

Sk. Bellal and ors Vs. the State

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Court : Kolkata Appellate

Decided On : Dec-24-2010

Judge : Raghunath Ray, J.

Appeal No. : CRA NO. 42 OF 1990

Appellant : Sk. Bellal and ors

Respondent : The State

Advocate for Def. : Mr. Ashimesh Goswami; Ms. Minoti Gomes; Mr. Subir Ganguly, Advs

Advocate for Pet/Ap. : Mr. Milon Mukherjee; Mr. Kaushik Biswas; Mr. Biswajit Manna, Advs

Judgement :

1. Conspectus of the Appeal

Six appellants named above preferred the present appeal challenging the legality of the judgment and order of conviction and sentence rendered by the learned Sessions Judge, 2nd Court Hooghly on 13.01.1990 in Sessions Trial Case No. 51 of 1983 under Sections 148/307/149 and 302/149 IPC (in short Indian Penal Code). Their appeal was admitted on 13.02.1990. All of them were directed to be released on bail to the satisfaction of the learned CJM Hooghly vide this courts order dated 16.02.1990. When this appeal was made ready for hearing, they

absconded. In such a situation their bail bond was cancelled by this court on 07.08.2008 Subsequently Appellant No. 1 (A1 in short) surrendered on 19.11.08 while Appellant Nos. 2 & 4 (A2 & A4 in short) surrendered on 16.12.08 and 19.11.08 respectively. All the appellants except Sk. Tazen, since deceased were granted bail for the second time by this court on 08.07.09 During pendency of this appeal, A1 and Appellant No. 5 Sk. Tazen, (A5 in short) expired on 24.08.09 and 11.02.04 respectively. Factual Matrix

2. The facts emerging from the records of the case may be encapsulated as under :-

Sometime in May 1980 one Saiful Islam of Nalitjole was murdered. Three sons of late Abdul Gaffar of the said village within PS Dhaniakhali, namely Abdul Salam, the de facto complainant PW1, Abdul Sayed and Najrul Islam were arrested in connection with murder of Saiful Islam. After their release on bail, these three brothers could not return to their house at Nalitjole since their residence was ransacked and badly damaged by the villagers. They had to stay temporarily in the house of Jigiria (PW3), one of their distant relations at Musalman para at Ayodhya.

3. Their endeavour was, however, on for going back to Nalitjole. Perceiving their eagerness to return to their own house, A1 since deceased and other covillagers asked them to pay visit to their village ostensibly on the plea of squaring up the disputes. Accordingly on 25.04.81, the de facto complainant PW 1 being accompanied by his two brothers namely Abdul Sayed and Najrul Islam and one of their co-villagers namely Khapa @ Ajijul (PW2) and some of their neighbours in Ayodhya e.g. Jigiria (PW3), Ismail, PW4 and a few others had been to their house at Nalitjole. While they were inspecting damages caused to their house, PW 1 and his companions found assemblage of some villagers near their house. Those people were talking amongst themselves in a low voice. PW1 and his companions grew suspicious. Sensing danger, they started to run to save themselves. But A1 and his associates armed with deadly weapons like Lathi, Tangi, spear, sword bow and arrows were found chasing PW1 and his brothers together with their companions. After a hot chase those miscreants managed to catch hold of PWs 3 & 4 ultimately.

4. The de facto complainant Abdul Salem alongwith his two brothers and PW 2, however, managed to make good their escape to their neighbouring village Hetampur and took shelter in the house of Haru Ghosh (PW6). But the appellants and their associates ultimately reached there and forcibly entered the said house. They dragged PW1, his two brothers and PW2. Their hands were tied with Gamcha from behind and brought to the field of Sk. Maziam. Appellants and his associates formed an unlawful assemble there and attacked PW1 and his brothers Abdul Sayed and Najrul Islam with sword and other deadly weapons. PW 1, however, managed to escape from the clutches of miscreants and to take shelter in the house of one Aziz @ Idrish.

5. Nakul Ghosh (PW5), the brother of Haru Ghosh (PW6) from whose house the victims were forcibly dragged had been to the Dhaniakhali PS to inform the police about the occurrence of the murder of Najrul and S. I. R. N. Sarkar (PW 13), the then duty officer diarised the matter vide G.D. Entry No. 1085 dated 25.04.81 (Exhibit 2) and proceeded towards the P.O. alongwith the force. The de facto complainant was, however, subsequently rescued by the police force and taken to Mazans field where his two brothers Nazrul Ismaeil and Sk. Sayed were found lying dead with severe injuries on several parts of their person. Both of them were brutally murdered at about 11.45 AM on 25.04.81. As per his saying S. I. Sri Sarkar recorded the de facto complainants statement which was subsequently treated as an FIR (Exhibit

1). Dhaniakhali PS Case No. 18 dated 25.04.81 under sections 143/149/342/326/307/302 IPC was registered for investigation against as many as 26 persons including the appellants whose names also figured in the FIR alongwith 8-10 more persons whom FIR maker knew by their faces.

6. PW13 took up investigation of the case and in course of investigation he conducted Inquest over both the dead bodies of the victims and reports (Exhibits 3 & 4) were prepared by him. He inspected the P.O., prepared its sketch map with index (Exhibit 5). He also seized bloodstained wearing apparels of the deceased, the bloodstained earth as well as controlled earth from the P.O. under a proper seizure list (Exhibit 6). He recorded the statements of witnesses and also collected

PM Examination Report of Najrul and Sayed. On his transfer, Asgar Ali S.I. (PW14) was asked to conduct further investigation. Accordingly, he perused the CD and recorded statement of PW 5 in course of further investigation. On completion of investigation, the second I.O., PW 14 submitted charge sheet under sections 148/149/307/302 IPC against the appellants and 12 others.

7. Since offences alleged against the appellants and others were exclusively triable by the Id. Court of Sessions, the case was committed to the Court of Sessions by Sri G.C. Sarkar, the then Id. Judicial Magistrate, 1st Class, Hooghly Sadar, vide order dated 3.2.1983. The case was subsequently transferred to the Court of Id. Additional District and Sessions Judge, 2nd Court Hooghly by the then Sessions Judge for its disposal. All the 26 accused persons so charge sheeted were charged under sections 148/307 IPC and 302/149 IPC and put on trial since they pleaded not guilty to the charges, levelled against them. During trial the prosecution examined as many as 16 witnesses and also relied upon several documents (Exhibits 1, 2, 3 series, 4, 5, 6, & 7 coupled with Material Exhibit 1 collectively). On closure of evidence, (i) Mohid Mella, (ii) Sk. Mozem Ali, (iii) Sk. Abdul Aziz, (iv) Md. Sayed, (v) Sk. Inadul Halder, (vi) Sk. Iaqub & (vii) Sk. Ibrahim were acquitted under section 232 Cr.P.C. of the charges under sections 148/307/149 & 302/149 IPC vide order dated 05.03.85. The trial, however proceeded against the rest 18 accused persons.

8. After conclusion of trial the entire evidence both ocular and documentary coupled with other relevant surrounding circumstances and materials on record, were taken into consideration by the Id. Trial court and it was opined that the prosecution failed to bring home the charges under sections 148/307/149 and 302/149IPC against accused (i) Musair Rahaman, (ii) Ozifar Rahaman, (iii) Dilwar Hossain, (iv) Sk. Sauquat Ali and (v) Sk. Ismaiel.

Accordingly all of them were acquitted of the abovementioned charges. However, the present appellants namely (i) A1 (ii) Sk. Khabir (A2 in short), (iii) Sk. Moharan (A3 in short), (iv) Sk. Batu (A4 in short), (v) A5 & (vi) Sk. Aziz (A6 in short) were found guilty and convicted under section 148/307 IPC read with section 149/302 IPC. They were sentenced to undergo imprisonment for life each and to pay fine of

Rs. 500/- each i/d to undergo further R.I. for one month each for the offence under section 302 read with section 149 IPC vide judgment and order dated 27/3/1985.

