

Ranjit Chakraborty and ors. Vs. the State

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Court : Kolkata

Decided On : Jun-09-2006

Reported in : (2006)3CALLT288(HC)

Judge : Alok Kumar Basu and ;Sadhan Kumar Gupta, JJ.

Acts : Juvenile Justice Act; ;[Indian Penal Code \(IPC\), 1860](#) - Sections 143, 147, 148, 149, 302 and 304; ;Code of Criminal Procedure (CrPC) - Section 313

Appeal No. : C.R.A. No. 260 of 1996

Appellant : Ranjit Chakraborty and ors.

Respondent : The State

Advocate for Def. : Kazi Safiullah and ;Subir Ganguly, Advs.

Advocate for Pet/Ap. : Ashim Kumar Roy, ;Rupa Bandopadhyay and ;Sreyasi Biswas, Advs.

Disposition : Appeal allowed

Judgement :

Sadhan Kumar Gupta, J.

1. Being convicted and sentenced to suffer rigorous imprisonment for 10 years each for the commission of the offence under Section 304 part 1/149 of the Indian

Penal Code by the learned Additional Sessions Judge, 1st Court, Hooghly in Sessions Trial No. 14 of 1988, the eleven convicts/appellants have preferred this appeal challenging the said order of conviction, as passed by the learned Trial Court. Said Sessions Trial was started on a written complaint submitted by one Kashi Nath Chakraborty to the Office-in-Charge of Balagarh P.S. on 25.03.1984 and on the basis of that Balagarh P.S. Case No. 11 dated 25.03.1984 was started. In the written complaint, said Kashi Nath Chakraborty stated that 27 persons whose names have been mentioned in the written complaint along with others formed an unlawful assembly on 25.03.1984 at about 8.00 a.m. and being armed with weapons trespassed into the house of his brother Ramanath Chakraborty. Seeing that Ramanath took shelter on the roof of his house out of fear. At that time one of the miscreant hit Ramanath by an arrow and as a result of that Ramanath sustained bleeding injury and fell down. The accused persons thereafter tied him with a rope and then assaulted him severely by lathi spear, chain and fist and blow. Due to such assault Ramanath sustained severe injuries. Within a short span of time Police came there and at that time Ramanath already died. However, the complainant and others took Ramanath to the hospital with the help of Police where he was declared dead. On the basis of such complaint, the case was started. It was investigated and after completion of the investigation charge sheet was submitted against the accused persons. During trial charges were framed against 25 persons. The prosecution in order to prove the charges, in all examined 24 witnesses, out of which P.W.3, P.W.5, P.W.6, P.W. 14, P.W. 15, P.W. 16, P.W. 17 & P.W. 18 are alleged to be the eye witnesses. That apart, prosecution has also examined the Doctor who conducted the Post Mortem examination on the body of the deceased as well as the Police Officer who conducted inquest and investigation of the case. After considering the entire materials, as available on record, the learned Trial Court was of the opinion that the prosecution was able to prove the charges under Section 304 Part 1/ 149 of the Indian Penal Code against the present appellants who are 11 in number and convicted them accordingly. The learned Trial Judge was of the opinion that there was room for doubt in respect of the commission of the offence by the rest 14 accused persons and as such he was pleased to hold them not guilty for the offences charged with. This order of conviction has been challenged by filing the present appeal.

2. We have heard the submissions of the learned Advocate for the appellant as well as the learned Advocate for the State. Mr. Ashim Roy, learned Advocate for the appellants submitted that since the learned Court did not convict the appellants for the commission of the offence under Sections 147/148 of the Indian Penal Code, so the conviction order as passed under Section 304 Part I/149 of the Indian Penal Code cannot sustain. In this respect he has cited decision reported in : 1966 CriLJ197 , Mahadev Sharma and Ors. v. State of Bihar.

3. Mr. Roy further argued that the learned Court below failed to appreciate the evidence as adduced by the witnesses for the prosecution properly and committed mistake in ignoring the glaring defects which are there in their evidence. As such, Mr. Roy submits that the learned Trial Court was not justified in passing the order of conviction on the basis of the oral evidence as adduced on behalf of the prosecution.

