2024 INSC 376

REPORTABLE

IN THE SUPREME COURT OF INDIA
CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 1637 OF 2021

ALAUDDIN & ORS. ...APPELLANT(S)

VERSUS

THE STATE OF ASSAM & ANR. ....RESPONDENT(S)

J U D G M E N T

ABHAY S. OKA, J.

FACTUAL ASPECT

1. The appellants are accused nos. 3, 1, 6 and 7 respectively. The appellants have been convicted for the offences punishable under Section 302, read with Section 149 of the Indian Penal Code **(for short, 'IPC')**. The allegation against the appellants is of committing culpable homicide amounting to the murder of one Sahabuddin Choudhury. The incident is of 3rd February 2013. There were eight accused who were tried for the offence. Out of the eight accused, the Trial Court convicted five. One died during the pendency of the trial. An appeal against conviction was preferred before the High Court. By the impugned judgment, the High Court confirmed the

appellants' conviction. However, the High Court set aside the conviction of accused no. 5. The case of the prosecution is that accused no. 1 (Md. Abdul Kadir) picked up the victim of the offence from his residence at 4 pm on the date of the incident and took him to Bhojkhowa Chapori Bazar. The accused killed the victim behind L.P. School by assaulting him with a sharp weapon.

SUBMISSIONS

2. Learned senior counsel appearing for the appellants has taken us through the notes of evidence of the material prosecution witnesses. He pointed out that in paragraph 42 of its judgment, the Trial Court held that the claim of PW-1 (Md. Akhtar Hussain Choudhury) that he was an eyewitness was fallacious. He pointed out that even evidence of PW-3 (Md. Afazuddin Chaudhury) needs to be discarded, as his evidence is full of omissions and contradictions. Moreover, he cannot be termed an eyewitness. As far as evidence of PW-4 (Md. Saidur Ali) is concerned, he again submitted that the evidence is not worthy of acceptance, as it is wholly unreliable. He pointed out that evidence of PW-6 (Mustt Hasen Banu, wife of the deceased) shows that there was a prior enmity between her husband and the accused. He pointed out that PW-6 admitted that her husband had lodged a police complaint against the accused on the allegation that the accused had dispossessed him from his land. He submitted that

evidence of last seen together in the form of testimony of PW-7 (Md. Sultan Ali) cannot be relied upon. He submitted that the same is true with evidence of PW-9 (Md. Abdul Haque). He pointed out that evidence of PW-10 (Md. Anisul Haque) does not help the prosecution at all. He also invited our attention to the evidence of PW-11 (Sri Bidyut Bikash Baruah, Investigating Officer). He submitted that while recording the cross-examination of the prosecution witnesses, the contradictions had not been properly recorded in accordance with the law.

3. Learned senior counsel appearing for the State submitted that the evidence of prosecution witnesses shows that the deceased was last seen together with the accused. He submitted that coupled with the evidence of last seen together, the motive for the commission of offence had been established. Even otherwise, there is convincing evidence against the appellants. He, therefore, submitted that no fault can be found with the view taken by the High Court.

CONSIDERATION OF SUBMISSIONS

4. There is one aspect that was not brought to the notice of this Court, which goes to the root of the matter. As can be seen from paragraph 108 of the judgment of the Trial Court, the appellants have been convicted for the offence punishable under Section 302 with the aid of Section 149 of IPC. We may note here that ultimately, the High Court

held that only four accused were guilty. Under Section 149 of IPC, every member of an unlawful assembly is guilty of the offences committed in the prosecution of the common object of the unlawful assembly. Therefore, to apply Section 149 of IPC, there has to be an unlawful assembly. Section 141 of IPC defines unlawful assembly as an assembly of five or more persons. The High Court has not held that apart from the present appellants whose conviction was confirmed, others formed part of the unlawful assembly. Hence, there was no unlawful assembly within the meaning of Section 141 of IPC. Therefore, the appellants could not have been convicted for the offence punishable under Section 302 of IPC with the aid of Section 149. The High Court has not modified the charge from Section 302, read with Section 149 of IPC, to Section 302, read with Section 34 of IPC.

CONTRADICTIONS AND OMMISSIONS

5. Before we deal with the merits, something must be stated about how the trial court recorded the prosecution witnesses' cross-examination in this case, especially when they were confronted with their prior statements. The Trial Court did not follow the correct procedure while recording the contradictions.

