

(2016) 03 CAL CK 0027
In the Calcutta High Court
Case No : Criminal Appeal No. 71 of 1989

Arjun Singh and Others

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 18-03-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, Section 31, Section 31 (2),
Section 313, Section 357A, Section 456
Penal Code, 1860 (IPC) — Section 120B, Section 201, Section 302, Section 304,
Section 323, Section 326, Section 34, Section

Citation : (2016) 03 CAL CK 0027

Hon'ble Judges : Indira Banerjee and Indrajit Chatterjee, JJ.

Bench : Division Bench

Advocate : Sudipto Moitra and Samiran Mondal, for the Appellant; Saibal Bapuli and Arijit Ganguly, for the Respondent

Final Decision : Disposed Off

Judgement

Indrajit Chatterjee, J.—1. This appeal has been directed against the judgment and order of conviction as passed by the learned Additional Sessions Judge, First Court, Bankura on 07.02.1989, wherein the learned Trial Court was pleased to convict the present appellants in respect of the charge under Section 302 of the Indian Penal Code (hereinafter called as the said Code) read with Section 34 of the said Code for the murder of the victim Batul Ghosh in furtherance of their common intention and sentenced them to suffer imprisonment for life and also directed to pay fine of rupees thirty thousand (30,000/-) each in default to suffer rigorous imprisonment for five years.

2. The learned Trial Court was further pleased to sentence the present appellants to suffer further period of rigorous imprisonment for one year each and to pay fine of rupees five thousand (5,000/-) each in default to suffer further three months of rigorous imprisonment for the offence punishable under Section 323 of the Indian Penal Code for causing hurt to the victim Menoka Ghosh. The accused/appellants were further sentenced to suffer the same term of imprisonment for

the offence punishable under Section 323 of the said Code in respect of causing hurt to the other victim Pachai Ghosh. The learned Trial Court further passed an order that the sentences will run consecutively and that a sum of rupees one lakh (1,00,000/-) out of the total fine amount so realised shall be given to the widow of the deceased Batul Ghosh and in case of her death to her legal heirs.

3. The prosecution case before the learned Trial Court can be stated in brief thus, that on 10.10.1984 at about 1.45 a.m. one Nabani Bauri, the local MLA of Gangajalghati Constituency, within the district of Bankura, accompanied by one Manik Ghosh, the Gram Pradhan of Barsal Gram Panchayat and Arun Bajpayee, a member of the Zilla Parishad of the said district came to the Officer-in-Charge (hereinafter called as O.C), Gangajalghati Police Station and informed that there was some tension at village Baralalpur as one Batul Ghosh of the village Palajuria had a clash with some men of the village Baralalpur in course of which Batul Ghosh sustained injuries. The matter was diarised as per GD Entry No. 200 dated 10.10.1984 at 1.45 a.m and the said O.C himself went to that village along with one Sub-Inspector of Police J. Ghosh and a police contingent of sufficient strength. The said O.C left the Police Station at about 1.55 a.m on 10.10.1984 as per GD Entry No. 201 dated 10.10.1984 and reached Baralalpur village at about 3 a.m. and on reaching the said village they found that a dead body was lying in a paddy field about 100 cubic from the village tank called as Talgaria and he identified the dead body as that of Batul Ghosh who was known to him from before as he was an accused in a dacoity with murder case. The Chaukidar of that area was also found near the dead body along with Pagal Ghosh, that is, the brother of the victim and also the FIR maker.

4. The statement of that Pagal Ghosh was recorded on the spot at about 3 a.m. and the said statement was forwarded to that Police Station for starting a case under Section 302/34 of the IPC and accordingly that Police Station Case No. 3 dated 10.10.1984 was started. The said O.C took up the investigation. The inquest examination was done on the dead body of the victim by the said OC.

5. It was disclosed in that FIR that at about 5 p.m. the victim Batul Ghosh, his brother Pagal Ghosh and the wife of Batul Ghosh namely Menoka Ghosh went to their field to pluck brinjals. It may not be out of place to mention that the said field was about 800 cubic from their residence. After collecting brinjals in a basket that Pagal Ghosh started for his house but not through any shortcut route but through the so called main village thorough fare. It was then roughly 7 p.m. It was the day of Kojagori Laxmi Puja and naturally it was a moonlit night. This FIR maker (henceforth called as PW-1) noticed 4 persons on his way to home who were waiting on the northern bank of the tank "Talgaria". Those persons are the present appellants namely Aditya Ghorui, Sujit Ghorui, Shaba Ghorui and Arjun Singh all of village Baralalpur.