Previous Criminal Appeal

9. Being aggrieved, with the aforementioned judgment and order of conviction, Criminal Appeal No. 123 of 1985 was filed questioning its legality and validity. It was argued on behalf of the appellants therein that the third charge under section 302/149 IPC was framed for the murder of two persons namely Abdul Sayed and Sk. Najrul in a rolled up manner without making the separate charge for separate distinct offence of murder of two persons contravening the provisions of Section 218 Cr. P.C. According to the appellants, there has been illegality in framing of the charge and, therefore, the conviction and sentence was not sustainable on the basis of such illegal charge. It was, further, argued that there was no separate and distinct discussion and consideration on each of the two murders in question by the Id. Trial judge. Rather, there was a rolled up discussion in his judgment in respect of murder of afore-named two persons. It was, therefore, pleaded on behalf of the appellants that there had been failure of justice causing prejudice to the appellants. Learned counsel for the appellants, therefore, urged the Division Bench of this court to send the case back on remand for retrial after framing the charge in accordance with law. Learned counsel for the state also conceded to such submission.

10. After taking into consideration the afore-mentioned submission advanced on behalf of the appellant and the state, the Division Bench of this court was pleased not to accept the appellants proposition that the third charge was illegal. But it was found by this court that there has been irregularity in respect of framing of the third charge. It was, however, held that as per section 464 of the Cr. P.C. the defect in the charge is not illegal but irregular and no finding or sentence or order by a competent court of jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including the mis-joinder of charges, unless, in the opinion of the court, a failure of justice was in fact, occasioned thereby. After a close scrutiny of the relevant portion of the judgment under challenge, it was found that a jumbled up

discussion was made by the Id. trial judge without making any separate and distinct discussion with reference to the evidence in respect of the murder of the afore-named two persons as also on the charge under sections 302/149 IPC for their murder. In the penultimate paragraph of the judgment of this Division bench dated 31.07.1981 passed in CRA 123 of 1985 it was held by the Division Bench as under :-

We, therefore, are of the opinion that there has been a failure of justice and the justice demands that the case should be retried after framing the charge according to law.

In the result, the appeal is allowed and the conviction and sentence of the accused appellants are set aside and the case with regard to these appellants be retired again on the basis of the charges to be framed against them according to law by any Id. Sessions Judges other than Sri S. N. Ganguly. No observation in this order shall be treated as expression of opinion with regard to the merits of the case.

Retrial

11. In obedience to the afore-quoted direction of the Division Bench of this court, the case was taken up for retrial of the seven accused persons after framing charges afresh according to law and other 11 accused persons who had been acquitted of the charges on the strength of this courts judgement dated 31.07.1986 were, however, not put to trial again by the Id. Court below, in course of retrial.

12. All the seven accused persons were asked to answer the charges so framed afresh during retrial as under :-

First That you along with others on or about the 25th day of April, 1981 at village Nalitjole, P.S. Dhaniakhali, Dist. Hooghly, were members of an unlawful assembly and did in prosecution of the common object of such assembly, viz., in murdering Abdul Sayed and Sk. Nazrul and attempting to murder +Abdul Salam committed the offence of rioting and at that time were armed with deadly weapons, to wit, swords, tangis, lathis etc. and thereby committed an offence punishable under section 148 of the Indian Penal Code, and within the cognizance of this court of

sessions.

Secondly That you, along with others, on or about the same day and at the same place were members of an unlawful assembly and in prosecution of common object of such assembly viz., in murdering Abdul Sayed and Sk. Nazrul and attempting to murder Abdul Salem, some of you did commit an offence of attempt at murder by causing sharp-cutting injured to Abdul Salam and you are thereby under section 149 of the Indian Penal Code guilty of causing the said offence of attempt to murder the said Abdul Salam, an offence punishable under section 307 of the Indian Penal Code, and with the cognizance of this court of Sessions.

Thirdly That you along with others on or about the same day and at the same place were members of an unlawful assembly in prosecution of the common object of which, viz., in murdering Abdul Sayed and Sk. Nazrul, some amongst you did commit murder commit murder by intentionally causing the death of Abdul Sayed and you are thereby u/s. 149 IPC guilty of causing the said offence of murder, an office punishable under section 302 of the Indian Penal Code, within the cognizance of this court of Sessions.

Fourthly That you along with others on or about the day and at the same place were members of an unlawful assembly in prosecution of the common object of which, viz., in murdering Abdul Sayed and Sk. Nazrul, some amongst you did commit murder to intentionally causing the death of Sk. Nazrul and you are thereby u/s. 149 IPC guilty of causing the said offence of murder an offence punishable under section 302 of the Indian Penal Code, and with the cognizance of this Court of Sessions.

All of them pleaded not guilty to the charges so recast against them in terms of this courts earlier directions. They were put to trial accordingly.

13. During retrial as many as 16 witnesses were examined. Since Dr. Parimal Sens presence could be secured as a witness for the second time, his earlier deposition in the previous trial as PW14 was admitted into evidence as PW16 in terms of section 33 of Indian Evidence Act as agreed by both sides vide Id. trial courts order No. 34 dated 10.08.1989. A good number of documents were

exhibited as Exts. 1, 2, 3, 4, 5 & 6 and wearing apparels of both the deceased were marked as Material Ext. I collectively in support of the prosecution case. All the appellants were examined u/s 313 Cr. P.C. They, however, declined to adduce any defence witness in order to substantiate their plea of innocence, denial and false implication. The defence, however, sought to make out a case through defence suggestion that two deceased were killed and others including PWI were assaulted by villagers when they made an attempt to commit dacoity at Hetampur village.

14. Upon consideration of evidence on record together with the case of defence as sought to have been made out during retrial, the Id. Trial judge vide judgment and order dated 13.01.1990 convicted (i) Sk. Bellal, Appellant No. 1 (ii) Sk. Khabir, Appellant No. 2 (iii) Sk. Moharan, Appellant No. 3 (iv) Sk. Batu, Appellant No. 4 (v) Sk. Tazen Appellant No. 5 & (vi) Sk. Aziz, Appellant No. 6 under section 148/307 read with Section 149 and 302 IPC. All the six convict appellants were heard by the Id. Trial court on the question of punishment and on careful consideration of nature and extent of the charges and the manner in which they were committed the Id. Trial judge, sentenced all of them to rigorous imprisonment for life and also directed them to pay a fine of Rs. 500/- each i/d R. I. for five months each for the offences under section 302 read with section 149 IPC. They were also sentenced to undergo R.I. for two years each for the offence under section 307 read with section 149 IPC and also to pay a fine of Rs. 500/- each i/d to suffer further R.I. for three months each. All of them were further sentenced to R. I. for six months for the offence under section 148 IPC and also to pay a fine of Rs. 100/- each i/d to further R. I. for one month each. All the sentences were or to run concurrently. It was however, opined by the Id. Trial judge that the charges against accused Kutubuddin have not been fully and satisfactorily proved by the prosecution beyond any shadow of reasonable doubt and as such accused Kutubuddin was acquitted of the afore-mentioned charge.

Present Appeal

15. Challenge in the present appeal is to the judgement and order of conviction and sentence impugned passed by the Id. trial judge during retrial.

Appellants Contention

16. Assailing the judgement impugned Mr. Mukherjee formulated his argument as under :-

I) Charge framed by the Id. trial court against the appellants does not contain such particulars of the manner in which the offence was committed and the charge itself was vague to some extent. In this context he has invited our attention to the formal charge wherefrom it would appear that appellants were charged alongwith others without specifying the names of others. The exact place and time of occurrence have not been noted therein. According to him accused persons are entitled to know with certainty and accuracy the exact time and place of occurrence. Such omission of vital information in the charge is bound to cause a serious prejudice in his defence. In this connection he has referred to a ruling of the Apex Court reported in 2008 (2) C. Cr. LR (SC) 638 (Latu Mahato vs. State of Bihar] wherein it is held that in order to frame charge properly details of accusations together with all relevant particulars are to be brought to the notice of appellants. Reliance has also been placed upon a celebrated judgement of the Apex court reported in AIR 1956 SC 116 [Willie (William) Slaney, Appellant vs. State of M.P., Respondents]. It is argued that formal charge must set out such particulars of date, time, place and person as are reasonably sufficient to give the accused notice of the matter with which he is charged and such requirement is mandated under section 213 Cr. P.C. In the present case, according to Mr. Mukherjee the charge does not specify the names of places where the alleged incidents occurred, its time lag and the manner of happenings. In such circumstances, the appellants could not set up an appropriate defence during re-trial. Therefore, therein conviction of the appellants based upon such defective charge is not legally sustainable.

