

GAHC010081802019



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

Criminal Appeal No.191 of 2019

Somna Boro @ Chamna Narzary,
Son of Dharam Narzary,
Village: Kachugaon, PO: Kachugaon, PS:
Kachugaon, District: Kokrajhar (BTAD),
Assam, PIN – 783360.

.....Appellant

-Versus-

1. The State of Assam, represented by
Public Prosecutor, Assam.

2. Rajendra Basumatary,
Son of Late Bimal Basumatary,
Village: Amlaiguri, PO: Gangia, PS:
Kachugaon, District: Kokrajhar (BTAD),
Assam, PIN – 783350.

.....Respondents

- BEFORE -
HON'BLE THE CHIEF JUSTICE
HON'BLE MRS. JUSTICE SUSMITA PHUKAN KHAUND

For the Appellant	: Mr. P.K. Das, Advocate.
For the Respondents	: Ms. B. Bhuyan, Additional Public Prosecutor, Assam, assisted by Ms. P. Borah, Advocate.
Date of Hearing	: 31 st August, 2023.
Date of Judgment & Order	: 15 th September, 2023.

JUDGMENT & ORDER

[Sandeep Mehta, CJ]

The appellant herein, namely, Somna Boro @ Chamna Narzary, has preferred the instant appeal under Section 374(2) of the Cr.PC for assailing the judgment dated 25.01.2019 passed by the learned Sessions Judge, Kokrajhar in Sessions Case No.112/2018, whereby he was convicted for the offence punishable under Sections 341/326/302 IPC and sentenced as below:-

*“Accused Somna Boro is hereby convicted under sections 341/326/302 IPC and sentenced to undergo **Rigorous Imprisonment for life** along with fine of Rs.3,000/- (Rupees three thousand) only for convicted offence under Section 302 IPC. In default of payment of fine will undergo imprisonment for another period of 6(six) months. Further, he is sentenced with **Rigorous Imprisonment for 5(five) years** along with fine of Rs.1000/- (Rupees one thousand) only for convicted offence under section 326 IPC. In default of payment of fine will undergo imprisonment for another period of 2(two) months. The accused is also sentenced with a fine of Rs.500/- (Rupees five hundred) for convicted offence under section 341 IPC. In default of payment of fine will undergo **simple imprisonment** for 15(fifteen) days. The sentences will run concurrently.”*

2. Brief facts relevant and essential for disposal of the appeal are noted herein below.

On 29.08.2013, one Rajendra Basumatary (PW-1) lodged a written report (Exhibit-1) with the Officer-in-Charge of Kachugaon Police Station alleging *inter alia* that on the previous day, i.e. on 28.08.2013 at around 6:30 PM, while his father Bimal Basumatary was coming from Hell Bridge Bazaar on his bicycle, suddenly he was

attacked by the accused/appellant, namely, Somna Boro, somewhere on the way to Dudua Gate near Gongia river. According to Bimal Basumatary, the accused/appellant was trying to finish him at the spot but somehow he managed to escape from the hands of the accused/appellant.

Immediately thereafter, Bimal Basumatary (father of the informant) was admitted to Kachugaon Block Primary Health Care. As the condition of his father was very serious, the Doctor advised that the injured should be provided with a better medical attention.

On the basis of this written report, a formal FIR No.37/2013 came to be registered at the Kachugaon Police Station for the offences punishable under Sections 341/326/307 IPC and investigation was commenced.

3. Shri Bimal Basumatary expired on 29.08.2013 while undergoing treatment at MJN Medical Hospital, Cooch Behar, upon which the dead body was subjected to autopsy by the Medical Officer of the said Hospital, namely, Dr. Subrata Haldar, who prepared the post mortem report (Exhibit-2), taking note of the following injuries:-

(i) One sharp cut injury was noted at left cheek admeasuring 7 CM bone deep.

(ii) Surgical stitches with silk were noted at forehead. On dissection, one sharp cut injury was noted admeasuring 10 Cm in length and was bone deep.

