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25.7.73	26.7.73	31.7.73	30.8.73	31.8.73. 130

IN THE CAUFAT HIGH COURT.

(The High Court of Assam, Nagaland, Meghalaya,
Manipur and Tripura)

Criminal Appeal No. 123 of 1970.

Against the judgment dated 11.12.70 passed by

Shri B. Goswami, Sessions Judge, Nowgong, in Sessions

Case Nos. 54 (N) and 59 (N) of 1970.

Keramat Ali alias Keru and Others ... (Accused) -Appellants.

- Versus -

The State of Assam ... Respondent.

P R E S E N T :

The Hon'ble Mr. Justice B.N. Sarma.

The Hon'ble Mr. Justice Baharul Islam.

For the Appellants : Mr. S.K. Chose,

Mr. M.A. Laskar, Advocates.

For the State : Mr. A.M. Mazumdar, Public prosecutor.

Mr. S.R. Bhattacharjee, Advocate for the
complainant.

Dates of hearing : 28.6.73 and 29.6.73.

Date of Judgment and Order : 20.7.73.

JUDGMENT AND ORDER



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Baharul Islam. J. - The eight appellants were convicted under Section 302 read with Section 149 of the penal code by the Sessions Judge, Nowrang, and were sentenced to imprisonment for life, each.

Appellants Keramat, Hasmat and Sorhab were further convicted under Section 248 of the penal code and were sentenced to rigorous imprisonment for a period of two years, each. The other five

AZ appellants were also convicted under Section 151 of the penal code and sentenced to suffer rigorous imprisonment for one ~~XXXX~~ year each.

2. The facts of the case may be, briefly, stated :

On 14.12.68 P.W.2, Abdul Kadir and his brother Nazimuddin, deceased, were going to Moirabari bazar for selling Brinjals. They loaded the Brinjals on a buffalo cart. They started to the bazar at about 7.30 in the morning. They were going by the village path that joined the P.W.D. road,



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road, and when they reached the P.W.D. road, near the house of appellant Kasem Ali, they proceeded some distance along the P.W.D. road, when the appellants, who had ambushed in nearby jungles, attacked them.

Appellant Keramat Ali was armed with a spear, Hasmat with a ~~takka~~ (a kind of spear), Sarafat with

a dao and the rest with lathis. The appellants rushed towards Nazimuddin and P.W.2, and at the order

of Kasem, they surrounded Nazimuddin and P.W.2.

Appellant Keramat thrust his spear through the mouth of Nazimuddin. The spear cut through the

carotid vessel. Nazimuddin ~~fall~~ fell down on the

ground. Appellant Sarafat pierced P.W.2 on his left

arm with the Teta. P.W.2 then pulled out a stick from the nearby fencing and brandished it in self

defence. While the attack on P.W.2 was on, Nazimuddin

somehow got up and struggled to the courtyard of

Niyamat Ali (P.W.3), whose house was situated nearby,

and fell down there. P.W.2 also ran to Niyamat Ali's

courtyard.

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courtyard. The appellants then made good their

escape. Nazimuddin died in the courtyard of

Niyamat Ali.

3. According to the prosecution P.W.

5, ~~six~~ Jinal Abedin, and P.W.6, Lalmia, who

were following Nazimuddin and P.W.2, ~~he~~ saw the

occurrence. P.W's 5 and 6 informed samsuddin (P.

W.B), the brother of the deceased, about the

occurrence. Samsuddin came to the place of

occurrence and after getting full information, went

to the police station and lodged an ejahar.

4. The Assistant Sub-Inspector of

Police, Malin chandra Laskar (P.W.4) came to the

place of occurrence and held an inquest over the

dead body. Meanwhile the Officer-in-charge of the

thana arrived at the place of occurrence and started

investigation.

5. The police, after investigation,

submitted charge-sheet against all the appellants

under



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under Sections 147, 148, 324 and 302/149 of the

Indian penal code. Eventually all of them were committed to the Court of Sessions where they were

charged under section 148 and 302 read which

Section 149 of the penal code.

