IN THE GAUHATI HIGH COURT

(HIGH COURT OF ASSAM, NAGALAND, MIZORAM & ARUNACHAL PRADESH)

PRINCIPAL SEAT AT GUWAHATI

Case No.: Criminal Appeal No.189/2019

Sri Mohon Das, Aged about 68 years,
Son of Late Bhumidhar Das,
R/o village- Sutpara, P.S. Salbari,
District- Baksa, BTAD, Assam.

.....***Appellant***

-***Versus***-

1. The State of Assam,
   Represented by P.P. Assam.

2. Shri Jugesh Patgiri,
   S/O Late Chandra Kanta Patgiri.

3. Shri Khagendra Nath Patgiri,
   S/O Late Chandra Kanta Patgiri.

4. Shri Harakanta Patgiri,
   S/O Late Chandra Kanta Patgiri.

5. Shri Hemanta Talukdar,
   S/O Late GopalTalukdar.

6. Shri Umesh Talukdar,
   S/O/ Late Gopal Talukdar.
   All are R/o village- Laugaon;
   P.S. Salbari, District-Baksa, BTAD, Assam

.....***Respondents***

- B E F O R E–

HON'BLE MR. JUSTICE MANISH CHOUDHURY
HON'BLE MR. JUSTICE ROBIN PHUKAN

Advocate for the appellant : Mr. N. Uddin;

Advocate for the respondents : Mr. K.K. Das, for respondent No.1;
Mr. P. Thakuria for respondents No. 4 & 6.

Date of hearing : 30.05.2024

Date of judgment : **25.06.2024**

JUDGMENT & ORDER (CAV)

[ROBIN PHUKAN, J.]

Heard Mr. N. Uddin, learned counsel for the appellant. Also heard Mr. K.K. Das, learned Addl. P.P. for respondent No.1 and Mr. P. Thakuria, learned counsel for the respondents No. 4 & 6.

2. In this appeal, under proviso to Section 372 of the Code of Criminal Procedure, the appellant, namely, Shri Mohon Das has challenged the correctness or otherwise of the judgment and order, dated 07.12.2017, passed by the learned Addl. Sessions Judge, Barpeta, in Sessions Case No.18/2015, arising out of G.R. Case No. 2677/2011, under Sections 346/304/34 IPC, arising out of Salbari P.S. Case No. 70/2011. It is to be noted here that vide impugned judgment and order, dated 07.12.2017, the

learned Addl. Sessions Judge, Barpeta had acquitted the respondents herein from all the charges.

3. The background facts, leading to filing of the present appeal, are adumbrated herein below:-

> "The appellant, Sri Mohan Das had a son, namely, Rameswar Das, aged about 20 years. On 28.11.2011,at around 11.30 O'clock, the appellant had found his son Rameswar Das, missing from his house. Then, along with his fellow villagers, the appellant started searching him at many places. But, he could not succeed. Then, at about 5.30 am, on 10th day of December, 2011, he had recovered his son Rameswar Das from inside the septic tank of the lavatory of the house of Sri Haren Talukdar, a resident of Laugaon, in presence of the Gaonburha (village headman) of the village. Then one 108 Emergency Ambulance was called for to take him to Hospital for treatment. But, as soon as he was put into the Ambulance, the staff declared him dead. He suspects that the accused persons, namely 1. Jugesh Patgiri, 2. Khagendra Nath Patgiri, 3. Harakanta Patgiri, 4. Hemanta Talukdar, 5. Umesh Talukdar, had killed his son Rameswar Das, by putting him inside the septic tank of the lavatory of Haren Talukdar. Then Mohan Das had lodged one FIR (Ext.-1), with the Officer-in-Charge, Salbari Police Station on 10.12.2011.
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> Upon the said FIR, the Officer-in-Charge, Salbari P.S. had registered a case, being Salbari P.S. Case No. 70/2011, under Sections 365/344/302/34 I.P.C., on 10/12/2011, and endorsed S.I.

Dilip Kumar Medhi to investigate the case. The I.O. then visited the place of occurrence, examined the witnesses and prepared Sketch Map, (Ext.-4), of the place of occurrence. The I.O. then reported the matter to the Circle Officer-cum-Executive Magistrate, Salbari Revenue Circle and got the inquest conducted by him and collected the Inquest Report (Ext.2). Thereafter, the I.O. got the autopsy of the dead body conducted at Barpeta Civil Hospital and collected the Post Mortem Report (Ext.-3). He also arrested the accused/respondents and forwarded them to the court. Then on completion of investigation, the I.O. laid charge sheet, (Ext.-5) against all the accused/respondents persons before the court of learned Judicial Magistrate 1st Class, Barpeta, to stand trial under Sections 365/344/302/34 IPC.

The learned Judicial Magistrate 1st Class, Barpeta then complied with the provision of section 207 Cr.P.C. Then, having found the case triable exclusively by the Court of Sessions, committed the case to the Court of learned Sessions Judge, Barpeta, vide commitment order, dated 27.01.2015. The learned Sessions Judge, Barpeta then made over the case to the court of learned Addl. Sessions Judge, Barpeta and accordingly, the accused/respondents entered appearance before the court of learned Addl. Sessions Judge. Then hearing learned Advocates of both sides, the learned Addl. Sessions Judge had framed charges under Sections 304/346/34 IPC against all the accused/respondents. Then on being read and explained over the

charges, the accused/respondents pleaded not guilty to the same and claimed to be tried.