II) Relying upon paragraphs 5, 7 and 9 of a decision reported in AIR 1976 SC page 2423 [Iswar Singh, Appellant vs. State of U.P., Respondent], it is argued that FIR is required to be sent forthwith to a Magistrate competent to take cognizance, as mandated under section 157 Cr. P.C. An unexplained delay in sending FIR to the Magistrate is fatal for the prosecution. FIR in this case was lodged on 25/4/81 at 5.15 PM and the said FIR was placed before the SDJM Sadar Hooghly on

29.04.81. Further, non-examination of Idrish, local grocery shop owner named in the FIR and essential to the unfolding of the narrative has dealt a severe blow to the prosecution case. No plausible explanation is forthcoming for such unusual delay of four days in despatching the FIR as also failure to examine Idrish. In the absence of any adequate explanation in this regard, the genuineness of the prosecution case is to be doubted. More so, whenever there are discrepancies in the account given by the PWs and the narration of events appearing in the FIR.

III) Referring to a ruling of this High Court reported in AIR 1924 Cal 323 [Mamfru Chowdhury & Ors vs. King Emperor], it is submitted by him that evidence so adduced by the prosecution should be consistent to show that the incident alleged happened at the time, in the place and under the precise circumstances narrated by the prosecution. But in the present case the prosecution has failed to satisfy such requirements. Therefore, the prosecution case is liable to be rejected in toto on that score.

IV) It is next argued by him that it is not safe and prudent to place reliance upon interested witnesses. Since the entire prosecution case rests upon interested eye witnesses who are closely related and connected with the victims and no independent witnesses have come forward to support the prosecution case, the testimony of close relatives who have tendency to exaggerate or add facts, should be discarded. Appellants conviction based upon such testimony, therefore, suffers from legal infirmity. Reliance has been placed upon Para 48 of a decision of the Apex Court reported in AIR 1984 SC 1622 (Sharad Birdhichand Sarda, Appellant vs. state of Maharastra, Respondent] as also Paragraph 7 of another decision reported in AIR 1994 SC 115 [State of Haryana, Appellant vs. Inderaj & Anr, Respondents.] in support of the afore-mentioned contention. In this connection it is further submitted by him that, if an injured witness misses to name some of the accused persons then such omission goes in favour of the accused persons and their presence at the scene of occurrence becomes doubtful. According to him, whenever, the injured witness has failed to mention the names of all accused persons, their presence in the P.O. can be called in question. He has referred to a ruling of the Apex court reported in 2001 SCC (Cri) 735 [Subhash Chander, Appellant vs. Kisanlal & Ors., Respondents] to fortify his argument.

V) Mr. Mukherjee, further, submits that examination of accused persons in terms of 313 Cr. P.C. is not an idle formality. The appellants were not properly examined under section 313 Cr. P.C. as per requirement of law in the present case. According to him, every inculpatory material which came to the fore, during trial was not brought to the notice of appellants in course of their examination u/s 313 Cr. P.C. in order to afford them an opportunity of explaining the same in its proper perspective. In view of such material omission, their examination u/s. 313 Cr. P.C. has become defective. It is also contended by him that the basic fairness of a criminal trial has thus been seriously jeopardized. According to him, incriminating materials and circumstances which were not put to him have not been excluded from the consideration of the Trial court while recording an order of conviction against them. It is undoubtedly a serious infirmity and such defective examination has, therefore, caused a prejudice to the appellants. Para 142 of Shards case (supra) has been relied upon in this regard.

VI) It has next been argued vehemently by Mr. Mukherjee that in an appeal against conviction a retrial cannot be ordered without setting aside the judgement of the trial court. But in the present case although retrial was ordered by the High Court, as many as eleven accused who were acquitted by the previous judgement, were not brought on record to face retrial. In that view of the matter, order of conviction passed against six appellants during retrial cannot be legally valid. In this context he has relied upon two rulings of the Apex Court reported in AIR 1998 (SC) 2910 [Avtar Singh & Ors, Appellants vs. Bhajan Singh & Ors, Respondents]. Relying upon another ruling of Apex Court reported in AIR 1989 SC 129 [State of West Bengal, Appellant vs. Laisal Haque & Anr. Respondent] it is submitted by him that in a case where some of the accused were acquitted and the rest were convicted by the Id. trial court, the retrial cannot be directed by the High Court in the appeal preferred by the convicts. It is further argued by him that in the present case retrial directed by the High Court earlier in the Criminal Appeal No. 123 of 1985 is not sustainable as it would amount to a trial de novo against all the accused. Espousing his argument further, it is submitted by him that the order of conviction passed by the Id. court below during retrial suffers from serious legal infirmities since there was no trial de novo against all the accused. According to him, retrial conducted afresh in terms of this courts direction vide judgement and

order dated 31.07.1986 passed in CRA No. 123 of 1985 stands vitiated for the simple reason that accused acquitted earlier were not retried along with the present appellants since such retrial was, for all practical purposes, a de novo trial. Fortified with the afore-cited rulings it is further argued by Mr. Mukherjee that since a re-trial could not have been ordered without setting aside the judgement in its entirety, persons acquitted in earlier trial are to be invariably brought to the fold during retrial. He is of the view that in a Session Trial where several persons were involved an order of retrial is not legally permissible as it would tantamount to a trial de novo against all the accused including those who were acquitted earlier. There is also hardly any scope for splitting up of the trial. Therefore, it is submitted by him that the order of conviction under challenge before this court is not sustainable on that score alone since all the accused were not tried during re-trial.

Per Contra

17. Refuting such argument Mr. Ganguli, Id. Counsel for the State submits that there is no doubt that the case of the prosecution rests on evidence adduced by PWs 1, 2 & 15. It is argued by him that the testimony of PW1 the injured-cumde facto complainant clearly establishes that Muharam, Khabir and Azizul along with other two appellants since deceased assaulted Najrul, Sayed since deceased with deadly weapons. Further, Sk. Tanjen since deceased, Muharam & Apsar already acquitted were named by PW1 the injured before the Doctor (PW15), who medically treated him for bleeding injuries caused by sharp weapons. Anomalies regarding the manner in which occurrence took place are bound to happen in a case where the victims were chased by the armed assailants. Evidence on record suggests that there were two groups of miscreants one of such groups was armed with deadly weapons while another, of course, had no arms and in such perspective of the matter PW2 states before the court that some of them were empty handed. He has supported the version of PW1 on all material points. Mr. Ganguly has also drawn our attention to the explanation offered by PW1 at the outset of his cross-examination about delayed recording of his statement (Exhibit 1) i.e. after the lapse of about 12 hours from the time when the incident was over. PW2s evidence also indicates that Khabir had bows and arrows and Muharram had also played a vital role assaulting the injured as well as the victim. The

testimonies of PWs 1 & 2 have fully been supported by Dr. Ghosh PW 15 as well as Dr. Sen PW 16. He is, however, candid enough to submit that the evidence on record does not establish involvement of Sk. Butu, Appellant No. 4. It is, therefore, submitted by him that there is hardly any scope to disturb the conviction of the rest of the appellants.

Profile of witnesses

18. Sixteen witnesses examined by the prosecution may conveniently be categorized for a profitable discussion under the following broad heads :-

I. Eye-witnesses

Abdul Salam, the injured is the brother of both the victims since deceased. He is an eye witness-cum- de facto complainant. He is examined as PW1, There are also other eye-witnesses namely Khapa @ Azizul (PW2), a neighbour of the injured Sk. Jigaria, PW3, Sk. Ismaeil PW4. They were the companions of the injured. Nakul Ch. Ghosh PW5 and Haradhan Ghosh PW6, were residents of Hetampur. The deceased and the injured were dragged from their house at the fateful moment on 25.04.81.