6. Under Section 161 of the Code of Criminal Procedure, 1973 **(for short, 'CrPC')**, the police have the power to record statements of the witnesses during the

investigation. Section 162 of CrPC deals with the use of such statements in evidence. Section 162 reads thus:

> **"162. Statements to police not to be signed: Use of statements in evidence.**—(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made:
>
> Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act, 1872 (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the

> purpose only of explaining any matter referred to in his cross-examination.
>
> (2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of Section 32 of the Indian Evidence Act, 1872 (1 of 1872), or to affect the provisions of Section 27 of that Act.
>
> *Explanation.*—An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.**"**

The basic principle incorporated in sub-Section (1) of Section 162 is that any statement made by a person to a police officer in the course of investigation, which is reduced in writing, cannot be used for any purpose except as provided in Section 162. The first exception incorporated in sub-Section (2) is of the statements covered by clause (1) of Section 32 of the Indian Evidence Act, 1872 **(for short, 'Evidence Act')**. Thus, what is provided in sub-Section (1) of Section 162 does not apply to a dying declaration. The second exception to the general rule provided in sub-Section (1) of Section 162 is that the

accused can use the statement to contradict the witness in the manner provided by Section 145 of the Evidence Act. Even the prosecution can use the statement to contradict a witness in the manner provided in Section 145 of the Evidence Act with the prior permission of the Court. The prosecution normally takes recourse to this provision when its witness does not support the prosecution case. There is one important condition for using the prior statement for contradiction. The condition is that the part of the statement used for contradiction must be duly proved.

7. When the two statements cannot stand together, they become contradictory statements. When a witness makes a statement in his evidence before the Court which is inconsistent with what he has stated in his statement recorded by the Police, there is a contradiction. When a prosecution witness whose statement under Section 161 (1) or Section 164 of CrPC has been recorded states factual aspects before the Court which he has not stated in his prior statement recorded under Section 161 (1) or Section 164 of CrPC, it is said that there is an omission. There will be an omission if the witness has omitted to state a fact in his statement recorded by the Police, which he states before the Court in his evidence. The explanation to Section 162 CrPC indicates that an omission may amount to a contradiction when it is significant and relevant. Thus, every omission is not a contradiction. It becomes a

contradiction provided it satisfies the test laid down in the explanation under Section 162. Therefore, when an omission becomes a contradiction, the procedure provided in the proviso to sub-Section (1) of Section 162 must be followed for contradicting witnesses in the cross-examination.

8. As stated in the proviso to sub-Section (1) of section 162, the witness has to be contradicted in the manner provided under Section 145 of the Evidence Act. Section 145 reads thus:

> **"145. Cross-examination as to previous statements in writing**.—A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.**"**

The Section operates in two parts. The first part provides that a witness can be cross-examined as to his previous statements made in writing without such writing being shown to him. Thus, for example, a witness can be cross-examined by asking whether his prior statement exists.

The second part is regarding contradicting a witness. While confronting the witness with his prior statement to prove contradictions, the witness must be shown his prior statement. If there is a contradiction between the statement made by the witness before the Court and what is recorded in the statement recorded by the police, the witness's attention must be drawn to specific parts of his prior statement, which are to be used to contradict him. Section 145 provides that the relevant part can be put to the witness without the writing being proved. However, the previous statement used to contradict witnesses must be proved subsequently. Only if the contradictory part of his previous statement is proved the contradictions can be said to be proved. The usual practice is to mark the portion or part shown to the witness of his prior statement produced on record. Marking is done differently in different States. In some States, practice is to mark the beginning of the portion shown to the witness with an alphabet and the end by marking with the same alphabet. While recording the cross-examination, the Trial Court must record that a particular portion marked, for example, as AA was shown to the witness. Which part of the prior statement is shown to the witness for contradicting him has to be recorded in the cross-examination. If the witness admits to having made such a prior statement, that portion can be treated as proved. If the witness does not admit the portion of his

prior statement with which he is confronted, it can be proved through the Investigating Officer by asking whether the witness made a statement that was shown to the witness. Therefore, if the witness is intended to be confronted with his prior statement reduced into writing, that particular part of the statement, even before it is proved, must be specifically shown to the witness. After that, the part of the prior statement used to contradict the witness has to be proved. As indicated earlier, it can be treated as proved if the witness admits to having made such a statement, or it can be proved in the cross-examination of the concerned police officer. The object of this requirement in Section 145 of the Evidence Act of confronting the witness by showing him the relevant part of his prior statement is to give the witness a chance to explain the contradiction. Therefore, this is a rule of fairness.

