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**(2014) 12 GAU CK 0001**  
**In the Gauhati High Court**  
**Case No : Crl. A. No. 185 of 2012**

Jalal Uddin Choudhury and Others

APPELLANT

Vs

State of Assam

RESPONDENT

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**Date of Decision :** 12-12-2014

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313, 374, 428  
Penal Code, 1860 (IPC) — Section 302, 34

**Citation :** (2014) 5 GLT 552

**Hon'ble Judges :** Nishitendu Chaudhury, J; C.R. Sarma, J

**Bench :** Division Bench

**Advocate :** H.R.A. Choudhury, Sr. Advocate, I.A. Hazarika, A. Ahmed and S.K. Nargis, Advocates for the Appellant

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## Judgement

Nishitendu Chaudhury, J.—By filing this appeal under Section 374 of the Code of Criminal Procedure (hereinafter referred to as "the Cr.P.C."), three appellants, namely, Md. Jalal Uddin Choudhury, Abdul Motin Choudhury and Md. Badrul Islam Choudhury have challenged their conviction under Section 302 IPC in Sessions Case No. 27/2007 of the Court of learned Sessions Judge at Hailakandi vide judgment and order dated 18.07.2012 whereby they have been sentenced to suffer R.I. for life and also to pay a fine of Rs. 3,000/- each in default to suffer S.I. for further 6 (six) months each. The prosecution case is that one Mustt. Rabia Begum Choudhury lodged an ejahaar with the Officer In-charge of Lala P.S. on 24.03.2007 alleging that 3 (three) accused persons who are appellants herein came to her house on 22.03.2007 at 8 a.m. and took away her husband on the pretext of settling ongoing land dispute. They went to Balichherra along with their minor son Sahajahan where in spite of settling the dispute, they started again towards home with her husband and the minor son. But after they had reached in front of teak forest at Lalachherra, they all on a sudden, confined her husband and in furtherance of their previously hatched plan, hit him on the head and other parts of his body with thick branches of teak tree with a view to killing him and cause serious injuries on his person. Then, under pressure of the rural

people they carried the injured victim on a bamboo stretcher to the bank of river Katakhal at Lalachherra and then ran away. Getting information from the people, the informant claimed to have rushed to the bank of river Katakhal and thereafter with the help of relatives and police personnel the injured was taken to Lala Hospital. As the condition of the injured was precarious, the doctor referred him to Silchar Medical College for treatment but before he could reach Silchar, he breathed his last at Ramnagar. On the basis of the aforesaid ejahaar, Lala P.S. Case No. 43/2007 was registered and police started investigation.

2. After the investigation was complete, police charge-sheeted these accused persons to the Court of learned Chief Judicial Magistrate at Hailkandi who having found that the case is triable by Sessions, committed the same to the Court of learned Sessions Judge at Hailakandi by his order dated 21.06.2007. The learned Sessions Judge framed charges against all the accused persons on 07.07.2007 under Section 302/34 IPC. The charges on being read over, the accused persons pleaded not guilty and claimed to be tried.

3. Prosecution examined as many as 14 (fourteen) persons including I/O and M/O whereas three other persons were examined as CWs.

4. Informant Rabia Begum examined herself as PW 1 and stated on oath that accused Jalal and Motin are the brothers of her deceased husband Hilaluddin Choudhury and accused Badrul Islam Choudhury being son of Abdul Motin Choudhury is nephew of the deceased. There was a dispute among the brothers in respect of a plot of land located near Balichherra forest village in connection with which the accused persons had come to her husband at about 8 am on that day and took away her husband for settling the dispute in a village "Bichar". Sahajahan, minor son of the informant, also accompanied them. The deceased and her minor son were taken to the house of one Md. Amir Uddin at village Balicherra for "bichar" but the accused persons tied up deceased Hilaluddin with rope and took him to Lalacherra teak forest. There the victim was severely assaulted with "dao" blow as a result of which he received injuries in both of his legs and head. The minor son, Sahajahan, aged about 14 years came back home and informed her about the incident. Thereafter, she proceeded to Lalacherra teak forest and found her husband lying on a road in an injured condition. On being asked, he disclosed to her that the accused persons had assaulted him and caused the injuries. She claimed to have seen Salim, Altaf and another person at the place of occurrence. On the same day, she went to Lala P.S. and informed the matter to the police. Thereupon police made G.D. Entry and proceeded to the place of occurrence, recorded the statements of the witnesses and took the injured to Lala Hospital for treatment. The injured was referred to Silchar Medical College Hospital but on the way, he succumbed to the injuries. Thereafter, post-mortem was held at Silchar Medical College Hospital and the dead body was taken to Silchar P.S. from where the body was handed over for cremation. On the following day, she lodged written ejahaar with Officer In-charge of Lala P.S. She claimed that police seized pieces of Segun" trees, blood and one nylon rope from