II. Medical Evidence

(i) Dr. Radhanarayan Bhattacharyaa PW7 examined the injured de facto complainant, Salam in Imambarahah Sadar Hospital, Chinsurah (ii) Dr. Tapas Kr. Sarkar (PW15) also examined the injured as M.O. Neuro Surgeon, N.R.S. Medical College & Hospital and (iii) Dr. Parimal Kr. Sen (PW16) as M.O. Surgeon of Imambarahah Sadar Hospital, Chinsurah conducted PM Examination over the dead bodies of Sk. Najrul and Abdul Syed.

III. Police Witnesses

(i) Nemai Ch. Kundu (PW8) S. I. of Police filled in the formal FIR (ii) Debi Prasad Dev (PW9) S. I. of Police handed over the complaint to the duty officer of Dhaniakhali PS. (PW8) (iii) Nilmoni Modak (PW11), a police constable carried and identified the dead bodies of the victims at the time of PM Examination. (iv)

Rabindranath Sarkar (PW13), S. I. of police & 1st I.O. and (v) Ali Asgar (PW14), S. I. of police & 2nd I.O.

IV. Tender Witnesses

(i) Debabrata Das, S. I. of Police, was the then OIC Dhaniakhali PS. (PW10) and Bhagyadhar Mondal (PW12) was a constable who identified the dead bodies of the victims for post mortem examination to the doctor (PW10). Both of them were tendered for cross-examination. PW10 was not cross-examined while cross-examination of PW12 was declined.

. Hostile Witnesses

Eye-witnesses namely i) Jigria and (ii) Ismail PWs 3 & 4 respectively as also (iii) Nakul Chandra Ghosh (PW5) and (iv) his son Haru Ghosh (PW6) in whose house the deceased, injured and others took shelter on the fateful day being chased by miscreants were declared hostile and were cross-examined by both sides.

19. Before we proceed to take into consideration the rival submissions advanced by both sides we propose to evaluate ocular testimony of eye witnesses coupled with medical evidence, I.O.s testimony and other relevant documentary evidence.

20. P.W. I The de facto complainant Abdul Salam who sustained severe bleeding injuries on his person in course of assault perpetrated upon him and his brothers since deceased by the appellants and others, testifies that while some people led by Bellal abused them with filthy languages and asked them to stop there, they being unnerved looked back and found A1 approaching them with a sword in his hand while Sk. Khabir, (in short A2) was found to come towards them along with A1 with bows and arrows in his hand. He also saw Sk. Maharam (in short A3) and Tazen A5 since deceased having a sword and tangi in their hand respectively. Subsequently, after covering some distance they could enter into contiguous village Hetampur and take shelter in the house of Haru Ghosh PW6 of that village. It further, transpires from his testimony that the people including the appellants who were chasing them numbering 32-35 reached the house of Haru Ghosh and entered the inside of that house and took out the complainant along with four others and dragged them forcibly outside and tied the hands of the de facto

complainant and his two brothers Najrul and Abdul Syed with a napkin and, thereafter, they dragged them towards the field and after taking them to the land of Mazam, A1 shot an arrow on his lips causing bleeding injuries there. A3 assaulted him thereafter with a sword on his face just below his right eye and A5 assaulted him with a sword on the right palm.

21. This deponent further asserts as under :-

After running for some distance and before entering the house of Aziz I stood for a while and looked back towards the place of occurrence and found that my brother Najrul and Abdul Sayed had been surrounded by about 30-35 men and of them Khabir, Aziz, Bellal, Tazen, Maharam, Ismael and Asphar () went on assaulting Najrul and Abdul Sayed with lathis, tangis, sword, spear and bows and arrows and I also found Najrul and Abdul Sayed to fall down on the ground with injuries. Accused Khabir, Aziz, Bellal, Batu, Tazen, Kutubuddin and Maharam were identified on dock .

22. This injured eye-witness has also stated in unequivocal language that the motive behind the assassination of my brothers by the accused persons and their assaulting me owing to the fact that police arrested me and my brothers in the case of murder of Safuluddin in our village in 1980. He has been cross-examined at length but nothing has been elicited from his cross-examination to indicate that he had deposed falsely. He is also candid enough to say that it is not his case that all 30-35 persons were taking part in the assault. He has also emphatically denied the defence suggestion that on 25.04.1981 he alongwith others attempted to commit dacoity in the house of Banshi Ghosh of Hetampur village and at that time they were chased by the villagers of Hetampur village and being so chased they fled away to different directions. He has corroborated the contents of FIR (Exhibit 2) on all material particulars regarding assault upon him and his two brothers as also fatal injuries causing death of his two brothers.

23. PW II Khapa @ Azizul testifies that while he alongwith PWI and his brothers and other relatives was inspecting the damaged house of the victims, they found some people speaking in low voice and they were empty handed. Sensing some trouble they started going towards a road through a garden of that village. While

they reached the road, the villagers asked them to stop. At that point of time when they looked back they found that 25-30 people armed with lathi, tangi, spear, bows and arrows and guns were chasing them. They, therefore, started running out of fear towards another village. While so running away they entered into the house of a villager. However, little later those villagers came there and surrounded the house and some of them climbed upon the tiled shed of the house and after removing the tiles they started shooting arrows inside that house causing bleeding injuries on the person of PW1. Some of the miscreants also entered the room after breaking open the doors. They caught them and tied the hands of Abdul Salam, Najrul and Sayed with napkins and, thereafter, dragged them towards their village. It is his further evidence that those armed people started beating Sayed, Najrul and Salam with lathi, Tangi, sword etc. and while beating continued, PW1 fell down on the ground. As a result of such severe assault Najrul and Syed expired, while the injured deponent and others were detained in a grocery shop of Naratzole village. They were rescued at about 3-30 PM when the police came to the shop and at that point of time villagers were not found in the village. He also identified namely Khabir, Sk. Bellal and Sk. Kutubuddin on dock. It is available from his testimony that Najrul, Syed and Salam were assaulted by Khabir and Bellal with sword, arrows and rods. 24. Another eye-witness P.W.2 who supported PW1 on broad details of the incident was subjected to rigorous cross-examination but his testimony remains unshaken. It is reiterated by him during cross-examination that the assembly of 30 to 35 persons was found to stand by the side of a grocery shop near the damaged house of Salam while some of such assembled persons, took part in the assault. They assaulted Sayd and Nazrul. It is frankly admitted by him that he did not count how many strokes they gave to the deceased with their weapons. It is however, available from his cross-examination that such assault took place during the period of 15 to 20 minutes. It is elicited from his cross-examination that he found an arrow being shot at only once when they took shelter in the tiled house of a man. The assailants shot the arrow after removing the tiles of the house. During cross-examination the defence has sought to take out some contradictions in respect of statements made before the I.O. and also before the Court on the previous occasion when he deposed as PW 13. He has however, categorically asserted before the I.O. as also before the court on both the

occasions that Nazrul Islam and Abdul Sayed, the deceased and Salam, the injured were taken outside the room and their hands were tied with napkin and, thereafter, they were dragged by the miscreants towards the village of Nalitjole. Therefore, on that vital aspect of the matter, statements of PW2 before the I.O. as well as before the court on two occasions was not at all discrepant. In such view of the matter, contradictions pointed out on behalf of the appellants, however, appear to be very minor in nature and are of no consequence since the broad spectrum of the gruesome incident of murder of two persons on the fateful day at the material point of time is well established from his convincing testimony taken as a whole.

25. It is also available from his cross-examination that the distance between the place where the dead bodies were lying and the tiled house where they took shelter would be about 5 minutes run. PW2 further gives out in his crossexamination that while they were running through the fields not along the road they did not come across any jungle or trees. Pausing for a moment, it may be pointed out that his version indicates that, it was an open field. Such being the position, assault upon the victims was visible from the side of the house. True, the deponent identified Khabir, Sk. Bellal and Sk. Kutubuddin on dock without mentioning their names. But the fact remains that he identified those three accused persons on dock and he was also emphatic in his assertion that those three accused persons alongwith others assaulted Najrul, Sayed and Salam with sword, arrows and rods.