(iii) Surgical stitches at parietal region. On dissection, one sharp cut injury was noted admeasuring 15 CM long upto bone deep. On dissection, clotted of blood into brain tissue was found.

The cause of death as per the findings in the post mortem report was shock and hemorrhage because of the injuries which were opined to be homicidal and sufficient in the ordinary course of nature to cause death.

4. After the death of Shri Bimal Basumatary, offence punishable under Section 302 IPC was added to the case. Statements of various witnesses were recorded under Section 161 Cr.PC. The accused/appellant absconded and thus, proceedings of proclamation and attachment were taken against him. Charge-sheet was filed against the accused/appellant in his abscondence. The accused/appellant surrendered in the Court of the Sub-Divisional Judicial Magistrate, Gossaigaon on 08.06.2016, on which the case was committed to the Court of Sessions Judge, Kokrajhar. Charges were framed against the accused/appellant for the offences punishable under Sections 341/326 and 302 IPC. He pleaded not guilty and claimed trial.

5. The prosecution examined as many as 4(four) witnesses in an endeavour to prove its case. It is noteworthy that the Doctor at Cooch Behar, who treated Bimal Basumatary in his injured condition and after his

death, conducted autopsy upon the dead body, was not examined during the course of the trial because the prosecution could not produce him for deposition. The trial Court closed the evidence of the Doctor by order dated 14.11.2018. The statement of the accused/appellant was recorded under Section 313 Cr.PC. He denied the circumstances projected against him by the prosecution in its evidence and claimed to be innocent. 2(two) witnesses were examined in defence.

6. After hearing the arguments advanced by the learned Public Prosecutor and the defence counsel and upon appreciating the evidence available on record, the learned trial Judge, proceeded to convict and sentence the accused/appellant, as above, by the impugned judgment dated 25.01.2019, which is subject matter of challenge in this appeal.

7. Mr. P.K. Das, learned counsel appearing for the appellant, vehemently and fervently contended that there is no plausible evidence on the record of the case so as to affirm the guilt of the accused/appellant. The prosecution case is purely based on the evidence of oral dying declaration, allegedly made by the victim Bimal Basumatary. He urged that the testimony of witnesses Temna Basumatary (PW-2) and Lohen Basumatary (PW-3), who claimed in their evidence that the deceased made an oral dying declaration in their presence implicating the accused/appellant for having attacked him by a *Khukri*, is

totally cooked up and unacceptable on the face of the record. He contended that both the witnesses stated in their evidence that this oral dying declaration was made by the deceased in their presence at his house soon after the incident which took place on 28.08.2013. However, the fact regarding the deceased having made an oral dying declaration before the aforesaid 2(two) witnesses was not mentioned in the FIR (Exhibit-1) lodged by the son of the deceased, i.e. Shri Rajendra Basumatary (PW-1) and that this omission completely discredits the prosecution theory regarding the deceased having made an oral dying declaration in presence of the aforesaid 2(two) witnesses. He further contended that the accused/appellant had no motive to assault the deceased and thus, the prosecution allegation that the accused/appellant herein stabbed the deceased by a *Khukri* and thereby killed him, is totally unbelievable and unsubstantiated by plausible evidence.

8. Learned counsel for the accused/appellant further contended that the prosecution theory of oral dying declaration made by Shri Bimal Basumatary was not corroborated by even a semblance of medical evidence to satisfy that he was in a position to make such a statement. He further contended that Lohen Basumatary (PW-3) admitted that when he arrived at the house of the deceased, there were about 5 to 6 persons from which, he specifically identified Endla Basumatary and Rakesh Brahma. These 2(two) persons testified in defence as DW-

