GAHC010001162022

THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

CRIMINAL APPEAL [J] NO. 7/2022

1. Badhna Orang
2. Bhete Orang
3. Pradip Orang
4. Samra Orang
5. Bablu Orang
6. Amit orang

……***Appellants***

-VERSUS-

The State of Assam

……***Respondent***

Advocates :

Appellant : Mr. D.K. Baidya, Advocate
Respondent : Ms. B. Bhuyan, Sr. & Additional Public Prosecutor, Assam;
Ms. M. Chakrabarty, Advocate

Date of Hearing, Judgment & Order : 25.07.2024

BEFORE
HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE KAUSHIK GOSWAMI

JUDGMENT & ORDER

[*M. Choudhury, J*]

Assail is made in this criminal appeal preferred from Jail under Section 383, Code of Criminal Procedure, 1973 ['CrPC'] to a Judgment and Order dated 30.04.2021 passed by the Court of learned Additional Sessions Judge [FTC], Biswanath Chariali ['the trial court', for short] in Sessions Case no. 304 of 2012. By the Judgment and Order dated 30.04.2021, the learned trial court has convicted the six accused persons, namely, [i] Badhna Orang [A-1, for easy reference]; [ii] Bhete Orang [A-2]; [iii] Pradip Orang [A-3]; [iv] Samra Orang [A-4]; [v] Bablu Orang [A-5]; and [vi] Amit Orang [A-5], who faced the trial for the offence under Section 302, Indian Penal Code [IPC] read with Section 148, IPC and on finding them guilty for the offence of Section 302, IPC, all of them have been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/- each, in default of payment of fine, to undergo simple imprisonment for another 6 [six] months each, for committing the offence under Section 302, IPC. The accused persons are also sentenced to undergo rigorous imprisonment for 1 [one] year and to pay a fine of Rs. 500/- each, in default of payment of fine, to undergo simple imprisonment for another 1 [one] month under Section 148, IPC. It has been ordered that the sentences are to run consecutively.

2. The investigating machinery was set into motion after institution of a First Information Report [FIR] by one Soma Orang on 12.11.2011 before the In-Charge, Gingia Out Post. In the said FIR, Soma Orang as the informant had inter alia alleged that his co-villager, Badhna Orang [A-1] armed with weapons and accompanied by the five accused persons, named therein, that is, A-2 to A-6 took away his wife, Birso Orang telling that a particular matter was to be discussed with her. The informant further alleged that the said accused persons, out of old grudge, assaulted his wife and killed her by hacking. Thereafter, they carried the

deadbody back and left it at the door of the house of the informant.

3. On receipt of the FIR, the In-Charge, Gingiya Out Post registered a general diary entry vide Gingiya Out Post General Diary Entry no. 232 dated 12.11.2011 at 11-00 a.m. and forwarded the FIR to the Officer In-Charge, Behali Police Station for registering a case under proper sections of law, while entrusting the investigation of the case to one Bhoben Chandra Nath, a Sub-Inspector of Police [P.W.7], attached to the said Police Station.

4. During the course of investigation, all the six accused persons were arrested. The Investigating Officer [I.O.] visited the place of occurrence [P.O.] and prepared a Sketch Map of the P.O. [Ext.9]. [i] One dao; [ii] one iron hammer; and [iii] a number of wearing apparels of the deceased were also seized by the I.O. [P.W.7] in presence of the witnesses vide [i] Seizure List - M.R. no. 75/2011 [Ext.-2] dated 12.11.2011; [ii] Seizure List - M.R. no. 707/2011 [Ext.-7] dated 12.11.2011; and [iii] Seizure List - M.R. no. 76/2011 [Ext.-8] dated 12.11.2011; respectively. The I.O. [P.W.7] after conducting inquest proceeding on the deadbody of the deceased, forwarded the deadbody to Behali Block Primary Health Centre [PHC] for post-mortem examination on 12.11.2011. The post-mortem examination of the deadbody of the deceased was performed at Behali Block PHC on 12.11.2011 and the Autopsy Doctor, P.W.5 after completing the post-mortem examination, recorded his findings in a Post-Mortem Examination [PME] Report [Ext.-5].

5. It was the case of prosecution that during the course of examination, statements of two witnesses, namely, Ramu Orang [P.W.1] and Dilip Orang [P.W.2] were also recorded under Section 164, CrPC by producing them before the Court of learned Judicial Magistrate, First Class, Biswanath Chariali on 14.11.2011. After completing investigation into the case, Behali Police Station Case no. 211/2011 [corresponding G.R. Case no. 799/2011], the I.O. [P.W.7] submitted a charge-sheet under Section 173[2], CrPC vide Charge-Sheet no. 44/2012 on 30.05.2012 finding a prima facie case well established against the six accused persons named in the FIR for the offences under Sections 147/148/302, IPC.

6. After submission of the Charge-Sheet, the Court of learned Sub-Divisional Judicial Magistrate [M] [‘the S.D.J.M.[M], Biswanath Chariali secured the appearance of the six charge-sheeted accused persons before it on 15.09.2012 by issuing summons as they were already released on bail in the meantime. After securing their appearance, the Court of learned S.D.J.M. [M], Biswanath Chariali complied with the procedure laid down in Section 207, CrPC by furnishing copies to them. As the offence under Section 302, IPC is exclusively triable by the Court of Sessions, the learned S.D.J.M. [M], BIswanath Chariali by an Order of Commitment dated 15.09.2012, committed the case records of G.R. Case no. 799/2011 to the Court of Sessions, Sonitpur for the purpose of trial. As the six charge-sheeted accused persons were on bail, they were allowed to remain on previous bail till their appearance before the learned Court of Sessions on the basis of applications filed by them. The learned Public Prosecutor was accordingly notified.

7. On receipt of the Case records of G.R. Case no. 799/2011, the Court of Sessions, Sonitpur registered the same as Sessions Case no. 304/2012 and transmitted the case records to the Court of learned Additional Sessions Judge [FTC], Biswanath Chariali [‘the trial court’] for trial and disposal. The learned trial court upon appearance of the six accused persons before it; after hearing the learned Public Prosecutor and the defence counsel; and upon perusal of the materials available in the case records; framed the following charges against the accused persons, on 26.06.2013, :-

> Firstly, that you all on 11.11.2011 at about 06-00 p.m. at Village – Pulisumoni under Behali Police Station in the district of Sonitpur, were members of an unlawful assembly, and in prosecution of common object of such assembly to commit murder of Birso Orang, committed the offence of rioting and thereby committed an offence punishable under Section 147 of the IPC, and within my cognizance.
>
> Secondly, that you on the same day, time and place were members

> of an unlawful assembly and in prosecution of common object of that assembly, and armed with deadly weapons, did commit the offence of rioting to kill Birso Orang and thereby committed an offence under Section 148, IPC, and within my cognizance.
>
> Thirdly, that you all on the same date, time and place, committed murder of Birso Orang with the intention of causing death to him, and thereby committed an offence under Section 302, IPC, and within my cognizance.

