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**(2003) 02 CAL CK 0030**  
**In the Calcutta High Court**  
**Case No : C.R.A. No. 288 of 1996**

Arjan Mallick and Others

APPELLANT

Vs

The State

RESPONDENT

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**Date of Decision :** 11-02-2003

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 154, 156, 313  
Evidence Act, 1872 — Section 134, 137, 45  
Penal Code, 1860 (IPC) — Section 147, 149, 302

**Citation :** (2003) 2 CALLT 444

**Hon'ble Judges :** Sadhan Kumar Gupta, J; Nure Alam Chowdhury, J

**Bench :** Division Bench

**Advocate :** Y.J. Dastoor, Prabir Mazumdar and Rupa Bandopadhyay, for the Appellant; Kazi Safiullah and R.K. Ghosal, for the Respondent

**Final Decision :** Dismissed

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## Judgement

S.K. Gupta, J.—The present appeal has been preferred against the judgment and order of conviction passed by the learned Additional Sessions Judge, 4th Court, Nadia in Sessions trial No. 1 of January, 1995 whereby he convicted the present applicants u/s 147, 302 read with Section 149 of the Indian Penal Code and sentenced the accused persons to suffer rigorous imprisonment for life and also to pay fine of Rs. 5,000/- each in default to further rigorous imprisonment for one year each. The prosecution case in short, is that on 20.02.1986 one Md. Samsujjoha Mondal submitted a Written complaint to the O.C. Tehatta P.S. stating therein that his father Wazed Ali Mondal was an assistant teacher of a primary school of Kulgachhi village and on 20.02.1986 at about 1.00 p.m. while he was taking class of the infant Section of the said school, the accused persons along with others entered into the said school and started assaulting his father with lathi, ballam, tangi and as a result of that Wazed Ali Mondal fell down on the ground. The students of the class fled away, being frightened of the incident. The teachers of the said school and others took Wazed Ali Mondal to Palashi Para Hospital where the Medical Officer attended him and thereafter advised that

Wazed Ali Mondal should be admitted in the Berhampur Hospital, where in fact he was admitted. Subsequently Wazed expired in the said hospital. On the basis of the said written complaint Tehatta P.S. Case No. 14 dated 20.02.1986 was started against the accused persons. The case was investigated and after completion of the investigation chargesheet was submitted against all the accused persons. Charge was accordingly framed. Same was read over and explained to them and they all pleaded not guilty to the charges and claimed to be tried. In order to establish the charges against the accused persons, prosecution has in all examined 20 witnesses. Accused persons have not adduced any evidence. Defence case as it has transpired from the trend of the cross-examination as well as from the statement as made by the accused persons u/s 313 CrPC is that of complete denial and that they have been falsely Implicated in this case. According to the defence, no such incident took place, as claimed by the prosecution. We have already pointed out that the accused persons have been charged under Sections 147, 302 read with 149 IPC. So it is the duty of the prosecution to prove those charges against the accused persons beyond any reasonable shadow of doubt. Prosecution is bound to prove that the accused persons on that day formed an unlawful assembly and thereafter they assaulted Wazed Ali Mondal and as a result of that he died. We have already pointed out that prosecution in all has examined 20 witnesses to established those charges against the accused persons. So, the evidence as adduced by the prosecution, is most important for our purpose in order to come to a clear decision as to how far the prosecution case has been established against the accused persons. As such, it is necessary to look into the evidence that has been adduced in connection with this case.

2. PW 1 is Samsujjoha Mondal. He is the son of the deceased Wazed Ali Mondal and it is he who lodged the FIR. This witness has admitted that he was not present when the alleged incident took place. He has claimed that he heard the incident from the persons who were present at the time of the occurrence. This witness has claimed that he along with others took Wazed first to Palashi Para Hospital from where the patient was referred to Berhampur Hospital. According to this witness he did not go to Berhampur Hospital along with his father and instead he went to Tehatta P.S. from the Palashi Para Hospital and lodged the FIR. He has claimed that he heard the Incident from one Monirul.

3. PW 2 is Hazarat Mulla. According to this witness, on the date of occurrence at about 12 noon when he was going towards his land, at that time he found that Wazed Ali Mondal was taking class outside the school room and at that time he found that the accused persons assaulted him by iron rod and lathi and as a result of that he fell down on the ground and lost his senses. He has stated that family members of Wazed Ali Mondal took him to the Hospital. He has identified the accused persons during his deposition.