9. If a former statement of the witness is inconsistent with any part of his evidence given before the Court, it can be used to impeach the credit of the witness in accordance with clause (3) of Section 155 of the Evidence Act, which reads thus:

> **"**155. Impeaching credit of witness.— The credit of a witness may be impeached in the following ways by the

> adverse party, or, with the consent of the Court, by the party who calls him—
>
> (1) .....
>
> (2) .....
>
> (3) by proof of former statements inconsistent with any part of his evidence which is liable to be contradicted.**"**

It must be noted here that every contradiction or omission is not a ground to discredit the witness or to disbelieve his/her testimony. A minor or trifle omission or contradiction brought on record is not sufficient to disbelieve the witness's version. Only when there is a material contradiction or omission can the Court disbelieve the witness's version either fully or partially. What is a material contradiction or omission depends upon the facts of each case. Whether an omission is a contradiction also depends on the facts of each individual case.

10. We are tempted to quote what is held in a landmark decision of this Court in the case of ***Tahsildar Singh & Anr. v. State of U.P.***[1] Paragraph 13 of the said decision reads thus:

> **"13.** The learned counsel's first argument is based upon the words "in the manner provided by Section 145 of the Indian Evidence Act, 1872" found in

1. 1959 Supp (2) SCR 875

Section 162 of the Code of Criminal Procedure. Section 145 of the Evidence Act, it is said, empowers the accused to put all relevant questions to a witness before his attention is called to those parts of the writing with a view to contradict him. In support of this contention reliance is placed upon the judgment of this Court in *Shyam Singh* v. *State of Punjab* [(1952) 1 SCC 514 : (1952) SCR 812]. Bose, J. describes the procedure to be followed to contradict a witness under Section 145 of the Evidence Act thus at p. 819:

> Resort to Section 145 would only be necessary if the witness *denies* that he made the former statement. In that event, it would be necessary to prove that he did, and *if the former statement was reduced to writing*, then Section 145 requires that his attention must be drawn to these parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made."

It is unnecessary to refer to other cases wherein a similar procedure is

suggested for putting questions under Section 145 of the Indian Evidence Act, for the said decision of this Court and similar decisions were not considering the procedure in a case where the statement in writing was intended to be used for contradiction under Section 162 of the Code of Criminal Procedure. **Section 145 of the Evidence Act is in two parts : the first part enables the accused to cross-examine a witness as to previous statement made by him in writing or reduced to writing without such writing being shown to him; the second part deals with a situation where the cross-examination assumes the shape of contradiction : in other words, both parts deal with cross examination; the first part with cross-examination other than by way of contradiction, and the second with cross-examination by way of contradiction only. The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to Section 162 of the Code of Criminal Procedure only enables the accused to make use of such statement to contradict a witness in the manner**

provided by Section 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of Section 145 of the Evidence Act. Nor are we impressed by the argument that it would not be possible to invoke the second part of Section 145 of the Evidence Act without putting relevant questions under the first part thereof. The difficulty is more imaginary than real. The second part of Section 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate : A says in the witness box that B stabbed C; before the police he had stated that D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer. On the other hand, the procedure suggested by the learned counsel may be illustrated thus : If the witness is asked "did you say before the police officer that you saw a gas light?"

and he answers “yes”, then the statement which does not contain such recital is put to him as contradiction. This procedure involves two fallacies : one is it enables the accused to elicit by a process of cross-examination what the witness stated before the police officer. If a police officer did not make a record of a witness's statement, his entire statement could not be used for any purpose, whereas if a police officer recorded a few sentences, by this process of cross-examination, the witness's oral statement could be brought on record. This procedure, therefore, contravenes the express provision of Section 162 of the Code. The second fallacy is that by the illustration given by the learned counsel for the appellants there is no self-contradiction of the primary statement made in the witness box, for the witness has yet not made on the stand any assertion at all which can serve as the basis. The contradiction, under the section, should be between what a witness asserted in the witness box and what he stated before the police officer, and not between what he said he had stated before the police officer and what he actually made before him. In such a case the question could not be put at all : only questions to contradict can be put and the question here posed does not

> contradict; it leads to an answer which is contradicted by the police statement. This argument of the learned counsel based upon Section 145 of the Evidence Act is, therefore, not of any relevance in considering the express provisions of Section 162 of the Code of Criminal Procedure.**"**
>
> **(emphasis added)**

This decision is a *locus classicus,* which will continue to guide our Trial Courts. In the facts of the case, the learned Trial Judge has not marked those parts of the witnesses' prior statements based on which they were sought to be contradicted in the cross-examination.