Thereafter, the prosecution side had examined as many as 10 (ten) witnesses, including the Doctor and the investigating officer, and the learned Addl. Sessions Judge also examined the mother of the deceased as court witness (C.W.1). Then closing the prosecution evidence, the learned trial court had examined the accused/respondents under Section 313 Cr.P.C. Thereafter, hearing learned Advocates of both sides, the learned trial court had found that the prosecution side had failed to establish the charges against the accused/respondents and accordingly, acquitted all of them."

4. Being highly aggrieved and dissatisfied, the appellant has preferred the present appeal contending to set-aside the impugned judgment and order, dated 07.12.2017, inter-alia, amongst others, on the following grounds:-

(i) That, the evidence on record proves that the accused-respondents had committed the offence under Sections 304/346/34 IPC, which warrant conviction of the accused-respondents but, the learned trial Court had erroneously acquitted the accused/respondents;

(ii) That, the learned trial court had totally misconceived the fact as well as the law and passed the impugned judgment and order, acquitting the accused/respondents from the charges under Section 304/346/34 IPC;

(iii) That, the learned court below had failed to appreciate the evidence of the prosecution witnesses, specially the evidence of P.W.1, C.W.1, P.W.3 and P.W.7, who had clearly deposed that after rescue of the Rameswar Das from the septic tank, he told the name of the accused/respondents who had assaulted him and put him inside the septic tank and the injuries found on the person of the deceased, which were also confirmed by the Doctor (PW9),in its proper perspective, and arrived at an erroneous conclusion;

(iv) That, the learned trial court had erroneously held that since accused Khagendra Nath Patgiri had filed a case against the appellant and others, where the appellant and others were convicted, therefore, the family members of the appellant falsely implicated the accused /respondents in this case adducing false and exaggerated evidence;

(vi) That, the learned trial court had failed to appreciate the fact that since there was enmity with the accused/respondents and the appellant, therefore, the accused persons have killed the appellant's son to take revenge against the appellant and erroneously held that due to enmity the appellant and his family members falsely implicated the accused respondents;

(vii) That, on the ground of minor inconsistency in the deposition of the prosecution witnesses, the learned trial Court had acquitted the accused/respondents, which could have been, in the given fact and circumstances of the case, ignored as there was direct evidence that

before his death the deceased told that the accused/respondents had assaulted him and put him inside the septic tank;

(viii) That, the learned trial court had erroneously believed the defence story, without any support or corroboration from any corner and discarded the prosecution story on non existing facts;

(ix) That, the learned trial court had erroneously held that the deceased was not in a position to name the accused/ respondent as he was not well;

(x) That, the learned trial Court had failed to consider the fact that the deceased was assaulted by none other than the accused/respondents and put him inside the septic tank and this has been proved beyond all reasonable doubt but the learned trial court had erroneously passed the impugned judgment and order;

5. It is to be noted here that during the pendency of this appeal, accused/respondents No.2, 3 and 4, namely Jogesh Patgiri; Khagendra Nath Patgiri and Harakanta Patgiri; suffered demise and Mr. Thakuria, the learned counsel for the respondents submits that this appeal is being pressed for respondents No. 4 and 6 only. The appellant side also had not disputed the submission of Mr. Thakuria. Therefore, in this appeal, we would mainly confine our discussion, upon the prosecution evidence, concerning the present accused/respondents No. 4 and 6 only.

6. Mr. Uddin, the learned counsel for the appellant, at the time of hearing, besides reiterating the grounds mentioned herein above, has canvassed following points for consideration of this court:-

(i) That, there was a dying declaration made by the deceased before P.W. 1, 3, 7 and C.W.1 and though the same was an oral dying declaration, yet, in the given facts and circumstances on the record, the learned trial court ought to have taken account of the same. Referring to a decision of Hon'ble Supreme Court in **Naeem vs. State of Uttar Pradesh,** reported in **(2014) 3 SCR 36,** Mr. Uddin submits that a dying declaration can be sole basis of conviction provided the same inspire confidence of the court. And since the evidence of P.W. 1, 3, 7 and C.W.1 had clearly established the same, the learned trial court ought to have accepted the same.

(ii) That, though there is no eye witness against the accused/respondents yet, there was sufficient circumstantial evidence against the accused/respondents and one such circumstantial evidence was that the deceased was recovered from the septic tank of the lavatory of the house of Sri Haren Talukdar with injuries on his person;

(iii) That, the factum of assault, as stated by the deceased in his dying declaration, was corroborated by the evidence of Doctor (P.W.9);

(iv) That, there was previous enmity between the appellant and the respondents' and as such there is every reason to believe that out of said enmity the accused/respondents had committed the offence;

These facts and circumstances, according to Mr. Uddin conclusively proved the guilt of the accused/respondents and as such the learned trial court ought to have accepted the same. But, as the learned trial court had failed to act upon the same, the acquittal of the accused/ respondents is contrary to the established legal principles, and therefore, Mr. Uddin has contended to set aside the impugned judgment and order.