the place of occurrence. On being cross examined, she stated that her house is situated on the western bank of river Katakhal and houses of the accused persons are situated to the east of her house and that there is an E & D bandh. House of Ikbal, Moinul and Hussain Ahmed are situated at the adjacent south of her homestead land whereas Aftab Uddin and others reside on the northern side. She stated that she has good terms with neighbours and the neighboring people witnessed that the accused persons had taken away her husband from her residence. But none of the villagers were listed as witness. She stated that the ferry is at a distance of 2 km from her homestead land and there are shops and other establishments on both sides of the Lalaghat ferry. However, no witness came forward to depose in connection with the case. She stated that distance between Lalacherra and Bilaipur would be about 10 km and a small village path has gone from Lalacherra to Balicherra. The distance between Lalacherra and Balicherra would be about 15 km. She stated that they got separated from the accused persons about 30 years back and their properties were also separated. In regard to the injury of the deceased, she replied in course of cross examination that brain was coming out from his skull owing to assault. Going a step further in course of cross examination, she stated that she also witnessed accused persons assaulting her husband and tying him up. She claimed that her minor son Sahajahan witnessed the assault. A specific suggestion was put to her that victim was not in sense and did not make any statement to her as claimed. She disclosed that accused Jalal is aged about 80 years old and that she went to the place of occurrence on foot.

5. Sahajahan, the aforesaid minor son of the victim deposed as PW2. He stated that at about 8 am on the fateful day, the accused persons took away his father when he also accompanied him. The place of occurrence is about 3/4 km from their house which is a forest land. The accused persons first took his father to Balicherra to the house of one Amiruddin to settle a dispute but while his father was taking tea in that house, all on a sudden the accused persons tied both his hands with nylon rope and assaulted him by giving kick. All the accused persons, thereafter along with Amiruddin took the victim towards their house and on the way at Lalacherra, Jalal gave a blow on the head of his father with the branch of teak tree. His father fell down on the ground and then all the accused persons started beating him with the branches of teak tree. As a result, his father sustained fracture injuries on both of his legs. Then the accused persons gave "dao" blow on his person which resulted cut injuries on his head back and hands. As the accused persons threatened him of dire consequences, he ran away from the place of occurrence and reported the matter to PW 1. Thereafter, he again went to the place of occurrence riding on a bicycle and saw that accused persons removed his father towards west near a "nala" at a distance of about 2 nals. He claimed to have seen Bilal and some Hindu people there who also had seen the occurrence. Subsequently, when his injured father was being carried towards their house, his mother met them on the way and at that time his father was senseless. He was not in a position to speak properly. The accused persons left