4. Mr. Roy further submitted that the manner in which the accused persons were examined under Section 313 Cr. PC is far from satisfactory and has actually caused prejudice to the accused persons as they did not get any opportunity to give sufficient explanation in their favour. In this respect he pointed out that all the alleged incriminating circumstances which were there in the evidence of the eye witnesses were not put to the accused persons at the time of their examination under Section 313 Cr.PC. That apart, the evidence that has been given by the Doctor who conducted the Post Mortem Examination of the deceased, was not at all put to the accused persons and their attention was not drawn to the statement made by the Doctor in this respect. As such, learned Advocate for the appellant argued that the accused persons were prejudiced due to this defective examination made under Section 313 Cr. PC.

5. Lastly, Mr. Roy further argued that it appears that when accused Sunil Singh was examined under Section 313 Cr.PC at that time his age was recorded as 26 years. He further pointed out that this recording was made in the year 1996. Admittedly the incident took place in the year 1984. So, according to the learned Advocate for the appellant, this accused Sunil Singh was certainly a minor at the time of incident and so he could not be tried with the other accused persons before

the learned Sessions Judge. He further pointed out that law enjoins that such a minor is to be tried as per provisions of the Juvenile Justice Act. Under such circumstances, the learned Advocate submitted that the conviction order, as passed against appellant Sunil Singh, should be set aside on this ground alone.

6. Mr. Kazi Saflullah, learned Public Prosecutor appearing for the State countered the argument of Mr. Roy on all the points. According to him the learned Trial Judge perfectly appreciated the evidence of the eye witnesses and came to the conclusion that the accused persons were guilty for the commission of the offence. He further argued that there was no defect in the examination of the accused persons under Section 313 Cr. PC. That apart he also submitted that since this alleged plea of minority was not taken at the earliest opportunity and since there is no supporting evidence in respect of such claim, simply on the basis of the noting of the age by the ministerial staff of the Court, it cannot be said that the appellant Sunil Singh was minor at the time of the commission of the offence. According to Mr. Safiullah the appellants were rightly convicted by the learned Trial Judge and so the appeal should be dismissed.

7. We have heard the submissions of the learned Advocates for both the sides and also perused the materials on record carefully. So far as the argument of the learned Advocate for the appellant that as the learned Trial Judge did not find the accused persons guilty for the offence under Sections 147/148 of the IPC, so the conviction order, as passed by him against the appellants under Section 304 Part I/149 IPC cannot sustain, he has cited decision reported in AIR 1966 SC 302 (supra) in support of such contention. We have perused the said decision and it appears that the view of the Hon'ble Apex Court is completely opposite to the submission as made by the learned Advocate for the appellant. It has been held in the said decision to the effect 'It is not obligatory to charge a person under Section 143 or Section 147 when charging him for an offence with the aid of Section 149. Sections 143 and 147 are implied. When the charge is laid for an offence like murder with the aid of Section 149, offences under sections 143 and 147 must always be present but the other two charges need not be framed separately unless it is sought to secure a conviction under them. It is thus that Section 143 is not used when the charge is under Section 147 or Section 148, and Section 147 is

not used when the charge is under Section 148. When the charge is under Section 149 read with an offence under the Penal Code, Section 147 may be dispensed with. For the validity of the conviction under Section 302/149, Penal Code, it is not obligatory that a charge under Section 147 or Section 148 should have been framed and a conviction under those sections recorded.' So, it appears that this decision is of no help for the appellants, as claimed. So far as the present case is concerned, the accused/appellants were convicted under Section 304 Part-I/149 IPC and in view of the decision quoted above it cannot be said that the said order of conviction is bad as there was no separate conviction order under Section 147/148 of the IPC. So, in view of our above discussion, we are unable to accept the contention of Mr. Roy.

8. Mr. Roy further argued that the learned Trial Judge failed to appreciate the evidence that has been adduced by the eye witnesses on behalf of the prosecution. According to him there are various loopholes in the statements of the eye witnesses and it is unfortunate that the learned Trial Judge failed to appreciate all those defects, in the evidence, as adduced on behalf of the prosecution. In support of his contention learned advocate for the appellant drew our attention to the evidence, as adduced by the eye witnesses, so far as the present case is concerned. Let us now see the statements, as made by the eye witnesses so far as the present case is concerned and to see whether on the basis of their statements the accused persons could be convicted or not. In this respect it may be pointed out here that the learned Trial Judge on the basis of the said evidence acquitted 14 accused persons out of 25. Be that as it may, we have already pointed out that in this case P.W.3 Mritunjoy Chakraborty, P.W.5 Haripada Paul, P.W.6 Nitya Pada Paul, P.W.14 Gosta Majhi, P.W.15 Basudeb Mondal, P.W. 16 Nanda Dulal Koley, P.W. 17 Dinabandhu Majhi and P.W. 18 Sudev Majhi are the eye witnesses. We have taken into consideration the statements made by those witnesses before the learned Trial Judge.