4. PW 3 is Monirul Mulla. This witness has claimed that at the relevant time he was a student of class-IV of Kulgachhi Primary School and Wazed Ali Mondal was

working as a teacher of the said school. He has claimed that on 20.02.1986 at about 11/12 noon Wazed Ali Mondal was taking class by sitting on a chair under a tamarind tree. At that time the accused persons being armed with lathi, iron rod etc. entered into the said compound. Accused Sahadat assaulted Wazed on his head by iron rod. As a result of that Wazed Ali fell down from the chair. As the students cried for help, other teachers came to the spot and seeing that the accused persons left the place. This witness has claimed that he rushed to the house of Wazed Ali Mondal and reported the incident.

5. PW 4 is Md. Harun Ali Seikh. This witness has stated that on the date of incident he found some persons were carrying Wazed Ali Mondal and on his enquiry those persons informed him that Arjan, Sahadat, Shersah, and Sahaman assaulted Wazed Ali Mondal. As this witness did not support the prosecution case in toto, so he was declared hostile by the prosecution.

6. PW 5 is Abdul Hamid. He has claimed that at the relevant time he was a student of class-I Kulgachhi Primary School. He has stated in his evidence that on that day Wazed Ali Mondal was taking class by sitting on a chair under a tamarind tree. At that time the accused persons along with others entered into the school compound and Sahadat assaulted Wazed Ali Mondal on his head by an iron rod and as a result of that he fell down. He has claimed that he returned back to his house and reported the matter to his father.

7. PW 6 is Gopal Chandra Mondal. He is the Head Master of Kulgachhi Primary School. According to him on 20.02.86 Wazed Ali was taking class under a tamarind tree and he was taking class in another class room. Suddenly he heard the alarm raised by the students and at that time he noticed that some persons including accused Sahadat were leaving the school compound hurriedly. This witness has claimed that Wazed Ali, being injured, was carried to Palashi Para Hospital.

8. PW 7 is Akshar Ali. As this witness did not support the prosecution case, so he was declared hostile.

9. PW 8 is Md. Abdul Khaleque. He has stated in his evidence on 20.02.86 he was working as a teacher at Kulgachhi Primary School. According to him Wazed Ali was taking class under a tamarind tree which is situated within the school compound. He has stated that he found that accused Sahadat along with others came there and assaulted Wazed Ali and as a result of that he fell down on the ground.

10. PW 9 is Hazira Khatoon. She is the widow of Wazed Ali Mondal. She has stated in her evidence that Monirul came to her house and reported that the accused persons assaulted Wazed Ali. She has further claimed that she along with others took Wazed Ali to Palashi Para Hospital from where he was referred to Berhampur Hospital where Wazed Ali died.

11. PW 10 is Goljar Mondal. He is the elder brother of Wazed Ali. He has stated in

his evidence that on the date of incident Monirul came to their house and reported that the accused persons assaulted Wazed Ali. He has further claimed that he along with others took Wazed Ali to Palashi Para Hospital wherefrom he was referred to Berhampur Hospital.

12. PW 11 is Fajle Haque Mondal. He has claimed that on the date of incident at about 11.42 a.m. when he was in his land, at that time he heard a noise coming from the school. He went to the said school and found Wazed Ali was lying in the school ground with injuries on his head. He has further stated that from the Head Master of the school he came to know that the accused persons assaulted Wazed. He along with others took him to the Palashi Para Hospital wherefrom he was referred to the Berhampur Hospital. This witness has claimed that in the morning of the date of incident there was a salish in the village over the theft of a motor. In the meeting, some altercations took place in between him and accused Sahadat who alleged that at the instance of Wazed Ali he made some allegation against Sahadat. Over this a trouble started.

13. PW 12 is Basiruddin Mandal. He was tendered from cross-examination.

14. PW 13 is Satyandra Nath Sarkar. He is an ASI of Police and according to him on 20.02.86 he conducted inquest on the dead body of Wazed Ali in presence of the witnesses.

15. PW 14 is Aizzuddin Sheikh. He has stated in his evidence that he was present at the time of the inquest and he identified the dead body.