his father on the bank of river and went away. At this stage, his father stated to his mother that Jalal, Motin and Badrul had assaulted him. Thereafter, his father was taken to the Lala Hospital and ultimately when he was being taken to Silchar Medical College Hospital, he died at Ramnagar. He was declared dead at Silchar Medical College Hospital. Thereafter post-mortem examination was conducted on his body. On that night, they stayed at Silchar Medical College and on the following day they came back home with the dead body. In sharp contrast to what he and PW1 stated in examination in chief, this witness stated during cross examination that his father had gone to the house of Amir Uddin one day prior to the day of occurrence. However, he maintained the stand that when his father was taking tea in the house of Amir Uddin, Amir Uddin sent information to the accused whereupon accused persons came and tied up his father with the help of a rope. From the house of Amiruddin, accused persons led his father towards home. He claimed to have given statement to police on the date of occurrence itself. He also stated that his mother had lodged a written ejahaar to police on the same day. Police came and found his injured father on the bank of river Katakhal at Lalacherra Ghat. His father was unconscious at that time and brain material was coming out due to assault. He claimed that after he had poured water in the mouth of his injured father, he regained sense and told him regarding the incident implicating the accused persons. He claimed to have seen the occurrence with his own eyes and denied to have stated to police that he had gone to the place of occurrence by riding a bicycle and thereupon he had found his father in injured condition on the bank of the river. He claimed to have stated to police that he accompanied his father towards Balicherra and when he reached at Lalacherra his bicycle developed disorder for which he kept the bicycle at Lalacherra and came back home. Again at 3 p.m., he went to Lalacherra to enquire about repairing of his bicycle and at that time he saw two persons were carrying one injured person and kept him on the Lalacherra ghat. According to him, Lalaghat is about 3 km from their house and there is a distance of 15 km between Lalacherra and Lalaghat from where Balicherra would be about 3 km away.

6. PW 3, Md. Altaf Hussain stated that having heard hue and cry, he came to the place of occurrence and found that Hilaluddin was lying on the ground at Moulaveicherra in injured condition. He found accused Jalal was making arrangement for carrying him to his house and subsequently he and Sabbir Ahmed carried the injured to his house with a bamboo stretcher. He specifically stated that he had heard that injured had fallen from tree as a result of which injuries were caused to his person. At this stage, he was declared hostile by the prosecution and he was cross examined both by prosecution as well as by defence. On the face of cross examination by prosecution, he stated that he could not remember as to what he had stated to Magistrate but he denied the suggestion he did not disclose to police about Hilal falling from the tree. He denied to have seen the occurrence. On the face of cross examination by defence, he stated that places like Bairagicherra and Lalacherra are famous for

honey collection. He learnt that accused Jalal came to the place of occurrence after getting information about Hilal being injured by falling. He was engaged for carrying injured from the place of occurrence to Lalacherra and as there was no vehicle on the road he took him to Lalaghat. He did not see PW 1 and PW 2 on the way. According to him, the accused persons did not assault the injured. He stated that he was in police station for a day and a night and was assaulted by police for which he had to give false statement before the Magistrate out of fear and that police was standing outside when his statement was being recorded by Magistrate.

7. PW 4, Bilal Ahmed stated that he heard about the incident. He had heard that Hilal had climbed upon a tree and had fallen from it as a result of which he sustained injuries. Thereafter, people assembled and Sabbir and Altaf carried him in injured condition on a bamboo stretcher. This witness was also declared hostile at this stage and was subjected to cross examination both by prosecution as well as defence. On being cross examined by prosecution, he stated that he had disclosed to the Magistrate about the injured being carried by Jalal, Motin and Badrul. On the face of cross examination by defence, he stated that he was in police lock up for one day and a night and that the police tutored him while in custody to give false statement before the Magistrate. Police threatened him that unless he would make the statement, he would be sent to jail. He heard people talking that one person fell down from tree while he was trying to pluck beehive.

8. PW 5, Sabbir Ahmed was also declared hostile after he stated at the threshold that he heard about the deceased falling from tree and sustained injury. On being cross-examined by prosecution, he denied to have stated to police that he had seen the accused persons assaulting Hilal with the help of teak tree branches and that he noticed the bleeding injuries on the person of Hilal as a result of which he became unconscious. He denied to have seen Hilal being assaulted by the accused persons. On being cross examined by defence, he denied to have seen the occurrence with his own eyes. When he arrived at the place of occurrence, many people had already assembled and the injured did not have any sense. At that time, one of his brothers came to the place of occurrence and made arrangements for shifting him. Thereafter, the injured was taken to the Lalaghat and it took about 2/3 hours during which period he was senseless. He stated that he was in police station for one day and a night. Police did not record his statements.

