CASE NO.:
Appeal (crl.) 993-994 of 2002

PETITIONER:
Amzad Ali @ Amzad Kha & Ors.

RESPONDENT:
Vs.
The State of Assam

DATE OF JUDGMENT: 22/07/2003

BENCH:
Doraiswamy Raju & Arijit Pasayat.

JUDGMENT:

J U D G M E N T

RAJU, J.

These two appeals are at the instance of twelve accused, who remained convicted throughout after acquittal at different stages of the remaining accused out of the total number of 25 who stood charged before the learned Sessions Judge, Barpeta, for offences under Sections 302 and 201 read with Section 149 of the Indian Penal Code [for short 'IPC'].

The necessary facts for appreciating the grievance of the appellants are that the case had its origin initially with a G.D. Entry No.115 on 3.8.1989 registered at Barpeta Police Station at 6.30 P.M. on verbal information followed by a formal written FIR that was lodged by one Rupchan Mia, on the same day at 7.00 P.M. As per the version in the FIR, on the fateful day, i.e., 3.8.1989, at about 4.00 P.M. when three persons viz., Tara Mia, Saket Ali and Owaz Kha were fishing in the Dhaneswari Beel, the accused armed with sticks, spears and other deadly weapons attacked those persons inflicting serious injuries resulting in their death and thereafter dragged the dead bodies and threw them in the Pahumara River. At the time of occurrence, hue and cry was also said to have been raised attracting crowd, which included witnesses Manowara Begum and Hussain Mia and the accused were said to have attacked the above two and also caused injuries on their person as well. In the FIR, reference was said to have been made to 24 persons by name and others generally, as the accused responsible for the incident and after completing the investigation, charge was laid on them viz about 26 under the provisions noticed above to face trial before the Trial Court. Since one of them by name Abdul Latif, who was also included in the charge sheet, died during pendency of proceedings, the trial was confined to the remaining 25.

During the trial, the prosecution examined about 11 PWs to substantiate the charge of whom PW.1, PW.2, PW.8 and PW.9 claimed to be the eyewitnesses for the occurrence and PW.5 and PW.6 were the Medical Officers, who conducted the post mortem examination. It appears that despite serious efforts, during the course of investigation, only the bodies of Saket Ali and Owaz Kha alone could be recovered from the Nakhanda river, but that of Tara Mia, could not at all be retrieved. The learned Trial Judge, after considering the materials on record, by his judgment dated 10.2.1999 in Sessions Case No.13 of 1994 found that the prosecution established its case against 16 enumerated accused and acquitted about 9 of the accused on the view that the evidence could not establish and prove the charges against them beyond reasonable doubt. The convicted persons were each sentenced to life imprisonment with a further fine of Rs.2,000/-, in default of payment to further suffer six months R.I. under Section 302 read with Section 149, IPC. For the conviction under Section 201 read with Section 149, IPC, they were sentenced to five years R.I. along with a fine of Rs.1,000/- each and three months R.I. in default of payment of the

same. The convicted accused filed two separate appeals viz., a group of 10 - Crl. Appeal No.57 of 1999 and the remaining 6 - Crl. Appeal No.68 of 1999. A Division Bench of the Gauhati High Court by a common judgment dated 9.1.2002 chose to confirm the conviction and sentence in respect of 12 accused, who are appellants before this Court, acquitting four more by giving them benefit of doubt in addition to those acquitted by the Trial Court.

Heard the learned counsel for the appellants and the learned counsel for the respondent-State. It has been strenuously contended for the appellants that the courts below failed to see whether there was any formation of an unlawful assembly to attract Section 149, IPC, that the witnesses were closely related to the victims and therefore highly interested and that the prosecution has withheld independent and impartial witnesses from being examined and that consequently the courts below ought to have held that the presence and participation of the appellants also in the occurrence was not established beyond reasonable doubt. It was further urged that the benefit of doubt given in respect of the other accused, who stood acquitted, should have been extended to the appellants too, having regard to the serious lapses, infirmities and the contradictions in evidence. Per contra, the learned counsel for the State contended, adopting the reasoning of the courts below, that in respect of the appellants, who have been concurrently convicted, there was ample, direct and clinching evidence to connect them with an offence and consequently no exception could be taken to the well-merited judgment by both the courts below so far as the appellants are concerned.