16. PW 15 Nafar Ali Mondal & PW 16 Sirajul Alam. Both of them were present at the time of the inquest.

17. PW 17 is SI Amulya Charan Hazra. He has stated in his evidence that on 20.02.86 he received the written complaint.

18. PW 18 is Dr. Santosh Kumar Bhuiya. He is the Deputy Superintendent of Berhampur General Hospital. According to him the hand writing of Dr. S.N. Sinha Biswas was known to him as they both were posted together in a Primary Health Centre. As Dr. Sinha Biswas, who has conducted the Post Mortem Report of the deceased Wazed Ali was dead, so this witness proved the Post Mortem Report. According to this witness in the Post Mortem Report it has been mentioned therein that there was one lacerated injury about 4 1/2"/1/4" x bone deep on occipital parietal region. It is traced and detected fracture of occipital bone with blood inside the cranial cavity. Sign of bleeding from both ears. According to the Post Mortem Report those were the cause of the death of the Wazed Ali and the injury could be caused by hard and blunt heavy weapons.

19. PW 19 is Dr. Mihir Kanti Chakraborty. On 20.02.86 he was posted at Palashi Para Primary Health Centre and on that day he examined Wazed Ali Mondal and found the following injuries on his person:

1. Bleeding through both ears following trauma and patent was very toxic and

pupil fixed not properly reacting to light.

## 2. Head injuries.

20. According to this Doctor he referred the patient to the District Hospital for proper management of the case.

21. PW 20 is S.I. Kanakmoy Sarkar. He is the Investigating Officer of this case. According to him he investigated the case and after completion of the investigation, as prima facie case was made out, so he submitted chargesheet against the accused persons.

22. We have discussed the evidence that has been adduced in connection with this case. The sum and substance of the said evidence appears to be that on the relevant day i.e. on 20.02.86 Wazed Ali Mondal was taking class by sitting in a chair under a tamarind tree and at that time the accused persons after forming an unlawful assembly entered into the said school compound and in the process accused Sahadat assaulted Wazed on his head by an iron rod, which subsequently resulted in his death. In order to substantiate this claim, prosecution mainly has relied upon the evidence of PW 2 Hazarat Molla, PW 3 Monirul Mondal, PW 5 Abdul Hamid, PW 6 Gopal Chandra Mondal and PW 8 Md. Abdul Khalek. Out of those witnesses the PW 3 Monirul Mondal and PW 5 Abdul Hamid are the most important witnesses. They, in their evidence, have categorically stated that on 20.02.86 they were the students of Kulgachhi Primary School and when they were attending the class of Wazed Ali at that time they found that the present accused persons along with others came inside the school compound and suddenly assaulted Wazed Ali by iron rod and lathi. They have categorically stated that Sahadat assaulted Wazed on his head by an iron rod. PW 3 Monirul Mondal claimed that immediately after the occurrence he rushed to the house of Wazed Ali and reported the incident. If we look into evidence of PW 9 Hazira Khatoon, the wife of Wazed Ali, and PW 10 Golzar Mondal, the elder brother of Wazed Ali, then it will appear that both those witnesses stated on oath that this PW 3 Monirul Mondal came to their house immediately after the occurrence and reported the incident. The PW 3 has been extensively cross-examined by the defence. But it appears that he withstood the cross-examination well and we find nothing to disbelieve his statement even after cross-examination. It is unbelievable that this PW 3 being a student of the said school would unnecessarily depose falsely against the accused persons. Simply one suggestion has been given to this witness that as per instruction of Fajlee Mondal and other enemies of the accused persons, he deposed falsely in this case. But we must make it very clear that the defence has thoroughly failed to substantiate this suggestion. There is nothing to show that this witness was tutored by this Fajlee Mondal. This Fajlee Mondal has been examined as PW 11 in this case. He in his evidence has stated that there was a trouble in the salish which took place in the morning of 20.02.86 between the accused Sahadat and himself. But simply for that reason it will be too much to believe that this witness Fajlee Mondal will instigate others to depose falsely against the accused persons