9. Md. Abdul Aziz deposed as PW 6. He stated that he did not know Hilal but heard that one person was killed at "Segun bagan". He did not know who had killed him and his statement was recorded by police. At this stage, he was also declared hostile and put to cross examination by the prosecution. Then, he stated that the victim and the accused persons are brothers while accused No. 3 is his nephew. He denied to have stated before police that there was a land dispute between the parties. He denied to have stated before police that he had noticed at about 10-11 am, on 22.03.2007 from his shop that accused persons

had tied up the victim with nylon rope and was taking him. On being cross examined by defence, he stated that village Bernerpur is situated at a distance of about 35 miles from his house by the side of river Katakhal. He denied to have stated before police of having seen the accused persons tying the victim up at any point of time.

10. Md. Gulae Ahmed was PW 7 and he stated that both the accused and the victim were known to him. The occurrence took place on 22.03.2007. On that day when he came to his shop in the evening he learnt that an incident had occurred in the teak forest at Tangia Moulobicherra. He stated that he had heard about a person falling from tree and that somebody murdered him. On the following day at the place of occurrence, he saw police. He was declared hostile at this stage and cross examined by the prosecution. He denied to have stated to police that accused persons had taken away the victim with them by tying him with a nylon rope. He denied to have disclosed about any "bichar" in the house of Amir Uddin leading to the incident of assaulting the victim by the accused. In reply to cross examination by the defence, he stated that he did not see anything about incident and police did not record his statement. He denied to have seen accused persons taking victim with them by tying him with a rope.

11. Md. Nazim Uddin was examined as PW 8. He stated that on the day of occurrence, he was at his school attending tuition classes. On the following day while he was coming to Lala Bazar, he saw police personnel at Moulabi Tangia when police enquired him about his name and address. He had heard that one person died after falling from tree and that his name was Hilal @ Jotla. Prosecution declared him hostile at this stage and cross examined him. He denied to have made statement before the police that he had witnessed accused persons taking away the victim by tying with a nylon rope and on being enquired they replied that he was mentally ill. He also denied to have disclosed to police that there was ongoing land dispute between the accused and the victim and that there was a "bichar" in regard thereto. When defence cross-examined him, he straightway denied to have seen any incident at all. He said that he has no shop and he did not make any statement to police at all.

12. Md. Nasir Uddin is the PW 9 who denied to have known the accused persons. He stated that about a year back when he was returning from Bairagicherra towards Teracherra he saw the victim lying on the road in unconscious condition with bleeding on his person and that people had assembled there and they informed him that the victim had Men from the tree. He denied to have seen the accused persons at the place of occurrence at that time. Few days thereafter police called hinsand took his signature on some paper. Prosecution declared him hostile and cross examined him. He denied to have stated before police that he had seen accused Abdul Motin keeping his leg on the chest of Hilal and giving water to him and other persons were preparing bamboo stretcher for carrying accused. On being cross examined by defence, he maintained that he had heard from the people assembled there about falling of victim from a tree while

plucking beehive. He denied to have given any statement to police.