26. True, he failed to recollect the names of three accused whom he identified on dock after the lapse of eight years. Such a situation is bound to happen because of passage of long time. It neither rules out involvement of accused identified by him nor affects the credibility of the prosecution case. He has fully corroborated the injured witness on all material aspects of the matter. As a matter of fact, his testimony althrough bears a ring of truth. We do not find any earthly reason to discard the cogent and consistent evidence of this eye-witness.

27. A critical analysis of the injured witness, PW1 and the eye-witness PW2 would reveal that they have corroborated each other and such corroborative evidence serves as the sheet anchor of the prosecution case of murder of two brothers and

inflictment of bleeding injuries on the person of the injured caused by some of the appellants with the help of sharp cutting as well as blunt weapons. Their evidence taken in its entirety leads us to opine that both of them are wholly reliable witnesses. More so, whenever nothing has been suggested from the side of the defence to the eye-witness, PW2 that he had any ill feeling against the accused persons. As a matter of fact, in course of his cross-examination it transpires that he had no occasion to visit Nalitjole earlier prior to the incident. Therefore, it is quite natural for him to narrate the entire incident without any embellishment or exaggeration. Accordingly he identified only those persons whose faces he was in a position to recollect. In such a situation, we are not prepared to accept the defence plea that in the absence of T.I. Parade this court should view his identification of three accused on dock with suspicion. 28. After analyzing evidence of both P.W.s.1 & 2 in its proper perspective, the learned Trial Court has rightly placed much reliance upon their corroborative testimony. It has correctly been held by him that the entire prosecution story does not suffer from any infirmity. He has further relied upon several circumstances of very strong nature which include medical evidence, lodgment of G.D Entry No. 1085 dated 25.04.1981 (Exhibit 2), Inquest Report of both the deceased (Exts. 3 & 4), circumstances leading to assault of the victims and injured PW1 as unfolded in the FIR itself (Exhibit I), Seizure List (Exhibit 6) pertaining to seizure of blood stained wearing apparels of both the deceased coupled with other relevant surrounding circumstances of similar nature. We are also not oblivious of the fact that both PWs 1 & 2 were manhandled and completely over-powered by the miscreants numbering 30 to 35 persons armed with deadly weapons after a hot chase covering considerable distance. Such a terribly perplexing and horror-stricken situation would definitely put them under severe stress and strain and make them panicky. In such a fact situation they could not portray a vivid pen picture of the entire incident in a full proof manner after a gap of long eight years. There are certain variations in their mode of narration of the sequence of events before the Court due to mental disposition, shock and horror at the time of occurrence and threat to the life. Such variations, however, do not touch the core of the case. That apart, when a large number of accused persons are involved in the occurrence the witness who is also injured in the incident can naturally get confused and his

testimony cannot be rejected on the ground of contradictions. We, therefore, feel inclined to place implicit trust on the unimpeachable corroborative testimony of these two witnesses.

29. Adverting to the testimony of P.W.3 Sk. Jigiria and P.W.4 Sk. Ismail who were also companions of P.W.1 on the date of occurrence, it is found that both of them have not supported the case of the prosecution and have been declared hostile. As P.W.3 Sk. Jigiria has, however, deposed that two brothers of Salam went with them about 7/8 years back to Naritzole village and the house of Salam was then found in damaged condition. At that point of time they found several persons to assemble at a place near that house. Both of them were declared hostile and cross-examined by the prosecution as well as the defence. PW 3 has, however, deposed that while they were returning from that village, several people armed with lathis chased them. Similarly PW4, another hostile witness has also deposed that one day about 7-8 years back Salam took him to the village Nalitjole. Nazrul, Syed, Jigiria and two others accompanied them. They reached the village at about 10 10.30 AM and found Salams house in damaged condition. According to him, villagers who were following them were empty handed. Both of them have, however, sought to introduce a new story of visiting the village for site seeing. It can, however, be inferred from the testimony of these two hostile witnesses if taken as a whole that their presence in the village at the material point of time cannot be doubted and all these hostile witness have endeavoured hard to save accused by suppressing the truth. Be that as it may, the fact remains that even if the testimony of all these hostile witnesses is excluded from our consideration, there are other corroborative evidence and circumstances on record to establish factum of murderous assault upon two victims namely Sayed and Nazrul as also severe assault upon the victim PW1 Salam with lathis, shovel & Sword causing bleeding injuries on their person. 30. A close analysis of other two hostile witnesses evidence, however, tends to show that both PWs 5 & 6 were in their field when the incidents of assault and murder took place. It is, however, interesting to note that none of the brothers ever put forward any specific denial about the presence of PWs 1, 2, 3 and deceased in their house being chased by the miscreants including the appellants. On the contrary, both of them stated that they knew about the death of those persons. They have, however, prevaricated

the defence case by deposing that they cannot say whether there was any attempt to commit dacoity at that time. The reason for resiling their earlier statement made before the I.O. is best known to them. At any rate, PW6 gives out in his testimony that on their return from field they came to know from the inmates of their house i.e. mother, sister, wife and daughter that several unknown people had entered into their house at about 10-10.30 AM and forcibly took away four persons who had already been staying at that house in their absence.

31. Against such backdrop of factual scenario projected through ocular testimony the medical evidence plays a pivotal role for judging the veracity of the prosecution case. Turning to medical evidence we find that the result of the Post Mortem Examination clearly indicates that injuries sustained by both the victims were ante-mortem and homicidal in nature. The M.O. (PW 16) conducted post mortem examination on the dead body of Nazrul and found the following injuries :-

1. Incised wound along the front of the neck 6 x 3 x 2 above the suprasternal notch, trachea, oesophagus and muscles severed.
2. Incised wound in front of left shoulder 1 x 1 x .
3. Lacerated wound over dorsum of right foot about 4 x 4 x bone deep, second, third and fourth metatarsal severed with tendons, soft tissues.
4. Lacerated wound above the left ankle middle aspect about 1 x 1 x .
5. Multiple abrasions over the right upper limb i.e. arm and forearm, chest, abdomen right thigh and right left.

32. On dissection the doctor found the body to be quite healthy and normal and no abnormality was detected in respect of the other organs of the deceased.

In his opinion death was due to severe shock and hemorrhage as a result of the above injuries which were ante mortem and homicidal in nature. He has further opined that the injuries No. 1 and 2 might be caused by assault with a tangi and sword and injuries no. 4 & 5 might have been caused by assault with blunt weapons like lathi and iron rod. He has also opined that the injury no. 1 itself was

sufficient to cause the death of the human being in the ordinary course of nature and the injuries found on the body taken together were sufficient to cause death in the ordinary course of nature.

33. On dissection of dead body of Abdul Sayed, another victim the deponent found the following injuries :-

1. Incised wound middle of right forearm about 4 x 2 x bone deep with fracture of ulna.
2. Incised wound over the right shoulder about 4 x 2 x exposing bone.
3. Incised wound upper th of right arm about 2 x 1 x .
4. Incised wound over the lower part of the right side of the face about 6 x 2 x 1.
5. Incised wound over the right side of the occipital region and across right mastoid region about 7 x 2 x 3 penetrating skull with fracture of occipital bone.
6. Multiple abrasions over the back.

On further dissection he found laceration of membrane of the brain corresponding to the fracture of the skull and also hemorrhage in the right cerebral hemisphere.

34. The doctor was of the opinion, that the death was due to shock and hemorrhage as a result of injuries mentioned above which were ante mortem and homicidal in nature and further that all the incised injuries mentioned above could have been caused by assault with sharp cutting weapons like sword, tangi, etc. and the other injuries found could be caused by assault with blunt weapons like lathis, etc. He was of further opinion that the abrasion found on the back of the deceased could have been caused by fall and friction including dragging along rough ground. He has further opined that the injury no. 5 was sufficient to cause death by itself in the ordinary course of business and all the injuries found on the deceased taken together were sufficient to cause death in the ordinary course of business.

35. The defence has, infact, not challenged the PM Examination Reports of both the victims during cross-examination. Such being the position it has rightly been held by the Id. trial court that it is abundantly proved that both the deceased Najrul Islam and Abdul Sayed had an unnatural death as a result of being assaulted with weapons like tangi, sword, iron rod, lathi etc.