8. When the charges were read over and explained to the accused persons, they pleaded not guilty and claimed to be tried. In the course of the trial, the prosecution side examine seven nos. of witnesses and they were – [i] P.W.1 – Ramu Orang; [ii] P.W.2 – Dilip Orang; [iii] P.W.3 – Raghunath Orang; [iv] P.W.4 - Parul Boruah; [v] P.W.5 – Dr. Jogen Chandra Bey; [vi] P.W.6 – Lothu Orang; and [vii] P.W.7 – Bhaben Chandra Nath. In order to bring home the charges against the accused persons, the prosecution side also exhibited nine nos. of documents and they were – [i] Ext.-1 – the statement of P.W.1 recorded under Section 164, CrPC; [ii] Ext.-2 – the Seizure List, M.R. no. 75/2011; [iii] Ext.-3 – the statement of P.W.2 recorded under Section 164, CrPC; [iv] Ext.-4 – the FIR; [v] Ext.-5 – the Post-Mortem Examination [PME] Report; [vi] Ext.-6 – the Charge-Sheet; [vii] Ext.-7 – the Seizure List, M.R. no. 77/2011; [viii] Ext.-8 – the Seizure List, M.R. no. 76/2011; and [ix] Ext.-9 – the Sketch Map of the P.O.

9. After closure of the evidence from prosecution side, the accused persons were examined under Section 313, CrPC by putting before them the incriminating materials emerging against them from the evidence of the prosecution witnesses. Their pleas were denial of committing the act of murder of the deceased. When the accused persons were asked as to whether they would adduce defence evidence in their support, they answered in the negative. After hearing the learned counsel for the parties and after evaluation of the evidence/materials on records, the learned trial court proceeded to deliver the Judgment and Order of conviction and sentence, as mentioned hereinabove.

10. It has emerged from the records that during the pendency of the trial, the informant, Soma Orang had expired.

11. We have heard Mr. D.K. Baidya, learned Amicus Curiae appearing for the accused-appellants; and Ms. B. Bhuyan, learned Senior Counsel & Additional Public Prosecutor assisted by Ms. M. Chakraborty, learned counsel for the respondent State.

12. Mr. Baidya, learned Amicus Curiae has contended that the prosecution had presented two prosecution witnesses - P.W.1 & P.W.2 – as eye-witnesses but on close scrutiny of their testimonies given before the court, it would emerge that none of them can be treated as eye-witnesses as their versions in the first part of the testimonies, that is, in the examination-in-chief part were at variance to their versions in the second part, that is, during cross-examination. It is his further contention that the learned trial court while considering their evidence, appeared to have erred in construing that it was the defence who ought to have confronted the said two witnesses with the previous statements. It is his contention that if the prosecution was of the view that these two witnesses had deviated from their previous statements recorded under Section 164, CrPC, these prosecution witnesses ought to have been confronted by the prosecution side, rather than by the defence side. Learned Amicus Curiae has further contended that in any view of the matter, any statement recorded under Section 164, CrPC is not a piece of substantive evidence and its purpose is limited for the purpose of contradiction or corroboration only. If the evidence of these two witnesses are left aside from the consideration being unreliable witnesses, there is no other credible evidence to bring home the charges against the accused persons. The factum of recovery of one iron hammer and one dao from the houses of the two accused persons cannot be considered as sufficient to point towards any kind of culpability on the part of the accused persons in the alleged crime. In absence of sufficient credible evidence to draw a conclusion on the standard of beyond reasonable doubts, the Judgment and Order of conviction and sentence cannot be sustained against the accused persons.

13. Au contraire, Ms. Bhuyan, learned Additional Public Prosecutor appearing for the respondent State has submitted that the informant had clearly mentioned that the accused were the persons who were involved in the perpetration of the crime against the wife of the informant resulting into her death and as the informant had expired, his such statement would be relevant. Ms. Bhuyan has further contented that from the evidence on record, it has emerged that the six accused persons had a motive to kill the wife of the informant as she was suspected to be involved in witchcraft. As there were also recovery of the alleged weapons of assault from the houses of two of the accused persons, there is clear indication that it was the accused persons who were involved in the crime. Ms. Bhuyan has further referred to the answers given by the accused persons in connection with the recovery of the alleged weapons of assault when they were examined under Section 313, CrPC to buttress her above submissions.

14. We have duly considered the submissions of the learned counsel for the parties. We have also gone through the evidence/materials on record including the testimonies of the witnesses and the documentary evidence, which are available in the case records of Sessions Case no. 304/2012, in original. We have also considered the decisions referred to by the learned counsel for the parties during the course of their submissions.

15. Before any dilation on the ocular testimonies of the other prosecution witnesses, we first turn to the medical evidence available on record, which are in the forms of the testimony of Autopsy Doctor, P.W.5 and the Post-Mortem Examination [PME] Report [Ext.5].

15.1. P.W.5, Dr. Jogen Chandra Bey who was serving as the Sub-Divisional Medical & Health Officer at Behali Block Primary Heath Centre [PHC], on 12.11.2011, performed the post-mortem examination on the deadbody of the deceased Birso Orang, aged about 35 years, on that day. In his testimony, he mentioned that during autopsy, he found the following injuries :-

1. One penetrative injury left side of the face 1 inch x ½ inch to right side cheek ¾ inch x ¼ inch in size. Clotted blood present in the mouth.
2. Multiple bruise with abrasion over back chest and abdomen of various side and shapes.
3. Abrasion present on both lower thigh and elbow joint of various sizes and shapes.

Multiple rib fractures in both side chest it is based on finding of the thorax.

Lacerated and contain blood in the cavity. Both lung lacerated, heart empty. Other organs of the thorax were found congested.
On examination of abdomen, liver and spleen were found lacerated and peritoneum contains full of blood. The stomach contains little food with smell of alcohol found.

All the injuries were ante mortem in nature. The penetrating injuries on the face were caused by sharp pointed objects.