13. Ajit Chakraborty, who was S/I of Police at Lala Police Station, was examined as PW 10. He stated that Rabia Begum lodged an F.I.R. with the Officer In-charge of the Police Station leading to registration of Lala P.S. Case No. 43/2007 under Section 302 of IPC. Ext. 1 is the F.I.R. and thereupon he was entrusted to investigate into the case. He visited the place of occurrence at Lalacherra at deep plantation area and recorded statement of Bilal, Altaf, Sabbir, Nasiruddin, Abdul Sattar and Musstt. Bansar Khatun. Exts. 2, 3 and 4 are the sketch map and Ext. 5 is seizure list whereby he seized three pieces of teak tree. Ext. 6 is another seizure list whereby he seized a Sumo vehicle bearing registration No. AS-24/4354. Immediately after occurrence he took steps for shifting the injured to Silchar Medical College Hospital and the injured died on the way. Ext. 7 is the Inquest Report. He arrested the accused persons and got them examined under Section 164 Cr.P.C. According to him, witness Sabbir, Abdul Aziz, Gulae Ahmed and Nazim Uddin deposed before him about having seen the accused persons assaulting the injured. On being cross examined by defence, he stated that the occurrence had taken place on 22.03.2007 at 8 am but the F.I.R. was lodged at 6 pm on 24.03.2007. He could not say who had put thumb impression on the F.I.R. He visited the place of occurrence on 25.03.2007 at 12.45 pm and proceeded from the police station at 10.30 am. In his case diary he did not mention any place like Lalacherra being the place of occurrence which is about 1 1/2 km from the main road. He did not find any blood-stain on the place of occurrence as there was heavy rain. He also did not find any mark of violence at the place of occurrence. He claimed to have recorded statement of the PW 1 on 24.03.2007. He found the injured in senseless condition for which his statement could not be recorded. He specifically stated that injured was not in a position to speak as he had serious injuries. According to him, PW 2, Sahajahan stated before him that he had started with his father by bicycle but when he reached Lalacherra, his bicycle went out of order for which he kept his bicycle at Lalacherra for repairing and then he went back home. At 3 pm he returned to enquire about repair of his bicycle. At that time he saw two persons were carrying an injured and when they came near Ferry ghat he recognized that the injured was none other than his father. The accused Jalal accompanied the persons who had carried the injured and then he went home and informed his mother. PW 2 had stated to him that he was not present when the occurrence had taken place. Rabia Begum also did not state before him that she found her husband in injured condition at Lalacherra and learnt about the occurrence from the injured. She did not state that the accused persons had taken away her husband to Balicherra. He denied that the F.I.R. was lodged by PW 1 on the date of occurrence. He denied to have suppressed the original F.I.R. and that Ext. 1 was subsequently prepared.

14. Dr. B.C. Roy Medhi was examined as PW11. He proved the post-mortem report. According to him, the accused had following injuries on his person:

1. One lacerated injury 2 x 1 c.m. scalp deep present on right frontal region.

2. One contusion 1 x 1 c.m. on anterior left frontal region of scalp.
3. Multiple abraded contusions present on dorsum of left foot part swollen. Left ankle joint also swollen.
4. One abrasion 2 x 1 c.m. on medial aspect of left ankle joint.
5. Closed fracture with contusion of muscles around on lower 3rd of right femur bone.

He opined that cause of death was, as a result of head injuries which were ante-mortem and caused by blunt forced impact which is homicidal in nature. He proved post mortem report as Ext. 8. In course of cross examination, he stated that injuries No. 1 and 2 were on the head and affected the brain. It caused intercranial haemorrhage and contusion on the brain which might be caused by blunt forced impact. However, he denied that such injuries could be due to falling on hard substance but according to him, after receiving such injuries patient would immediately lose sense.

15. PW 12 is Amir Uddin. He straightway denied to have known the accused persons and denied to have any knowledge about the incident. Prosecution declared him hostile and put him to cross examination. He denied to have known the victim. He denied having held any "bichar" in his house and denied that accused persons tied up the victim in his house in course of "bichar". On being cross examined by the defence, he stated that he used to reside at Aizawl doing business there. His house is at a distance of 50 km from Bemerpur and about 15/20 km from his house at Bairagicherra. He denied to have given any statement to police.

16. PW 13, Abdul Sattar being the last witness totally denied to have any knowledge about the incident and the defence also did not cross-examine him. PW 14, Banecha Begum similarly denied to have made any statement to police and thereupon prosecution declared her hostile. She denied to have made statement before police that victim was severely beaten by his brothers and nephew by branch of teak tree. She denied to have made statement before the police that victim died due to the assault. On being cross examined, she stated that she has husband and other children. Police did not visit her house at any point of time in connection with the case and that she did not know anything about the occurrence and she did not know even the accused persons.