6. PW-1, however, reached home and as soon as he reached home he heard a voice of some alarm raised by someone and he rushed back to the field on the north-eastern corner of the said tank and found that the present appellants were

assaulting his elder brother Batul with various weapons like tangi, spears, bhojali and lathi. One or two persons were also there along with the present appellants but they could not be identified. He further saw his father Pachai and boudi Menoka to request the present appellants to spare his elder brother and not to beat him anymore but they did not care and rather assaulted his father and boudi. They received bleeding injuries.

7. It was further case of the prosecution that Batul died at the spot and he was bleeding profusely. This PW-1 raised alarm which attracted the villagers who came to the place of occurrence and the offenders fled away. The Chaukidar of Guska area came to the place of occurrence after the incident. Thereafter, the police came at about 3 a.m. and this FIR was lodged about which we have already told. Inquest examination was done on the body of the victim, the body of the deceased was sent for post-mortem examination, and his wearing apparels were seized. The police also seized one sheath of bhojali made of leather from the northern bank of the tank Talgaria and one basket in which brinjals were being carried by Menoka and Batul. The police also seized as per seizure list after the PM examination was done the wearing apparels of the deceased that is one green lungi and one white underwear both stained with blood.

8. On the next day Pachai Ghosh and Menoka Ghosh were forwarded to Amarkanan Primary Health Centre and both of them were treated by Dr. Anjan Pal (PW-4). The police collected the postmortem report of the deceased but could not collect the injury reports of Pachai Ghosh and Menoka Ghosh, which were however produced by the said doctor PW-4 before the Trial Court, at the time of recording his evidence.

9. The case was at first investigated by Sub-Inspector Pitadhar Mondal (PW-12), the then O.C Gangajalghat Police Station and on his transfer the investigation of the case was taken over by Sub-Inspector Gurupada Roy, the successor of PW 12. PW-12 could arrest one accused, that is, the appellant No. 1 Arjun Singh and forwarded him to Court on 11.10.1984. He also tried to arrest the other absconding accused persons but failed. The second I.O also could not arrest those absconding accused persons and he submitted charge-sheet against present appellants on 04.12.1986 showing appellant Nos. 2, 3 and 4 as absconders under Section 302 etc. of the I.P.C.

10. The charge-sheet was received by the learned Sub-Divisional Judicial Magistrate, Bankura on 30.12.1986 and he issued process for appearance of the accused persons including the three absconding accused persons. The appellant No. 1 Arjun Singh, however, appeared in response to the summons but the other three accused persons continued to abscond. The case was committed to the Court of Sessions on 23.05.1987 only with the accused Arjun Singh and the learned Trial Judge was pleased to frame charge against the said accused Arjun Singh under Section 302 read with Section 34 of the said Code on 10.03.1988 to which the said accused pleaded not guilty and claimed to be tried.

11. The three other absconding accused persons were produced before the Learned Sub-Divisional Judicial Magistrate, Bankura on 12.04.1988 and they were also committed to the Court of Sessions in Sessions Case No. 1(5)1988 and the Trial Court received those three accused persons along with record of that Sessions Case on 03.05.1988. Earlier Sessions Case No. 8(6)1987 was tagged with the present sessions case that is 1(5)1988. It may be mentioned that in Sessions Case No. 8(6) of 1987 giving rise to S.T No. 2(3) 1988 charged was framed against all appellants under Section 302 read with Section 34 of the said Code and it may also be mentioned that on 21.05.1988, the learned Trial Judge in the later Sessions case framed separate charge against the three accused persons who were committed later on, under Section 302 read with Section 34 of the Code. All the four accused persons were charged on 08.06.1988 on 23.07.1987 and charge was framed against the Appellants Nos. 2, 3 & 4 namely Arjun Singh, Aditya Ghorui, Sujit Ghorui and Shaba Ghorui for the offence punishable under Section 302 read with 34 of the said Code on 21.05.1988 to which all of them pleaded not guilty and claimed to be tried and as such the trial of Session Trial No. 2 of March 1988 was started before the Trial Court.