9. So far as P.W.3 Mritunjoy Chakraborty, is concerned, it appears that he is the son of the deceased. He has stated that he saw the incident. But he could not name all the accused persons. His explanation is that as he was minor at that time so he could not mention the names of the miscreants. This explanation does not

inspire confidence at all and as such it cannot be accepted. This witness admitted the first part of the incident which is also the defence case. He has admitted that on the date of the incident in the morning there was a trouble in between the deceased and accused Ranjit Chakroborty. He has stated that after some time Ranjit Chakroborty and others came to their house in a body and out of fear the deceased went to the roof of the room. He has further stated that at that time the accused persons started throwing bricks and arrows to the father of this witness and as a result of that he fell down from the top of the roof. Thereafter he has claimed that the accused persons lifted the deceased to a nearby field in tied up condition and there, they severely assaulted him with lathi, iron rod, chains, back side of the spear as well as by fists and blows. According to this witness due to such assault the deceased died. In his cross-examination this witness admitted that he did not mention the names of all the accused persons before the I.O. That apart if we look into his cross-examination then it will appear that police came to the P.O. within a very short span of time after the occurrence. But this witness categorically stated 'I also did not disclose the names of the assailants to the police.' It is expected that this witness, being an eye witness and also the son of the deceased, would immediately disclose the names of the assailants to the Police Officer who visited the P.O. shortly after the incident. This fact certainly raises a doubt regarding the veracity of the statement made by this witness. That apart it is the case of the defence that there was trouble going on in between accused Ranjit Chakroborty and the deceased over a property. It is also the defence case that over this dispute trouble started in between the parties and on the morning of the date of the incident there was a fight in between accused Ranjit and the deceased and due to the conduct of the deceased, the villagers became angry and they assembled in front of the house of the deceased and at that time they were very much excited. It is the defence case that the deceased out of fear went to the roof of the house and ultimately he fell down from there which resulted in his death. Whether that version of the defence is correct or not we will discuss it later on while discussing the evidence of the Doctor who conducted the post mortem examination in respect of the dead body of the deceased. But one thing is very much clear from the evidence of this P.W.3 that there was a long standing dispute over property in between the parties. This P.W.3 admitted in his cross-

examination by saying 'After some days of the death of Subhankari Debi property dispute started between accused Ranjit and my father.' So there cannot be any doubt that a long standing dispute was going on in between accused Ranjit Chakraborty and the deceased over the property. Be that as it may, we have already pointed out that it is practically the admitted position so far as the first part of the incident is concerned. If we consider the first part of the incident along with the evidence of this P.W.3 then it will appear that the defence version that the deceased, being threatened by the villagers, actually fell down from the roof of the house, finds corroboration. The P.W.3 tried to establish that after the fall of the deceased from the roof, the accused persons lifted him to a nearby place and assaulted him severely with various weapons which resulted in his death. But this statement of the P.W.3 regarding the second part of the incident does not find support from the evidence of the Post Mortem Doctor which will be discussed later on by us.

10. So far as the P.W.4 Shibapada Nayek is concerned it appears that he was declared hostile by the prosecution. But if we look carefully into his examination-in-chief then it will appear that he tried his best to support the prosecution case. At the same time, in his examination in-Chief he admitted that on the date of incident the deceased Ramanath had a scuffle with accused Ranjit. This witness has stated 'Said Ramanath assaulted the accused Ranjit. The accused persons took the accused Ranjit to the hospital. After admitting Ranjit in the hospital the accused persons came back. The accused persons went to assault Ramanath.' For this statement this witness was not declared hostile by the prosecution. So, in our considered opinion there cannot be any bar in accepting statement of this P.W.4. It is clear from this statement that there was a trouble in the morning in between the deceased and accused Ranjit and as a result of that accused Ranjit was taken to the hospital and for that reason the accused persons became excited and wanted to assault the deceased Ramanath. It further appears from the evidence of this witness that Ramanath climbed on the top of the tiled roof of his room. So from the statement of this witness the defence version of the incident finds clear corroboration.