6. The appellants pleaded not guilty to the charges. Appellants Keramat, sarafat and Kasem have however, admitted an occurrence.

The defence of Karamat is that on the day previous

to the date of occurrence there was a quarrel between

him and his men and the party of the complainant

Over the seduction of the servant, Mia Hussain.

Over that matter P.W.5 Joynal, P.W.6 Lalmia,

Mohammad Ali and others attempted to attack his

house. He further states that on the date of

Occurrence, on his way to Molabari bazar with one

Siraj Master, he heard some hue and cry coming from the south near the firm of Siraj Master .

He came to the ~~near~~ source of the noise with

Siraj



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Siraj Master and found P.W.4, deceased Nazimuddin,

P.W.2 Abdul Kadir, Kasem, Kobad and others, armed with deadly weapons. He alleges that P.W.8,

Samsuddin, ordered for assault on him. Then a fight took place between him and his party on one side and appellants, sarafat and Kasem, on the

other. He further says that he went to lodge an

ejabahar about the matter when he was arrested by

the ~~Officer~~ Officer-in-charge of the thana at

5 P.M.

The case of kasem is~~x~~ that appellant

keramat, sarafat and Siraj Master were passing by

the road in ~~in~~ front of his house and on hearing

some noise he followed them. On his way he

found appellant Sarafat coming with injuries on

his person. Then he returned home.

The case of appellant sarafat is that

he was sitting in ~~in~~ front of his house with his

maternal uncle, appellant Kasem, when he heard

some



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some noise coming from the south. He ran to the source of the noise along with appellant Keramat and Siraj Master. On his way he met his brother, Reajuddin, on the road, and from him he learnt that P.W.8, Samsuddin, and P.W.2, Abdul Kadir, and others had been beaten him. He then came to the place and enquired of Samsuddin about it, whereupon at the order of Sumsuddin, Kasem assaulted him with a spear and caused injury on his abdomen. At that time Nazimuddin (deceased) aimed a blow on his head with a dāo whereupon he tried to ward off the blow with his ~~■~~ hand and he ~~xxx~~ received injury on his hand. He (Sarafat) took up a spear and assaulted Nazimuddin with the spear. In effect, Sarafat has admitted that he gave the fatal blow to Nazimuddin, but he has pleaded the right of private defence of his person.

7. These three appellants have examined a defence witness, Dr. Samuddin Ahmed, to prove



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prove the injuries on the person of Sarafat. They

have also proved the ejahar lodged by keramat over
the incident in support of their defence.

8. Shri M.A.Laskar, learned counsel appearing on behalf of the appellants, makes three submissions before us - (i) that the

prosecution case, as alleged, is absurd and cannot be accepted; the appellants have been falsely implicated out of previous grudge subsisting between the parties;

(ii) that the prosecution has failed to prove

the common object and as such conviction under

Section 147, 148 as well as 302 read with Section

149 of the Penal Code is not sustainable in law;

and (iii) that Sarafat, Keramat and Kasem acted in

the exercise of their right of private defence of

their person and as such they were not liable to

conviction.

9. On the first point Shri Laskar submits that the day on which the occurrence took place was admittedly a bazar day; the time was broad day light and that the sketch map (Ext.3)

does



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does not disclose any jungle or bushes near the place of occurrence as alleged by the prosecution and as such the story of ambush is false.

9A. The first submission of Shri Laskar is factually incorrect. Item 'Ta' of the index to the sketch map (ext.3) shows - "Row of trees on the west boundary of the house of Niamat Moral", and at point 'Nya' there is jungle. This is further corroborated by the evidence of P.W.12.

P.W.2, Abdul Kadir, in his deposition says that Niyamat (P.W.3) has his house to the east of the road. Near his house there are some bamboos and other trees just near the road towards south-east of the road, and the appellants ambushed in these bushes. P.W.10, Alimuddin deposes that he learnt from P.W.2, Abdul Kadir, that the appellants ambushed in the jungles near the road and attacked Nazimuddin. There is evidence to prove that there were trees, bamboos and other shrubs where

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where the culprits could have ambushed.

