phukan, Dhajen Phukan, Muhiiram Phukarn, Haren Saikia and Jiban Chetia. It appears that at some stage three more accused
- C were arrested and they were also sent for trial. The two accused who remained absconding are Dhajen Phukan and Muhiiram Phukan. The charge-sheet was submitted finding *prima facie* case for trial under Sections 147, 148, 149, 447, 448, 324, 326 and 302 IPC. The charges were read out to the accused who pleaded not guilty and claimed to be tried.
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4. The prosecution examined seven witnesses and also filed four documentary evidences to prove the charges. The seven witnesses are as follows:
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- i. PW 1- informant and eye-witness: Smt. Nareswari Phukan (sister-in-law of the deceased);
 - ii. PW2-Eye-witness and injured: Robi Phukan (brother of the deceased);
 - iii. PW 3 – Eye-witness: Smt. Jogmaya Phukan(sister in law of the deceased) ;
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- iv. PW 4- Eye-witness: Smt. Anjana Phukan, (relative of the deceased);
 - v. PW 5 – Bhuban Phukan, relative of the deceased;
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- vi. PW 6 –Dr. Naleswar Sonowal who conducted the autopsy on the dead-body of the deceased; and
 - vii. PW 7 – Nilo Chiring, the Investigating Officer who submitted the charge-sheet (Ex.-4).
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5. The documentary evidence produced and proved by the prosecution are:

- i. FIR (Ejahar)-Ex.-1; A
- ii. Seizure of the axe-Ex.-2;
- iii. Post-mortem report-Ex.-3;
- iv. Charge-sheet-Ex.-4.

6. The Trial Court and the High Court came to the conclusion that B
the evidence led by the prosecution was unquestionable and have accordingly recorded the conviction and sentence as afore-stated.

7. Heard learned counsel for the parties and perused the material on record. C

8. Learned counsel for the appellants made the following submissions:

A. The prosecution has not come forward with fair and honest version for the following reasons:

- i. The FIR is very sketchy. The statement of the first informant (PW-1) before the Trial Court is a clear improvement from the version mentioned in the FIR. D
- ii. PW-1, PW-2 and PW-3 have clearly stated that at least five police personnel were present at the time the incident took place. It is also stated that the police personnel had accompanied the accused. There is no explanation given regarding the presence of the police throughout the occurrence. E
- iii. If the police personnel were present outside the house of the deceased then the matter ought to have been reported by them regarding the incident rather than PW-1 going to the Police Station to lodge the FIR. F
- iv. The accused accompanied the police to the Police Station along with PW-2 who was throughout assaulted on the way.
- v. Why did the police personnel who were five in number not make any attempt to apprehend the accused and not only let them go scot-free but also accompanied them to the Police Station. G

B. There is no evidence whatsoever to show that all the accused had come with a common object with regard to the offence to be H

- A committed and if that be so invoking sections 147, 148 and 149 IPC would be untenable in law. The ingredients of Section 142 of IPC are not established by any evidence.
- C. There is material inconsistency in the evidence of the eye-witnesses PW-1 to PW-4 which completely discredits their testimony
- B not only for the reason that they are interested witnesses being relatives of the deceased but also on careful scrutiny of the evidence, their testimony cannot be regarded as reliable. Further testimonies of PW-1 to PW-4 *vis-à-vis* their statements under Section 161 Code of Criminal Procedure, 1973³ are quite inconsistent.
- C D. It is a clear case of false implication at the hands of the police inasmuch as:
- i. The police were present throughout the incident, which presence has not been explained.
 - ii. The FIR is written by one Md. Majid Sikdar whose evidence is not only not recorded in the police case diary but also not produced through trial to prove the report.
 - iii. The first informant has clearly stated that she did not know the contents of the FIR as the same was not read out to her and that she had only put her signatures where she was told to.
- E 9. On the other hand, learned counsel for the State-Respondent submitted that both the Courts below i.e. the Trial Judge as well as the High Court, after considering the material evidence on record, have recorded concurrent findings on conviction and as such the same would
- F not require any interference by this Court.