12. The trial had to be adjourned as some papers were not available and on 08.06.1988 the learned PP-in-charge filed one petition for framing of additional charge against all the accused persons under Section 323 read with Section 34 of the said Code and the said prayer was allowed and additional charge was framed against all the four accused persons for the offence punishable under Section 323/34 of the said Code to which the accused pleaded not guilty and claimed to be tried.

13. To prove the charge the prosecution examined in all 12 (twelve) witnesses. Let us now say who they were,

PW-1, as we have already stated is the de facto complainant who is also the brother of the deceased and also one alleged eye witness of the incident.

PW-2, Menoka Ghosh is the widow of the deceased, also another alleged eye witness of the incident and also a victim.

PW-3, is Pachai Ghosh, the father of the deceased who also allegedly saw the incident and also received injuries.

PW-4, is the Dr. Anjan Pal who examined PW-2 & 3 at Amarkanan P.H.C.

PW-5, is one Amarendranath Palit, one A.S.I of police who filled in the formal FIR.

PW-6, is one Sanatan Debnath, being constable No. 563, who accompanied PW-12 to the place of occurrence and he also escorted the dead body of Batul Ghosh to Bankura Medical College Morgue and at that time he was accompanied by one constable Sudhir Mitra. The dead body was identified to the Medical Officer at the morgue by this witness, this witness also handed over the challan and a copy of the inquest report to the Medical Officer. This witness also collected the wearing apparels of the victim from the autopsy surgeon and made over to

the first I.O of this case that is PW-12(however the wearing apparels were not produced before the learned Trial Court).

PW-7, is that constable Sudhir Mitra, about which we have already told and he was only tendered by the prosecution for cross-examination by the defence.

PW-8, is one Mangal Ghosh, one co-villager of the deceased who rushed to the spot hearing hue and cry and saw that the accused was murdered in the paddy field of Baralapur. This witness saw PWs-1, 2 & 3 by the side of the body of the deceased.

PW-9, is one Sudhir Mondal another co-villagers of the deceased, who came to the spot on that evening at about 8 p.m. he along with others were gossiping at Hari Mela of their village (Palajuria) and they heard hue and cry coming from that tank, Talagaria. Thus, this witness is one post occurrence witness.

PW-10, is the second I.O of this case who submitted charge sheet in this case he also proved that he could not arrest the FIR named accused person and showed three accused persons as absconders.

PW-11, is the doctor who conducted the post-mortem examination on the dead body.

PW-12, is the first I.O of this case.

14. The defence preferred not to adduce any oral and documentary evidence but submitted notes argument and also the learned advocate of the defence made oral submission. The prosecution also did the same. Separate argument was made on behalf of opposite party namely Menoka Ghosh.

15. It is the case of the defence as we get from the trend of cross-examination and the answers given by the accused persons in their statements under Section 313 of the Cr.P.C is that they are innocent and have been falsely implicated in this case. It was also the case of the defence that they had no knowledge or complicity in this incident but after Batul Ghosh died a false case was fabricated against them in collusion with the police. It was also claimed by the defence before the Trial Court that the victim Batul Ghosh was a man of questionable character who was involved in a case of dacoity with murder and as such it was not unlikely that he might have quarrelled with other persons and that he was murdered by other partners of that gang.

16. At the time of argument the learned Lawyer of the appellants attacked the story of the prosecution as to the filing of the FIR at a belated stage. He submitted that the incident took place at about 7 pm on 09.10.1984 whereas the FIR was handed over to the police at 3 a.m. (in the intervening night) at the place of occurrence which was forwarded through one policeman to Galgajalghati police station and the case was registered ultimately at 5 a.m. on 10.10.1984, that is after a gap of 8 hours. He submitted that the police came to the place of occurrence at 3 a.m. On this point he cited the decision of the Apex Court as

reported in , (2004) 10 SCC Page 141 State of Punjab v. Daljit Singh and another, in which case the FIR was lodged at 6 a.m. on the next day, when the incident occurred at 8 p.m. on the previous day, wherein the Apex Court was not satisfied as to why the defacto complainant could not go to the Police Station which was situated 5 Km. in the opposite direction and that was held to be one ground of acquittal by the Apex Court.