15.2. P.W.5 deposed to the effect that the injuries were ante-mortem in nature and the penetrating injuries on the face were caused by sharp pointed objects. It was opined that the death was due to shock and haemorrhage due to the injuries sustained. P.W.5 exhibited and proved the PME Report as Ext.-5 and his signature therein as Ext.5[1]. In cross-examination, P.W.5 stated that the ages of the injuries were not mentioned in the PME Report and it was not possible to say from the PME Report about the proximate time when the death of the deceased took place. He clarified that the rib injuries sustained by the deceased could not occur due to fall on hard substance as only abrasions could result from falling on hard substance.

15.3. In the PME Report [Ext.-5], the following findings were recorded :-

I – EXTERNAL APPEARANCE

1. Condition of subject stout emaciated, decomposed etc :
Thin built. Rigor mortis present. Eyes closed, moth half open.

2. Wounds – position, and character :
1. Penetrative injury through left side face 1” x ½” to Rt. Cheek, ¾” x $^{11}/_{4}$” in size. Blood clot present in the mouth.
2. Multiple bruise with abrasion over back, chest and abdomen of various size and shapes.
3. Abrasion on the both lower thigh and elbow jt of various size and shapes.

* * * * * * *

II – CRANIUM AND SPINAL CANAL

1. * * * * * * *
2. * * * * * * *
3. Brain and spinal cord : Congested

III. THORAX
1. Walis ribs and cartilages : Multiple rib fractures in both side chest
2. Pleurae : Lacerated and contain blood in the cavity

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V. MUSCLES, BONES AND JOINTS
1. Injury : As described
2. Disease or deformity : Nil
3. Fracture : As described
4. Dislocation : Nil

MORE DETAILED DESCRIPTION OF INJURY OR DISEASE
All the injuries were ante-mortem in nature. The penetrative injury on the face were caused by sharp pointed object.

* * * * * * *

OPINION OF ASSISTANT SURGEON AS TO CAUSE OF DEATH
SUB – ASSISTANT SURGEON
Death was due to shock and haemorrhage as a result of injuries sustained.

15.4. From the testimony of P.W.5 and the PME Report [Ext.-5], it has emerged that the deceased sustained penetrating injuries on her face apart from multiple bruises with abrasion over back, chest and abdomen. There were multiple rib fractures on both sides of the chest and the injuries were found to be ante-mortem in nature. The penetrating injuries on the face were found to be caused by sharp pointed objects. From the nature of the injuries sustained by the deceased and the nature of weapon opined to be used to cause those injuries, it can be safely concluded that the death of the deceased was a homicidal death.

16. In view of the nature of death met by the deceased, the next issue which arises for consideration is whether other evidence led by the prosecution during the trial are sufficient enough to connect the accused persons with the crime of homicide.

17. P.W.3, Raghunath Orang is an inhabitant of the same Village no. 3, Pulisumari as that of the informant [since deceased] and the accused persons. In his testimony, he deposed that one Katiram Orang [not a witness] told him that Birso Orang was killed by some unknown person. On receiving the information, P.W.3 went to the house of Birso Orang and saw her deadbody lying on the ground there. P.W.3 was a witness to the Seizure List, M.R. no. 75/2011 [Ext.-2], whereby, a dao measuring 11 inches long with a bamboo handle was seized by the I.O. [P.W.7] on being produced by Sivani Orang, wife of Samora Orang [A-4]. P.W.3 identified his signature in the Seizure List [Ext.-2] as Ext.-2[2]. At this stage, prosecution side sought permission from the court to cross-examine this witness after declaring him as a hostile one. During cross-examination by the prosecution, P.W.3 denied a suggestion that he stated before the I.O. that Soma Orang, the husband of the deceased, told him that the accused persons killed Birso Orang. When P.W.3 was cross-examined by the defence, he stated that Police recovered the dao from the house of the accused, Bablu Orang [A-5] and he did not know to whom the seized dao belonged. He further stated that he did not know anything more about the occurrence.

17.1. P.W.4, Parul Baruah deposed to the effect that she was the scribe of the FIR [Ext.4] and she identified her signature in the said FIR as Ext.4[1]. P.W.4 further deposed that she wrote the FIR as per the version of the informant, Soma Orang and as asked by Soma Orang, she lodged the FIR. P.W.4 stated that as told by Soma Orang, she wrote the names of the accused persons in the FIR. In cross-examination, P.W.4 stated that the informant, Soma Orang was sent to her house from the Police Station for writing the FIR. P.W.4 further stated that she did not have personal knowledge about the incident. As the informant, Soma Orang was illiterate, he only put his thumb impression in the FIR. P.W.4 further stated that as she was not told what objects the accused persons had carried with them, no mention was made about any object in the FIR. The informant did not disclose about any kind of previous grudge harboured by any of the parties. P.W.4 also stated that there was no mention about the time on the night when the body of the victim was left at the house of the informant/the deceased or at what time the informant came to know about it.

17.2. P.W.6, Lothu Orang is a co-villager and a neighbour of the informant and the accused persons. On the incident, P.W.6 deposed to the effect that on the date of the incident, when he went to tether the cattle he saw gathering of persons near the house of the deceased. Going there, he saw the deadbody of the deceased lying there. He further stated that he had no knowledge how the woman died.

17.3. From the testimonies of the above prosecution witnesses - P.W.3, P.W.4 & P.W.6 - it has emerged that none of these witnesses had witnessed any incident of assault on the deceased by the assailants. They were neither witness to the alleged act of taking away of the deceased from her house by the accused persons nor to the alleged act of leaving of the deadbody of the deceased at the door of the house of the informant later on. Their testimonies are not of any assistance to the prosecution side to bring home the charge of murder and participation of the accused persons in an unlawful assembly. As held in Khujji @ Surendra Tiwari vs. State of Madhya Pradesh, [1991] 3 SCC 627, the evidence of prosecution witness cannot be rejected in toto merely because the prosecution has chosen to treat him as hostile and cross-examined him. The evidence of such witness cannot be treated

as effaced of washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on careful scrutiny thereof. From such standpoint, the evidence of the prosecution witness, P.W.3, who was declared hostile, to the extent that he was a witness to the Seizure List [Ext.-2] can be accepted.

18. For the purpose of examining whether the testimonies of P.W.3, P.W.4 and P.W.6 would lend corroboration to the testimonies of the remaining two witnesses, that is, P.W.1 & P.W.2, we would now turn to the testimonies of P.W.1 and P.W.2.