10. Before proceeding with the analysis of the evidence led by the prosecution, the deposition of each of the seven witnesses is briefly recorded hereunder:

- G 10.1 The first informant PW-1 opens her statement by stating that she knows the accused persons by name and face. She further states that she knows the accused persons present in the dock on the day of her statement; the two absconded accused Dhajen and Muhibram are not present; she then reiterates the contents of the FIR; while Robi

³ CrPC

Phukan (PW 2) was being assaulted, the deceased fled by the back court yard; the accused persons chased the deceased who entered into the house of Anjana Phukan (PW4); she followed the accused persons who also entered into the house of Anjana Phukan (PW4); that Kuleswar assaulted the deceased with iron rod and Pulen Phukan gave a blow on the neck of the deceased, as a result of which he fell down. The accused thereafter left that place. She then states that while the accused persons were taken to the Police Station she along with Jogmaya Phukan (PW-3) came to the Police Station where the FIR was written and she put her thumb impression; she proves her thumb impression on the FIR which is marked as Ex.-1; thereafter she proceeds for the Mission Hospital where the body of the deceased had reached. In her cross-examination she states that Chabua Police Station is about 3 kms. away from her house; she reached the Police Station at about 3-4 PM; she did not read Ex.-1 which was written in the Police Station and only her signatures were obtained thereon; it was also not read over to her; she does not know what is written in it; the police did not question her. Then she denies the suggestion about the assault being incorrect. Lastly she states that on the date of occurrence, the police were accompanying the accused.

10.2 PW 2- Robi Phukan, brother of the deceased, is an eye-witness as also alleged to be injured. According to him, the deceased, his mother and Jogmaya his wife and he himself were present at home on the fateful day at about 12 noon when the accused persons armed with *dao* etc. came to their house and enquired about Pradip (deceased). On seeing the accused persons coming, the deceased went out through the back door of the house then the accused persons chased him. The deceased entered Bhuban's (PW-5) house (which is the same house as Anjana's (PW-4) as they are husband and wife). The accused also entered Bhuban's house and assaulted Pradip, the deceased. Kuleswar hit him with a *dau* while he was trying to enter. Then I did not see who assaulted with *dau* on the deceased's neck. Thereafter the accused persons came near him and caused injury by assaulting with lathis. The police arrived there a little later and took him to the hospital for treatment. He further states that he sustained injuries on his head and hands. In the cross-examination he states that the police did not question him with regard to the incident. When the accused persons came, he was outside the house. However, on seeing the accused persons entering the house, he also came in. He came out when the deceased was chased by the accused. He then states that the police personnel and the accused persons caught

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- A hold of him. He claims to have seen the hacking of his brother. He denies the suggestion that actually he did not see anything. He admits that before the police he had not stated that Kuleswar and Dhule had assaulted the deceased. He further goes on to say that the police personnel had come along with the accused to his house. Another relevant fact which he mentions in the cross-examination is that prior to the incident of his brother's murder, police had registered a case against them on the basis of allegation made by Pulen Phukan. They had appeared in the court while the police were searching for them. On the day of the occurrence police along with the accused came to his house searching for him and his brother (deceased).
- B 10.3 Jogmaya Phukan (PW-3) is the wife of Robi Phukan (PW-2). She has given a similar version that while she was sitting at home with her husband, the deceased and her mother-in-law at around 12 noon the accused persons armed with *dao* and axes came to their house. The deceased on seeing them went out through the back door and entered
- C Anjana's house. He was chased by the accused who also entered into Anjana's house. She saw Kuleswar assaulting the deceased with an iron rod and Dulen assaulting on the neck with an axe. The neck had almost separated from the body and it was hanging. The accused persons took her husband Robi Phukan (PW2) to the Police Station assaulting him. She also states about the police personnel coming to her house along with the accused and that they witnessed the incident. According to her also, the police did not question her. She further states that 5-6 persons have entered into the room where the deceased was assaulted. She also states that she did not enter the said room. She further states that police had come to apprehend her husband and the deceased.
- D 10.4 Anjana Phukan(PW-4) has stated that she knows the accused persons as also the deceased who was her brother-in-law by relation. Their house is in the neighbourhood and they share common boundary. On the date of the occurrence at about 12 noon she heard some sound outside and she saw the deceased enter her house in a haste and accused
- E Kuleswar who was chasing him assaulted with an iron rod. Despite the same the deceased entered into the house and then Dulen Phukan with an axe assaulted on the deceased neck as a result of which he fell down instantaneously. The neck had almost severed and he died immediately. The accused persons then fled the scene. She however states that she stayed at home with the dead-body till about 4 PM when the police
- F came and took the dead-body.Her two small children had been taken