7. Per contra, Mr. P. Thakuria, learned counsel for the respondent No. 5 and 6 has supported the impugned judgment and order so passed by the learned trial court. Mr. Thakuria submits that since the respondents were acquitted of the charges by the learned trial court, the presumption of innocence of the accused/respondents, now, becomes double. Mr. Thakuria also submits that there was no direct evidence regarding involvement of the accused/respondents with the offences and the entire prosecution case rest upon circumstantial evidence and the circumstances, so relied upon by the prosecution, are too feeble to establish even a prima-facie case against the accused/respondents, let alone establishing the same beyond all reasonable doubt. Further, contention of Mr. Thakuria is that the circumstances, so relied upon by the prosecution, also fails to form a complete chain so as to establish that it was none other than the accused/respondents that had committed the offence. Therefore, Mr. Thakuria has contended to uphold the impugned judgment and order.

8. Whereas, Mr. K.K. Das, the learned Addl. P.P. has subscribed the submission of Mr. Uddin, the learned counsel for the appellant. Mr. Das submits that besides dying declaration of the deceased there are number of circumstances the prosecution side had established and relied upon the

same Mr. Das contended that it had succeeded in bringing home the charges against the respondent. Therefore, Mr. Das has contended to interfere with the impugned judgment and order.

9. Having heard the submission of learned Advocates of both sides, we have carefully gone through the record of the learned trial court and also through the decision, so referred by Mr. Uddin, the learned counsel for the appellant.

10. Notably, this appeal is preferred against the judgment and order of acquittal so passed by the learned trial court. Before delving a discussion in to the merit of the appeal we deemed it appropriate to understand the governing principles, presently occupying the field, in respect of approaching/dealing with the appeal against acquittal.

11. The principle, governing appeal against acquittal has succinctly been dealt with by Hon'ble Supreme Court in the case of **Chandrappa v. State of Karnataka, (2007) 4 SCC 415**. In the said case Hon'ble Supreme Court has held as under:-

> "**42.** From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (*1*) An appellate court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (*2*) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.

(3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. *Firstly*, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. *Secondly*, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

12. Again, in a recent case in **Mallappa & Ors. vs. State of Karnataka, Criminal Appeal No. 1162 of 2011,** Hon'ble Supreme Court has held as under:-

"36. Our criminal jurisprudence is essentially based on the promise that no innocent shall be condemned as guilty. All the safeguards and the jurisprudential values of criminal law, are intended to prevent any failure of justice. The principles which come into play while deciding an appeal from acquittal could be summarized as:

(i) Appreciation of evidence is the core element of a criminal trial and such appreciation must be comprehensive – inclusive of all evidence, oral or documentary;

(ii) Partial or selective appreciation of evidence may result in a miscarriage of justice and is in itself a ground of challenge;

(iii) If the Court, after appreciation of evidence, finds that two views are possible, the one in favour of the accused shall ordinarily be followed;

(iv) If the view of the Trial Court is a legally plausible view, mere possibility of a contrary view shall not justify the reversal of acquittal;

(v) If the appellate Court is inclined to reverse the acquittal in appeal on a re-appreciation of evidence, it must specifically address all the reasons given by the Trial Court for acquittal and must cover all the facts;

(vi) In a case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the Trial Court."

13. Thus, the proposition law, governing appeal against acquittal, which emerges from the aforesaid two decisions of Hon'ble Supreme Court can be crystallized as under - 'an appellate court has unrestricted power to review, re-appreciate and reconsider the evidence, based on which the order of acquittal is passed and to come to its own conclusion. The presumption of innocence in favour of the accused, in case of acquittal, becomes double; firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law and secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed

and strengthened by the trial court and in case, two reasonable conclusions are possible, on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court. The appellate court must specifically address all the reasons given by the trial court for acquittal and must cover all the facts and in case of reversal from acquittal to conviction, the appellate Court must demonstrate an illegality, perversity or error of law or fact in the decision of the trial court.'

14. Keeping above principles in mind, now, an endeavour would be made to adjudge the submissions of learned Advocates of the respective parties, in the light of the given facts and circumstances on the record of the learned trial court. The record of the learned trial court indicates that to bring home the charges, under Sections 346/304/34 IPC, the prosecution side had examined as many as 10 witnesses, including the Doctor and the investigating officer and exhibited as many as 5 documents. The learned trial court had also examined the mother of the deceased as court witness.

15. The informant/appellant Mohon Das was examined as P.W.1. P.W.2 is Shri Dipen Das; P.W.3 is Shri Mathura Das, P.W.4 is Harendra Nath Talukdar; P.W.5 is Ajit Ch. Basumatary, the Gaonbura of Laogaon. P.W.6 is Shri Lakheswar Das; P.W.7 is Shri Aswini Das, P.W.8 is Shri Utpal Ramchiary; P.W.9 is Dr. Nurul Islam, who had conducted autopsy on the dead body of the deceased. P.W.10, Mustafa Seikh is the ASI of Police, who had appeared in the witness box on account of death of the actual I.O. He had proved the Sketch Map (Ext.-4), and the Charge Sheet (Ext.5). C.W.1, Smti. Gunabala Das is the wife of the appellant and mother of the

deceased. We have carefully gone through the evidence of these witnesses and the six exhibits relied upon by the prosecution side.