10. Shri Laskar further submits that

the murder as alleged by the prosecution could

not have taken place in broad day light on a

bazar day. But the defence cannot forget that

it has admitted an occurrence. The very defence of

appellant Sarafat, Keramat and Kasem show that

an occurrence did take place between them on one

side and Nazimuddin, Abdul Kadir and others on the

other side. Sarafat in his examination under

Section 342, code of criminal procedure, has categorically

admitted that he pierced Nazimuddin with a spear.

This submission of learned counsel, therefore, has

no substance.

11. The next point for our decision

is whether the prosecution has been able to prove

an unlawful assembly.

P.W's 2, 5 and 6 are the eye witnesses

to the occurrence. P.W.2, Abdul Kadir is the younger

brother ...



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brother of Nazimuddin deceased. His evidence is that on the date of occurrence, he with his deceased brother, Nazimuddin, were going, at about 7.30 A.M., to Moirabari bazar with a cart load of Brinjals for sale. After they proceeded about half a mile by the katcha road, they reached the P.W.D. road near the house of appellant Kasem. They were followed by P.W.5, Jainal Abedin and P.W.6, Lalmi. Near the P.W.D. road at that place is the house of P.W.3, Niyamat Ali, and near his house towards the east, there are some bamboos and other trees. Suddenly the eight appellants, who had ambushed in that jungle, came out and started abusing them (P.W.2 and the deceased).

Appellant Kasem asked the others to assault them.

Then the eight appellants surrounded him and the deceased. He further deposes that appellant

Keramat had a spear, Hasmat a Teta, Sohrab a dao, and the others had lathis in their hands. Keramat

pierced



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pierced Nazimuddin through his mouth. Nazimuddin

fell down. He pulled out ~~the~~ the spear. Hasmat

assaulted Nazimuddin with the butt of the Teta.

P✓ Sarafat chased him (P.W.2) with a lathi. P.W.2

then took up a stick from the nearby fencing and

brandished it in self defence, when sarafat

received some injuries from the stick brandished

by him. Sarafat then returned and Hasmat pierced

him (P.W.2) on his left hand with the teta.

Meanwhile Naximuddin got up and somehow struggled

to the courtyard of P.W.3. P.W.2 followed him.

Nazimuddin fell down with face downward in the

courtyard of Niyamat.

P.W.5, Jainal Abedin, was the nephew

(Sister's son) of Nazimuddin. P.W.6, Lalmia, is his

uncle. Appellants Keramat, sarafat, Araj Ali and

sorhab Ali are his uncles (father's

younger brothers), their father having been

the son of the step-mother of the father of P.W.5.

He



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He deposes that on the date of occurrence he and Lalmia were going to the bazar. They were following Nazimuddin and P.W.2 at a distance of about 10/15 cubits along the P.W.D. road. While they were near the house of P.W.3, the appellants suddenly came out from the shrubs nearby. He

deposes that Keramat had a spear, Hasmat a teta, Sorhab a dao and the others had lathis. Appellant

Kasem used filthy language to Nazimuddin and

P.W.2 and at his instance all the eight appellants surrounded Nazimuddin and P.W.2. Appellant Keramat

pierced Nazimuddin on his face when Nazimuddin

fell down on the ground. Sarafat attacked P.W.2,

who then took up a piece of stick from the

nearby fencing and brandished it when appellant

Sarafat was hurt. At that time Hasmat pierced P.W.2 in the arm with the teta.

P.W.6 is Lalmia. His evidence is practically the repetition of the evidence of P.W.5.

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of P.W.5.