in order to implicate them in connection with the murder of Wazed Ali. The fact remains that Wazed Ali was murdered and for that prosecution has been able to produce at least two eye witnesses in order to connect the accused persons with the act of said murder. We are of opinion that the evidence of the PW 3 Monirul Mondal is a clear proof that it is the accused persons who actually formed an unlawful assembly and in furtherance of their common object they assaulted and murdered Wazed Ali. Like this, the PW 5 Abdul Hamid is also important. This witness has also claimed on oath that when he was attending the class of Wazed Ali along with PW 3 at that time accused Sahadat and others came there and Sahadat assaulted Wazed Ali on his head by an iron rod. This witness was also cross-examined extensively by the accused persons. But it appears to us that there is nothing to disbelieve this witness. It is also unbelievable that a student of the said school would falsely implicate some innocent persons leaving aside the actual culprit who caused the murder of his teacher viz. Wazed Ali Mondal. The evidence of the PW 3 and PW 5 is a clear proof that prosecution has been able to prove that the death of Wazed Ali as actually caused by the accused persons. That apart if we look into the evidence of the PW 6 Gopal Chandra Mondal, then it will appear that at the relevant time he was the Head Master of Kulgachhi Primary School. He in his evidence, has stated on oath that immediately after the incident he came to know from the students that the accused persons assaulted Wazed Ali while he was taking the class. He has stated on oath that PW 3 Monirul and PW 5 Abdul Hamid were present in the said school on that day. He has also stated that Wazed Ali was taken to Palashi Para Hospital for treatment. During his cross-examination the defence tried to give suggestion to the effect that the attendance register of the said school was not properly maintained and that it was manufactured subsequently. This suggestion was given only to establish that PW 3 and PW 5 were not present in the school at the relevant time. It was also given in order to establish that the other teachers namely PW 8 Md. Abdul Khalek was also not present in the school on the date of incident. But the Head Master has clearly denied all those suggestions. There may be some defects in the school Attendance. Register. But simply for that reason the evidence of this Head Master cannot be overlooked. There cannot be any interest for him to depose falsely against the accused persons. It is unbelievable that this Head Master would depose falsely regarding the presence of those two students and the teacher on the date of incident only to implicate the accused persons in this case. As such, we do not attach any importance to this argument of the learned advocate for the appellants. If we look into the evidence of the PW 8 Md. Abdul Khalek then also it will appear that he clearly stated that the accused persons being led by Sahadat entered into the school compound and assaulted Wazed. This witness at the relevant time was working as a teacher of the said primary school. He has stated on oath that he found the incident from his class room. This witness has been elaborately cross-examined by the defence. But it appears that even after cross-examination his evidence remained unshaken. In the cross-examination, a suggestion was given that he did not state before the Investigating Officer that the place of occurrence was

visible from his class room and for this the learned advocate for the appellant argued that there is room for doubt regarding the credibility of the statement of this witness. But we regret we cannot agree with this argument. It is not expected that everything in details about the incident would be stated to the Investigating Officer during the investigation. There is no doubt that the prosecution has been able to prove that this witness at the material time was working as the teacher in the said school and he was taking the class. It is our common experience that a village primary school runs in a small house and one class room is visible from the other class rooms. So far as the present case is concerned, it has been established by the prosecution that at the material time Wazed Ali Mondal was taking class by sitting under a tamarind tree out side the class room. Naturally there is nothing unusual for another teacher to see the proceeding that was going on in the class of Wazed Ali, by sitting Inside another class room. Be that as it may, the evidence as given by the Head Master and by this teacher also clearly supports the claim of the PW 3 & PW 5 regarding the incident and we do not find anything to disbelieve their evidence.