1 and DW-2, respectively, and stated that when they reached the home of Bimal Basumatary, he was lying in his courtyard and was not in a position to speak. Rather, the witnesses specifically stated that Bimal Basumatary (the deceased) was unconscious. The learned counsel for the accused/ appellant thus, urged that the theory put forth by the prosecution regarding the victim having made the oral dying declaration as above is absolutely unbelievable and the learned Trial Court was unjustified in placing reliance on the evidence of Temna Basumatary (PW-2) and Lohen Basumatary (PW-3) on this aspect. He further urged that the prosecution has failed to lead appropriate evidence to show that the deceased received injuries at the time and in the manner alleged by the prosecution. The trial Court acted with gross illegality in permitting the post mortem report (Exhibit-2) to be proved during the testimony of the Investigating Officer Meloram Basumatary (PW-4), who himself being an ASI, was not even competent to conduct the investigation. As per the learned counsel for the accused/appellant, there was no reason as to why the Medical Jurist was not examined to prove the post mortem report and hence, the post mortem report (Exhibit-2) cannot be read in evidence and has to be discarded. He concluded his submissions urging that the prosecution has failed to bring home the charges against the accused/appellant by reliable evidence and hence, the impugned judgment deserves to be set aside and the accused/appellant is entitled to an acquittal.

9. Per contra, Ms. B. Bhuyan, learned Additional Public Prosecutor, Assam, vehemently and fervently opposed the submissions advanced by the appellant's counsel. She urged that there is a reference to the oral dying declaration of Bimal Basumatary (the deceased) in the written report (Exhibit-1), wherein it is stated that Bimal Basumatary told that Somna Boro (accused/appellant) was trying to destroy him but he somehow escaped from the hands of Somna Boro. Learned Additional Public Prosecutor further urged that the fact regarding the deceased having made the oral dying declaration in presence of Temna Basumatary (PW-2) and Lohen Basumatary (PW-3) cannot be doubted because these 2(two) witnesses had no reason so as to falsely implicate the accused/appellant in the case. The evidence of these 2(two) witnesses is corroborated by the post mortem report (Exhibit-2). She contended that the prosecution was not responsible for the non-examination of the medical jurist Dr. Subrata Haldar because he was cited in the calendar of witnesses but despite service of summons sent by registered post, he failed to appear in the Court. As per the learned Additional Public Prosecutor, it was the duty of the trial Court to have ensured presence of the Medical Jurist by issuing bailable warrant or warrant of arrest, as the situation required. She urged that this Court should consider exercising power under Section 391 Cr.PC to summon the medical jurist and examine him for proving the post mortem report. Without prejudice to the above, she contended that as the defence has not disputed the

genuineness of the post mortem report, the trial Court was justified in admitting the same in evidence and in relying upon the document for holding that the death of Bimal Basumatary was homicidal in nature. On these grounds, she implored the Court to dismiss the appeal and affirm the impugned judgment.

10. We have given our thoughtful consideration to the submissions advanced at bar and have gone through the impugned judgment and have carefully re-appreciated the evidence available on record.

11. At the outset, we may note that admittedly, there was no eye witness to the incident and the entire case of the prosecution as against the accused/appellant is based purely on the evidence in form of oral dying declaration purportedly made by Shri Bimal Basumatary in presence of Temna Basumatary (PW-2) and Lohen Basumatary (PW-3). Thus, we would proceed to appreciate the evidence of these 2(two) witnesses to find out whether their version is reliable so as to believe the theory of oral dying declaration. Before that, we would like to make a brief reference to the evidence of Rajendra Basumatary (PW-1), the first informant.

12. In his deposition, the informant Rajendra Basumatary (PW-1) stated that the accused/appellant Somna Boro committed murder of his father Bimal Basumatary by stabbing him with a *Khukri* at about 6:30 PM. As per this witness, the accused/appellant stabbed his

father three times on the head and seven to eight times all over the body. However, his father somehow managed to reach home in an injured condition and told his younger brother Temna Basumatary (PW-2) that the accused/appellant had stabbed him. At that time, the informant was present at his own house. Immediately thereafter, his father was taken to the RNB Hospital, Kokrajhar but the Doctor there, refused to provide treatment without registration of the case and thus, they came back to the Kachugaon Police Station. After the FIR had been registered, the police advised them to take the injured Bimal Basumatary to the hospital for treatment and thus, he was taken to Cooch Behar and was got admitted in the hospital. However, while undergoing treatment at Cooch Behar their father expired on 29.08.2013. The post mortem was conducted, the body was cremated and thereafter he lodged the FIR (Exhibit-1).