We have carefully considered the submissions of the learned counsel appearing on either side. It is incorrect to claim that prior formation of an unlawful assembly with a common object is a must and should have been found as a condition precedent before roping the accused within the fold of Section 149, IPC. No doubt the offence committed must be shown to be immediately connected with the common object, but whether they had the common object to cause the murder in a given case would depend and can rightly be decided on the basis of any proved rivalry between two factions, the nature of weapons used, the manner of attack as well as all surrounding circumstances. Common object has been always considered to be different from common intention and that it does not require prior concert and common meeting of minds before the attack. Common object could develop eo instanti and being a question of fact it can always be inferred and deduced from the facts and circumstances of a case projected and proved in a given case. The evidence on record, in our view, sufficiently established that there was some prior animosity and there were faction-ridden groups in existence apparently over the exercise of right to fish in the area. From the nature of the weapons like lathi, dagger, spear like iron rods, which seem to have been liberally used by the appellants, the chasing of the victims who ran for their lives and killing the three of them by merciless attack and throwing their dead-bodies in the running river rendering it almost difficult to retrieve immediately their bodies and some of them absconding from the locality for nearly about twelve days, would go to inevitably prove that by their joint armed attack, the common object to murder the victims was obvious and stood proved by convincing and cogent evidence. The mere claim that the alleged eyewitnesses to the occurrence are close relatives and were interested witnesses is an usual plea invariably repeated and is found to be reiterated in this case too. The witnesses were said to be living in and around the place of occurrence which could be visible from the place of their huts even and that, therefore, their presence at the time, seem to be not only normal and natural, but their claim that they rushed to the place of occurrence on hearing the hallas, appears to be genuine and acceptable. Yet another bogie raised vaguely that independent and impartial witnesses have been withheld, on the facts and circumstances of the case, equally does not merit any credence of acceptance. Keeping in view the faction ridden groups in the surrounding, no independent or impartial witness was likely to volunteer to give evidence even if there was anyone present at or near the place of occurrence and it is only the relatives, who were otherwise nearby and could have witnessed as legitimately claimed by them, would come to depose boldly. There is no rule of any presumption that the evidence of a related witness will always be an interested one or that such

witness will have only a hostile attitude towards the accused facing trial. Except making a bald cry that independent and impartial witnesses were withheld, it was not even brought on record in some form or other as to who such persons could be and who according to the defence stand, were otherwise present nearby, but were not examined and otherwise withheld. As rightly observed by both the courts below, the witnesses, particularly PWs.1, 2, 8 and 9, appear to be natural eyewitnesses and their version, found to be specific, cogent and trustworthy have been rightly accepted. No doubt our attention has been drawn to the fact that at the end of the FIR there is a note that having learnt about the aforesaid occurrence from his younger brother Lal Mia, he lodged the FIR but courts accepted his evidence only as an eye witness for part of the occurrence. Even eschewing his evidence from consideration, the evidence of PW.2, PW 8 and PW.9, in our view, convincingly, cogently and sufficiently establish the participation and direct involvement of Appellants 1,2,4,7,8,10 and 12 in the crime and there is no justification to disbelieve or condemn the evidence of these witnesses in toto. The courts below despite the other accused acquitted by them being named also in the evidence, have chosen to give some of them benefit of doubt in the absence of positive role by any overt acts being attributed to them. The same treatment cannot be meted out to all the other accused whose complicity and specific role in the commission of the offence was firmly established by the evidence. Having gone through the evidence of PWs.1, 2, 8 and 9, as also PW.3, who spoke for the arrest on the spot of 1st appellant, we find that specific role and overt acts have been attributed to the above seven appellants at least and there is no scope for exonerating them from the crime by any means whatsoever â\200\223 either on the ground of want of evidence against them or by extension of any benefit of doubt.

Apart from the fact that the courts below have analysed the evidence at great length and given sufficient and sound reasons to convict the appellants, in spite of our careful scanning through of the evidence for us to discredit or deviate from them for any good or legitimate reason and, there appears to be no justification to acquit them also in the teeth of overwhelming evidence to directly involve them in the gruesome murder and throwing away the bodies in the river to make the evidence disappear to absolve them of the liability for the crime committed by them. As a matter of fact the dead bodies of Owaz Khan and Saket Ali could be recovered from Pahumara river after 2/3 days of intensive search and that of Tara Mia cold not at all be recorded.

For all the reasons stated above, except extending the benefit of doubt in favour of appellants 3,5,6,9 and 11 in respect of whom the evidence of PWs.2 and 9 is sketchy and does not make out their participation beyond reasonable doubt, we see no reason whatsoever to extend any benefit of doubt in respect of the remaining accused/appellants. Consequently, we order the acquittal of appellants No. 3, 5, 6, 9 and 11 by partly allowing the appeals and confirm the conviction and sentence in respect of appellants No.1, 2, 4, 7, 8, 10 and 12, dismissing the appeals, so far as they are concerned. The appellants acquitted by us shall be released from jail, if not required in any other case. The others whose conviction and sentence has been confirmed by us shall serve the remaining period of the sentence, as ordered by the courts below.