18.1. P.W.1, Sri Ramu Orang who is a resident of Village no. 3 Pulisomoni, deposed to the effect that he knew the accused persons. P.W.1 stated that the incident took place on one evening about one and a half years earlier. He stated that on that day, the accused persons assaulted Birso Orang with dao and hammer and as a result, Birso Orang died. He further stated that Birso Orang was assaulted as she was suspected to be a witch. P.W.1 stated that he gave his statement earlier before the court and exhibited his such previous statement as Ext.-1 with his signature therein as Ext.-1[1]. P.W.1 also stated that he was a witness to seizure of a dao vide Seizure List, Ext.-2 and he identified his signature therein as Ext.-2[2]. He also identified the dao as Mat. Ext.-1 which was seized vide Seizure List, Ext.-2. P.W.1 also identified two material exhibits viz. [i] Mat. Ext.-2 - a hammer; and [ii] Mat. Ext.-3 - the wearing apparels of Birso Orang, though he was not a witness to the Seizure Lists whereby those material exhibits were seized.

18.2. In cross-examination, P.W.1 stated that he came to know about the incident 2/3 hours after the incident had taken place. He stated to have learnt about the incident when he came home after working as a daily wage earner. P.W.1 further deposed that he neither saw nor heard as to how many people were present at the time of the incident. He stated that he did not know wherefrom the Police brought the material exhibits and he did not know when the same were seized. P.W.1 further stated that he was not aware about the contents of the Seizure List [Ext.-1] and he put his signature in the Seizure List [Ext.-1] due to fear of the Police. As regards his previous statement, P.W.1 stated that he gave his such statement in the Court as tutored by the Police because they told him that if he did not do so, he would be

punished.

18.3. On reading both parts of the testimony of P.W.1, that is, the examination-in-chief part and the cross-examination part, it is evident that the two parts are at variance to one another in a significant manner. From the cross-examination part of P.W.1, it is clearly discernible that he was not an eye-witness to any of the events connected to the death of the deceased, Birso Orang who was the wife of the informant, Soma Orang. According to P.W.1, he became aware of the incident only 2/3 hours after the incident. As regards the material exhibits also, his testimony was that he was not aware about the place of their seizure. P.W.1 also claimed that he did not know about the contents of the Seizure Lists. As regards his previous statement made before the court, which he exhibited as Ext.-2, P.W.1 in his cross-examination, had stated that he made such statement before the court as tutored by the Police and after he was given threat that if he did not do so, he would be punished. P.W.1 in examination-in-chief part, stated about the incident and about the assault on the deceased by dao and hammer by the accused persons resulting into her death. On a close scrutiny, it is found that P.W.1 in examination-in-chief part, did not depose specifically to the effect that he was an eye-witness to such assault. On the face of such testimony of P.W.1, it cannot be said that the testimony of P.W.1 can be accepted as an eye-witness to any of the events occurred from the time of alleged taking away of the wife of the informant to leaving of her deadbody after killing, at the door of the house of the informant.

19. P.W.2, Dilip Orang is also an inhabitant of Village – Pulisomoni like P.W.1, wherein the deceased and the accused persons used to reside. P.W.2 in his examination-in-chief part, deposed to the effect that he knew the accused persons and he saw the accused, Badhna Orang [A-1] assaulting Birso Orang to death on suspicion that Birso Orang was a witch. P.W.2 stated that he gave his statement previously in the court. Conspicuously, P.W.2 replied in the negative way when a question was put to him by the prosecution during examination-in-chief that in his previous statement given in the court, he stated that the accused, Badhna Orang [A-1] along with all other accused persons [A-2 to A-6] present in the court, had committed the offence and he had falsely deposed that he did not mention their names earlier. P.W.2 replying in negative, denied another question from the prosecution side put to in his

examination-in-chief to the effect that he told to Police that the accused persons assaulted Birso Orang with dao and stick. P.W.2 exhibited his previous statement recorded under Section 164, CrPC as Ext.-3 and his signature therein as Ext. 3[1].

19.1. In his cross-examination by the defence, P.W.3 deposed that it was the villagers who told him about the incident and he came to know about the incident only when he came home in the night after doing works in the daytime. P.W.2 stated that he did not see how many persons had gathered at the place of occurrence and did not know the identities of those persons. He categorically stated that he did not see who killed Birso Orang and how she was killed. P.W.2 further stated that he was only questioned by Police on the day following the date of the incident and he told the Police that he did not witness the incident. But the Police brought him to the court for recording his statement and after teaching him in what manner such statement was to be given in the court. P.W.2 further stated that he mentioned the name of Badhna Orang [A-1] in the court because the villagers told him his name. It needs a mention here that no part of the P.W.2's previous statement recorded under Section 164, CrPC [Ext.-3] was marked for the purpose of contradiction to prove such contradiction by asking the I.O., later on, about the marked part from the previous statement either by the prosecution or by the defence. _

19.2. On a close perusal of the testimony of P.W.2, it can be seen that though in the first part of his testimony, that is, in the examination-in-chief part, P.W.2 claimed to have witnessed the incident of assault on the deceased by the accused persons, but in his testimony in the second part, that is, in the cross-examination part, P.W.2 declared himself to be a hearsay witness as he claimed that he was told about the incident at a later point of time and thus, he did not see who killed Birso Orang and how Bisro Orang was killed. If the first part of the testimony of P.W.2, that is, the examination-in-chief part is only looked at, it can be seen that P.W.2 had only implicated one accused person, namely, Badhna Orang [A-1] by name as the only one who made the assault. But in cross-examination, P.W.2 answered to the effect that he took the name of Badhna Orang [A-1] as he was asked by the villagers to do so. It does not emerge from the materials on record as to why the prosecution side had put leading questions to P.W.1 when he was examined-in-chief, without seeking permission

from the Court. In examination-in-chief, it is the duty of the Public Prosecutor to ask the witness to state the facts or to give his version of the case as to what he had seen or heard or perceived. A question which suggests to the witness the answer the Public Prosecutor desires to receive is not to be allowed unless the witness, with the permission of the court, is declared hostile and cross-examination is directed thereafter.

20. It has been strenuously contended on behalf of the State that the prosecution witness, P.W.2 in his previous statement recorded under Section 164, CrPC [Ext.-3], had clearly implicated all the six accused persons by mentioning the time and date of the incident of assault and the weapons of assault by which the deceased was assaulted, were recovered and seized. It has, thus, been contended that such previous statement of P.W.1 which was consistent with the FIR lodged against them on 12.11.2011, cannot be discarded as it demonstrates about involvement of the accused persons in the crime. It has also been contended that the deceased was killed as she was suspected to have practiced witchcraft. All these circumstances go to show that the accused persons were involved in the crime.