36. Turning to the injuries of PW1, who was medically examined by Dr. Tapes Sarkar, M.O. of Dhaniakhali PHC, PW14, it is found that he sustained the following injuries :-

1. An oblique cut injury obliquely downward and laterally 1 cm. below the lateral angle of right eye 1 in length, margin sharp cut deep upto bone.
2. A transverse abrasion 1 in length x 1 mm. Wide over the middle of the right deltoid muscle.
3. A cut injury L shaped over right palm. The injury was transverse 1.5 cm. in length, margin sharp cutting deep up to the tendons of the palm, 1 cm. proximal to the base of right ring and middle finger. The injury was obliquely towards the dorsum of the palm between the right ring and little finger 2 cm. in length, margin sharp, tendons seen.
4. An oblique injury over the palmer aspect of right little finger towards the dorsum of the finger 1.5 cm. distal to the mestacarpophallangeal joint 1.5 cm. in length, tendon seen margin sharp.
5. A linear cut injury 1 cm. in length deep up to the full layer of skin 3 cm. below the midpoint joining both meolus of right leg posteriorly 1 cm in length margin sharp.
6. A punctured wound over the right side of the upper lip just over the right side of midline, linear 1/3rd in length, margin sharp and the margin of the wound over the inner surface of the upper lip was irregular due to swelling of the margins. The wound was punctured the whole of the right upper lip and its buccal surface.

37. The doctor, PW 15 deposes that the patient, PW I stated before him that he was assaulted by Tajen, Sk. Asper and Maharrum. He has further stated that the said patient was referred to him by Dhaniakhali police in connection with Dhaniakhali PS. Case No. 18 dt. 25.04.1981 He (the patient) was again referred by him (PW15) to Sadar Hospital for his better treatment and better security on request of police. He has also opined that the injuries may be caused due to assault with sword and iron rod. It is also admitted by him that the punctured wound on the upper lip might be caused with sharp point of an arrow if the force of the arrow be not sufficiently great. There were incised injuries on the right palm and below right eye and such injuries might be caused by sharp cutting weapon. 38. PW15s injury report has not seriously been challenged by the defence. He has simply been cross-examined on the question of age of the injury. It is admitted by the doctor that the age of the injury is an important factor in determining the time of receiving the injuries but he has not noted down the age of injury. Save and except this no suggestion was offered to this doctor challenging the injury report as well as his medical opinion on that score. Such being the position, we may safely place much reliance on the injury report for determination of the nature of injury and the type of weapons used for causing such injuries especially on the anvil of ocular evidence already dissected hereinbefore.

39. It is importantly important to note that the medical evidence stands fully corroborated with the ocular evidence of two eye-witnesses wherefrom it is firmly established that assailants used both blunt objects as well as sharp cutting weapons to cause injuries on the person of Najrul and Sayed as also the injured witness PW I.

40. We would now proceed to deal with the contention of Mr. Mukherjee pointwise in the light of factual scenario projected through ocular evidence scanned and medical evidence dissected in preceding paragraphs coupled with the proposition of law enunciated in various judicial pronouncements of the Apex Court.

RE : Contention I

41. It is a settled position of law that in a criminal trial charge being the foundation of accusation every care should be taken to frame it properly and all the material

particulars like time, place and person etc. are to be set out as per provision of law enunciated in Sections 211 to 214 Cr. P.C. It is also equally true that mere omission of exact place of occurrence and time etc. is a curable irregularity and the defect in the charge can be cured under section 464 Cr.P.C. In fact, the purpose of charge is to give an idea to the accused as precisely and concisely as possible of the matter with which he is charged and the same, of course, is required to be conveyed to him with sufficient clarity too. What the prosecution intends to prove against him is to be put to him. As a matter of fact, sections 211 to 214 give a clear and explicit direction as to how a charge should be drawn up. There is no doubt that the framing of a charge properly is vital to a criminal trial. We have very carefully taken into consideration the ruling of the Honble Apex Court reported in AIR 1956 SC 116 (W. Slaney vs. State of M. P.) and relied upon by Mr. Mukherjee. It is clearly held therein that even the omission to frame a separate charge under section 302 IPC is not per se illegal and the very broad proposition that where there is no charge the conviction would be a mere curable irregularity which in the absence of prejudice could not affect the legality of conviction under section 302 IPC.

42. Turning to the question as to what would be the effects of errors, if any in the formal charge adumbrated in section 215 Cr. P.C., it appears, that this section is intended to prevent any failure of justice for non-compliance with the matters required to be stated in the charge. The crux of the matter is that unless the irregularity in the charge is found to mislead the accused and the failure of justice has thereby occasioned, a conviction cannot be set aside. The combined reading of sections 464 and 465 together with section 215 Cr. P.C. would make it clear that unless irregularity or omission has misled or caused prejudice to the accused in his defence and also occasioned a failure of justice, it will not vitiate the trial.

43. In the present case, keeping in view the afore-mentioned principle of law as enunciated in different judicial pronouncements we find that, although the place of occurrence was mentioned as Nalitjole and the time of occurrence has also not been set out in the charge itself, corroborative evidence and circumstances on record have made it abundantly clear that the incident took place at about 10-11 AM and the nature of incident was such that some parts of the occurrence in

question took place at Nalitjole village while the rest took place at Hetampur village. Since the victims were chased by the appellants and other co-villagers the place of occurrence cannot by any stretch of imagination be confined to a particular place. It can unhesitatingly be said that appellants had the best of opportunities to counter the same through cross-examination as also their examination under section 313 Cr. P.C. and to take a positive defence in respect of charges so framed against them. In fact, appellants were afforded full and fair chance to defend themselves and such defence was not handicapped because of omission in respect of exact time and place relating to an offence for which the charge was framed. It cannot be said that failure of justice had been caused because of such omission arising out of peculiar nature of incident as indicated earlier. The celebrated judgment in W. Slanley case has dealt with in details about such omission in framing charge and it has been held therein that for setting aside the conviction on the ground of irregularity in the charge prejudice will have to be made out. Therefore, in the present case since it is not established that prejudice was caused because of such omission in framing charge, the argument made on behalf of appellants on that score appears to be not a meritorious one.

44. In such view of the matter we are to opine that the charge framed by Id. court below is neither patently irregular nor illegal ex facie. As a matter of fact, non-mentioning of exact time of occurrence or places of occurrence are not sufficient to invalidate the charge in view of the fact that those irregularities are curable as per section 211 Cr. P.C. Such being the position of law, mere omission to incorporate certain particulars in the charge would not affect the merits of the order of conviction and sentence.

RE : Contention II

45. The formal FIR itself would indicate that the FIR was despatched from Police Station on 26.04.1981 i.e. on the following date of incident. There is no doubt that such FIR was placed before the Id. SDJM Sadar Hooghly on 29.04.1981. The legal requirement under section 157 Cr. P.C. is that FIR is to be sent forthwith to the Id. Magistrate. Three days delay in placing the FIR before the Magistrate remains explained. But this circumstance alone is not sufficient to raise suspicion

in the mind of court about the genuineness of the prosecution story. In fact, there was no scope for embellishment in the FIR. Since FIR itself was deapatched on 26.04.1981. In such a situation, we are not in a position to doubt the veracity of the FIR. That apart, during retrial no suggestion was given to the recording officer or I.O. regarding delayed despatch / placement of FIR before the Id. SDJM Hooghly, Sadar. On the question of non-examination of Sk. Idrish it can be said that all the witnesses who have seen the incident need not be examined AIR 1977 (SC) 701 [V.Thomas, Appt. vs. State of Kerala, Respt]. Considering all these we are to opine that the present case is contextually and factually distinguishable on facts from Iswar Singhs Case (supra) relied upon by the appellants. .