17. Mr. Jaydev Koch who was Munsiff-Magistrate at Hailakandi was examined as CW1. He proved statements of Bilal, Sabbir and Altaf given under Section 164 Cr.P.C. before him as Ext. X, Y and Z respectively. He stated that the witnesses admitted the statements to be correct once the same were read over to them after recording and then they gave their thumb impression thereafter. He stated that he did not give certificate at the end of the statements about voluntariness in regard to giving of statements. In course of cross examination by prosecution, he stated that whatever was written in the statement under Section 164 Cr.P.C.

was actually stated by the witnesses. In course of cross examination by defence he admitted that the Court was busy on the day the statements of the witnesses were recorded under Section 164 Cr.P.C. He admitted to have not mentioned the time as to when the statements were recorded and that he did not ask the witnesses about the place where they were kept before production by the police or how they were treated by police. He could not say as to whether the witnesses were kept for one day in police station and were tortured by police before their statements were recorded by him.

18. Mr. M Chetia who was Munsiff-Magistrate, 2nd Class at Hailakandi during the relevant time, was examined as CW 2. He stated that he had recorded statement of Md. Kasrul Haque Laskar under Section 164 Cr.P.C. and that Ext. Z(2) was that statement. He admitted that he did not mention as to voluntariness of the witness at the foot of the statement. Prosecution did not cross examine him but defence cross examined this witness when he stated that the witnesses deposed in Bengali and he wrote them in English. He also admitted that he did not ask the witnesses from where were they produced and as to whether they were tortured by police at the police station.

19. Mr. Bhaskarjyoti Phukan was examined as CW3. He produced the relevant G.D. Entry No. 602 dated 22.03.2007 which was marked as Ext. Z(5). The Ext Z(6) is the copy of the same. While prosecution did not cross examine him, on the face of cross examination by defence, he stated that he could not say whether G.D. Entry No. 602 was subsequently recorded or not.

20. The learned Sessions Judge thereafter examined the three accused persons under Section 313 Cr.P.C. wherein their one line reply was that they are innocent and that they have no knowledge about the incident.

21. After considering the aforesaid evidence on record, the learned Sessions Judge by his judgment and order dated 18.07.2012 convicted all the accused persons under Section 302/34 of the IPC and sentenced them to suffer R.I. for life and also to pay fine of Rs. 3,000/- each in default to suffer S.I. for further 6 (six) months each. The learned Sessions Judge ordered that the period of detention suffered by the accused persons would be set off under Section 428 Cr.P.C. It is this judgment which has been brought under challenge in the present criminal appeal.

22. We have heard Mr. H.R.A. Choudhury, learned senior counsel assisted by Mr. I.A. Hazarika for the appellants and Ms. S. Jahan, learned Additional PP on behalf of the State.

23. Mr. H.R.A. Choudhury, learned senior counsel would argue that the learned Sessions Judge has convicted the accused persons only on the basis of statements given by PW1 and PW 2 who actually were not eye witnesses to the incident and merely deposed about having last seen the accused persons with the victim. All other witnesses were declared hostile by the prosecution and nothing inculpatory could be elucidated from the depositions of all those

independent witnesses. Analysing the evidence of PW 1 and PW 2, Mr. Choudhury would argue that the versions given by PW 1 and PW 2 are contradictory to each other.