21. It is well settled that neither the FIR lodged in a case nor a statement recorded under Section 164 of the Code in connection with that case is substantive evidence in a case. It is the evidence given in court under oath which has the element of sanctity and it is for this reason, the same is called substantive evidence. It is also a settled proposition that a statement recorded under Section 161, CrPC can be used only for the purpose of contradiction. However, a statement recorded under Section 164, CrPC can be used for both corroboration and contradiction. It has been clarified in R. Shaji vs. State of Kerala, reported in [2013] 14 SCC 266, that so far as the statement of witnesses recorded under Section 164, CrPC is concerned, the object is two-fold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164, CrPC. A proposition to the effect that if a statement of a witness is recorded under Section 164, CrPC, his evidence in court should be discarded, is not at all warranted. As defence had no opportunity to cross-examine the witness whose statement is recorded under Section 164, CrPC, such statement cannot be treated as substantive evidence.

22. It has already emerged from the prosecution evidence that when the prosecution witness, P.W.2 was cross-examined during the trial, he denied to have witnessed any of the events relating to the death of the deceased. His such testimony was not in conformity with the version he gave earlier in his statement recorded under Section 164, CrPC, exhibited during his examination-in-chief as Ext.-3. P.W.2 when he was cross-examined, stated that he did not see who killed Birso Orang and how she was killed. P.W.2 testified to the effect that he came to know about the incident only after he reached his home at that night after doing works during the day time. The testimony of P.W.2 that he came to know about the incident only later had brought his testimony given in the examination-in-chief part that he saw the incident, under the cloud, creating a dent in his credibility and trustworthiness as it resulted into a significant departure from the text and tenor of his testimony given during examination-in-chief. At no point of time, the prosecution sought any permission from the court in order to permit his [P.W.2] cross-examination under Section 154 read with Section 145, Evidence Act. At this juncture, it is relevant to mention that the learned trial court had made an observation that the previous statement given by P.W.2 under Section 164, CrPC was not contradicted by confronting him [P.W.2] with such previous statement at the time of his testimony before the court in compliance with the provision laid down in Section 145 of the Evidence Act. Observing so, the learned trial court proceeded to observe that from the evidence of P.W.2, it appeared that his evidence was consistent with his previous statement recorded under Section 161, CrPC and Section 164, CrPC. It is pertinent to mention that a previous statement of a witness recorded under Section 161, CrPC cannot be used for corroboration of a prosecution witness as it can only be used for contradicting a prosecution witness [Ref.: Tahsildar Singh and another vs. State of Uttar Pradesh, AIR 1959 SC 1012].

23. In so far as the trial court's observation regarding testimonies of P.W.1 and P.W.2 receiving corroboration from their previous statements recorded under Section 164, CrPC is concerned, we find that such observation was in ignorance of the testimonies of P.W.1 and P.W.2 given in their cross-examination. It has emerged that the testimonies given by P.W.1 and P.W.2 in the evidence-in-chief parts were at significant variance with the testimonies given in their cross-examination parts, which had resulted into two versions, contradictory to

each other, about witnessing the concerned events and incidents by the same witnesses immediately after one another. There also existed their previous statements recorded under Section 164, CrPC which, according to the prosecution, were consistent with the projected case of the prosecution. We are of the considered view that in such obtaining fact situation, it was the prosecution side, who ought to have sought permission from the court to confront these two witnesses [P.W.1 & P.W.2] with their previous statements recorded under Section 164, CrPC. There were materials to indicate that these two witnesses had deviated from their previous statements by presenting a completely different version as regards their witnessing the event/incident in their cross-examination, which have clearly dented their credibility and trustworthiness.

23.1. In Rajesh Yadav and another vs. State of Uttar Pradesh, reported in [2022] 12 SCC 200, the Hon'ble Supreme Court has observed that the expression 'hostile witness' does not find a place in the Indian Evidence Act, 1872. It is coined to mean testimony of a witness turning to depose in favour of the opposite party. A witness may depose in favour of a party in whose favour it is meant to be giving through his chief examination, while later on, change his view in favour of the opposite party. Similarly, there would be cases where a witness does not support the case of the party starting from chief examination itself. This classification has to be borne in mind by the court. With respect to the first category, the court is not denuded of its power to make an appropriate assessment of the evidence rendered by such a witness. Even a chief examination could be termed as evidence, such evidence would become complete after the cross-examination. Once evidence is completed, the said testimony as a whole is meant for the court to assess and appreciate qua a fact.

23.2. In this connection, the observations made in the case of Dayabhai Chhaganbhai Thakker vs. State of Gujarat, reported in AIR 1964 SC 1563, when a witness resiles from a very material statement regarding the manner in which the accused committed the offence, are also of relevance and import :-

> 8. ... Section 137 of the Evidence Act gives only the three stages in the examination of a witness, namely examination-in-chief, cross-examination and re-examination. This is a routine sequence in the

examination of a witness. This has no relevance to the question when a party calling a witness can be permitted to put to him questions under Section 154 of the Evidence Act : that is governed by the provisions of Section 154 of the said Act, which confers a discretionary power on the court to permit a person who calls a witness to put any questions to him which might be put in cross-examination by the adverse party. Section 154 does not in terms, or by necessary implication confine the exercise of the power by the court before the examination-in-chief is concluded or to any particular stage of the examination of the witness. It is wide in scope and the discretion is entirely left to the court to exercise the power when the circumstances demand. To confine this power to the stage of examination-in-chief is to make it ineffective in practice. A clever witness in his examination-in-chief faithfully conforms to what he stated earlier to the police or in the committing Court, but in the cross-examination introduces statements in a subtle way contradicting in effect what he stated in the examination-in-chief. If his design is obvious, we do not see why the court cannot, during the course of his cross-examination, permit the person calling him as a witness to put questions to him which might be put in cross-examination by the adverse party. To confine the operation of Section 154 of the Evidence Act to a particular stage in the examination of a witness is to read words in the section which are not there. We cannot also agree with the High Court that if a party calling a witness is permitted to put such questions to the witness after he has been cross-examined by the adverse party, the adverse party will not have any opportunity to further cross-examine the witness on the answers elicited by putting such questions. In such an event the court certainly, in exercise of its discretion, will permit the adverse party to cross-examine the witness on the answers elicited by such questions. The court, therefore, can permit a person, who calls a witness, to put questions to him which might be put in the cross-examination at any stage of the examination of the witness, provided it takes care to give an opportunity to the accused to cross-examine him on the answers elicited which do not find place in the examination-in-chief….

> * * * * *
>
> Broadly stated, the position in the present case is that the witnesses in their statements before the police attributed a clear intention to the accused to commit murder, but before the court they stated that the accused was insane and, therefore, he committed the murder.