In cross-examination, the witness stated that the village of his father, namely, Thaijauguri, is located at a distance of around 6/7 Kms from his village Amlaiguri. He came to know about the incident at about 10:00 PM. However, he did not proceed to his father's village in the night. He heard about the incident from his brother. His father was initially taken to the RNB Civil Hospital but on denial of admission, his father was brought back to the Amlaiguri village. He emphatically denied the suggestion given by the defence that he did not visit the house of his father at Thaijauguri but rather his body was brought to his house at Amlaiguri. He also denied the defence

suggestion that he was giving a false deposition regarding the accused/appellant having stabbed his father.

13. An important fact which requires to be highlighted is that in the FIR (Exhibit-1) lodged on 29.08.2013, i.e. next day of the alleged incident, there is no reference to the fact that Bimal Basumatary made an oral dying declaration in presence of his son Temna Basumatary (PW-2) and Lohen Basumatary (PW-3) that the accused/appellant had stabbed him by a *Khukri*.

14. Temna Basumatary (PW-2), son of the deceased, stated on oath that while his father was returning home after closing his medicine shop, the accused/appellant accosted him near the Gongia river and demanded money. When his father refused, the accused/ appellant stabbed him by *Khukri* at different parts of his body. The accused/ appellant gave three to four blows on the head and face and seven to eight blows on the entire body of the deceased. While the accused/appellant was stabbing his father, suddenly the *Khukri* fell down on ground and when the accused/appellant was trying to trace it out, taking advantage, his father somehow managed to escape from the scene with serious injuries on his whole body and returned home. The witness claimed to be present at his house and stated that his father informed that the accused/appellant had stabbed him near the Dudua Gate. Initially Bimal Basumatary was taken to the RNB Civil Hospital, Kokrajhar but the Doctor refused to provide

treatment without registration of a police case on which, his father was brought back to the MRM Hospital, where some stitches, etc., were applied and then the injured was taken to the house of his brother, i.e. the informant. On the next day, his father was taken to the Hospital at Cooch Behar where he expired while undergoing treatment.

In cross-examination, the witness stated that when his father was present at the hospital and the Police Station, he was in his senses and talked with the police. He also talked with Doctor at Cooch Behar. He was initially taken to the Kachugaon State Dispensary but no treatment was provided to him. Similar was the situation in the Civil Hospital, Kokrajhar. He denied the defence suggestion that the accused/appellant did not stab his father and that he was giving false evidence in the Court. The witness admitted in his cross-examination that there are 8(eight) houses near his house and the neighbors numbering about 20(twenty) gathered in his house after the incident. He also admitted that his wife and his mother were both present when his father returned home in an injured condition.

15. Lohen Basumatary (PW-3) being the neighbor of the deceased, testified on oath that at about 6:30 PM, Bimal Basumatary while coming back after selling medicines was accosted by the accused who demanded money from him. As the demand was not satisfied, the accused/appellant attacked Bimal Basumatary with a

Khukri and stabbed him at different parts of his body and as a result, Bimal sustained multiple injuries all over his body. Somehow Bimal Basumatary managed to reach his house and was crying out in pain. The witness also claimed to have arrived at the house of the deceased where he saw Bimal Basumatary who was profusely bleeding from wounds all over the body. On enquiry, Bimal Basumatary told that accused had attacked him near Gongia river. Thereafter, the injured was taken by the family members for treatment to different hospitals.

In cross-examination, the witness stated that he came to know about the incident at about 7:00 PM. Temna Basumatary (PW-2) came to his house and told him about the incident. He rushed to the house of Temna Basumatary where 5/6 persons were present from whom he could identify Mergha, Kunta, Gudang, Rakesh, Bishnu and Endla. All these persons also came to know about the incident. On the next day at about 3:00 PM, he along with Temna Basumatary (PW-2) and Rajendra Basumatary (PW-1) went to Kachugaon Police Station for lodging the report. He denied the defence suggestion that the deceased did not tell them about the incident and that they had conspired and lodged a false case against the accused/ appellant.