17. On this point the learned defence counsel also cited another decision of the Apex Court as reported in , 1991 Cr.L.J 1391 (SC) Peddireddy Subbareddi and other v. State of Andhra Pradesh.

18. We have gone through these decisions unfortunately these two decisions will not apply in the present case considering the facts and circumstances of this case. In the decision of Daljit Singh's (supra) the Apex Court did not believe the explanation that critical law and order situation was existing in that area, but the FIR maker went to a village 5 Km. away from the place of the incident to inform his grandmother about the occurrence who did not report the matter instantly to the police station and that apart there was also delay in sending the FIR to the Magistrate. In the instant case before the floor of this Court it was not the situation.

19. In the second decision there was delay of 15 hours in lodging the FIR and apart from this circumstance the Apex Court did not believe the evidence of PW-1 who was the sole eye witness of that incident being highly interested witness and also highly artificial.

20. Every case is to be judged on its own facts. Here the incident took place after 5 pm in the evening and continued at least up till 7:30 p.m and in a village. The police was informed for the first time at 1:45 a.m on that very night, police came at 3 a.m, thus, it cannot be said that there was delay in lodging the FIR. It is true that the information was first divulged to the police by some political persons. Such information cannot be treated as FIR in view of the decision of the Apex Court as reported in , 2010 (1) SCC cri 413 (Pandurang Chandrakant Mhatre and Anr. v. State of Maharashtra). There cannot be any straight jacket formula to match every situation. The family of the deceased consisted of three persons, one old father, the widow of the deceased and the brother apart from the deceased. The widow and the father of the deceased also got injuries. In such circumstance none very naturally did not take the risk of going to the police station on that. The decision of the Apex Court relied upon by the defence as reported in 2002 AIR (SC) Page 50 (Sevak @ Ramsevak v. State of M.P.) will not apply on the facts and circumstances of this case.

21. The learned defence counsel also attacked the prosecution story as regards framing of the charge. He submitted that at first the charge was framed against the accused Arjun Singh under Section 302/34 of the said Code and thereafter another charge was framed against the present appellant Nos. 2-4 also under that section. We repeat under Section 302/34 of the said Code. The judicial

record shows that additional charge was framed under Section 323/34 of the said Code.

22. We have gone through the sheets of framing of charge and also perused the judgement of the learned trial court from these it appear that the charge was framed under Section 302/34 of the said Code on 10.03.1988 in Sessions case No. 8(6)1987, we repeat against appellant No. 1 only when appellant Nos. 2-4 were absconding. Subsequently the case was committed to the court of session in respect of the appellant Nos. 2 to 4 and naturally similar charge was framed against those appellants on 21.05.1988 in Sessions Case No. 1(5) of 1988 and thereafter prayer was made by the learned Public Prosecutor after some additional papers were received by him to frame additional charge and as such the trial court framed additional charge under Section 323 read with Section 34 of the said Code against all the appellants but in separate group, for causing hurt to Pachai Ghosh and Menoka Ghosh. Such additional charge was framed on 8th of June, 1988. Thus there is no apparent defect in the framing of the charge. The learned defence Counsel tried to make a mountain out of a mole. On scrutiny of the record we are satisfied that the appellants were not at all prejudiced in the framing of charge and expressed no grievance before the learned trial court.

23. On this point the learned Public Prosecutor cited the decision of the Apex Court as decided in Kamalanathan v. State of Tamil Nadu which was reported in 2005 (4) SC 501 wherein the Apex Court on the facts and circumstances before that court held that there was no failure of justice regarding framing of charge. Thus, we reiterate that the learned trial court did not err in framing of the charge and the charge as framed cannot be said to have prejudiced the accused persons. We prefer to rely on such decision.

24. The defence counsel also attacked the prosecution story as regards the injuries sustained by PWs-2 & 3, as the medical papers were not seized by the Investigating Officers or that copies of those medical papers were not supplied to the defence. The non-supply of those papers were not agitated before the learned Trial Court and the doctor who produced those papers were duly cross examined by the defence by all sets. Simply because of the inaction on the part of the investigating agency some medical papers were not seized, the prosecution cannot remain idle over the matter and the injury reports cannot be thrown away for their late production. The court is there to administer justice. The Trial Court rightly admitted into evidence that is the injury reports of PWs-2 & 3 even though those were produced at the time of just beginning of the trial through the learned prosecutor.