11. Prosecution has relied much upon the evidence of P.W.5 Haripada Paul and P.W.6 Nitya Pada Paul. It appears from the evidence of the P.W.5 that he found Ramanath on the tiled roof of his house and some of the accused persons were throwing bricks and broken tiles at him. In fact, he could not name all the accused persons who allegedly were assaulting Ramanath at that time. According to him, due to such assault Ramanath sustained injury and at that time some of the accused persons asked him to come down and they assured him that they would not assault him further. This witness has stated 'I cannot say whether the victim Ramanath came down or fell down. I did not see that.' So it appears that the first part of the incident has been corroborated by this P.W.5. He has stated in his deposition that thereafter the accused persons lifted Ramanath to a nearby place and all of them assaulted him severely and as a result of that he died.

12. Similarly, if we look into the evidence of P.W.6 Nitya Pada Paul then it will appear that he also corroborated the P.W.5 regarding the first part of the incident. But in addition to that he has stated in his examination-in-chief that before the actual incident, in the morning there was a trouble in between accused Ranjit and the victim Ramanath. He deposed to the effect 'Going there I saw that both were pushing each other.' The P.W.6 further stated that subsequently the accused persons assembled in front of the house of Ramanath with weapons in their hands and that time he found Ramanath on the tiled roof of his house. He has further stated that the accused persons threw bricks and broken piece of tiles towards Ramanath resulting his injury on his person. This witness further stated 'The victim Ramanath was shivering in fear. While he was coming down he fell down rolling.' So the first part of the incident is also corroborated by this P.W.6. Thereafter this witness like other eye witnesses claimed that the accused persons then tied the hands of Ramanath and lifted him to a nearby place and assaulted him severely with various weapons resulting in his death. We are concerned with the second part of the incident and to see how far this claim of the P.W.3, 5 and 6 are believable.

13. Prosecution has further relied upon the evidence of the P.W. 14 Gosta Majhi. If we look into his evidence then it will appear that he also supported the defence version that on the morning of the date of the incident he found accused Ranjit

Chakraborty and the deceased Ramanath were quarrelling with each other. According to this witness subsequently he found that many persons assembled in front of the house of the victim with various weapons in their hands and victim Ramanath climbed on the tiled roof of his house and the miscreants were throwing broken bricks, gulti, arrow etc. at him. This witness has stated that after being assaulted by the said mob, the victim Ramanath was coming down from the tiled shed and at that time his legs and hands were shivering. He has further stated 'He rolled and fell down from the tiled shed.' Thereafter this witness has claimed that the accused persons then lifted Ramanath to a different place and assaulted him severely with various weapons resulting in his death.

14. So far as the P.W. 15 Basudeb Mondal is concerned, it appears that he has deposed straight way regarding the second part of the incident when according to him the victim Ramanath was severely assaulted by the accused persons by sticks, bricks, broken tiles etc. In his cross-examination this witness has stated 'I told the I.O. at the time of inquest names of the assailants and the manner of assault and the names of weapons by which the victim was assaulted.' But if we look into the evidence of the Police Officer, who conducted the inquest, then it will appear that nothing was mentioned in it, as claimed by this witness.

15. Similarly, it appears from the evidence of the P.W. 16 Nanda Dulal Koley that he admitted that on the date of incident in the early part of the morning there was a trouble in between accused Ranjit and the victim Ramanath. This witness has stated that he found the accused persons subsequently assembled in front of the house of the victim Ramanath. According to this witness seeing such assembly in front of the house of the victim, he informed the matter to Kashinath Chakraborty, the elder brother of the victim. He has stated in his examination-in-chief to the effect 'I told him that the victim Ramanath might be assaulted and he rose up on the roof of the tiled shed. He went to the P.S. to inform. I came back to my house.' This statement shows clearly that Kashinath who lodged the FIR actually did not see the incident, as claimed by him in the written complaint. This shows that whatever has been stated in the written complaint is not correct and we cannot rule out the possibility of exaggeration which is the result of after thought. In his cross-examination, this witness has clearly stated 'I did not see the accused Ranjit

there so long I was in the place of occurrence.' This statement of this witness lends support to the defence version which finds corroboration from the statement of P.W.4 that accused Ranjit was injured by the victim earlier and as such, as he was sent to hospital, so there could not be any possibility of his presence at the time of the alleged actual incident.