P.W.8, Samsuddin, is another

brother of the deceased. His evidence is that

on the date of occurrence at about 8 O'clock in

the morning, he was proceeding to Moirabari

bazar. At that time he heard hue and cry. Going

a little ahead, he met P.W.'s 5 and 6 coming

through the field. They reported to him that the

eight appellants has surrounded Nazimuddin and

P.W.2 on the road near the house of Keramat and

pxrremdx pierced Nazimuddin through his mouth

with a spear and that Hasmat injured P.W.2 with

a teta, and that Nazimuddin was lying in the

courtyard of Niamat. P.W.10, Alimuddin, is the

brother-in-law of deceased Nazimuddin, being the

younger brother of hisx his wife. He deposes that

while going xxs along the P.W.D. road, near

about the house of P.W.3, at about 8 O'clock in

the morning, he heard some hue and cry towards

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the east, he ran towards the source of the noise

P.W. and learnt ^{that} Nazimuddin had been killed and was lying

in the courtyard of P.W.3. He came to that place.

He reached the place and found Nazimuddin already dead. He also found Abdul Kadir (P.W.2) injured.

P.W.2 reported to him that the eight appellants ambushed in the forests near the road, surrounded

him and Nazimuddin, and at the instance of appellant

Kasem, appellant Keramat pierced Nazimuddin with

a spear. He further deposes that P.W.2 further

told him that appellant Hasmat injured him on his

arm with a teta. Then Mahar Hajji, Samsuddin,

Sadir, Lalmia, Jainal, Mahamad and others arrived

and he with samsuddin, Kadir and Lalmia went to

the thana. P.W.11, Abdul Hasim, deposes that on

the date of occurrence he was harvesting pulses.

At about 8 O'clock in the morning he heard hue and

cry towards the south. He rushed to the source of

the noise. On the P.W.D. road he met P.W's 5 and 6,

from whom he learnt that appellant Keramat and

Others

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others killed Nazimuddin and that they were going to inform P.W. 8.

12. Learned counsel submits that

P.W's 2, 5 and 6, who are eye witnesses, are all relations to the deceased, Nazimuddin, and P.W.2,

and, therefore, highly interested and their

evidence ought not to be accepted. It may be

mentioned that both the parties are admittedly

inter-related and therefore the witnesses who are

related to the deceased are related to the appellants

as well. On the ground of relationship therefore

they cannot be disbelieved. In fact, by long

cross-examination of the witnesses, nothing

could be elicited to show that they were deposing

falsely. The evidence of P.W.2 is most important,

inasmuch as he was injured in the occurrence and

his presence in the occurrence has been admitted by

the defence. The occurrence took place in broad

day light and the parties were wellknown to each

other.

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other. Therefore the question of any false identification also did not arise in this case.

Their evidence, however, appears

to contain some embellishment. Their ~~ext~~ evidence

to the extent that Sorab, Araj, Hussain and

Nazar were armed, and were with the other four

appellants appears to be parrotlike and presents

the picture of a dumb-show by the above four

accused and does not inspire confidence. The

above named four accused are alleged to have done

nothing. It cannot be believed that they would

merely accompany the culprits in ambush and escape.

12 Their presence in the assembly has not been proved beyond reasonable doubt. The Prosecution, therefore, has failed to prove ~~prove~~ an unlawful assembly, the number of culprits being

less than five.

13. Learned counsel has drawn our attention to certain omissions of ~~P.W.'s~~ P.W.'s 5

and 6 before the Investigating Officer. He has

drawn ~~out~~ our attention to the evidence of the

Investigating Officer, P.W.12, and submits that

P.W.5, Jaina



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P.W.5 Jaina said that he did not tell the Paroga that while he and P.W.6 were going, he met Nazimuddin and P.W.2 on the P.W.D. road, and that he also did not tell P.W.12 that the appellant came out from the nearby forests; he further did not tell

P.W.12 that the accused surrounded Nazimuddin and Abdul Kadir and that Hasmat assaulted Nazimuddin with the handle of the teta and that P.W.2 then

taking up a stick from the fencing brandished it, and that P.W.2 and Nazimuddin went to the courtyard

of Niyamat. Learned counsel also has referred to the statement of P.W.6 that P.W.6 did not tell

him that the appellants surrounded Nazimuddin and Abdul Kadir and that Nazimuddin fell on the road.