23. So, from our above discussion, it appears that prosecution has been able to prove that the accused persons assaulted Wazed Ali by iron rod and lathi and as a result of that he sustained injury. From the evidence of PW 18, Dr. Santosh Kumar Bhuiya it appears that during post mortem examination it was found that Wazed Ali sustained lacerated injury on his head and there was bleeding from both ears and death was caused due to such injuries. It may be pointed out here that this Doctor did not conduct the post mortem examination. It was actually done by Doctor S.N. Sinha Biswas. But as this Doctor is dead, so the post mortem examination report was proved by this PW 18, who was acquainted with the hand writing of the deceased Doctor. According to the Doctor, post mortem report reveals that death was caused due to the injuries sustained by Wazed Ali on his head. This Doctor opined that the injury could be caused by hard and blunt heavy weapons. If we look into the cross-examination of this witness then it will appear that the accused persons tried to establish that this witness was not acquainted with the hand writing of the Doctor who actually conducted the post mortem. But we have already pointed out that this Doctor is attached to the Berhampur Hospital and there cannot be any earthly reason for him to depose falsely against the accused persons. We do not attach any importance to this suggestion. However, the learned advocate for the appellant argued that this Doctor in his evidence in cross-examination admitted by saying "this type of injury may be caused by fall and contact on hard, blunt and heavy substance. Such injury may also be caused by accidental fall." By this the learned advocate tried to impress upon us that the Doctor could not ignore the suggestion that the injuries sustained by Wazed Ali might be caused by accidental fall. But it must be remembered that this Doctor did not conduct the post mortem examination. He simply proved the report which was done by another Doctor who is now dead. The said Doctor after examination of the injury was clearly of the opinion that the injury was caused by hard and blunt heavy weapon. Simply because the PW

18 opined that such injuries may be caused by accidental fall, it cannot be said that by this statement the claim of the prosecution that Wazed Ali sustained injury due to the assault cannot be believed. We have already pointed out that it has been established by cogent and clear evidence that the accused persons actually caused injury to Wazed Ali by iron rod and lathi. Nowhere from the evidence on record it appears that Wazed Ali sustained those injuries by accidental fall. As such, the suggestion that Wazed Ali sustained those injuries by accidental fall has got no leg to stand and so we reject this argument. So from the evidence of the PW 18 it is clear that prosecution has been able to prove that Wazed Ali sustained injuries on his head which was caused by Iron rod and lathi and as a result of that he died. From the evidence on record it has been clearly proved that the accused persons by forming unlawful assembly caused the said death.

24. The learned advocate for the appellants further argued that from the evidence of the eye witnesses it appears that Wazed Ali was assaulted by iron rod as well as by lathis at random. As such, the learned advocate for the appellant argued that if that is the position then in that event there would have been multiple injuries on the body of the deceased. But as the Doctor has pointed out only one injury then the version of the eye witnesses in this respect should not be believed. True it is, that the post mortem Doctor has pointed out one lacerated injury on the head of the deceased and according to him that was the cause of the death. At the same time, it appears from the evidence of the eye witnesses that the other accused person also assaulted Wazed on his body by lathi. For that reason it has been argued that when Wazed was assaulted by lathi at random then there would have been signs of injury mark on his body and it should have been detected during post mortem examination. But it appears from the post mortem report that there is no such injuries found by the Doctor. There cannot be any hard and fast rule that when a person is assaulted on his body by lathi then in that event it will left some injury marks on the said body. To our mind if there were some injury marks on the body caused by lathi then the Doctor must have ignored the same as according to him the lacerated injury on the head of the deceased was most serious and as that was the main cause of the death of the deceased, so the Doctor was right in pointing out the said injury only. We find no irregularity in this respect. Learned advocate for the appellant further argued that from the evidence of the PWs it appears that blood was coming out from the injury of Wazed Ali and it fell on the ground as well as on the wearing apparels of the other teachers. But the Investigating Officer did not seize any bloodstained earth of the locality or the wearing apparels of the persons in order to show that actually Wazed Ali sustained bleeding injury as claimed by the prosecution. By this the learned advocate tried to impress upon this Court to show that there is room for suspicion regarding the prosecution claim. But we have already pointed out that the evidence is very clear regarding the injury sustained by Wazed Ali and the evidence in this respect of the eye witnesses has been clearly supported by the medical evidence. There is no