16. Meloram Basumatary (PW-4), ASI of Kachugaon Police Station, investigated the case. He stated on oath that on 28.08.2013 at about 10:00 AM, the injured Bimal Basumatary was brought to the Police Station with

multiple injuries with the information that on the previous night, he was attacked by the accused/appellant Somna Boro with a *Khukri* for which he sustained multiple injuries all over his body. The FIR was lodged with the Officer-in-Charge of the Kachugaon Police Station and thereafter, the case was endorsed to Meloram for investigation. This witness further stated that he came to know that the *Khukri* held by the accused fell down on ground. He started searching for the weapon and taking advantage, the deceased managed to escape. The witness deposed that after coming to know that the injured had expired at the Hospital in Cooch Behar, he collected the post mortem report and proved the same as Exhibit-2. He also proved the charge-sheet.

In cross-examination, the witness stated that the injured was brought to the Kachugaon Police Station but his statement could not be recorded as he was in a serious condition and was not in a position to speak. He recorded the statements of Temna Basumatary (PW-2) and Lohen Basumatary (PW-3) at the place of incident on 28.08.2013. He neither visited the Hospital at Cooch Behar nor did he talk with the Doctor about the treatment provided to the injured. He did not record the statement of the Doctor of the Kachugaon PHC though he made a verbal enquiry from him. He furnished a requisition to the Doctor for recording the dying declaration of the deceased. When the injured was brought to the Police Station, he had bandages on the cut injuries received by

him which had been applied at the Kachugaon PHC. He did not collect any medical report from the Kachugaon PHC.

17. The defence witness Endla Basumatary (DW-1) deposed that he saw the victim Bimal lying in his courtyard in an injured condition. He had gone thereupon hearing the commotion. He tried to make an enquiry from Bimal Basumatary, who was in an unconscious state and was not in a position to speak. Defence witness Rakesh Brahma (DW-2) stated that he visited the house of the deceased Bimal Basumatary and saw him in an injured condition. His family members were trying to move him into the veranda of the house from the courtyard and he was not in a position to speak.

The prosecution declined the opportunity to cross-examine both the witnesses and thus, their testimony remained uncontroverted.

18. The statement of the accused recorded by the trial Court under Section 313 Cr.PC makes an interesting reading and is reproduced herein below for the sake of further future reference:-

“Question No.1:- *There is an allegation brought against you that on 27.8.13 at about 6.30 P.M. while the father of the informant was coming from the hell bridge bazaar on his bi-cycle you suddenly attacked him with the sharp weapon for the injury sustained by the father of the informant he died during treatment. Is it true?*

Answer:- *No it is not true. I am innocent. I have not assaulted the father of the informant nor I committed murder.*

Question No.2:- PW1 informant of this case, son of the deceased deposed that his father was coming from hell bridge bazaar selling medicine and when he reached near Gangia river at about 6.30 P.M. you stabbed him with 'Khukri'. Immediately his father was taken to RNB Civil Hospital, Kokrajhar and thereafter they again came to Kochugaon P.S. lodging the FIR and during his treatment his father died due to serious injuries sustained by him. Is it true?

Answer:- No it is not true. I am innocent. I have not committed any such offence nor I stabbed the deceased by the Khukri.

Question No.3:- PW2 another son of the deceased also deposed that when his father reached near Gangia river you asked money from him and on his refusal you gave 3/4 blows on his head and face and other 7/8 blows on his entire body by the Khukri and subsequently his father died during his treatment at Cooch-bihar for severe injuries sustained by him. Is it true?

Answer:- No it is not true. I am innocent. I have not committed any such offence nor I stabbed the deceased by the Khukri.

Question No.4:- PW3 deposed in his evidence that when you met the deceased near Gangia river you asked him money and on his refusal there was quarrel between you and deceased and finally you attacked the deceased with the Khukri and stabbed him in different parts of his body for which he sustained multiple grievous injuries. The family members took him to hospital but, during treatment he died. This witness also deposed that you enquired the matter to deceased and he reported the matter that you attacked him near Gangia river causing grievous injuries on his person. Is it true?