25. The prosecution story was also attacked by the learned defence counsel on the ground of non-examination of the Chaukidar, the member of the Zilla Parishad Bankura one Arun Bajpayee, the local MLA of Gangajalghati, one Nabani Bauri, Pradhan of Barshal Gram Panchayat, Manik Ghosh and also some 8/9 persons who came to the place of occurrence hearing the hue and cry. On this point some decisions of the Apex Court have been referred to being , (2006) 2

Cr.L.R (SC) page 1 (Pratap Singh and Anr v. State of Madhya Pradesh) and , (2004) 11 SCC 253 (Harjinder Singh @ Bhola v. State of Punjab) these decisions cannot apply on the facts before us on the ground that the information divulged by the members of some political party cannot be treated as FIR being a cryptic information.

26. In Pratap Singh's case (supra) the evidence of child witness was viewed with suspicion vis a vis the site map wherein one "mound" was not mentioned in the site plan wherefrom the child witness saw the incident. We are satisfied that the existence of this mound was very vital as from that the child saw the incident and this was the main issue before the Hon"ble Apex Court and the non-examination of some witnesses was relegated to the second position. In that case names of some eyewitnesses transpired during investigation and the Apex Court held that their non-examination was fatal.

27. In Harjinder Singh's Case (supra) the conviction was set aside on the ground that the prosecution evidence was based on chance witnesses and that too relations of the deceased and in that case the statement of the witnesses was recorded after three months and some persons who gathered after the occurrence were not examined and their statement was not recorded under Section 161 of the Cr.P.C. In the instant case before us PWs-1-3 are not the chance witnesses. They are very natural witnesses. The fact that some villagers came much later cannot be said to be vital in the facts and circumstances before us.

28. In Harjinder Singh's case (supra) there was land dispute between the parties but here in the instant case before us nothing has come out that there was any dispute between the parties. Thus we are of the opinion that neither Pratap Singh's Case (supra) and nor Harjinder Singh's Case (supra) will apply in this case.

29. We are not unmindful of the decision of the Apex Court as reported in 2014 (1) CLJ (SC) Page 1, wherein the Apex Court taking into consideration its own decision as reported in , AIR 1954 SC 31 (Abdul Gani and Ors. v. State of Madhya Pradesh), , AIR 1957 SC Page 747 (Sardul Singh v. State of Bombay), , AIR 1965 SC 202 (Masalti v. State of U.P.), , AIR 2004 SC 261 (Banti @ Guddu v. State of M.P.), , AIR 2013 SC 651 (R. Shaji v. State of Kerala), , AIR 1957 SC 614 (Vadivelu Thevar v. State of M.P.) and Kishan Chand v. State of Haryana, as reported in , JT 2013 (1) SC 222 summarised the matter and decided that the prosecution is not bound to examine all the cited witnesses and it can drop witnesses to avoid multiplicity and plurality of the witnesses. We may add here that the learned advocate of the prosecution has every right not to examine such witnesses whom he ascertained to be a hostile witness. It was further held in Rohtash Kumar v. State of Haryana as reported in , (2013) 14 SCC 434 that the accused can also examine the cited witnesses of the prosecution, but in that case the defence did not take up the matter before the trial court. Thus, it is the discretion of the prosecutor to tender the witnesses to prove the case of the

prosecution and the Court will not interfere with the exercise of that discretion unless, perhaps, it can be shown that the prosecution has been influenced by some oblique motive.

30. In another decision of the Apex Court as reported in , 1971 (SC) 2156 (Raghubir Singh v. State of U.P) that the public prosecutor is not bound to produce all witnesses. There is another decision of the Apex Court on this point as reported in , 2005 Cr.L.J at page 108 : of , AIR 2005 SC 44 (State of M.P. v. Dharkole).