23.3. In Sat Paul vs. Delhi Administration, reported in [1976] 1 SCC 727, the Hobn'ble Supreme Court has elucidated about the purposes of cross-examination of a witness by the party which itself called it, in the following manner :-

> **42.** The fallacy underlying this view stems from the assumption that the only purpose of cross-examination of a witness is to discredit him; it ignores the hard truth that another equally important object of cross-examination is to elicit admissions of facts which would help build the case of the cross-examiner. When a party with the leave of the court, confronts his witness with his previous inconsistent statement, he does so in the hope that the witness might revert to what he had stated previously. If the departure from the prior statement is not deliberate but is due to faulty memory or a like cause, there is every possibility of the witness veering round to his former statement. Thus, showing faultness of the memory in the case of such a witness would be another object of cross-examining and contradicting him by a party calling the witness. In short, the rule prohibiting a party to put questions in the manner of cross-examination or in a leading form to his own witness is relaxed not because the witness has already forfeited all right to credit but because from his antipathetic altitude or otherwise, the court feels that for doing justice, his evidence will be more fully given, the truth more effectively extricated and his credit more adequately tested by questions put in a more pointed, penetrating and searching way.

23.4. As observed in Dayabhai [supra], the two prosecution witnesses, P.W.1 and P.W.2 in the case in hand, in their examinations-in-chief, appeared to have stated somewhat in conformity to what they had stated earlier in their previous statements recorded under

Section 164, CrPC but in their cross-examination, P.W.1 and P.W.2 introduced versions of the events in a manner which contradicted the versions totally from what they stated in the examinations-in-chief parts. But the prosecution side herein did not choose to cross-examine these witnesses, that is, P.W.1 and P.W.2 by taking permission from the court under Section 154, Evidence Act in order to make efforts to bring these witnesses to revert back to what they had stated earlier in their previous statements recorded under Section 164, CrPC.

24. The learned trial court considered the following parts of the previous statement of the prosecution witness, P.W.1 under Section 164, CrPC, by reproducing them in the judgment, :-

> Statement of Ramu Orang under Section 164, CrPC
>
> 84. "Birsa Orang is my aunt [Mami]. On 11.11.2021 at about 06-00 p.m., Badhna Orang, Amit Orang, Somra Oang, Bablu Orang, Pradip Orang and Bhete Orang altogether six persons collectively assaulted Birsa Orang with lathi, dao, hammer, etc. As a result Birsa Orang died. Badhna Orang assaulted with bamboo lathi, Bablu Orang assaulted with hammer, Somra Orang assaulted with dao. Rest assaulted with kicks and blows. Badhna Orang accompanied with other accused assaulted Birsa Orang on the pretext of 'witch'. I have seen the whole incident with my own eyes".

24.1. The learned trial court had thereafter, proceeded to accept the above paras from the previous statement of P.W.1 recorded under Section 164, CrPC as one of the basis to return the finding of guilt against the accused persons, by observing inter alia as under :-

> 62. Admittedly statements under Section 164, CrPC is not a substantive piece of evidence. P.W.1 and P.W.2 had given their statements under Section 164, CrPC in connection with the instant case and they have admitted during the course of their evidence that they had given their statements before the Court and duly exhibited the same. But during cross-examination they have stated that they have been threatened by police to give their statements in the tune as they had stated before the Court.

* * * * *

65. Although evidence of P.W.1 and P.W.2 had been recorded on the same date itself but fact remains that the incident occurred in the year 2011 whereas the evidence of those witnesses were recorded in the year 2013 and that too without providing any protection to those witnesses. As such the accused being native villagers of those witnesses had easy access to them and probably win over them. So, it can be inferred that it is none other than the accused who pressurized them to twist the fact at the time of their cross-examination.

* * * * *

85. As the P.W.1 has not confronted with his previous statements during examination before the Court although he has admitted that he has given his statements before the Court and marked the same as Ext.-1 containing his signature as Ext.-1[1]. So, no option is left with the Court but to accept the chief of P.W.1 being the reliable and corroborative evidence in the process of separating grain from chaps and on that count it is apparent that P.W.1 is the eye-witness of the incident and he has very categorically narrated about the involvement of the accused persons collectively numbering in six and armed with weapons committed the offence and thereby killed Birsa Orang.

24.2. It is relevant to note that P.W.1, Ramu Orang and P.W.2, Dilip Orang were both examined-in-chief and cross-examined on the same date, 18.09.2013.

24.3. In order to find out as to what extent the prosecution witnesses, P.W.1 and P.W.2 can

be accepted as reliable witnesses, it is apt to refer to the decision of the Hon'ble Supreme Court of India in State of Delhi vs. Shri Ram Lohia, reported in AIR 1960 SC 490. In that case, the testimony of a prosecution witness named R.C. Aggarwal, who was examined as P.W.10, came under scrutiny. The said witness, P.W.10 when he was cross-examined, gave and made out a completely different story to what he had said in examination-in-chief and the effect of his such statement had thrown considerable doubt on the prosecution story. The Magistrate and the Additional Sessions Judge held that P.W.10's various statements in cross-examination were false and were of the opinion that P.W.10 had been won over by the defence and had held that what P.W.10 had said in evidence-in-chief was true. The High Court set aside the conviction disbelieving the evidence of P.W.10 by holding that the evidence of P.W.10 required corroboration in material particulars connecting or tending to connect the accused with the crime. The High Court went on to hold that as there was no such corroboration it was impossible to convict the accused on the sole testimony of P.W.10.

24.4. The Hon'ble Supreme Court had extracted the reasoning recorded by the Additional Sessions Judge, which were as under :-

> 13. 'He no doubt in his further cross-examination made certain damaging statements which would throw doubt on his previous statement but as the statement was made long after the first statement and at a time when Tara Chand accused had been discharged it seems to me that this witness was won over and he has intentionally prevaricated under the influence of the accused whose ex-employee he was. This inference finds support from the fact that in his statement under Section 164, Criminal Procedure Code made on 20th October, 1951, he stated that he was still in the employment of Messrs. Iron and Hardward [India] Company, while has now asserted in Court that he had been already dismissed by Sri Ram accused because of Sri Ram's differences with Tara Chand accused'….