24. While PW 1 stated that accused persons had taken away the victim from her house on 22.03.2007 at 8 a.m., PW 2 contradicted her in course of cross examination and stated that the victim had gone to the house of Amir Uddin on the previous day. Moreover, the statement of the PW 1 that PW 2, her minor son had accompanied the victim upto Balicherra i.e. to the house of Amir Uddin and had witnessed the accused persons assaulting the victim, was also contradicted by PW 2 in course of his cross examination. The PW 2 disclosed that he started with his father on a bicycle and after he had gone upto Lalacherra, his bicycle went out of order for which he left the cycle there for repairing and came back home. So there was no question of his having been with the victim at the time of occurrence. PW 2 also disclosed that he returned to Lalacherra at 3 pm on the same day to enquire about repairing of his bicycle when he noticed that an injured person was being carried by two persons and once they had reached near Ferry Ghat he found that the injured was none other than his father. Such categorical statement made by PW 2 in course of his cross examination not only belies his own statement given in course of examination in chief but it has also demolished the evidence of PW 1. While PW 1 claimed that on being informed by people she went to the place of occurrence and found her husband in injured condition when the victim disclosed to her that he had been assaulted by the accused person, but her own statement that brain had come out of the skull of the victim at that time, has shaken the edifice of alleged dying declaration. M.O. (PW 11) also stated that the victim might have been senseless immediately upon receiving the injuries. Thus, PW1 proved herself to be a liar when she claimed that the victim had made statement to her implicating the accused persons. Both the PW 1 and PW 2 stated that on the same day police case was registered and police took the victim to Lala Civil Hospital and then proceeded towards Silchar Medical College and the victim succumbed to the injuries on the way at Ramnagar, the evidence of PW 10 shows that the case was registered on 24.03.2007 only after victim had died. Thus there are serious discrepancies in the statements of PW1 and PW 2. The learned senior counsel would submit that prosecution failed to prove its case beyond reasonable doubt and so the appellants are entitled to be acquitted and their sentences are liable to be set aside.

25. Ms. S. Jahan, learned Additional Public Prosecutor argued, per contra, that involvement of the appellants with the incident has been proved by the prosecution beyond reasonable doubt. PW 1 and PW 2 corroborated each other and established that the accused persons were last seen together with the victim and the accused persons having failed to give any explanation as to how the incident had taken place, the conclusion drawn by the learned Sessions Judge cannot be faulted with. She stated that existence of disputes between the parties in regard to land has been brought on record. There is proof beyond reasonable

doubt that it is the appellants who caused injuries on the person of the deceased resulting in his death. The learned Additional PP, therefore, would argue that the appeal be dismissed and the conviction of the appellants be maintained.

26. We have gone through the depositions of all the witnesses in detail and examined the as well. From perusal of the evidence of PW 1 and PW 11 it appears that on 22.03.2007, PW 1 had gone to police station and informed the Officer In-charge about the incident. A G.D. Entry was recorded on that day vide No. 602 which has been exhibited as Ext. Z(5). Ext. Z(6) is the copy of the said G.D. Entry which is quoted below:

27. Ext. Z(6) shows that PW 1 went to the police station on 22.03.2007 at 4.45 pm and disclosed that her husband was taken to Lalacherra jungle by the accused persons and were beaten up there with tree branches. They were carrying him back home on a stretcher when her son had noticed them. The accused persons then ran away. She claimed to have known the incident from her husband. Now, GD Entry does not reveal that PW 2 was present at the place of occurrence when the victim was assaulted by the accused persons. GD Entry reveals that PW 2 noticed the accused persons carrying the injured on a stretcher towards home and having seen him the accused persons had run away. This part of the GD Entry is in consonance with the statement of the PW 2 given in course of cross examination by the defence. Although, in his examination in chief he had claimed to be present at the place of occurrence and had witnessed the accused persons assaulting his father, in his cross examination he stated that he noticed them for the first time when the victim was being carried at about 3 pm on 22.03.2007. The claim of PW 2 of having witnessed the incident, therefore, is belied by not only his cross examination but also by GD Entry No. 602 on the basis of which the machinery of investigation was set on motion. The PW 1 and PW 2 appear to have developed the story subsequently to ensure punishment of the accused persons by disclosing for the first time that PW 2 had accompanied his father and that he had witnessed the accused persons assaulting his father. The discrepancies in the statement of PW 2 as indicated hereinabove show that the examination in chief of PW 2 and PW 1 are vitiated by exaggeration and embellishment. The witnesses are not credible.