further necessity of searching for other corroborations. as claimed by the learned advocate for the defence. Learned advocate for the defence argued that the Medical Registers of the Hospital have not been seized by the Investigating Officer in order to prove the injuries sustained by Wazed Ali. While admitting that it was the duty of the Investigating Officer to seize those papers, we must say that the absence of those registers does not nullify the statements of the eye witnesses regarding the injury sustained by Wazed Ali and particularly when those statements find clear support from the post mortem report. No doubt the investigation done by this Investigating Officer is far from satisfactory. In a case of murder, it is the duty of the Investigating Officer to take all possible precautions to make out a full proof case for the prosecution and for that it was his duty to seize the bloodstained earth of the locality as well as the blood stained rearing apparels of the persons as well as the hospital registers in order to establish that Wazed Ali at that time sustained serious bleeding injury on his head. But simply because the Investigating Officer has not done that, it cannot be said that for that reason only the entire prosecution case should be disbelieved particularly when we find that there is clear and sufficient oral evidence to establish the claim of the prosecution. If that is done, then in that event it will give a wrong signal and there will be every possibility that the Court will have to play at the whims of the Investigating Officer. As such, we do not accept all these arguments of the learned advocate for the defence. The learned advocate for the defence further argued that in the FIR it has been mentioned therein that the accused persons assaulted Wazed Ali by lathi, ballam, tangi etc. But from the post mortem report it appears that the injury sustained by Wazed Ali was caused by hard and blunt weapon. There is no injury on the body of Wazed which have been caused by a sharp cutting weapon like ballam, tangi etc. By this he wanted to impress upon this Court that the FIR maker has made a deliberate false statement and he tried to mislead the Investigating Agency and the Court in this respect. True it is that there is no injury found on the body of Wazed Ali which could have been caused by a sharp cutting weapon like ballam and tangi. But simply because in the FIR the complainant has mentioned that Wazed Ali sustained injuries by lathi, ballam and tangi, it cannot be said the entire statement as made in the FIR is false. We must remember that the FIR maker is the son of Wazed Ali and he heard the incident from PW 3 Monirul and he immediately rushed to the P.S. We could very well imagine the mental condition of the FIR maker at the material time. Similarly we also should not forget that the PW 3 at the material time was a child and was reading in a primary school. It is not expected that a clear cut statement in minute detail would come from the mouth of the PW 3 immediately after the occurrence and due to the shock sustained by him as a result of the incident there is a possibility of little exaggeration by him. As such we are of opinion that this defect as pointed out in the FIR by the learned advocate for the defence cannot be said to be fatal so far as the prosecution case is concerned. Learned advocate for the defence further argued that the incident took place on 20.02.86 and the matter was reported in the P.S. on the same day. But it appears that the FIR was placed

before the learned SDJM, Krishnanagar on 25.02.86. According to him there is no explanation for this delay in sending the FIR to the concerned Court. He has drawn our attention to the admission of the witnesses to show that it was the duty of the P.S. to send the FIR within 24 hours of its recording. As the FIR was placed before the SDJM about 4 days after the incident so the learned advocate for the defence argued that the possibility of lodging the FIR subsequently in collusion with some interested persons cannot be ruled out. But with respect, we would like to differ with this argument of the learned advocate for the defence. There may be various reasons for not placing the FIR before the learned SDJM in due time but that does not mean that the FIR was subsequently manufactured in collusion with some Interested persons. Of course, it was the duty of the Investigating Officer to produce all the papers in this connection in order to dispel any doubt. But simply because that has not been done, it cannot be said that the FIR was subsequently manufactured in collusion with some interested persons. We have already pointed out that the prosecution has been able to establish that there is credibility in the statements of the eye witnesses as well as in the evidence of the PW 1 who has lodged the FIR and as such we prefer to ignore this defect as pointed out by the learned advocate for the defence.

25. Learned advocate for the defence drew our attention to the evidence of PW 2 Hazarat Molla. This PW 2 in his evidence-in-chief has stated that he saw the incident while he was going to his land. But in his cross-examination this witness had admitted by saying "I have no land of my own." As such the learned advocate argued that the statement made by this witness regarding the alleged incident is not at all believable as this witness has made contradictory statement in chief and cross-examination regarding his visit to his land. In fact when he has admitted that he has got no land of his own, then the question of his going to his land and seeing the incident does not arise at all. But if we closely look into the cross-examination of this PW 2 then it will appear that while admitting that he has got no land of his own, the PW 2 at the same time stated that he was proceeding towards a land which he cultivated in "Bhagh" and at that time he noticed the incident. We find nothing wrong to the statement made by this witness in this respect. In our opinion there is no contradiction at all in the statement of this witness regarding the alleged land. He has successfully clarified the position in the cross-examination. As such we do not accept this argument of the learned advocate for the appellant.