24.5. The Hon'ble Supreme Court, in the above backdrop, had proceeded to observe as under :-

> 13. … It is clear therefore that the learned Judge relied on some statement of Aggarwal recorded under Section 164 of Criminal Procedure Code. The statement under Section 164 referred to was not specifically put to Aggarwal even to contradict him. Statements recorded under Section 164 of the Code are not substantive evidence in a case and cannot be made use of except to corroborate or contradict the witness. An admission by a witness that a statement of his was recorded under Section 164 of the Code and that what he had stated there was true would not make the entire statement admissible much less that any part of it could be used as substantive evidence in the case. The Additional Sessions Judge therefore erred in law in using the statement of Aggarwal under Section 164 to come to the conclusion that he had been won over. If that statement is excluded from consideration it is a matter of pure guess that Aggarwal had been won over after his examination-in-chief was over.
>
> 14. As the Additional Sessions Judge has erred in law, we are bound to consider the evidence of Aggarwal and arrive at our own conclusion whether he is a reliable witness on whose evidence the respondent can be convicted. The various statements made by Aggarwal in cross-examination before and after the framing of the charge clearly demonstrate him to be an utterly untrustworthy witness. We are satisfied that it would be highly dangerous to act upon his evidence. Without his evidence the other evidence in the case does not establish that the respondent has committed the offence with which he was charged.

25. Thus, in the light of the above discussion and the authorities mentioned, we are not in a position to agree with the observation made by the learned trial court that as the

prosecution witnesses, P.W.1 and/or P.W.2 was/were not confronted with his/their previous statements during examination before the court although he/they had admitted that he/they gave his/their statement[s] before the court vide Ext.-1 and/or Ext.-3 respectively, there was no option left to the court but to accept his/their evidence-in-chief being the reliable and corroborative evidence in the process of separating the grain from the chaff. Proceeding on that basis, the learned trial court had reached a finding that P.W.1 and P.W.2 were the eye-witnesses of the incident and had categorically narrated about the involvement of the accused persons, numbering six, collectively and the accused persons armed with weapons committed the offence and, thereby, killed the deceased. We are of the considered view that P.W.1's diametrically opposite versions in his examination-in-chief and in his cross-examination had made him a witness who cannot, at all, be termed as a reliable witness. Similarly, P.W.2's diametrically opposite versions in his examination-in-chief and in his cross-examination had also made him a witness who cannot be categorized as a reliable witness.

26. Section 134 of the Evidence Act, 1872 has laid down that 'no particular number of witnesses shall, in any case, be required for the proof of any fact'. Legal maxim that 'evidence has to be weighed and not counted' is ingrained in Section 134, Evidence Act. It has been laid down in a long line of decisions as a general rule that a court can and may act of the testimony of a single witness though uncorroborated. It has been held in Vadivelu Thevar vs. State of Madras, AIR 1957 SC 614, that one credible witness would outweigh the testimony of a number of other witnesses of indifferent character. It has been observed that oral testimony can be classified into three categories, namely, [i] wholly reliable; [ii] wholly unreliable; and [iii] neither wholly reliable nor wholly unreliable. If the oral testimony falls in the first category, the court has no difficulty in coming to its conclusion either way – it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. If the oral testimony falls in the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.

27. On a thorough evaluation of the testimony of the two prosecution witnesses, that is,

P.W.1 & P.W.2, we are of the clear view, in the backdrop of the discussion made above, that the oral testimonies of both of them can, in no manner, be termed as wholly reliable. Assuming arguendo that their testimonies fall in the category of neither wholly reliable nor wholly unreliable, without placing them in the category of wholly unreliable witnesses which prima facie they are, then their such testimonies are required to be looked at with circumspection and it would require corroboration in material particulars by reliable, direct or circumstantial, evidence.

28. It has been pointed out and urged by the prosecution that one of the proved facts is that the weapons of assault used in the commission of the crime were duly recovered and seized in the course of investigation vide Seizure List, M.R. no. 75/2011 [Ext.-2] and Seizure List, M.R. no. 77/2011 [Ext.-7]. By the Seizure List, M.R. no. 75/2011 [Ext.-2], the object seized was one dao measuring about 11 inches with bamboo handle wrapped with orange colour plastic rope with a handle measuring about 7 inches. The same was seized on being produced by Smti. Sivani Orang, wife of Samra Orang [A-4] and the place of seizure was the house of Samra Orang [A-4]. By the other Seizure List, M.R. no. 77/2011 [Ext.-7], one iron hammer of 3 inches long and 1.5 inches wide with a bamboo handle was seized from the house of Bablu Orang [A-5] on being produced by him.

28.1. The kinds of objects, that is, the dao and the iron hammer, which were seized from the house of the accused persons, Samra Orang [A-4] and Bablu Orang [A-5] respectively are ones which are commonly available in the households in rural areas and which are also readily available in the markets. Mere recovery and seizure of the dao and the iron hammer, without anything more, cannot be held to be a circumstance providing a link to connect the two accused persons, Samra Orang [A-4] and Bablu Orang [A-5], not to speak of all the six accused persons, with the crime of murder of Birso Orang. P.W.1 who was a seizure witness to the seizure of the dao vide Seizure List, M.R. no. 75/2011 [Ext.-2] and exhibited the dao as Mat. Ext.-1, did not testify that the dao was a blood stained one and was recovered from a place indicating towards an act of concealment on the part of the accused, A-4. P.W.3, another witness to the Seizure List, M.R. no. 75/2011 [Ext.-2] had deposed that the dao was recovered from the house of Bablu Orang [A-5], contrary to the contents of the Seizure List,

M.R. no. 75/2011 [Ext.-2] which mentioned that the dao was recovered from the house of Samra Orang [A-4]. P.W.3 further stated that he did not know to whom the seized dao belonged. When the I.O., P.W.7 gave his testimony-in-chief, he affirmed about the seizure of the dao and the iron hammer and further deposed that the accused persons in their statements had admitted that they had used those to kill the deceased. There is no iota of doubt that any admission made by an accused person before a Police Officer is inadmissible in view of the bar contained in Section 25 and Section 26 of the Evidence Act, 1872. Thus, that part of the testimony of the I.O., P.W.7 that the accused persons had used the dao and the iron hammer in killing the deceased is clearly inadmissible. After leaving aside that part of the testimony of the I.O., P.W.7, if his other part of the testimony is looked at, it is noticed that he [P.W.7] admitted that he did not notice blood stains on the dao and the iron hammer which he seized during the investigation. The I.O., P.W.7 further admitted that he did not send the seized articles, the dao and the iron hammer to the Forensic Science Laboratory for the sole reason that they did not contain any blood stains. As a result, there was recovery only of a dao and an iron hammer from the houses of two accused persons, A-4 and A-5 respectively, but without resulting in any kind of incriminating evidence from them providing even a semblance of a link to connect the two of them [A-4 & A-5], not to speak of all the six accused persons, with the homicidal death of the deceased, Birso Orang. As a corollary, there was utter failure on the part of the prosecution to establish the seizure of the dao and the iron hammer as a piece of corroborative evidence to the testimonies of the two prosecution witnesses, P.W.1 and P.W.2.