16. The evidence of the informant/appellant (P.W.1) and the FIR-Exhibit-1, reveals that the occurrence took place on 28.11.2011. On that day at about 11.30 am his son Rameswar Das, since deceased, went missing. Thereafter, on 10.12.2011 at about 5.30 am his son was recovered from the septic tank of the lavartory of the house of one Haren Talukdar a resident of Laugaon. It also appears that as soon as he was boarded on 108 Ambulance, the staff of the Ambulance declared him dead. C.W.1, the mother of the deceased also reveals that about three years back at about 10.30 am, while she called her son Rameswar Das, she found him missing. Then after 13 days, he was recovered from the septic tank of Haren Das. Then after being taken him back to home, she was giving wash to him, by putting him on a chair. She also provided him water as asked for and then he collapsed on the chair. P.W.3 Mathura Das and P.W.7 Aswini Das are the elder brothers of the deceased Rameswar Das. They also corroborated the evidence of P.W.1 and C.W.1, in respect of missing of their brother on 28.11.2011 and his recovery in 10.12.2011 and also about his demise on the same day. P.W.4, Shri Harendra Nath Talukdar is the person from whose septic tank the deceased was recovered. He, of course, could not state about the date, but, he deposed that on the very day of recovery Rameswar suffered demise. P.W.5 the Gaonbura, however, could not state about the date of occurrence but he stated that it took place in 2012. He also testified about recovery of the deceased from the septic tank of Haren Talukdar and also testified that he suffered demise when he was given a

wash after recovery, on the same day. P.W.6 Lakheswar Das also testified about recovery of the deceased from the abandoned well of Haren. P.W. 8 is another Gaonburah, who also corroborated the evidence of P.W.1 and C.W.1 in respect of the date of missing of Rameswar Das on 28.11.2011 and his recovery on 10th December from the old latrine of Haren Talukdar and about his demise on the same day. P.W.10 the then Police ASI of Salbari Police Station also testified about receipt of a written complaint about missing of Rameswar Das on 29.11.2011 and further confirms about recording of a General Diary Entry (GDE) and subsequent lodging of FIR on 10.12.2011. But, said GDE has not been exhibited during trial.

17. Notwithstanding, the evidence of the prosecution witnesses and also the evidence of C.W.1, clearly reveals that the occurrence of missing of Rameswar Das took place on 28.11.2011, at about 11.30 am. He was recovered on 10.12.2011, at about 5.30 am, from the septic tank of the lavatory of Haren Talukdar, a resident of Laugaon and on the same day he suffered demise. It is to be noted here that the accused/respondents had not disputed the date, time and place of occurrence. They had also not disputed the death of Rameswar Das on 10.12.2011.

18. Now, it is to be seen how Rameswar Das suffered demise and whether his demise was accidental, suicidal or homicidal in nature. To decide this issue, the evidence of the Doctor, who had conducted autopsy on the dead body of Rameswar Das, is relevant. The prosecution side has examined Dr. Nurul Islam as P.W.9. His evidence reveals that on 10.12.2011, he was serving at Barpeta Civil Hospital as Sr. M & H.O. On that day, on police requisition, vide Salbari P.S. G.D. entry No.138, dated

10.12.2011, he had performed post mortem examination on the dead body of Rameswar Das, son of Mohan Das, at village Sutpara, on being identified by UBC/12 Ranjit Das, Mohan Das and Jadev Das and on examination he found the followings:-

"A male boy complexion is fair. Hands and feet are straight. Mouth and eyes are closed. Bruises are present along thigh, knees, chest and back. Rigor mortis present.

Pericardium and heart:

Left chamber of heart filled with clotted blood. Right chamber empty.

Muscles, Bones and joint:

Bone fracture left fifth rib bone fracture.

Cranium and Spinal Canal:

Scalp, skull, vertebrae- Healthy.
Membrane- Healthy.
Brain and spinal cord- Healthy.
Liver- Healthy.
Spleen- Healthy.
Kidneys-Healthy.
Bladder- Empty.

Organs of generation, extema, and interlan:

Healthy.

More detailed description of injury or disease:

Bruises with left fifth rib fracture and chest, back and bruises along both thighs and knees.

Opinion:-

In his opinion the death is due to shock and hemorrhage as a result of sustained injury.

Accordingly, he had submitted Post-mortem report- Ext.3,with his signature thereon as Ext.3(1).

19. Thus, it becomes apparent from the evidence of the Doctor, (P.W.9), that he found bruises with left fifth rib bone fracture and on the chest and back. He also found bruises along both thighs and knees. It also becomes apparent that the death of Rameswar Das had occurred due to shock and hemorrhage, as a result of aforesaid injury. The respondent side had not disputed the injuries sustained by the deceased. But, in cross-examination of the P.W.9, it was elicited that such kind of fracture may occur by falling on any hard substance and such bruises may also occur as a result of hit or sleep on any hard substance.

20. It also appears that during investigation, the I.O. got the inquest held on the dead body of deceased Rameswar Das by the Executive Magistrate, and Circle Officer, Sarupeta Revenue Circle. Though the prosecution side had not examined the said Executive Magistrate as witness, yet, it had exhibited the Inquest Report as Ext.2, through the P.W.1- Shri Mohon Das. A careful perusal of the Inquest Report indicates that the Executive Magistrate had found small marks/bruises along the knee on the right thigh, chest and back of the dead body. The accused/respondents had not disputed the Ext.-2 in any manner. Thus, to a considerable extent, the Ext.2 also lends support to the evidence of the Doctor (P.W.9) and the Post Mortem Report-Ext. 3.