RE : Contention III

46. The proposition of law laid down in AIR 1924 CAL 323 [Mamfru Chowdhury & Ors. vs. King Emperor](supra) that the prosecution should be consistent to the precise circumstances is not in dispute. In the present case the prosecution has led sufficiently strong evidence through PWs 1 & 2. Both of them are cogent and consistent to the precise circumstances as unfolded by the prosecution during retrial. It is also specifically ruled in the afore-cited decision that the evidence on record should show that the incident alleged happened at the time, in the place and under the precise circumstances narrated on behalf of the prosecution. Such legal proposition is also equally applicable to the facts and circumstances of the present case. In our considered view, evidence on record adduced on behalf of the prosecution specially the evidence of PWs 1, 2, 14 & 15 has established and firmly established the time, the places of occurrence and the precise circumstances as unfolded during re-trial. There is no doubt that the nature of the present case is peculiar and such peculiarities are to be taken into account to locate the P.O. A large number of villagers chased the de factocomplainant, the injured and his brothers since deceased alongwith others even crossing the boundary of Nalitjole village. In fact, such chasing continued till some of the victims took shelter in the house of Haru Ghosh at Hetampur, a contiguous village out of fear. The terror stricken victims were forcibly dragged to an open field and some of the appellants together with other unknown covillagers formed an unlawful assembly and ruthlessly assaulted the victims being prompted by their common

object of taking away their precious lives. Since the factual incident in its entirety spread over to a continuous village it is not practically feasible to pinpoint any particular place as the exact location of the P.O. It is more or less established that Mazian field is the place where Najrul & Sayed were assaulted with deadly weapons. Both of them breathed their last there. The injured de facto complainant was also assaulted by some of the appellants and others near the house of Haru Ghosh. Be that as it may, the fact remains that narration of PWs 1 & 2 about the fatal incident has fully been corroborated by the contents of FIR. It is also evident that incident took place at about 11 O'clock. Therefore, it can safely be concluded that the prosecution has proved the manner in which gruesome murder of Najrul and Sayed took place. We are, therefore, not prepared to accept the submission of Mr. Mukherjee on that score.

RE : Contention IV

47. Mr. Mukherjee's contention is based on the assumption that the material injured witness PW1 being the brother of the deceased cannot be relied upon and in the absence of any independent witness the prosecution case must fail. As already indicated earlier Id. trial court found PW1 worthy of credence since nothing has been elicited during his cross-examination to discard his convincing testimony. It is now well settled that evidence of an injured witness cannot be brushed aside merely on the ground that he is either partisan or interested or closely related to the deceased if it is otherwise found to be trustworthy and creditable. However, only a close scrutiny is required with abundant care, caution and circumspection so that neither the guilty escapes nor the innocent is wrongly convicted. If his evidence is found to be reliable and probable even after its close and rigorous judicial scrutiny such evidence of the injured relative witness can safely be acted upon. On perusal of the decision reported in AIR 1994 SC 115 (supra) it appears that evidence of eye witnesses who were highly interested do not corroborate medical and circumstantial evidence and their presence at the scene of occurrence was also highly doubtful. That apart, eyewitness also made certain improvements regarding nature of weapon used by the convict accused. In such circumstances, the Apex Court opined that it would not be safe and prudent to convict accused on the basis of such evidence especially when the appeal was

against the acquittal. But the facts and circumstances of the present case are quite distinguishable in this appeal against conviction. It would sound far-fetched that PW 1, himself being injured has not given the accurate version of the incident happened on that fateful day. More so, whenever such evidence stands corroborated by another eye witness who is not in any way related to the injured and his two brothers since deceased. Needless to mention that the evidence of both PWs 1 & 2 further corroborates the medical evidence. In fact, there is no conflict between ocular evidence and medical evidence as is available from the testimony of PWs 14 & 15 coupled with the injury report and PM examination report. It is a settled position of law that the evidence adduced by the injured witness is the best evidence and his presence at the place of occurrence cannot be doubted. Simply because he is the brother of both the victims since deceased, his testimony should not be acted upon is unacceptable. Rather, much importance should be attached upon his testimony for the simple reason that he being the brothers of the victims would not implicate any stranger as the assailants of his brothers. Another ruling of the Apex Court reported in AIR 1984 SC 1622 (supra) and cited on behalf of the appellants is also both contextually and factually distinguishable on the facts of the present case. There is no doubt that the evidence of a close relative of victims is required to be evaluated with care and caution since relations have tendency to exaggerate or add facts. But in the case in hand as indicated earlier it cannot be said by any stretch of imagination that the PW 1, the injured has embellished the facts as narrated in the FIR the basic document which set the law into motion.

Furthermore, as already indicated earlier, his testimony stands corroborated by another disinterested eye witness PW 2 as also by medical evidence adduced to PWs 14 & 15. Despite our meticulous scrutiny of the testimony of PW1, with utmost circumspection, we are unable to opine that the testimony of PW1 suffers from exaggeration or embellishment. Therefore, it can safely be concluded that the testimony of PW 1, carries much conviction and inspires confidence in the mind of the court even though the deceased were closely related to him. In this context reliance can be placed upon paras 13,14 & 15 of a recent ruling of the Honble Apex Court reported in 2010 Cr.L.J. 3826 (Chuni Lal vs. State of UP).

48. We have paid our anxious consideration to Mr. Mukherjees objection regarding appellants defective examination u/s 313 Cr. P.C. by the Id. trial court. Keeping in view such objection we have had occasion to go through the appellants examination sheet u/s 313 Cr. P.C. and on our reading of as many as 17 questions containing exhaustive details of evidence and circumstances on record put to each of the appellants separately and their answer thereto recorded by the Id. court below in course of their examination u/s 313 Cr. P.C., We find that the same leaves no room to doubt that all the inculpatory materials transpiring in evidence and relied upon by the court have been brought to their notice affording them sufficient opportunity to explain such incriminating materials on record adequately. In such a fact situation, reliance can be placed upon two rulings of the Apex Court reported in (1973) 2 SCC 739 (Sibaji Shab Rao Bubude, Appellant vs. State of M.P., Respondent) and another 2001 SC 2924 [State (Delhi Administration), Appellant vs. Dharampal, Respondent]. Accordingly we are of the view that even if there occurs any omission in this regard to bring any piece of incriminating circumstance to the attention of the accused that does not ipso facto vitiate the proceedings. The appellants must show that failure of justice was occasioned by such omission and appellants have suffered serious prejudice in setting up an effective defence.

49. In the case in hand all evidentiary materials which include incriminating ocular and medical evidence were put to the appellants who have replied to the same after fully understanding its import and implication. That apart, in the event of any omission it is also open to the appellate court to call upon the counsel for the appellants to offer reasonable explanation in respect of inculpatory materials not put to them during their examination u/s 313 Cr. P.C. At any rate, taking all these facts and circumstances together into account we are to opine that appellants examination u/s 313 Cr. P.C. does not suffer from any serious infirmity vitiating the proceeding itself. Rather, basic fairness of criminal trial has strictly been maintained in the present case, we are, therefore, unable to persuade ourselves to sustain Mr. Mukherjees objection in this regard.

50. For deciding the contention raised by Mr. Mukherjee, as to whether conviction of appellant is illegal for not holding trial de novo by the Id. trial court in terms of the High Courts order dated 31.07.1986 in Criminal Appeal No. 123 of 1985, we would first refer to the order of the High Court passed in CRA 123 of 1985. For irregular framing of charge by the Id. trial court appeal was allowed and the conviction and sentence of accused appellants were set aside. The Id. trial court was directed that the accused appellants be retried again on the basis of the charges to be framed against them according to law. Significantly, this order remains unchallenged. It, however, appears from the decision of the Apex Court reported in AIR 1989 SC 129 (supra) cited by Mr. Mukherjee that such order of the Division Bench asking retrial on the ground of irregularity of charge was challenged by the State Government before the Apex Court in another contemporaneous case and in paragraph 10 of the afore-cited judgement the Supreme Court observed as under ;-

10. Lastly, we are constrained to observe that the High Court has not examined the merits of the case at all. If it had done so, it could not have come to the conclusion that there was any material defect or omission in the framing of the charges or giving the particulars thereof or any failure of justice was occasioned thereby. It failed to appreciate that in an appeal by the respondents under S. 374(2) of the Code, the order of acquittal passed by the learned Additional Sessions Judge as against the 26 other accused could not be interfered with. The High Court also failed to appreciate that there cannot be piecemeal trial. The retrial directed by the High Court must necessarily revise the prosecution and must result in a trial do novo against the 42 accused. The 26 other accused acquitted by the learned Additional Sessions Judge were not impleaded as parties to the appeals before the High Court. In the absence of an appeal preferred by the State Government against their acquittal, the High Court could not under S. 386 (b) on an appeal by the respondents against their conviction alter the acquittal nor can there be a splitting up of the trial.