Answer:- No it is not true. I am innocent. I have not committed any such offence nor I stabbed the deceased by the Khukri.

Question No.5:- PW4 I.O. of this case during enquiry he found sufficient incriminating materials against you

and collecting all the materials from Kotiwali P.S. P.M. report etc. he filed the charge sheet against you. Is it true?

Answer:- *No it is not true. I am innocent. I.O. filed the charge sheet against me without any material.*

Question No.6:- *Do you want to say anything else?*

Answer:- *Yes, I am innocent. I am not involved with the alleged offence.*

Question No.7:- *Do you want to give evidence in support of your defence?*

Answer:- *No, I will give defence witness.”*

19. A perusal of the above statement clearly reflects that though the trial Court put questions pertaining to the depositions of Temna Basumatary (PW-2) and Lohen Basumatary (PW-3) to the accused but the pertinent fact regarding the injured having made the oral dying declaration before these 2(two) witnesses was not incorporated in this statement.

Be that as it may, the fact remains that the FIR (Exhibit-1) came to be registered on 29.08.2013, i.e. on the next day of the incident. As per the prosecution case, Lohen Basumatary (PW-3) and Temna Basumatary (PW-2) accompanied Rajendra Basumatary (PW-1) to Kachugaon Police Station for lodging the report (Exhibit-1). Notwithstanding this, there is no indication in the report that the injured Bimal Basumatary had made an oral dying declaration in presence of Temna Basumatary and Lohen Basumatary regarding the manner in which he was assaulted. The FIR also narrates the fact that the injured was forthwith admitted to Kachugaon Block Primary

Health Care Centre. However, the Investigating Officer did not care to collect any document/medical report from the said establishment. Furthermore, even the statement of the Doctor from the said Hospital was not recorded.

20. The impact of omission in FIR was examined by Hon'ble the Supreme Court in the case of **Ram Kumar Pandey -Vs- State of M.P.**, reported in **AIR 1975 SC 1026**. A few relevant observations from the said judgment are reproduced herein below:-

“7. The prosecution case, as set out, in the first information report was: Uttam Singh, PW 1, residing at Ganj Parao, on the first floor, went home at about 3.30 p.m. on March 23, 1970 and was preparing to have a bath when Suresh Ahuja came down from an upper storey of the house and complained that Uttam Singh had been quarrelling with members of his family. Uttam Singh requested him to take his seat and promised to look into the matter. This angered Suresh Ahuja. Thereafter, his elder brother arrived and started quarrelling with Uttam Singh's daughter. At this stage, the landlord Mulkraj Ahuja, accompanied by the appellant Ram Kumar Pandey, who lives with his family in a side room on the ground floor, entered and immediately gave him a blow on his eye-brow. Uttam Singh fell down. As Uttam Singh got up, the appellant struck him with a knife from behind. Mulkraj asked Pandey to run downstairs. Both the accused tried to run away. Uttam Singh tried to catch them but failed. Uttam Singh then asked his son Harbinder Singh to make a telephone call. At this point, Suresh, son of Mulkraj, stabbed Harbinder Singh who fell down in the lane. Uttam Singh saw Harbinder Singh lying near the house of Saudagar Shah with an injury on his chest which was bleeding profusely. Harbinder Singh was carried to a hospital on a cart and Gurcharan Singh telephoned the police. Joginder Singh also came while the injuries were being inflicted. Uttam Singh's daughters Amarjit Kaur and Taranjit Kaur saw Uttam Singh wrapping a

chadar on the wound of Harbinder Singh. Raj Jaggi had seen Harbinder Singh falling down. The motive for this incident was that Mulkraj Ahuja, the landlord, wanted his house vacated by Uttam Singh. Harbinder Singh had died while being taken to hospital.