21. Thus, the evidence of P.W.9 and his report, Ext-3, and the Inquest Report, Ext.4 goes a long way to establish that the injuries sustained by the deceased Rameswar Das were homicidal in nature. Now, what left to be seen is who caused the same.

22. Admittedly, there is no direct evidence. The prosecution side had relied upon an oral dying declaration, allegedly made by the deceased, before the informant Mohan Das (P.W.1), Smti. Gunabala Das (C.W.1), Shri Dwipen Das (P.W.2), Shri Mathura Das (P.W. 3), and Aswini Das (P.W.7). Indisputably P.W.1 is the father and C.W.1 is the mother and P.W.3 and P.W.7 are the elder brothers of the deceased Rameswar Das and P.W.2 is their relative.

23. The evidence of P.W. 1 reveals that having received information that his son was in the latrine of Haren Talukdar he went there and lifted his son Rameswar from the septic tank of the lavatory and after bringing him to his house and giving a bath to him when he asked him, he replied that Khagen Patgiri, Jogesh Patgiri, Hemanta Talukdar, Umesh Talukdar and Harakanta Patgiri threw him into the latrine. Thereafter, Rameswar drank a little water and embraced death. His evidence also reveals that Rameswar died since the accused persons threw him into the latrine.

24. But, this fact finds no mention in the FIR-Ext.1. It is elicited in cross-examination of this witness that as per his ejahar, he only suspected that the accused persons along with some other persons killed his son by throwing him inside the septic tank of the lavatory and that the number of the accused persons would increase to 7, if the other persons were also

named. It is also elicited that his relation with the accused persons is not cordial. It is further elicited that Khagen Patgiri had lodged an ejahar with the PS against him and 10 others alleging that he had killed Pawan Patgiri, wherein the name of Haren Patgiri, Hemanta Das and Aswini and others were named. And Haren and Basudev were sentenced to imprisonment for life in that case. Other persons and he were sentenced to undergo imprisonment for 6 months and to pay a fine of Rs. 5000/-. He admitted having taken Rameswar to Dr. Jayanta Das, a 'brain' Doctor (psychiatrist), in Guwahati, for treatment of his son, about three years prior to his death, but he denied that his son was not suffering from any disease.

25. C.W.1- Smti. Gunabala Das is the wife of the informant Mohan Das and mother of the deceased. Her evidence reveals that about three years back on one day at about 11.30 am she called Rameswar to have tea, but she did not find him in the house and then she had reported the matter to her husband, while he had returned home from the paddy field. Then her husband searched for Rameswar, but, could not succeed. Then after 13 days Mahari had sent Dipak to inform them that Rameswar was shouting 'Maa, Maa' in the lavatory of Haren. Then her husband, taking Aswini and Dipak along with him, had recovered her son from the tank of Haren's latrine. Then Rameswar was put on a *Thela* (handcart) and was brought to her house. She then made him sit on a chair and gave him a wash, since stool was sticking to his body. Her evidence also reveals that when she asked Rameswar, he told that accused Khagen, Harakanta, Jogesh, Hemanta and Umesh took him to the house of the accused, by gagging his mouth, and assaulted him, keeping him in the house of the accused. He

could not say who left him in to the latrine. Her evidence also reveals that thereafter, Rameswar wanted to take water and then she gave him water and after taking water Rameswar collapsed on the chair.

26. Her cross-examination reveals that Rameswar told that he was caught and kept in the house of accused Hemanta. She however denied that there was a quarrel between her and Rameswar on 10th December and that her hand was fractured on that day. It is also elicited that Aswini and Dipen brought Rameswar on Haren Mahari's pushcart. She denied that Rameswar was not able to speak after he was picked up from the lavatory.

27. Close on the heel of P.W.1 and C.W.1, their two sons Mathura Das (P.W.3) and Aswini Das (P.W.7) also testified that having been informed by a fellow villager, they came and found, Rameswar inside the latrine (tank) with the lid affixed and the lid was covered by leaves of betel nut tree. The evidence of P.W.3 also reveals that thereafter, they have lifted Rameswar, brought to the house on a *'Thela'* (handcart) and gave him a wash. Then on being asked Rameswar told in presence of his parents and him that the accused persons put him into the latrine (tank). Nothing tangible could be elicited in his cross-examination, except however that Rameswar told him prior to his death the names of the accused person and he stated the same to police also. He denied that Aswini Das, Dharya Das and Mohan Das along with other persons of the village underwent imprisonment.

28. The evidence of P.W.7 also reveals that with the help of Lankeswar he had lifted Rameswar from the tank and giving a wash to him at there, they brought him to the house on a 'Thela' (handcart). Then they washed

him well in the house and thereafter called one 108 ambulance. Then on being asked Rameswar told him in presence of his mother, and Nripen Das of his village, and his elder brother Mathura Das and his father Mohan Das that Khagen Patgiri, Jogesh Patgiri, Harakanta Patgiri, Hemanta Talukdar and Umesh Talukdar put him inside the tank of the latrine after assaulting him. It is elicited in cross-examination that Rameswar was able to speak, though not clearly, when being lifted from tank and he was alive for about 1 to 1½ hrs. He admitted that Rameswar took treatment with Doctor Joyanta Das but for general illness. He also admitted that earlier the accused persons had instituted a case against Haren Patgiri, Basanta Patgiri, Hemanta Das, Basudev Das, Dharjya Das, Aswini Das, Harakanta Das, Mohan Das, Ganesh Das and him, for killing Pawan Patgiri, but, they were acquitted in the case, and although Haren Patgiri and Basudev Das were sentenced to imprisonment, they were acquitted by High Court.