31. It was argued by the learned Counsel appearing on behalf of the appellants that the prosecution has failed to prove anything from the evidence of the witnesses that there was any motive behind the crime. He submitted that it may be noted that it was a case of murder. He cited the decision of the Apex Court as reported in , AIR 2010 SC Page 85 (Pannayar v. State of Tamil Nadu by Inspector of Police) wherein the Hon"ble Apex Court acquitted the appellant on the ground that no motive could be gathered. We have gone through that decision. In that case before the Apex Court it was a case of murder and robbery based on circumstantial evidence. He also cited another decision of the Apex Court as reported in , AIR 2004 SC 26 (Badam Singh v. State of Madhya Pradesh) where in the Apex Court disbelieved the evidence of the eye witnesses on the facts and circumstances as the conduct of the witnesses was most unnatural and the Apex Court did not find any motive of the murder and there was also doubt as there was no blacking and charring of skin observed by the doctor around the wounds and there was no strangulation marks found on the dead body. In that case before the floor of Apex Court the special report reached the Magistrate after many days. Thus, on facts this decision cannot match with the case before us.

32. The case before us is not based on circumstantial evidence and it is based on direct evidence. We may refer to the decisions of the Apex Court as reported in , 2004 SCC (Cri) Page 149 (Balram Singh v. State of Punjab), wherein the Hon"ble Apex Court held "motive is of no relevance if evidence produced is acceptable." In another decision of the Apex Court as reported in , 2003 SCC (Cri) Page 1362 (Thaman Kumar v. State of Union Territory of Chandigarh) wherein the Apex Court held absence of evidence on the point of motive would not be in essentiality establishing the guilt of the accused. On this point there is another decision of the Apex Court as reported in , 2003 SCC (Cri) 1402 (Arvind Prakash v. State of Uttar Pradesh). In another decision on this subject as reported in , AIR 1989 SC Page 733 (Subedar Tewari v. State of U.P) the Apex Court observed that motive is not always an integral part of the crime. Sometimes crime could be committed even without any motive at all and when the fact of the commission of the crime has been clearly established it is by no means incumbent upon the prosecution to show that motive actuated in the criminals mind and induced to commit the particular crime. It further reiterated that absence of proof of motive is of no consequence if there is clear and cogent evidence of the commission of an offence against the accused persons.

33. We are of the view that when there is direct evidence the Court should not go for the motive. It is said, it is difficult to fathom in a criminal case what was in the mind of the accused. Thus, we cannot accept the contention of the defence counsel that as no motive was established the accused persons are fit to be acquitted.

34. The defence counsel attacked the evidence of some witnesses as they have exaggerated before the Court who did not narrate before the I.O regarding that portion of the evidence. On this point the learned defence counsel cited the decision of the Apex Court as reported in , (2003) 3 Supreme Court Cases 175 (Vimal Suresh Kamble v. Chaluverapinake Apal S.P. and Anr.). It is a settled law that if the witness did not state a particular fact to the investigating officer in the course of investigation and the prosecution later on seek to establish that fact through the evidence of the witnesses that portion of the evidence is to be disbelieved by the Court. Here the question is whether that omission to state before the I.O was vital or not. In every criminal trial the omissions may be fatal or not considering the weight of the question and the relevancy of that with the fact of the case. On this point the learned defence counsel referred to two decisions of the Apex Court as reported in , (2003) Supreme Court Cases (Cri) 1052 (Tarun @ Gautam Mukherjee v. The State of West Bengal) and , (2007) C.Cr.LJ (SC) 669 (Sujoy Sen @ Sujoy Kumar Sen v. State of West Bengal).

35. Regarding the omission in the FIR the learned defence counsel referred to the decision the Apex Court as reported in 2009 (1) E. Cr. N page 637 (State of Maharashtra v. Ahmed Sk. Babajan and Ors.) in that case there was omission to mention Section 456 of the Code without any explanation and naturally the Apex Court did not accept the evidence of the witness to introduce the ingredients of that section. There is no reason to contradict the argument of the learned defence counsel on this point but at the same time the court will consider as to whether that omission will touch the merit of the case.

36. Regarding the theory of the common intention it was submitted by the learned defence counsel by taking us to the decision of the Apex Court as reported in 2008 (3) E.Cr.N at Page 1340 (Shashi Mohan v. State of Madhya Pradesh). We have gone through the decision of that case. One Rakesh was shot dead by the appellant No. 3 who pumped into him three gun shots resulting in instant death of the said Rakesh. In that case his father (A-1 and brother A-3 were present in the scene of occurrence and there was no specific overt act on the part of the third appellant and naturally the Apex Court held that Section 34 of the said Code cannot be attracted.