8. *The abovementioned first information report was lodged at Police Station Ganj on March 23, 1970 at 9.15 p.m. The time of the incident is stated to be 5 p.m. The only person mentioned as an eye-witness to the murder of Harbinder Singh is Joginder Singh. The two daughters Taranjit Kaur, PW 2, and Amarjit Kaur, PW 6, are mentioned in the FIR only as persons who saw the wrapping of the chadar on the wound of Harbinder Singh. What is most significant is that it is nowhere mentioned in the FIR that the appellant had stabbed Harbinder Singh at all. It seems inconceivable that by 9'15 p.m. it would not be known to Uttam Singh, the father of Harbinder Singh, that the appellant had inflicted one of the two stab wounds on the body of Harbinder Singh.*

9. *No doubt, an FIR is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, in this case, it had been made by the father of the murdered boy to whom all the important facts of the occurrence, so far as they were known up to 9-15 p.m. on March 23, 1970, were bound to have been communicated. If his daughters had seen the appellant inflicting a blow on Harbinder Singh, the father would certainly have mentioned it in the FIR We think that omissions of such important facts, affecting the probabilities of the case, are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case.*

10. *Even Joginder Singh, PW 8, was not an eyewitness of the occurrence. He merely proves an alleged dying declaration. He stated that Harbinder Singh (described by his pet name as "Pappi") rushed out of his house by opening its door, and held his hand on his chest with blood flowing down from it. He deposed that, when he asked Pappi what had happened, Pappi had stated that Suresh and Pandey had injured him. It is clear from the FIR that Joginder Singh had met Uttam Singh before the FIR was made. Uttam Singh did not*

mention there that any dying declaration, indicating that the appellant had also injured Harbinder Singh, was made by Harbinder Singh. The omission to mention any injury inflicted on Harbinder Singh by the appellant in the FIR seems very significant in the circumstances of this case. Indeed, according to the version in the FIR, Joginder Singh, who was in the lane, is said to have arrived while Harbinder Singh was being injured. Therefore, if this was correct, the two injuries on Harbinder Singh must also have been inflicted in the lane outside.

11. Satwant Kaur, PW 7, the wife of Uttam Singh, who claimed to have been an eyewitness of the whole occurrence, was also not mentioned in the FIR Suresh had, according to her, stabbed Harbinder Singh on the right side of the chest at the door of the kitchen, and, thereafter, Pandey was said to have attacked him.

12. Again, we find that Taranjit Kaur, PW 2, and Amarjit Kaur, PW 6, daughters of Uttam Singh, have figured as eyewitnesses of the whole occurrence including the stabbing of Harbinder Singh by the appellant. As already indicated, they are not mentioned in the FIR as eyewitnesses of the murder. This is also very significant in the present case. They have been mentioned only as witnesses of wrapping a chadar on the wound of Harbinder Singh who was then said to be lying in the lane after the occurrence.

17. As regards the second and third points, we are unable to give credence to the version of the three alleged eyewitnesses as they were not mentioned as eyewitnesses in the FIR made in the circumstances indicated above.

18. Lastly, the alleged dying declaration is also not mentioned in the FIR. On the other hand, the FIR, mentions Joginder Singh who tried to prove the dying declaration only, as an eyewitness.”

Seen in light of the observations made by Hon'ble the Supreme Court in the case of **Ram Kumar Pandey** (supra), omission of the fact regarding presence of the

eye witnesses at the spot and so also the omission regarding the alleged dying declaration would be fatal to the prosecution.

21. The situation in the case at hand is almost identical. Had there been an iota of truth in the prosecution theory that Bimal Basumatary, while he was in an injured condition made an oral dying declaration in presence of his son Temna Basumatary (PW-2) and his neighbor Lohen Basumatary (PW-3), then this fact would definitely have been incorporated in the written report (Exhibit-1), which came to be lodged by another son of the deceased, namely, Rajendra Basumatary (PW-1) on the next day of the incident more particularly when both the witnesses to the alleged oral dying declaration had accompanied Rajendra to the Police Station for lodging the report. Furthermore, there is an inherent contradiction in the version as stated by Temna Basumatary (PW-2) regarding the number of injuries inflicted to the deceased as per the oral dying declaration (three to four blows on the head and seven to eight blows on the entire body) and the post mortem report (Exhibit-2), which takes note of only three injuries described (supra) on the body of the deceased when the autopsy was carried out.