16. Prosecution has further adduced the evidence of P.W. 17 Dinabandhu Majhi, who in his evidence tried to establish that he found the accused persons assaulting the victim. During cross-examination this witness could not say approximately as to how many blows of lathi were given on the body of the victim by the accused persons. In fact, the manner in which this witness has deposed does not inspire confidence at all.

17. Prosecution has further relied upon the evidence of the P.W. 18 Sudev Majhi. He in his evidence stated that he found the victim on his tiled roof of his house and the accused persons were throwing bricks etc. towards him. According to this witness, the victim was hit by brick and as a result he fell down from a tiled roof. This witness has claimed that after this, the victim was tied up and by the accused' persons severely resulting in his death. He has further stated that Police came to the P.O. at about 8.30 to 9 A.M. and took the victim by the Police Van.

18. P.W.19 is Basudeb Mallick. He in his evidence has stated that he found the victim Ramanath was sitting on the tiled roof of his house and altercation was going on between the victim and the crowd who surrounded the house. He has mentioned names of some of the accused persons as members of that assembly. He has further stated that the miscreants were armed with sticks, spears, bows and arrows and broken bricks. According to him, as one of those persons threw one broken brick towards Ramanath he sustained injury.

19. So it appears from the evidence of prosecution witnesses that there was an incident of fighting in between the deceased Ramanath and accused Ranjit Chakraborty. It is the defence case that due to the incident Ranjit sustained injury and was sent to the hospital. This defence version finds support from the evidence of P.W 4. Defence has claimed that over this incident the villagers became excited and agitated and they surrounded the house of Ramanath in order to teach him a

lesson. We find corroboration of this defence version from the evidence of the prosecution witness also. It has transpired from the evidence on record that out of fear the victim climbed up to the tiled roof of the house and at that time, the mob which surrounded his house, started pelting stones, tiles etc. towards him resulting some injuries on his person. It further appears from the evidence of the prosecution witnesses that the victim Ramanath fell down from the roof and as a result of that he also sustained injury. This part of the evidence is practically undisputed. It appears that it is not the prosecution case that due to this part of the incident the victim died. The prosecution has set up a case that after the victim fell down, he was tied up by the accused persons and then taken to a different place and they assaulted him with lathi, back portion of the spear, sticks, broken tiles etc. resulting in his death. So we are to consider whether this second part of the incident, as alleged by the prosecution, has been established or not. We have already pointed out that it is the prosecution case that when the victim fell down, the accused persons in a body assaulted him severely with various weapons. Naturally it is expected that in that event the victim would suffer various types of injuries on all over his body had there been any such assault on him. In this respect, the best evidence would be the evidence of the Doctor who conducted the Post Mortem examination on the body of the deceased. This Doctor has been examined as P.W.21. He in his evidence did not support the prosecution case that the victim was assaulted by a large number of persons with lathi. Ballam, iron rod, chain etc. From his evidence it appears that he found ecchymosis on the right forearm, left shoulder and middle of abdominal wall and also at the back and extending from right shoulder joint area to middle of the back and some up to left shoulder joint. He also noticed that the liver of the victim was ruptured and there was fracture of the upper third of right ulna and upper end of radius. He also noticed that the right scapular and right elbow joint was fractured and dislocated respectively. In his cross-examination this Doctor admitted that the injury No. 1, 2 and 3 were simple in nature and those were not the cause of the death. According to the Doctor 'The ruptured liver, ruptured spleen and 8 ounce of blood in peritoneum cavity contributed largely to the death of the victim. Rupture of liver and rupture of spleen cannot be caused by simple fall. If a person falls from a height of 20 ft. then his spleen and liver may be ruptured in my opinion.' This