29. P.W. 2, Shri Dipen Das is a relative of the informant Mohan Das. His evidence reveals that having got the information that Rameswar was lying in the latrine of Haren Talukdar he went there and found Rameswar there and then they had brought him to the house and Rameswar was shivering in cold. Then, when asked, Rameswar told that the accused persons had kept him in the lavatory. But, it is elicited in cross-examination of this witness that his brothers Hemanta Das and Basudev Das were sentenced to imprisonment in connection with the case instituted by Khagen.

30. Thus, the evidence of P.W.1, 2, 3, 7 and C.W.1 reveals that Rameswar was able to speak, though not clearly, when being lifted from tank and he was alive for about 1 to 1 &1/2 hrs. While he was given a bath

in the courtyard of his house, by sitting him on a chair and while he was asked by C.W. 1, then Rameswar told that the accused Khagen, Harakanta, Jogesh, Hemanta and Umesh took him to the house of the accused, by gagging his mouth and assaulted him, keeping him in the house of the accused, but, he could not say who left him in the latrine.

31. It is, under these circumstance, Mr. Uddin, the learned counsel for the appellant, submits that the since after making the aforesaid statement, Rameswar had breathed his last, the statement amounts to oral dying declaration, and being the same voluntary in nature, the learned trial court ought to have acted upon the same, as it has been well settled in the case of **Naeem** (supra), that a dying declaration can be sole basis of conviction provided the same inspire confidence of the court. It is to be noted here that relying upon its earlier decision in **Atbir vs. Government of NCT of Delhi**, reported in **(2010) 9 SCC 1,** Hon'ble Supreme Court has, in the case of **Naeem** (supra), held as under:-

> "It can thus be seen that this Court has clearly held that dying declaration can be the sole basis of the conviction if it inspires the full confidence of the court. The Court is required to satisfy itself that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination. It has further been held that, where the Court is satisfied about the dying declaration being true and voluntary, it can base its conviction without any further corroboration. It has further been held that there cannot be an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. It has been held that the rule requiring corroboration is merely a rule of prudence. The Court has observed that if after

careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

32. In this context, it would be apposite to refer to the decision of Hon'ble Supreme Court in the case of **Atbir** (supra) wherein, certain factors were laid down, which are to be taken into consideration while resting the conviction on the basis of dying declaration. In para No. 22 it has been held as under:-

"22. The analysis of the above decisions clearly shows that:

(i) Dying declaration can be the sole basis of conviction if it inspires the full confidence of the court.

(ii) The court should be satisfied that the deceased was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

(iii) Where the court is satisfied that the declaration is true and voluntary, it can base its conviction without any further corroboration.

(iv) It cannot be laid down as an absolute rule of law that the dying declaration cannot form the sole basis of conviction unless it is corroborated. The rule requiring corroboration is merely a rule of prudence.

(v) Where the dying declaration is suspicious, it should not be acted upon without corroborative evidence.

(vi) A dying declaration which suffers from infirmity such as the deceased was unconscious and could never make any statement cannot form the basis of conviction.

(vii) Merely because a dying declaration does not contain all the details as to the occurrence, it is not to be rejected.

(viii) Even if it is a brief statement, it is not to be discarded.

(ix) When the eyewitness affirms that the deceased was not in a fit and conscious state to make the dying declaration, medical opinion cannot prevail.

(x) If after careful scrutiny, the court is satisfied that it is true and free from any effort to induce the deceased to make a false statement and if it is coherent and consistent, there shall be no legal impediment to make it the basis of conviction, even if there is no corroboration."

33. There appears to be some substance in the submission, so advanced by Mr. Uddin in respect of the proposition of law concerning the dying declaration, and in respect of its acceptance. But, in the case in hand, what left to be seen is whether deceased Rameswar had made any such dying declaration and whether he was in a fit state of mind at the time of making the statement and that it was not the result of tutoring, prompting or imagination.

34. Now, adverting to the facts here in this case, we find that the alleged dying declaration, upon which the learned counsel for the appellant has emphasized upon, is an oral dying declaration. He, i.e. Rameswar breathed his last before being taken to Hospital and before arrival of police. Though, from the evidence of P.W.1, 2, 3, 7 and C.W.1, reveals that Rameswar did made such a statement, what left to be seen is how far the testimonies of these witnesses are reliable and whether there is independent witness to

support the same as admittedly the aforesaid witnesses bore enmity with the respondents herein this case.

35. As discussed herein above, apart from P.W.1, 2, 3, 7 and C.W.1, the prosecution side has examined Shri Harendra Nath Talukdar as P.W.4; Shri Ajit Ch. Basumatary, the Gaonbura of Laogaon as P.W.5 Lakhsman Das as P.W.6, and Shri Utpal Ramchiary as P.W.8.