away by her mother to her home; her husband was not at home. She also states that the accused had left the axe which was the weapon of assault on the body of the deceased. She further states that she signed the recovery memo (Ex.-2). In her cross-examination she stated that she had seen Kuleswar, Dulen Phukan and Pulen Phukan and also the five police personnel with them. The various suggestions given by the defence were all denied by her. She also states that the seized articles have not been produced in Court and she has not seen them.

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10.5 Bhuban Phukan (PW-5) is not an eye-witness. He has only stated that he returned in the evening after working when he came to know that Pradip Phukan had been murdered inside his house. He further states that his wife and children had left for their maternal home. He also states that two days after the incident police visited his house and took away one axe and he prove his signature on Ex.-2(2).

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10.6 Dr. Naleswar Sonowal (PW-6) conducted the autopsy and had noticed the following ante-mortem injuries:

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Injuries:

1. Incised wound 10 x 3 cm x 6 numbers of cervical vertebrae cuts in the right side of the back of the neck. Skin, muscles, vessels, nerves and 6th cervical vertebrae were cut completely and slightly the spinal cord.

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2. Incised wound 4 x 2 cm x bone deep in the scapular end at the clavicle, clavicle was cut.

3. Incised wound 4 x 2 cm x bone deep in the lateral side of the left elbow. Bevelled cut incised wound 9 x 3 cm x skin cut in the left temporal region.

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4. Bruises 3 x 3 cm below the left nipple.

5. Bruises 3 x 2 cm over the 11th right rib in the interior axillary line.”

She has stated that the dead-body was received at the hospital at 1 PM on 13.06.1989 and the post-mortem was conducted at 11 AM on 14.06.1989.

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10.7 PW-7 is the Investigating Officer who had submitted the charge-sheet. According to him, the investigation was conducted by Sub-Inspector Dharendra Nath Saikia and after his transfer it was entrusted