witness has further elaborated to the effect 'Lacerated injuries are caused by any hard and blunt substance. Lacerated injuries may be caused by blows with hard and rough substance. A lathi is a hard substance but not rough. Lacerated injuries are expected if 18/19 persons assault at a time at random. There is no lacerated injury in the said P.M. report.' So it appears from the P.M. report that there was no lacerated injury on the body of the deceased although it is the case of the prosecution that the deceased was assaulted severely by the accused persons with weapons like lathi, back portion of a spear, chain etc. So the evidence of the eye witnesses in respect of the alleged assault of the victim by the accused persons does not find support from the medical evidence. On the contrary, it appears from the defence version that when the villagers surrounded the house of the victim then out of fear he climbed on the roof of the house and ultimately he fell down resulting in his death. This version of the defence finds support from the evidence of the P.W.21 who has clearly opined that the dead body of the deceased suggested that the liver, spleen were ruptured. According to this Doctor if a person falls from a height of 20 ft. then the spleen and liver may be ruptured. We have already pointed out that the victim fell from the top of the roof and as such we cannot rule out the possibility that due to such fall the liver and spleen of the victim was ruptured and that might have resulted in his death. Be that as it may, we have already pointed out that the evidence of the eye witnesses does not find any support from the evidence of the P.M. Doctor so far as the alleged second part of the incident is concerned. Had there been any such assault by a large number of persons on the body deceased, as alleged by the eye witnesses, then the Doctor certainly would have noticed lacerated and other injuries on the body of the deceased which cannot be simple in nature, as pointed out by the Doctor. This shows that there is reason to believe that the eye witnesses did not depose faithfully at the time of trial. In this respect, learned Advocate for the appellant cited a decision reported in 1994 Cr. LJ 1385 Shri Niwas v. Ram Bharosey and Ors. wherein the three Judges Bench of the Hon'ble Apex Court clearly held that if the oral testimony of the witnesses is irreconcilably in conflict with the medical evidence and when it appears that the true picture of the occurrence was not placed by the prosecution before the Court then the accused persons are entitled to get the benefit of doubt. Similar is the case in our hand. We have already

pointed out that there are two parts of the incident, one is the fall of the victim from the roof when he was threatened by the villagers, resulting in his death and the other part is the assault by the accused persons by various weapons on the victim resulting in his death. So far as the first part is concerned we find sufficient corroborating evidence from the medical evidence which suggests that the victim might have died as a result of fall from the roof of his house. No corroborating medical evidence is available so far as the claim of the prosecution regarding the second part of the incident wherein it has been claimed that the victim died as a result of severe assault by various weapons by more than 25/27 persons. The medical evidence does not indicate any such assault. That apart, we have already pointed out that the claim of the informant that he saw the incident does not find support from the evidence of other witnesses. There is clear evidence that the defacto-complainant was informed about the incident and he had no occasion to see the incident. But inspite of that he claimed in the written complaint falsely that he saw the incident. That apart he stated in the FIR that Ramanath was injured by the accused persons by arrow. But even the eye witnesses did not support this. Even the Doctor has stated he did not notice any arrow injury on the body of the deceased. All these things suggest that from the very beginning, an attempt has been made to implead the accused persons by making some false and exaggerated statements. We could not rule out the defence suggestion that out of political rivalry the accused persons were impleaded in this case by way of making false and exaggerated statements. As such in view of the decisions cited above, we are of the opinion that the prosecution did not place the true picture of the incident and as such the accused persons are certainly entitled to get the benefit of doubt due to that reason.

20. Mr. Roy argued further that the manner in which the accused persons were examined under Section 313 Cr. PC by the learned Trial Judge was not at all proper. In this respect he has drawn our attention to the effect that the actual fact of assault as specifically done by the accused persons were not mentioned to the accused persons when the questions were put to them as per provisions under Section 313 Cr. PC It is the settled position that all the incriminating circumstances which are there in the evidence of the witnesses should be put to the accused persons during their examination under Section 313 Cr. PC so that they can give

sufficient explanation, if they so like. But so far as the present case is concerned, it appears that the learned Trial Judge did not describe the specific act, as done by the accused persons while committing the alleged offence, to the accused persons during their examination under Section 313 Cr. PC. This non-mentioning of the entire incriminating circumstances at the time of their examination under Section 313 Cr. PC to the accused persons, has certainly caused prejudice to them. That apart, if we look into the recording of the statement made under Section 313 Cr. PC then it will appear that nowhere there is any mention regarding the evidence of the Doctor who conducted the Post Mortem examination on the body of the deceased. So far as the present case is concerned, there cannot be any doubt that the opinion of the Doctor is a very vital thing and the learned Trial Judge was duty bound to inform the accused persons about the said opinion of the Medical Officer in order to give them opportunity to offer explanation, if any. But surprisingly it appears that the learned Trial Judge did not mention anything whatsoever about this evidence of the Post Mortem Doctor. This fact has certainly caused prejudice to the accused persons and on this ground also it must be held that the learned Trial Judge was not justified in holding the accused persons guilty without offering sufficient opportunities to the accused persons to offer their explanation in this respect.