36. That, the evidence of P.W.4 reveals that in the morning on the day of occurrence, when he went to defecate, he heard someone saying as 'Maa'… 'Maa'…. He then came out and reported the same to Gaonburha then several persons came there and looked into the septic tank and found Rameswar there and they lifted him, took him to his house and after giving him a wash with warm water in his house and thereafter, he was taken to his own house on a 'Thela' (handcart). After a while he went there and found Rameswar kept at the courtyard of his house and he found Rameswar lying dead. Then 108 Ambulance came and then left. Thereafter he went to the P.S. His evidence also reveals that he doesn't know how Rameswar fell into the tank of his latrine. As the tank of the latrine was in broken condition since a long time, they were not using it. Cross-examination of this witness reveals that he was not aware of when Rameswar went missing and that he cannot say who had killed Rameswar. It is also elicited that he heard that Rameswar was mentally unsound and owing to that he used to roam along the roads. It is also elicited that many people of the village washed Rameswar and that Rameswar was

motionless and that he was not capable of speaking and that nobody asked anything to Rameswar while cleaning him.

37. P.W.5 is the Gaonbura of village Laugaon. His evidence reveals that on one day, in the year 2012, he was informed over phone that a person was lying in the tank situated behind the house of Haren Talukdar. Then he went there and saw a boy in the tank and the boy seemed to be unconscious and was not in a position to speak. Then the members of the family of the boy and the public gathered there, lifted the boy and gave him a wash. The boy was taken to his house on a 'Thela' (handcart). The boy breathed his last after he was given a wash. His evidence also reveals that he could not say how the boy fell into the tank. Cross-examination of this witness reveals that he heard that the boy remained missing for some days and that he heard that the boy had mental disorder and as asked by the accused persons he had given a certificate, Ext. 'A', to the effect that the boy had mental problem, subsequent to the death of the boy. But, admittedly, he had not seen the boy during his lifetime.

38. The evidence of P.W.6 reveals that on the day of occurrence, he came to learn in the village that Rameswar was shouting 'Maa, Maa' in an abandoned well in the house of Haren. Then he, along with public, lifted Rameswar and cleaned him with water. At that time Rameswar was not able to speak properly. After a short while Rameswar breathed his last. It is elicited in cross-examination that when they were giving a wash to Rameswar, his brothers arrived at there, but not his parents, and that he

know that Rameswar had mental imbalance and that few days prior to the incident, Rameswar had a quarrel with his parents and left the house.

39. P.W.8 is the Gaonbura of Sutpara village. His evidence reveals that on 28th November, 2011, Rameswar, son of Mohan Das, went missing and he was informed by Mohan Das on 29th November. Thereafter on 10th December, Mohan Das informed him that Rameswar was rescued from a tank of an old latrine of Haren Talukdar. Then he accompanied by police officer of Salbari PS went to the house of Haren Talukdar and found Rameswar in the septic tank and public were there. Thereafter, Rameswar was lifted from the tank in presence of Ajit Basumatary. His evidence also reveals that on arriving at the house of Rameswar, they saw the dead body of Rameswar. His hands and legs had become pale and he noticed injury on his body. There was cut injury in his face. He breathed his last after his mother served him water. It is elicited in his cross-examination that he doesn't know who killed Rameswar and nobody told him the names of the accused persons.

40. Thus, the evidence of P.W.4, 5 and 6 reveals that at the time of his rescue from the septic tank of Haren Talukdar, he was seemingly unconscious and was not capable of speaking and while he was given a wash he was motionless. But, the fact, which remained undisputed, is that Rameswar was found in the septic tank and the same was spotted by Haren Talukdar, after hearing his voice 'Maa…Maa…..'. It is also apparent that subsequent to his rescue from the septic tank, he became unconscious, in view of the evidence of P.W.4, 5 and 6.

41. Thus, the evidence of P.W. 4, 5 and 6, has almost belied the evidence of P.W. 1, 2, 3 and 7 and of C.W.1 that Rameswar had ever whispered the names of the accused/respondents before his death. It is also to be noted here that these prosecution witnesses are neither confronted by the prosecution side nor declared hostile. And as such, there is no ground to disbelieve their evidence.

42. In view of the evidence of P.W. 4, 5 and 6 as well as also of the P.W.8, it cannot be said that deceased Rameswar was in a fit condition to make alleged oral dying declaration before P.W. 1, 2, 3, 7 and C.W.1. Therefore, the evidence of P.W. 1, 2, 3 and 7 and of C.W.1, failed to inspire confidence of this Court.

43. Besides, there are some other reasons also for which we find it difficult to place reliance upon the evidence of P.W. 1, 2, 3 and 7 and of C.W.1. One such reason is that the evidence of P.W.1, in respect of making of alleged oral dying declaration by the deceased, finds no corroboration from the FIR (Exbt.-1), which is the earliest version of P.W.1. Nothing has been mentioned in the FIR about the alleged oral dying declaration. Had the alleged oral dying declaration been made before him and P.W. 2, 3, 7 and C.W.1, he could have very well mentioned the same in the FIR. For the first time, P.W.1 and 7 made such statement before the court. Same is the position in case of P.W. 2 and 3 also. It is to be noted here that emphasizing the importance of an FIR in a criminal case, specially from the stand point of an accused, Hon'ble Supreme Court, in the case of **Thulia Kali v. State of Tamil Nadu**, reported in **(1972) 3 SCC 393**, has held as under :–

> '....First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be over-estimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of the eye-witnesses present at the scene of occurrence.'