22. There is another important fact which persuades the Court to not rely upon the theory of the oral dying declaration. As per the statement of Rajendra Basumatary (PW-1) and Temna Basumatary (PW-2), immediately after

the incident, the injured was taken to the RNB Civil Hospital, Kokrajhar and Kachugaon Block Primary Health Centre. However, the Investigating Officer, made no effort whatsoever to collect the medical report, if any, of the victim prepared in these 2(two) hospitals. Furthermore, statement of the Medical Officers, who attended the injured in either of these 2(two) hospitals, were also not recorded by the Investigating Officer. There is no material on record of the case which can satisfy the Court that after receiving the injuries as alleged, the injured was in a position to speak or to make a coherent statement. As stated above, the 2(two) defene witnesses, i.e. Endla Basumatary (DW-1) and Rakesh Brahma (DW-2), whose presence at the house of the deceased was admitted by Lohen Basumatary (PW-3), made an empathetic deposition that Bimal Basumatary was unconscious and not in a position to speak when they reached his house soon after the incident.

Temna Basumatary (PW-2) made a categoric assertion that when Bimal Basumatary came to the house in an injured condition, at that time, his wife and his mother (wife of the deceased) were present. However, neither of these 2(two) ladies were examined in evidence so as to lead corroboration to the flimsy theory of oral dying declaration projected in the evidence of Temna Basumatary (PW-2) and Lohen Basumatary (PW-3).

23. Another aspect of the case which discredits the prosecution is that the Doctor, who conducted autopsy

upon the dead body of the deceased, was not examined in evidence even though he was cited in the list of witnesses. In this regard, on a perusal of the record of the trial Court, it becomes clear that summons by registered post was sent to the Doctor and as he did not appear presumably despite service, the evidence of the Doctor was closed. In our opinion, this approach of the trial Court cannot be appreciated. As a matter of fact, there is nothing on record which could have satisfied the trial Court that the summons was actually served to the Doctor. Thus, the evidence of the Medical Jurist being a witness of vital import should not have been closed in such a casual manner. Furthermore, the prosecution should have been more vigilant and proper effort should have been made to serve the summons to the Doctor by hand through of the Officer-in-Charge of the Police Station concerned. If the witness did not appear despite service of summons, coercive measures should have been sought for.

24. In an appropriate case, this Court could have exercised jurisdiction under Section 391 Cr.PC and the Doctor could have been summoned for giving evidence even at the appellate stage, but in view of the preceding findings, wherein we have discarded the prosecution theory regarding the oral dying declaration made by the deceased, which is the only palpable evidence relied upon by the prosecution so as to bring home the charges against the accused, this Court is not inclined to exercise

powers under Section 391 Cr.PC so as to summon and examine the doctor at this stage as it would be nothing short of an exercise in futility.

25. In wake of the discussion made above, we have no hesitation in holding that the prosecution failed to lead plausible and reliable evidence so as bring home the charges against the accused, who deserves to be acquitted by giving him the benefit of doubt.

26. Resultantly, the impugned judgment dated 25.01.2019 passed by the learned Sessions Judge, Kokrajhar in Sessions Case No.112/2018 convicting and sentencing the accused/ appellant, as above, is hereby reversed and set aside. The accused/appellant, namely, Somna Boro @ Chamna Narzary, is acquitted of the charges. He is in custody and shall be released from prison forthwith, if not wanted in any other case.

27. However, keeping in view the provisions of Section 437-A Cr.PC, the appellant Somna Boro @ Chamna Narzary is directed to furnish a personal bond in the sum of ₹ 30,000/- (Rupees Thirty Thousand) and a surety bond in the like amount before the learned trial Court, which shall be effective for a period of 6(six) months to the effect that in the event of filing of a Special Leave Petition against the present judgment on receipt of notice thereof, the appellant shall appear before the Hon'ble Supreme Court.

28. The appeal is allowed accordingly.

29. Registry is directed to send back the LCR to the learned trial Court forthwith.

JUDGE

CHIEF JUSTICE

Mukut

Comparing Assistant