21. Lastly, Mr. Roy, the learned Advocate for the appellant argued that in this case prosecution failed to examine the Investigating Officer in full and as such defence was deprived of taking contradictions as were there in the evidence of the eye witnesses from the said Investigation Officer. According to him, non-production of the Investigating Officer in order to allow the defence to take full advantage of his cross-examination has caused severe prejudice to the defence case and as such it is a fit case where the accused persons should be given the benefit of doubt by drawing an adverse presumption against the prosecution case. It appears from the record that this Investigating Officer is the P.W.22 Janardan Nandi. He was examined-in-Chief in full and thereafter cross-examined in part. During such cross examination the accused could take the contradiction from the said witness so far as P.W.3 Mritunjoy Chakraborty and P.W.4 Shibapada Nayek are concerned. This witness was last examined on 18.08.95. It is the admitted position that there are many other eye witnesses who have deposed against the accused persons.

Naturally it is expected that the accused persons would try to draw the attention of the Court by pointing out the contradictions in the evidence of those eye witnesses as given in Court and as made by them during investigation. In order to avail of this opportunity, the defence is required to cross-examine the Investigating Officer, who is the only person to give proper answer in this respect. But surprisingly after 18.08.95, although several opportunities, were given, the prosecution failed to produce this Investigating Officer for further examination. As such, ultimately on 21.06.96, evidence of the prosecution was closed and the next date was fixed for examination of the accused persons under Section 313 Cr.PC. Prosecution did not challenge this order. As such, the fact remains that the Investigating Officer could not be cross-examined by the accused persons in full. We have already pointed out that the law has given privilege to the accused persons to have a full fledged cross examination of the Investigating Officer in order to show that whatever the eye witnesses have stated in their evidence in Court, were not stated before the I.O. at the time of investigation. Since the accused persons were deprived of this opportunity, it must be said that same has caused severe prejudice to the accused persons and we have got no hesitation to hold that in absence of the full cross-examination of the Investigating Officer, the Trial Judge was not Justified in holding that the prosecution had been able to prove its case beyond any reasonable shadow of-doubt.

22. Therefore, from our above discussion, we have got no hesitation to hold that the circumstances as discussed above clearly show that it is difficult to accept the version of the eye witnesses as claimed by them. Their evidence, as discussed above does not find corroboration from the evidence of the Post Mortem Doctor. So far as the present case is concerned, it is palpable that there is conflict in between the ocular evidence with that of the medical evidence and as such in view of the decision of the Hon'ble Apex Court cited above, we have got no hesitation to hold that there is room for doubt regarding the genuineness of the claim of the eye witnesses to the effect that the deceased died as a result of the assault by the accused persons. Moreover, since, the prosecution has failed to produce the Investigating Officer for cross-examination, said fact also caused prejudice to the defence and it must be held that under such circumstances, an adverse prosecution should be taken against the prosecution case. We fail to understand

as how the learned Trial Judge could ignore all those things while passing the Judgment.

23. Considering all these tilings, we are of opinion that there is room for doubt regarding the genuineness of the prosecution case and we have got no hesitation to hold that the accused persons are entitled to get the benefit of doubt in view of the loopholes In the prosecution case, as discussed above. Thus we are of opinion that the learned Trial Judge was not justified in convicting the accused persons/appellants and In our opinion the appellants are entitled to get the benefit of doubt, like other accused persons, who have been acquitted. Under such circumstances we hold that the appellants are not guilty of the offence charged with and they are entitled to be acquitted.

24. In the result, the appeal and the same is allowed. The order of conviction, as passed by the learned Trial Judge against the appellants is set aside and they are acquitted and discharged from their bail-bonds so far as this case is concerned.

Send a copy of this Judgment to the Court below alongwlth L.C.R. for information and taking necessary action.

Xerox certified copy, if applied, be handed over to the parties on urgent basis.

Alok Kumar Basu, J.

25. I agree.

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