51. Unfortunately, neither the state nor the appellant moved the superior court, challenging the order of retrial passed in the present case. It is further intriguing to note that neither at the time of framing charge afresh by the Id. trial court below nor during recording of evidence or to say at any stage of the re-trial appellants took the plea that such retrial was not in consonance with the principles of law or contrary to the settled position of law as laid down by the Apex Court. In such a fact situation, Id. court complied with the direction of the High Court and proceeded to undertake retrial of the convicts as directed by the High Court since he was bound by the judgment of the superior court. While narrating the backdrop of retrial Id. trial judge observed that in view of direction of the Honble High Court the case was taken up for retrial for seven accused after framing charges afresh according to law. The other eleven accused who were acquitted on the strength of the previous judgement were not being tried for obvious reasons. In this context we would like to refer to section 465 Cr. P.C. The principle underlying section 465 is that any and every irregularity or infraction of a procedural provision cannot constitute a ground for interference by the superior court unless such irregularity or infraction has caused irreparable prejudice to the party and requires to be corrected at that stage itself. A mere irregularity in procedure is not ordinarily sufficient to challenge order of conviction. It is well settled that the fact of an omission or irregularity unaccompanied by any probable indication of failure of justice having been thereby occasioned is not enough to quash a conviction which may be supported by curative provisions of section 464 & 465. Even though Section 465 Cr. P.C. has no application in original proceeding, it deals with the validity of a finding, sentence or order already passed and under consideration by the Appellate Court i.e. superior court. True, it does not refer to substantive errors of law, but it obviously refers to error of procedure. The object of this section is to prevent the escape from punishment of criminals owing to laches of procedural law or possibilities of acquittal except on merits of the case. The very object underlined in section 465 of the code is that if on any technical ground any party is aggrieved in any criminal trial / proceeding he must raise the objection thereof at the earliest stage. In the event of not doing so, he cannot be heard on that aspect after the whole trial is over or at the appellate stage.

52. Against such legal and factual backdrop, observations of the Apex Court in Paragraph 13 of the decision reported in AIR 1999 (SC) 775 [Kumari Brahmaice & Ors., Appellant vs. Public Prosecutor, High Court of A.P., Respondent] may be quoted as under :-

The aforesaid discussion leaves no doubt that non-framing of charge would not vitiate the conviction if no prejudice is caused thereby to the accused. As observed in the aforesaid case, the trial should be fair to the accused, fair to the State and fair to the vast mass of the people for whose protection penal laws are made and administered. Criminal procedure code is a procedural law and is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities.

53. In paragraph 6 of Slanleys Case (supra) the larger Bench of the Apex Court has made an illuminating discussion on the issue of substantial as opposed to purely technical compliance with the spirit and requirements of the code to ensure a fair and proper trial and such oft-quoted observations may be reproduced as follows :-

the Code is a code of procedure and, like all procedural laws, is designed to further the ends of justice and not to frustrate them by the introduction of endless technicalities. The object of the Code is to ensure that an accused person gets a full and fair trial along certain well-established and well-understood lines that accord with our notions of natural justice.

If he does, if he is tried by a competent Court, if he is told and clearly understands the nature of the offence for which he is being tried, if the case against him is fully and fairly explained to him and he is afforded a full and fair opportunity of defending himself, then, provided there is substantial compliance with the outward forms of the law, mere mistakes in procedure, mere inconsequential errors and omissions in the trial are regarded as venal by the Code and the trial is not vitiated unless the accused can show substantial prejudice. That, broadly speaking, is the basic principle on which the Code is based.

54. It has further been observed in paragraph 14 of the celebrated judgment that the swing of the pendulum has been away from technicality, and a greater endeavour has been made to regard the substance rather than the shadow and to administer justice fairly and impartially as it should be administered

55. Viewed in the light of foregoing discussion we are to opine that mere irregularities in the framing of charge and failure to hold de novo trial impleading all including accused already acquitted earlier after a full fledged trial would not in any way vitiate the conviction if no prejudice is caused thereby to the accused appellants. But in the present case as already indicated earlier the appellants have failed to show that any prejudice has been caused to them during retrial because of the absence of co-accused who were favoured with an order acquitted in the previous trial. Importantly, it is to be borne in mind that the direction of the High Court binds the Id. trial judge and that judicial discipline obliges him to follow it regardless of his doubt about its correctness. Otherwise it would involve violation of the basics of judicial discipline. It would, therefore, be worthwhile to note here that there are valid grounds for the Id. trial court for not holding de novo trial. Since it has not been specifically shown that prejudice has been caused to the appellant, order of conviction and sentence impugned cannot and should not be affected in the present case on that score. Accordingly, Mr. Mukherjees objection in this regard stands overruled.

Applicability of Section 148/149

56. On the question of applicability of section 148/149 of IPC in the present case we would like to reiterate that common object as contemplated by section 149 IPC does not require prior concert or meeting of minds before the attack. Generally no direct evidence is available regarding the existence of common object, which in each case has to be gathered from the attending facts and circumstances. Needless to mention that when a concerted attack is made on so many victims by a large number of villagers armed with deadly weapons, it is often difficult to determine the actual part played by each offender. In such a situation it would be feasible to opine that such persons who attacked the victims had the common object for an offence which is known to be likely to be committed in the

prosecution of such an object. There is no doubt that sometimes the presence of an innocent person in an assembly of persons being merely a bystander does not make such person a member of unlawful assembly. But the fact remains that where the persons forming the assembly having identical interest came armed, others coming with them though not armed, would under the normal circumstances be deemed to be the members of the unlawful assembly.

57. In the present case it is established that appellants were in inimical terms with the de facto complainant and his companions. Since they had suspicion that the de-facto complainant and his brothers who were arrested subsequent to the murder of Salfiuddin, a co-villager, they conspired to wreck vengeance. Being trapped, when the de-facto complainant and his brothers came to their village for a settlement in respect of their damaged house, they were chased and attacked. Consequently two precious lives were lost. The Id. trial court was, therefore, justified in holding that the appellants involved in the occurrence shared the common object and there are ingredients of rioting armed with deadly weapons.

58. On wholesome appreciation of entire evidence on record specially testimony of PWs 1 & 2, 14 & 15 we cannot but hold that the prosecution has clearly proved the charges under sections 148/307 read with section 149/302 IPC against all the appellants except Sk. Batu (A4) beyond all reasonable doubts. In our considered view materials on record are not sufficient to warrant conviction of appellant Sk. Batu (A4). He is, therefore entitled to an order of acquittal. Result

59. In the premises, we do not find any cogent ground to interfere with the order of conviction of the appellants except Sk. Batu (A4). The impugned judgement and order of conviction and sentence passed against A2, A3 and A6 stands affirmed. The appeal in respect of these three appellants stands dismissed.

60. The appeal so far relates to i) Sk. Bellal (A1), & ii) Sk. Tazen (A5) stands dismissed since both of them had already left this world of living.

61. Conviction and sentence imposed upon Sk. Batu are hereby set aside accordingly. He is acquitted of the charge under sections 148/307 read with section 149/302 IPC. The appeal is thus allowed in part.

Direction

62. Sk. Khabir, A2, Sk. Moharam, A3, and Sk. Aziz, A6 are directed to surrender before the Id. Trial Court within one month to serve out the sentence in default whereof the Id. Trial Court would take appropriate steps in this regard. 63. Let a copy of this judgement and order be sent to the Id. Trial Court for necessary compliance.

Another copy of this judgement and order also be sent to the Superintendent, Hooghly, Correctional Home, Chinsurah for information and necessary action.

Photostat certified copy of this Judgement and order, if applied for, be supplied on priority basis.

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