ANALYSIS OF EVIDENCE

11. PW-1 (a son of the deceased) claimed that accused no. 1 - appellant no. 2 picked up his father at 4.00 p.m. from his house on 3rd February 2013 and took him to Bhojkhowa Chapori Bazar. He stated that at 7.00 p.m., he returned home and around 8.00 to 8.30 p.m., he came to Bhojkhowa Chapori Bazar to make some purchases. He claimed that he was riding a motorbike, and in the flash of the headlight of the motorbike, he saw the accused no. 7 - appellant no. 4 (Md. Nur Islam), accused no. 3 – appellant no. 1 (Md. Alaluddin), acquitted accused no. 2 (Md. Tahiruddin), accused no. 6 – appellant no. 3 (Md. Nurul Islam), accused no. 1 – appellant no. 2 (Md. Abdul Kadir),

acquitted accused no. 5 (Md. Abdul Kadir Jilani) leaving the place on a motorbike after hacking a person. PW-1 stated that he got down from the motorcycle and found his father lying there. Evidence of PW-1 need not detain us, as the Trial Court has already held that his claim that he witnessed the incident was fallacious. However, he stated that at about 4 p.m. on the date of the incident, appellant no. 2 picked up his father from his house. PW-2 (Md. Asraful Islam) was declared as hostile.

12. Now, we come to the evidence of PW-3 (another son of the deceased). He deposed that appellant no. 2 came to their house at 4 p.m. on the date of the incident. The witness stated that the deceased was an influential Congress party leader. He stated that there was a meeting of Congress at Chapori Centre, and therefore, he took the deceased on his motorcycle. He stated that at 6.30 p.m., appellant no. 2 brought his father. He claims that he followed them on his bicycle. He stated that he heard a hue and cry from a distance of about 30 meters away from L.P School. After going ahead, he saw appellant no. 3 running towards the road with a sharp weapon in his hand. He stated that he saw appellant no. 3 in the flash of the headlight of the motorcycle. He claimed that he saw appellant no. 2 leaving by motorcycle. Then he found the body of his father. PW-3 was sought to be contradicted in the cross-examination based on his prior statement

recorded under Section 161 of CrPC. A suggestion was given in his cross-examination that he did not tell the police that at about 6.30 p.m., appellant no. 2 returned with his father on a motorcycle. Moreover, a suggestion was given that he did not tell the police that he followed them on his bicycle. Another suggestion was given to the witness that he did not tell the police that while coming back from a meeting on a bicycle, he saw in the flash of the headlight of a motorcycle that appellant no. 3 was running away and leaving the place with a weapon. At this stage, it is necessary to look at the cross-examination of PW-11 (Sri Bidyut Bikash Baruah), the Investigating Officer. In the cross-examination, he stated thus:

> **"** PW3 Afazuddin Choudhury has not stated before me that he also went to attend the meeting. This witness has also not stated before me that at about 6:30 p.m. accused Kadir brought his father back from the meeting in a motor cycle and he also followed them after 10 minutes. This witness has also not stated before me that hue(sic) he was returning in his bicycle he saw, in the light of bike, that Nurul was running with a weapon in his hand.**"**

Hence, the case which he made out in the examination-in-chief that he saw appellant no. 3 running away with the weapon in his hand in the flash of the motorcycle's

headlight is an omission. This omission is very significant, which amounts to contradiction. Therefore, his evidence remains material only insofar as his statement about appellant no. 2 taking his father on a motorbike at 4.00 p.m. The witness stated that at 4.00 p.m., his father went to a meeting with appellant no. 2, as his father was an influential leader of Congress. Therefore, assuming that the deceased was last seen with appellant no. 2 at 4.00 p.m., the deceased thereafter attended a meeting of Congress. Thus, after 4.00 p.m., the deceased was also in the company of other persons.