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- A to him. He then states that out of thirteen, eight accused were charge-sheeted and five were reported to be absconders. He also states that he made several attempts to arrest the absconded accused but could not find any traces of them. He also stated that he made attempts to collect the injury report of Robi Phukan (PW2) at St. Look Hospital, Chabua and also at Medical College, Dibrugarh but could not find any records of the injured person. He proves the charge-sheet bearing his signature as Ex.-4. He also states that the earlier Investigating Officer Dharendra Saikia had collected the post-mortem report from the Medical College and had not done any investigation in the case. All the investigation, according to him, was carried out by Sub Inspector D. Gogoi who had expired. In his cross-examination he has stated that the scribe of the FIR was Md. Majid Sikdar and that no evidence is recorded of the said scribe in the case diary. The witnesses Nareswari Phukan PW 1, Anjana Phukan PW 4 had not stated before the Investigating Officer about the assault made by Kuleswar and Dulen Phukan on the body of the deceased.
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 - 11. The accused in their statements under Section 313 of the CrPC have not stated anything in particular, and have denied their involvement in the incident. No evidence is led in defence.
 - 12. Having gone through the evidence not only which is available on record of the appeal but also having seen the original record, our analysis of the same is as under:
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 - 13. The job of the prosecution is not to accept the complainant's version as Gospel Truth and proceed in that direction but the investigation must be made in a fair and transparent manner and must ascertain the truth. The evidence collected during investigation should then be analysed by the Investigating Officer and accordingly a report under Section 173(2) of the CrPC should be submitted. Further, the duty of the Trial Court is to carefully scrutinise the evidence, try to find out the truth on the basis of evidence led. Wherever necessary the Trial Court may itself make further inquiry on its own with regard to facts and circumstances which may create doubt in the minds of the Court during trial. If the investigation is unfair and tainted then it is the duty of the Trial Court to get the clarifications on all the aspects which may surface or may be reflected by the evidence so that it may arrive at a just and fair conclusion. If the Trial Court fails to exercise this power and discretion vested in it then the judgment of the Trial Court may be said to be vitiated.

14. In the present case, the informant (PW-1), the injured eye-witness (PW-2), eye-witness (PW-3) and eye-witness (PW-4) have categorically stated that police personnel had accompanied the accused and they were there throughout the incident. This fact is noticed by the Trial Court in its judgement but it fails to get this clarification from the prosecution as to what occasioned the presence of the police personnel accompanying the accused and standing outside the house of the deceased to watch the accused assault PW-2 and commit the murder of his brother. The Trial Court had simply brushed aside the argument of the defence on this count without giving a serious thought.

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15. If the police personnel were present at the time of commission of the offence, they should have immediately acted upon to set the criminal machinery in motion by first apprehending the accused from the spot itself rather than allowing them to get way by accompanying the police to the Police Station while continuing to assault the injured (PW-2) on the way. The entire version of the prosecution witnesses that the police personnel accompanied the accused and were standing outside the house of the deceased creates a serious doubt on the very genesis of the prosecution story.

16. Coming to the evidence of the eye-witness PW-1, the informant in her report has not assigned any specific role to any accused. It is only stated that 13 persons came to her house, some of them chased and followed the deceased who was trying to save himself by escaping from back courtyard and entering into the neighbour's house where he was done to death. As per the FIR this role is given to Mozen Phukan, Dulen Phukan and Haren Saikia. However, in her statement in the trial she has stated that Kuleswar assaulted with an iron rod whereas Pulen Phukan caused the injury on the neck of the deceased. Interestingly, she also states that the accused persons were taken to the Police Station. She along with Jogmaya came there and lodged the FIR (Ex.-1) which was written at the Police Station. In her cross-examination, she states that she did not read the Ex.-1, it was written at the Police Station and she had only put her signatures. Ex.-1 was not read over to her, she did not know the contents of the same. Then she goes on to state that there were police along with accused.

17. The statement of PW-1 does not inspire confidence primarily for two reasons out of many. Firstly, that the FIR version and the statement during trial are materially different and secondly, once the