In our opinion the above omissions by P.W.'s 5 and 6 are not contradictions. The broad fact was that

the deceased and P.W. 2 were waylaid and suddenly attacked with dangerous weapons and injured. They

could not therefore narrate the details to the police officer and particularly if they were not asked to do so by P.W.12. This court, in the case

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case of the State-v- Md. Misir Ali and others,

reported in AIR 1963 Assam 151, has held :

" Strictly according to law an omission cannot be regarded or proved as a contradiction, firstly because there is no diction in the case of an omission, because an omission implies absence of diction, and secondly because S. 162,

Cr. P.C. permits the limited use of a statement made to the police, and what is permitted to be used is a portion of that statement which is found to be contradictory to the evidence given in the Court. Section 162 thus

only permits the statement made to the police officers to be used for that limited purpose, and not the statements not made during the police investigation. Again, an omission cannot

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cannot be proved as a contradiction,

because S. 145 of the Evidence Act,

which is the section dealing with the

procedure to prove a contradiction,

deals with statements in writing, and

requires the portion of the writing ~~mix~~

which is sought to be used for contradi-

-ction to be brought to the notice of

the witness and the witness being

questioned about it. For that reason

again, an omission in a previous statement

cannot be used for the purpose of contra-

-diction under S. 145 of the Evidence

Act. Hence, what is not found in a

police statement under S. 162, Criminal

P.C. cannot be used under that section,

nor can the same be proved under S. 145

of the Evidence Act.

This does not, however, mean

that



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that in no case can a serious and glaring omission from a police statement can be relied upon. It may not be relied upon as a contradiction as such but it may be relied upon as a relevant circumstance."

In the instant case the omissions, pointed out by learned counsel, are omissions of details and not such major omissions as to constitute such circumstance as to render the witnesses unreliable.

In the case of Sohrab and another -v-

State of Madhya pradesh, reported in 1972 (3) S.C.C.

751, the Supreme Court has held :

"Where the witnesses tried to

embellish and exaggerate and there were

discrepancies and contradictions in the

evidence, the broad features of the

evidence of the prosecution case cannot

be doubted on that ground alone. The

position of eye-witnesses in relation to

the



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the occurrence may have been such that

all the details could not have been

noticed. Merely because there have been

discrepancies and contradictions in

the evidence of some or all of the

witnesses does not mean that the entire

evidence of the prosecution has to be

discarded. It is only after exercising

caution and care and sifting the evidence

to separate the truth from un-truth,

exaggeration, embellishments and improv-

-ement, the court comes to the conclusion

that what can be accepted implicates

the accused it will convict them".

14. Drawing our attention to the evidence

of P.W.12, stating that P.W.12 did not record in the

diary the evidence of P.W.10 in details, learned

counsel submits that ~~in that the investigating agencies~~

investigation has been defective. The law is well

settled



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settled that a defective police investigation does not vitiate the trial, unless miscarriage of justice is

caused. In AIR 1955 S.C. 196, the Supreme Court has laid

down :

" If, therefore, cognizance is in

fact taken, on a police report vitiated

by the breach of a mandatory provision

relating to investigation, there can

be no doubt that the result of the trial

trial which follows it cannot be set

aside unless the illegality in the

investigation can be shown to have

brought about a miscarriage of justice.

That an illegality committed in the

course of investigation does not affect

the competence and the jurisdiction of

the court for trial is well settled.

Hence, where the cognizance of

the case has in fact been taken and the

case



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case has proceeded to termination, the invalidity of the precedent investigation does not vitiate the result, unless miscarriage of justice has been caused thereby."

In the absence of any prejudice to the accused, mere irregularity, if any, in the investigation, does not vitiate the trial or conviction (See 1973 S.C. 1379).

15. The next submission of learned counsel is that appellants had the right of private

defence. D.W.1, Dr. Samsuddin Ahmed, who examined

appellant, Sarafat, at 9.50 A.M. on 14.12.68,

found two lacerated wounds one on the lower part of the front of the left side of chest $1\frac{1}{4}$ " x $1\frac{1}{3}$ "

$\times \frac{1}{4}$ " and the other on the posterior identical side

of the left forearm. According to the witness the injuries were caused by blunt weapon. In fact this

injury was explained by the prosecution. P.W.2,

Abdul Kadir, has deposed that he picked up a piece

of



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of bamboo from the nearby fencing, and brandished

it when appellant Sarafat received the injuries,

and this explanation is supported by the evidence

of D.W.1.