28. Once the foundation of the prosecution case that PW 2 had witnessed the occurrence collapses, what remains is only the alleged dying declaration of the victim to PW 1. Even in the GD Entry there is mention of such statement by the victim to the PW 1. PW 2, however, maintained that the victim was all along in senseless condition. But after his mother had come and after PW 2 poured water in the mouth of the victim, he regained his sense and made statement to PW 1 implicating the accused persons. PW 1 had stated that there were cut injuries on the body of the victim but the post-mortem report (Ext. 8) and deposition of PW11 belie this allegation. Both PW 1 and PW 2 having specifically stated that brain matter of the victim had come out of the skull owing to the assault and PW 11 (M.O.) having stated that patient would have lost senses immediately after

receiving the injuries, the possibility of making statement by the victim about 7 hours after the occurrence does not at all appear to be probable. Even I/O (PW 10) stated that the victim was in senseless condition and so his statement could not be recorded. The nature and character of the injuries on the person of the victim as recorded above, coupled with the opinion of the M/O do not show that victim could have made any statement to the PW1 as claimed by her. PW 2 stated that after he found the victim in injured condition at Lalacherra Ferry Ghat, he went to home to inform his mother and then she came. It also belies the PW1 as to her statement of having seen the incident.

29. Statements of PW 1 and PW 2 are the only materials basing on which the learned Sessions Judge convicted the appellants under Section 302 of IPC. But discrepancies in the statements of these two witnesses as indicated above, would show that these witnesses did not speak the truth and were desperate to secure conviction of the appellants at any cost. The statements made by them in the examination in chief were contradicted by each other and PW 2 sharply contradicted his own examination in chief. Because of such conduct of the PW 1 and PW 2, these two witnesses have been found to be unreliable. The prosecution could not prove beyond reasonable doubt that the appellants had assaulted the victim. One thing is conspicuous that even the PWs who have been declared hostile consistently maintained that the victim had gone to collect beehive from tree. He fell from the tree and sustained injuries. It is also noticed that accused persons No. 1 and 2 being the own brothers of the victim and accused No. 3 his own nephew, were found carrying the injured towards his home in a bamboo stretcher. Had the accused persons assaulted the victim in teak forest, why should they carry the injured person towards his house only to be noticed by all. The normal human behavior, therefore, does not support the prosecution story that the accused persons would first assault the victim in the forest and then they would carry him to the house and then would leave injured on the bank of the river on being noticed by the PW 2. Rather, the version of the hostile witnesses that the victim had gone to collect honey by plucking the bee heave from the teak forest and received injuries by falling from the tree and having heard so, his own brothers and a nephew went there and were carrying him towards his house on a bamboo stretcher, appear to be more convincing. It is also to be noticed that although, PW1 and PW 2 stated that the accused persons inflicted "dao" blow on the person of the victim, no such cut injury is discernible from the post-mortem report or the deposition of the PW 11. The injuries No. 1 and 2 on the head of the victim have been found to have been caused by blunt forced impact. The statement of the M/O (PW11) that such injuries cannot occur due to fall appears to be a mere opinion without any evidentiary value.

30. Having so found, it is apparent that PW 1 and PW 2 did not see any incident themselves. Victim was not in a condition to narrate anything to PW 1 and PW 2 after 3 pm on 22.03.2007 and so conviction of the appellants on the sole testimony of PW 1 and PW 2 of the above nature cannot be sustained.

Prosecution has failed to prove beyond reasonable doubt that there was any assault on the victim in the manner and method suggested at the threshold of investigation. The prosecution could not prove beyond reasonable doubt that assault, if there be any, was staged by the accused persons. The prosecution could not explain as to why would the appellants carry the injured from teak forest towards his house only to be seen by others. Not a single witness from the neighbourhood has been examined by police to set up a case of ongoing dispute between the parties.

31. On totality of circumstances, the prosecution case implicating the accused persons has not been established beyond reasonable doubt. Consequently, the conviction of the appellants cannot be sustained. It is accordingly, set aside. The accused persons are acquitted from charges under Section 302/34 of IPC. Their sentences are set aside. They shall be released forthwith from jail, if not required in any other case(s).

32. The appeal stands allowed. Send down the records.