- A deceased had escaped from the back door of the house of PW-4 and PW-5, followed by some of the accused, PW-1 would have no opportunity to reach the house of PW-4 and PW-5 where the actual assault took place and to witness the manner in which the crime was committed. It, therefore, appears to be a tutored version.
- B 18. Robi Pukhan (PW-2), brother of the deceased has also not seen the occurrence. According to him, initially he was standing outside his house. Thereafter, when the accused entered his house, he came inside and by that time Pradip Phukan (the deceased) had escaped through the back door to the house of PW-4 and PW-5 and when he tried to follow Pradip Phukan, he was stopped by the police and the other accused persons. His version was that he received injuries from the accused after they had assaulted the deceased whereas the other eye-witness PW-1 stated that PW-2 was assaulted along with the deceased. He further states that police came there and took him to the hospital; he received injuries on his head and hand. He has again stated that police personnel had come along with the accused. Interestingly, there is no injury report on record. The Investigating Officer (PW-7) had specifically stated that despite his best efforts, he could not obtain any medico-legal report of PW-2. Thus, the presence of PW-2 is also doubtful.
- C 19. Jogmaya (PW-3) wife of PW-2 has given a different version of the incident. According to her, the accused persons chased her husband and assaulted him and then the accused persons took her husband to the Police Station assaulting him all along. Thereafter, she along with PW-1 came to the Police Station to lodge the FIR. She had also clearly stated that five police personnel of the Chabua Police Station had come to her house with the accused persons and the police witnessed the incident.
- D F In her cross-examination, she admits that she did not enter the house of PW-4 and PW-5 where the deceased was assaulted. She states that police had come to apprehend her husband and the deceased. She further stated that she did not see all the accused and she did not witness the assault on the deceased.
- E G 20. PW-4 and PW-5 are the husband and wife who reside in the neighbourhood of the deceased and it is in their house that the deceased was assaulted. Evidence of PW-4 has been discarded by the Trial Court. With regard to the manner of assault, her evidence is only relevant to the extent that an incident took place in her house and not as to the manner of assault. She, however, states that she remained in her house till 4PM
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along with the dead-body of the deceased till such time police came and A took the dead-body.

21. PW-5 has not stated anything material.
22. PW-6 is the Doctor who conducted the autopsy.
23. PW-7 is the Investigating Officer. B
24. Coming to the legal issues, we first deal with the issue as to whether in the facts and circumstances it was a case of unlawful assembly and further the accused were members of the unlawful assembly with common object is made out or not. Chapter VIII of the IPC deals with 'Offences Against the Public Tranquillity'. Sections 141 to 149 deal with definition of unlawful assembly, being member of unlawful assembly, punishment of being part of the unlawful assembly armed with deadly weapons and every member of unlawful assembly to be guilty of the offence committed in prosecution of common object to be punished under Section 149 IPC. According to Section 149 IPC every member of the unlawful assembly must know the common object of their assembly and also the offence likely to be committed in prosecution of the common object. C D

25. The evidence of all the eye-witnesses has been narrated in detail in the earlier part of this judgment. None of the eye-witnesses have taken names of all the accused persons who are said to be 13 in number. Only names of 3-4 accused persons are taken who are said to have assaulted the deceased and the injured PW-2. None of the eye-witnesses have stated that all the accused persons had come with a common object of committing murder and assaulting the injured PW-2. It is also not stated by any of the eye-witnesses that there were any utterances by one or many or all the accused that they must eliminate the deceased and cause injuries to the injured PW-2. There is no evidence to the effect that any of the accused exhorted the others saying that they have to eliminate the deceased and assault the injured (PW-2). Further, it is clearly stated by the eye-witnesses PW-1, PW-2 and PW-3 that at least five police personnel were accompanying the accused and that they were standing outside and did not interfere in the commission of the alleged crime. From the above it is clear that it is difficult to decipher that all the members of the unlawful assembly were aware of the common object. E F G