P.W.4, Malin Laskar, has stated in

cross-examination that appellant keramat, lodged

an ejahar at the thana but in that case police has

submitted a final report. During cross-examination

P.W.4 admitted that appellant keramat had arrived

to lodge the ejahar before P.W. Samsuddin lodged

the ejahar in the instant case. Admittedly both the

cross cases arose out of the same occurrence.

Naturally, therefore, there was a competition as

to who could lodge the ejahar earlier. In the instant

case a brother of the first informant was killed,

while, on the other hand, none of the accused party

even received any serious injury. It can therefore

be seen that the accused party was in a better

position to go to the thana a little earlier

while



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		while P.W. 10 was more concerned at the death of his brother Nazimuddin.		
		There is no other evidence, either adduced or brought out by cross-examination of the P.W's by the defence, to prove that the appellants had the right of private defence at all.		
		When the defence pleads special exception under the penal code, under Section 105 of the Evidence Act		
		the burden is on the accused to prove the existence of the right of private defence; but in this case they failed to do so.		
		16. The next question for our consideration in this case is whether murder was committed to Nazimuddin. The evidence in the committing Court of Dr. D.N. Bharali, who held the post mortem examination on the dead body of the deceased, shows he found the following injuries :		
		"External wounds :		
		(1) One incised wound on the right		



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		right check at the angle of the mouth 2" x $\frac{1}{2}$ " x neck deep. Mendible fracture at the angle seen.		
		(2) One bruise on the left forearm 2" x 2 $\frac{1}{2}$ ".		
		(3) One bruise on the right thigh $2\frac{1}{2}$ " x 1".		
		External carotid vessel and x interior dental vessel found ruptured on the right side of the neck".		
		In his opinion, the death was due to shock and haemorrhage due to the injuries sustained, In cross-examination he has said x that injury No. 1 was the cause of death. The culprit, there is no doubt, in causing injury No. 1, had either the intention of causing death or had the intention of causing such injury as was likely to cause death or at least had the knowledge that the injury No. 1 was likely to cause death		



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death of Nazimuddin. We have, therefore, no hesitation

to hold that murder was committed to Nazimuddin.

17. As the number of miscreants are

less than five, convictions under sections 147, 148

and 302 read with Section 149 I.P.C. cannot be

sustained, and the appellants are acquitted of

those charges. The evidence on record, however,

proves that appellants keramat, Hasmat, Kasem and

Sarafat had the common intention of committing

murder to Nazimuddin. The common intention is

evidenced by the facts that they were all armed,

ambushed, and suddenly surrounded and attacked

Nazimuddin and P.W.2, and the fatal blow was

given by one of them. Their conviction can therefore

therefore, be altered from 302/149 to 302/34

I.P.C. We accordingly convict appellants Keramat

Ali, Hasmat Ali, Kasem Ali and Sarafat Ali and

maintain their sentences to imprisonment for

life each. Their appeal is dismissed. Appellants

Hasmat



भारत
FORTY PAISE

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	Hasmat Ali, Kasem Ali and Sarafat Ali appear to be on bail. Their Bail Bonds are cancelled. They shall surrender forthwith to serve out their sentences.			
	Appellants Sohrab Ali, Araj Ali, Hussain Ali and Nazar Ali are acquitted. They are discharged of their bail bonds. Their appeal is allowed.			Sd/- Baharul Islam
	I agree		Judge.	
	Sd/- B.N. Samra			
	Judge.			
Typed by:-	13.8.73		Certified to be true Copy. 30/8/73 Assistant Registrar, (Jd.) GAUHATI HIGH COURT. Authorised U/S 76 Act. 1 of 1872.	
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13.8.73

30/8/73
Assistant Registrar, (Jd.)
GAUHATI HIGH COURT.
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