29. The learned Additional Public Prosecutor for the State has referred to the answers given by the accused persons during their examination under Section 313, CrPC to a specific query prepared in reference to the testimony of the I.O., P.W.7 to canvas that the answers given by them has supported the case of the prosecution. On perusal of the records, we have found that same question was put to all the six accused persons when they were examined under Section 313, CrPC. It was Question no. 7 which was put to all the six accused persons and the same read as under :-

Question no. 7. P.W.17 [Bhaben Ch. Nath, I.O.] stated that on 12.11.2011

he was serving as second officer at Jinjia Police Station. On the said day the then O/C of the Police Station on receipt of an ejahar from Soma Orang, registered a case and endorsed him for investigation. During the course of investigation he has visited the P.O., drew sketch map of the P.O., examined witnesses, made inquest over the deadbody by Magistrate and sent for post-mortem report. He has seized a dao being weapon of offence from the house of Samra Orang, seized some wearing cloths of the deceased. He also seized an iron hammer from your house, which have been used by you and Bhete Orang, Pradip Orang, Badhna Orang, Samra Orang, Bablu Orang and Amit Orang for murdering Birso Orang. After completion of investigation he has submitted charge sheet. Ext.-6 is the charge sheet wherein Ext.-6[1] is his signature. Ext.-7 is the seizure list wherein Ext.-7[1] is his signature. Ext.-8 is a seizure list wherein Ext.8[1] is his signature. Ext.-9 is the sketch map wherein Ext.-9[1] is his signature. Ext.2 is also a seizure list wherein Ext.-2[1] is his signature. What do you say?

Answer :- Yes, it is true.

29.1. Section 313[1] of the Code has inter alia provided that in every trial, for the purpose of enabling the accused 'personally' to explain any circumstances appearing in the evidence against 'him', the court shall, after the witnesses for the prosecution have been examined and before 'he' is called on for 'his' defence, question 'him' generally on the case. It is a settled proposition that the statement of an accused under Section 313, CrPC can be used as evidence against the accused, in so far as it supports the case of the prosecution. However, the statement under Section 313, CrPC simpliciter cannot be made the basis of conviction of the accused. Where the statement of the accused under Section 313, CrPC is found in line with the case of the prosecution, the heavy burden of proof resting on the prosecution, stands reduced to a certain extent. When from such perspective, the Question no. 7 framed and the answers given, quoted above, are analyzed, we find that because of the reason already mentioned above, anything in the nature of admission, etc., elicited from the accused and recorded by Police in absence of a Magistrate, would not be admissible. When such part is excluded from Question no. 7, nothing inculpatory had resulted for the accused as a consequence of their reply to the question in the manner, quoted above, to corroborate the

testimonies of P.W.1 and P.W.2, who were found not in the category of wholly reliable witness.

29.2. In view of the fact situation obtaining above, we do not find any kind of merit on the point canvassed by the learned Additional Public Prosecutor for the State in reference to the examination of the accused persons under Section 313, CrPC. Consequently, there is nothing emerging therefrom which goes to corroborate the testimonies of the two prosecution witnesses, P.W.1 & P.W.2.

30. The contention of the learned Additional Public Prosecutor that the informant had named all the accused persons in the FIR and the same lended support to the case of the prosecution since the informant had expired before giving his evidence before the trial court is found untenable upon consideration. Firstly, a First Information Report [FIR] is not a substantive piece of evidence. Secondly, it cannot be treated to be a declaration under Section 32[1] of the Evidence Act, 1872. For a dying declaration to be admission under Section 32[1], Evidence Act, it must relate to the cause or circumstance relating to the death of its maker. For example, if X makes a declaration about his wife, Y's death, even though it was from X's personal knowledge, and after making the statement, X dies, the same would not be a dying declaration since the declaration was related to Y's death and not related to X's death and is not, therefore, admissible. Section 32, Clause [1] has laid down that statement made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that persons' death comes into question are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question. In the trial in question in the present appeal, it was not the death of the informant, Soma Orang but the death of his wife, Birso Orang which was tried. Therefore, the fact that the informant, Soma Orang named the accused persons in the FIR is not relevant under Section 32, Clause [1], Evidence Act, 1872 and, therefore, it cannot lend any support to the prosecution case.

31. Summing up, the vacillated testimonies of the two prosecution witnesses, P.W.1 &

P.W.2 wherein they were found to have testified as eye-witness at one point of time and as a hearsay witness at another point of time, by completely denying about witnessing any events related to the death of the deceased, have made them to fall from the category of wholly reliable witnesses to the category of neither wholly nor wholly unreliable witnesses, requiring evaluation of their evidence with circumspection. When the said two prosecution witnesses, P.W.1 & P.W.2 vacillated from their versions given during examination-in-chief, at the stage of cross-examination the prosecution choosed not to confront these prosecution witnesses with their previous statements recorded under Section 164, CrPC wherein they had, according to the prosecution, supported the case of the prosecution, to revert them [P.W.1 & P.W.2] back to what they had stated previously. The versions given by these two prosecution witnesses, P.W.1 & P.W.2 in their cross-examination had displaced the notion that they were eye-witnesses to any of the events preceding, attending and succeeding the death of the deceased, occurred between the act of alleged taking away of the wife of the informant from his house and the act of leaving the deadbody of the deceased at the doorstep of the house of the informant later on. The law is settled that hearsay evidence is inadmissible. The other circumstances, canvassed by the prosecution and considered by us, are not found to have lend any corroboration to the case of the prosecution by providing any link connecting the accused persons with the alleged killing of the deceased. Thus, we are of the unhesitant view that there was failure on the part of the prosecution to prove the charges of murder as well as the charge of formation of unlawful assembly against the six accused persons, the appellants herein. It is settled that benefit of doubt, other things being equal, at all stages goes in favour of the accused. In view of the failure on the part of the prosecution to prove the charges beyond reasonable doubts against any of them, not to speak of all of them, the accused-appellants are entitled to the benefit of doubt. In such view of the matter, the Judgment and Order of conviction and sentence passed by the learned trial court, impugned herein, is found not sustainable. Consequently, the present criminal appeal being found merited, is to be allowed and it is accordingly allowed by setting aside the Judgment and Order dated 30.04.2021, impugned herein.

32. The accused-appellants are to be released forthwith, if their detention is not required in connection with any other case/purpose.

33. This Court records its appreciation for the assistance rendered by the learned Amicus Curiae. The learned Amicus-Curiae is to be paid remuneration as per the rules in force.

34. The records of the learned trial court be sent forthwith.

JUDGE **JUDGE**

Comparing Assistant