37. We are not unmindful of a three bench decision of the Apex Court as reported in , AIR 1977 SC 710 : 1977 CR.LJ 352 (Harshadsingh Pahelvansingh Thakore v. The State of Gujarat) wherein Justice Krishna Iyer speaking for the bench illustrated the principle of attracting Section 34 of the Code in this manner:

"..... When people play with knives and lives, the circumstance

that one man's stab falls on a less or more vulnerable part of the person of the victim is of no consequence to fix the guilt for murder. Conjoint complicity is the inevitable inference when a gory group animated by lethal intent accomplish their purpose cumulatively. Section 34 IPC fixing constructive liability conclusively silences such a refined plea of extrication. (see *Amir Hussain v. State of U.P.*; *Maina Singh v. State of Rajasthan*.) Lord Sumner's classic legal shorthand for constructive criminal liability expressed in the Miltonic verse "They also serve who only stand and wait" a fortiori embraces cases of common intent instantly formed, triggering a plurality of persons into an adventure in criminality, some hitting, some missing, some splitting hostile heads, some spilling drops of blood. Guilt goes with community of intent coupled with participatory presence or operation. No finer justice niceties can be pressed into service to nullify or jettison the plain punitive purpose of the Penal Code."

38. It was faintly submitted by the learned lawyer appearing on behalf of the appellants that at best the appellants might have been convicted under Section 304 (Part-I) of the said Code considering the nature of the injuries. He extended his argument by taking us to the decision of the Apex Court as reported in , 2008 (3) AICLR (SC) page 22 (*Marimuthu v. State of Tamil Nadu*) wherein three accused persons were acquitted on benefit of doubt by the High Court in a case of under Section 302 of the Indian Penal Code and the conviction of the appellants before the Apex Court was altered to that of Section 304 (Part-I) of the Code. In the instant case before the floor of this Court the victim sustained in all eighteen injuries and out of those eighteen injuries three were vital, which in ordinary course was enough to cause the death of a person. The analogy of the decision of the Apex Court in the *Marimuthu* (supra) cannot influence the decision of this case on the facts and circumstances before us.

39. The learned defence counsel referred to the decision of *Jeet Singh and Anr. v. State of Madhya Pradesh* as reported in (2008) 17 SCC 723 wherein the Apex Court disbelieved the story of the prosecution that all the appellants had a common intention to cause death of the deceased and as such the conviction of the appellants under Section 302/34 was altered and the appellants were convicted under Section 326/34 of the said Code. It was a specific case of the prosecution that the serious injuries were caused by "Farsa" which was inflicted on the accused "D" but in the instant case before us there no evidence as to which accused inflicted which blow on the victim and as such this decision will not apply in the present case. It may also be mentioned that the decision of the Apex Court *Jeet Singh* (supra) which is a three judges' bench decision can very much apply on the facts and circumstances before us.

40. The learned defence counsel also cited another decision of the Apex Court as reported in , (2008) 2 C.Cr.LR (SC) 476 (*Tamilselvan v. State represented by the Inspector of Police, Tamil Nadu*) but unfortunately the fact of that case cannot match with the fact before this Court. In that case, the incident took place at 10 p.m. and the guards had no torch light in their hands and the Apex Court held

the identification of the appellants in the moonlit as doubtful. In that decision the names of the miscreants were not mentioned in the FIR. In the present case before the floor of this Court the incident took place in a moonlit night at about 5 p.m. and all the four miscreants were known at least to two witnesses that is PWs-1 & 3 and one miscreant was known to PW-2 (Menoka Ghosh). We have gone through that decision unfortunately the fact of that case is not matching with the present one.

41. He also cited the decision of the Apex Court as reported (2005) 5 SCC 72 (Raja Ram v. State of Rajasthan) wherein the Apex Court held that the evidence of a hostile witness may be relied upon by the defence and it would be binding on the prosecution.