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- A 26. There is one more reason to discard the theory of unlawful assembly. PW-2 and PW-3 have stated that the police along with the accused had come to arrest the deceased and the injured. If that was the object and the police were taking help of the accused persons then also the factum of common object of committing the crime of murdering the deceased is not borne out. It could be that the common object known to the accused was of apprehending the deceased and the injured PW-2 as there was some criminal case registered against them lodged by Pulen Phukan, one of the accused. In view of the above analysis, we are unable to hold that there was an unlawful assembly and further to uphold the conviction under Section 149 IPC.
- C 27. Now coming to the issue as to whether the named accused were the actual assailants or not and whether the eye-witnesses' version of naming the five accused namely, Kuleswar, Pulen Phukan, Dulen Phukan, Mozen Phukanand Haren Saikia can be relied upon to record conviction. In the FIR, Kuleswar and Pulen Phukan have not been assigned any role of assault. The role assigned is to Mozen Phukan, Dulen Phukan and Haren Saikia. PW-1 has taken the name of Kuleswar assaulting on the leg with an iron rod and Pulen Phukan assaulting on the neck. In the cross-examination, she has stated that Dulen Phukan assaulted on the neck. PW-2 has stated that Kuleswar hit the deceased with a *dao* then he says that he did not see who assaulted Pradip Phukan and later on says that it was Pulen Phukan who dealt a blow on the neck. PW-3 has stated that Kuleswar assaulted with an iron rod and Dulen Phukan assaulted on the neck with an axe. PW-4 has stated that Kuleswar dealt a blow on the leg with an iron rod and then Dulen Phukan dealt a blow on the neck of the deceased with an axe. There is no recovery at the instance of any accused under Section 27 of the Evidence Act. The axe, according to the evidence, was left on the dead-body of the deceased. From the above what is evident is that Kuleswar's name was not included in the FIR but his name has been consistently taken by the eye-witnesses of first assaulting the deceased with an iron rod. Insofar as Pulen Phukan is concerned, his name has been taken by PW-1 and PW-2 for assaulting on the neck and whereas PW-3 and PW-4 have taken the name of Dulen Phukan striking on the neck. Thus, there is material inconsistency in the statement of the eye-witnesses.
- H 28. Another important aspect to be noted from the evidence of PW-1, PW-2, PW-3 and PW-4 is that after being hit by Kuleswar with

an iron rod, Pradip Phukan, the deceased struggled to enter the room and there he was assaulted on the neck. When according to the prosecution story itself Pradip Phukan, the deceased had entered the neighbour's house it would be very difficult for the eye-witnesses to also have entered the house of PW-4 and PW-5 and to witness the assault. PW-1 and PW-3 have not stated that they also entered the room where the assault took place. PW-2 has clearly stated that when he tried to follow Pradip Phukan he was stopped by the accused and the police personnel who were standing outside.

29. The above evidence creates a very serious doubt on the entire prosecution story. It is quite possible that the police personnel of the concerned Police Station were there to arrest the deceased and his brother and in that process some resistance may have resulted into the incident causing the death of Pradip Phukan. The injuries of PW-2 have not been proved as admittedly there was no injury report. Even the scribe of the FIR has not been produced nor the signatures have been proved. It is quite possible that it was a complete set-up by the police. They having committed the murder in the process of arresting the deceased, and thereafter, knowing the enmity between the two parties, set-up a false case against the accused. Apparently for this reason, no explanation has come forward to explain the presence of the police personnel of Chabua Police Station throughout the incident.

30. The prosecution has not established the place of occurrence by any material exhibit of having collected the blood-stained earth from the place of occurrence. Even the material exhibit, the axe, which is said to have been taken into custody by the police whether on the date of the incident or two days thereafter has also not been produced nor any evidence led to that effect. It is still a mystery as to how the Investigating Officer in his statement has stated that he had filed a charge-sheet against eight accused as five were absconding and there is no further statement regarding three more accused being arrested and put to trial, how the Trial Court proceeded to convict 11 accused and only two were set to be absconding. Even the scribe of the FIR has not been examined. It was extremely relevant when PW-1 has stated that she had no knowledge of the contents of the FIR.

31. From the above analysis, we are of the view that although the death of Pradip Phukan was homicidal but we are not convinced that the prosecution has established the case beyond reasonable doubt against

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A the accused appellants. The appellants would be entitled to benefit of doubt. The appeal is accordingly allowed. The conviction and sentence are set aside. The appellants are set at liberty forthwith. They are in judicial custody. They may be released forthwith, if not wanted in any other case.

B 32. Pending applications, if any, are disposed of.

Nidhi Jain
(Assisted by : Kanishka Singh and Tamana, LCRAs)

Appeal allowed.