And as the factum of oral dying declaration, allegedly made by the deceased, finds no mention in the FIR, the same, appears to be afterthought, and on such count the evidence of P.W. 1, 2, 3 and 7 and of C.W.1 are found to be not reliable

44. Another reason, for which we would like to disbelieve the version of the P.W. 1, 2, 3, 7 and C.W.1 is that there was admitted enmity with the accused/respondents. P.W.1 had admitted that his relation with the accused persons is not cordial and that he, along with 10 others, were an accused in a case, lodged by Khagen Patgiri for alleged killing of Pawan Patgiri, and Haren Patgiri, Hemanta Das and Aswini were also named and Haren and Basudev were sentenced to imprisonment for life in that case and he was sentenced to undergo imprisonment for 6 months and to pay a fine of Rs. 5000/-. Similarly, P.W.7 also admitted that the accused persons had instituted a case against Haren Patgiri, Basanta Patgiri, Hemanta Das, Basudev Das, Dharjya Das, Aswini Das, Harakanta Das, Mohan Das, Ganesh Das and him, for killing Pawan Patgiri, but, they were acquitted in the case, and although Haren Patgiri and Basudev Das were sentenced to

imprisonment. P.W.2, Shri Dwipen Das also admitted that his brothers Hemanta Das and Basudev Das were sentenced to imprisonment in the case instituted by Khagen. This admitted enmity also militates against the veracity of the versions of P.W.1, 2, 3 and 7 and C.W.1. It is well settled that enmity is a double edged weapon. It can be a ground for false implication, but it can also be a ground for correct implication. In the case of **Ramashish Rai vs. Jagdish Singh,** reported in **(2005) 10 SCC 498,** Hon'ble Supreme Court has observed thus:-

> "7. .....By now, it is well-settled principle of law that enmity is a double edged sword. It can be a ground for false implication. It also can be a ground for assault.
>
> Therefore, a duty is cast upon the court to examine the testimony of inimical witnesses with due caution and diligence. .....".

But, in the case in hand, having examined the evidence of the P.W.1, 2, 3 and 7 and C.W.1, with due caution and diligence, in the light of given facts and circumstances on the record, and in absence of corroboration from independent witnesses, we find it difficult to accept their evidence on account of the admitted enmity.

45. Further, from the evidence of prosecution witnesses, it becomes apparent that the deceased Rameswar was not mentally sound. Though P.W.1, in his evidence denied his deceased son was suffering from any disease, yet, he admitted having taken Rameswar to Dr. Jayanta Das, a psychiatrist in Guwahati, for treatment about three years prior to his death. The evidence of P.W.4 also reveals that Rameswar was not mentally sound and on account of the same he used to roam along the road. P.W.5 also

testified that he heard about the same. The evidence of P.W.6 also reveals that Rameswar was mentally imbalance and few days prior to incident he had a quarrel with his parents and left the house. This fact also raised doubt that the deceased was in a fit state of mind at the time of making oral dying declaration.

46. In the case of **Richhpal Singh Meena v. Ghasi,** reported in **(2014) 8 SCC 918;** Hon'ble Supreme Court, having taken note of its earlier decisions, has held that in an offence, where death is the end result, a five step enquiry must be carried out by the court. The court has to enquire as to:-

(i) Is there a homicide?

(ii) If yes, is it a culpable homicide or a "not-culpable homicide"?

(iii) If it is a culpable homicide, is the offence one of culpable homicide amounting to murder (Section 300 IPC) or is it a culpable homicide not amounting to murder (Section 304 IPC)?

(iv) If it is a "not-culpable homicide" then a case under Section 304-A IPC is made out.

(v) If it is not possible to identify the person who has committed the homicide, the provisions of Section 72 IPC may be invoked. Since this five-pronged exercise has apparently been missed out in the first category of decisions, the learned amicus was of the opinion that those decisions require reconsideration.

47. Application of the aforesaid five step enquiry, to the given facts and circumstances of the case in hand, it becomes clear that –

(i) There was death of Rameswar, which was a homicide;

(ii) Bruises, with left fifth rib fracture on chest, back and bruises along both thighs and knees were caused to Rameswar. Besides, he was

put him in the abandoned septic tank of the lavatory of Haren Talukdar;

(iii) The opinion of Doctor Nurul Islam, (P.W.9) indicates that the death was due to shock and haemorrhage as a result of the injury sustained. That being so, it appears to be a culpable homicide;

(iv) But, the evidences on the record are falling short of to establish who the assailants were, that caused the said injuries to Rameswar and thrown him into the abandoned septic tank of the lavatory of Haren Talukdar;

48. We have considered the submission of Mr. Uddin, the learned counsel for the appellant, with the aid of all circumspection at our command. But, we are in respectful disagreement with the same, because of the reasons discussed herein above. On the other hand, we find the submission of Mr. Takuria, the learned counsel for the accused/respondents No.4 and 6, is well founded both on law and facts and accordingly we record our concurrence to the same.

49. Thus, we find and hold that the appellant side has failed to demonstrate any substantial and compelling reason to interfere with the impugned judgment and order of acquittal, so passed by the learned trial court. With their acquittal, by the learned trial court, the presumption of innocence becomes double, as at the first instance, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Next, the accused/respondents, having secured his acquittal in the trial court, the presumption of his innocence is further reinforced, reaffirmed and

strengthened by the trial court, as held by Hon'ble Supreme Court in the case of **Chandrappa** (supra).

50. In the result, we find this appeal against acquittal devoid of merit and accordingly the same stands dismissed. Send down the record of the learned trial court with a copy of this judgment and order.

JUDGE **JUDGE**

Comparing Assistant