13. Now, coming to evidence of PW-4, he claims that he saw eight to ten persons, including appellant no. 2, appellant no. 4, and the acquitted accused, assaulting the deceased by using a dao. He stated that he and PW-9 raised a hue and cry after which the accused left. The witness was contradicted by suggesting that he did not tell the police that about eight to ten people were assaulting the deceased by surrounding him. On this aspect, in the cross-examination, the Investigating Officer stated thus:

> **"** PW4 Saidar Ali has stated before me that he saw hulla near L.P. School while he was returning from the market. **This witness has not stated before me that he alongwith Ainul were going in a motor cycle. This witness has not stated before me that he saw accused Alaluddin, Nur Islam, Nurul, Kadir**

> **and Jilani assaulted Sahabuddin by means of dao. This witness has not mentioned the name of Abdul Kadir Jilani before me.** This witness has stated before me the name of Rustam, Mamrus and Tahiruddin. This witness has not stated before me that kadir surrendered before police station.**"**
>
> **(emphasis added)**

Thus, there are material omissions which affect the reliability of the witness. Thus, it is very doubtful whether PW-4 had seen the assault on the deceased.

14. PW-5 stated that at about 8.00 p.m., he saw the deceased, appellant nos. 2, 3 and 4, conversing on the road near Bhojkhowa Girl's School. The deceased requested him to carry his bag as the deceased stated that he was going to campaign for the election. The witness was confronted in his cross-examination with a suggestion that he had not told the police that at 8.00 p.m., while he was going back to his house, he saw the accused conversing with the deceased. PW-11, the Investigating Officer, admitted that PW-5 did not state before him that at about 8.00 p.m., while he was coming from Bhojkhowa, he saw the deceased conversing with the accused. Thus, the material part of the testimony of PW-5 is a significant omission which amounts to contradiction.

15. PW-6 is the wife of the deceased, who is neither an eyewitness nor a witness on the point of last seen together. However, she stated that her deceased husband had filed a complaint against the accused on the allegation that the accused had dispossessed him.

16. PW-7 stated that at 8.10 p.m., on the fateful day, while he was ready to go to his house to bring food, he noticed appellant no. 2 was riding on the pillion of the deceased's motorcycle. As seen from the evidence of PW-11, even this statement is an omission. PW-8 is a medical officer who performed postmortem on the body of the deceased. PW-9 stated that at 8.00 p.m. on the day of the incident, he had seen appellant no. 2 and Abdul Kadir Jilani (acquitted accused) leaving the place where the deceased was lying. Even this statement has been proven to be an omission in the evidence of PW-11. PW-10 is not an eyewitness or a witness who deposed about the last seen together.

17. Therefore, as far as evidence of assault on the deceased is concerned, there is no reliable evidence to show the involvement of the appellants. The only evidence regarding the last seen together is that at 4.00 p.m., on the date of the incident, appellant no. 2 took the deceased on his motorcycle. However, PW-3 has stated that appellant no. 2 took the deceased at 4.00 p.m. to attend a meeting of the Congress Party. He also said that his deceased father

was an influential leader of the Congress. Therefore, after 4.00 p.m., there were also persons other than the accused around the deceased. Even assuming that the accused were seen with the deceased on the day he was found dead, after he was allegedly seen with the accused, the deceased attended a meeting of the Congress Party. The theory of last seen together is helpful to the prosecution if the deceased was seen in the company of the accused in the proximity of the time at which the dead body is found. If the evidence shows that after the deceased was seen in the company of the accused, he was in the company of others as well, the theory of last seen together is not of any assistance to the prosecution. The reason is that the involvement of other persons in the offence is not ruled out. Hence, the fact that appellant no. 2 was found in the company of the deceased at 4.00 p.m. is not sufficient to link him with the commission of the offence of murder. For the reasons we have recorded, the testimony of so-called eyewitnesses cannot be relied upon. The theory of last seen together deserves to be rejected. Therefore, the prosecution has failed to bring home the charge against the appellants.

CONCLUSION

18. For the reasons recorded above, the impugned judgments of the Trial Court and High Court to the extent to which the appellants were convicted for the offence

punishable under Section 302, read with Section 149 of IPC, are hereby set aside. The appellants are acquitted of charges against them. The appeal is accordingly allowed.

19. The appellants shall be set at liberty unless their custody is required concerning some other offence.

.....J.
(Abhay S. Oka)

.....J.
(Ujjal Bhuyan)

New Delhi;
May 03, 2024