26. Learned advocate for the appellant further pointed out that the examination of the accused persons u/s 313 CrPC is far from satisfactory and as such as the accused persons were not given reasonable opportunity to explain the incriminating circumstances against them, so the entire trial has been vitiated for that. In order to substantiate his claim he pointed out that no statutory warning was given to the accused persons before putting the questions to them. Moreover, separate relevant circumstances which were against the accused persons, were not put to them and the sum total of the evidence were put to the accused persons at a time. As a result of this, the accused persons were

deprived of giving proper reply in their defence. As such, when this vital right of the accused persons has been infringed, so it cannot be said that the trial as conducted by the learned Court below was fair and proper. But we regret we cannot agree with this argument. Section 313 CrPC provides a statutory safeguard to the accused persons so that they can understand what is there against them in a particular trial. The main thing that is to be looked into is, whether, by not giving the statutory warning and by not putting the questions properly, the accused persons were prejudiced or not. It appears from the Lower Court Record that all along the accused persons were given ample opportunities to contest the case and they actively participated in the crossexamination of the witnesses. As such, it cannot be said that the accused persons were taken by surprise at the time of their examination u/s 313 CrPC and they were prejudiced by the manner in which the questions were put to them. Although, it must be admitted that the manner in which the examination of the accused persons u/s 313 CrPC was done by the learned Court below, is far from satisfactory and in our considered opinion the learned Court below ought to have been more diligent and careful in putting the questions to the accused persons, but simply for that reason it cannot be said that the accused persons have been denied of a fair trial before the learned Court below. As we are of opinion that the accused persons were not in any way prejudiced due to the alleged defective examination u/s 313 CrPC, so we are of opinion that there cannot be any question of sending the case back to the Court below for further examination u/s 313 CrPC.

27. Lastly, the learned advocate for the appellant argued that at the time of incident one of the appellant namely appellant No. 4 Sher Shah Sk. was minor and as such it was the duty of the Court to take step for trial of the said appellant under Juvenile Justice Act and it was not proper on the part of the learned Court below to try the said appellant along with the other accused person who were majors at the time of incident. Learned advocate for the appellant submitted that in view of the provisions of Juvenile Justice Act, the matter should be sent back to the learned Court below in order to come to a finding as to whether the said appellant was Juvenile or not at the time of the incident and to take further step thereafter. But it appears that the incident took place in the year 1986. Since then trial continued for a long time and after conviction of those accused persons, when an appeal has been preferred before this Court, the present plea that the appellant No. 4 was at the material time a minor, was taken. We fail to understand as to why the defence did not prefer this claim at the earliest opportunity. We are of opinion that if at this stage, an order is passed upon the learned Court below to make an enquiry on this point, then it will not at all be proper. In this respect we rely on the decision reported in 1993 supp. (1) Supreme Court cases at page 409 where the Hon"ble Apex Court held that when such a plea of minority was not taken before the committal Court or before the trial Court then the appellate Court was not at all justified in holding a particular accused to be "child" within the meaning of Juvenile Justice Act. The ratio as decided in the said decision appears to be that the plea of minority

should be taken reasonably at the earliest opportunity and if that is not done then it would not be proper for an appellate Court to reopen the matter at a very belated stage. As such, we are unable to accept this argument of the learned advocate for the appellant and we reject the same.

28. Therefore, from our above discussion we are of opinion that the prosecution in this case has been able to prove that on the date of incident the present appellants after forming an unlawful assembly entered into the Kulgachhi Primary School and in furtherance of their common object assaulted Wazed Ali Mondal seriously which ultimately resulted in his death. The evidence, as adduced in this case, is trustworthy and in our opinion, the learned Additional Sessions Judge was perfectly justified in relying upon the evidence as adduced in connection with this case. We fully agree with the view of the learned Additional Sessions Judge that the accused persons are guilty of forming unlawful assembly and they are also responsible for the murder of Wazed Ali Mondal. The learned Court below, in our opinion, rightly-convicted the accused persons u/s 147, 302 read with 149 of the IPC and we do not like to interfere with the said finding of the learned Court below. Under such circumstances the order of conviction and sentence as passed by the learned Court below upon the appellants, is confirmed. The appeal stands dismissed. The appellants, if on bail, are directed to surrender before the Court below to serve out the sentence.

Send the LCR along with the copy of this judgment to the Court below at once.

N.A. Chowdhury, J.

29. I agree.