42. It is true that in view of such decision the defence can vary well rely on the evidence of one hostile witness.

43. It was further argued by the learned advocate appearing on behalf of the appellant and also by filing one written notes of argument that the evidence of these three prosecution witnesses that is the star witnesses of the prosecution case namely Pagal Ghosh, Menoka Ghosh and Pachai Ghosh contradicted in between themselves and as such their evidence cannot be relied upon. As regards the evidence of the doctor that is PW 4 it was the submission of the learned defence counsel that the injury report was prepared by this witness (PW 4) but it was not collected by PW 12 that is the first investigating officer of this case and this doctor was also not examined under Section 161 of the Cr.P.C. On this point he cited the decision of the Apex Court as reported in , 2004 Cri.L.J 2001: (2006) 2 Cr.L.R. SC1. Considering the fact of the case before this Court this court is satisfied that the doctor is an independence witness and he had no axe to grind against the accused persons and what he deposed is duly corroborated by the injury reports. It is true that the injury reports were not collected by the first IO but those were produced by the prosecution and the learned prosecutor had every right to do so.

44. He has also attacked the evidence of PWs 5 & 6 that is the two constables who took the first information report to the police station from the place of occurrence and the other who escorted dead body to the morgue of Bankura Hospital along with other constable Sudhir Mitra (constable No. 293 i.e. PW 7) and he also identified the dead body to the doctor. The autopsy surgeon handed over the wearing apparels of the deceased to the officer in charge but while examining the autopsy surgeon (PW 11) he stated that when he examined the subject it had no wearing apparels that is it was completely naked. Regarding the evidence of PW 8 it was submitted by the defence that this witness is none but the son of the elder brother of the father of the Batul Ghosh but his statement differed from the statements of PWs 1, 2 & 3. Regarding the evidence of PW 9 it was argued by the defence that these witnesses did not see the crime and he went to the place of occurrence after hearing hue and cry and he found the dead body of Batul Ghosh lying murdered and wife of the Batul Ghosh was also seen

near the said dead body. We can say that the prosecution story cannot be brushed aside in view of such lapse.

45. Regarding the evidence of PW 10 it was argued by the defence that this witness was the Officer-in-Charge of Gangajalghati Police Station since 20.03.1986 and got charge of investigation of this case on and from 10.10.1984 but he did not examine the doctor of Amarkanan Public Health Centre. As regards the autopsy surgeon (PW 11) it was argued by the defence that the injuries as mentioned is not possible by fists and blows which might be caused by moderated heavy sharp cutting weapons like bhojali, tobla, and da (katari). The learned defence counsel has also raised suspicion that how the dead body which has produced before the autopsy surgeon can be naked. Regarding the evidence of PW 12 that is the first Investigating Officer of this case the line of attack of the defence was regarding sending of the dead body in naked condition, even though he made a request to the autopsy surgeon to return the wearing apparels to him through the constable. This argument of the defence is not matching with the evidence of the doctor. Whether the dead body was naked when it was produced before the doctor for post mortem is not in issue in this case as in this case the murder of Batul is not in dispute and the defence did not make out a case that the body of some other person was sent to the doctor.

46. Learned defence counsel also submitted that this Batul Ghosh was not a clean man but he was arrested by Gangajalghati police station in connection with a dacoity case. Here we may say the prescription of the legislature that evidence of bad character will not be admissible as per the Evidence Act.

47. Learned defence counsel submitted that when the charge was framed the time of occurrence was not mentioned and as such the charge was defective in view of the decision of the Apex Court as reported in , (1983) 2 SCC 66 and , 2011(1) Crimes 187 (SC). Learned defence counsel also submitted that some important witnesses like Nabani Bauri, Arun Bajpayee and Manik Ghosh had not been examined and that will cost the prosecution dearer.

48. Learned defence counsel took us to the FIR wherein the FIR maker disclosed that some more persons hit the deceased and the names were not disclosed.

49. As regards the common object it was argued by the learned defence counsel that in the evidence on record there was nothing to apply Section 34 of the Code as per evidence on record. These accused persons were gossiping on the bank of the tank, Talgaria and there is nothing on record to show that the appellants had common intention to commit the crime. It was also argued by the defence that the Chowkidar who was also sitting beside the dead body has also not been examined and that is also fatal to the prosecution. On this point the learned defence counsel cited the decision of the Apex Court as reported in (2008) 17 SCC 723 and (2008) 3 ECrN. 1340. He also submitted that some of the witnesses deposed before the learned trial court that they were not examined by the prosecution and as such their evidence should not be considered by this Court in

connection with this. The learned defence counsel cited a decision of the Apex Court as reported in 2003 SCC (Cri) 1052.

50. It was further submitted by the learned counsel that the prosecution witnesses have not supported the case in proper perspective and on that point he cited the decision of the Apex Court as reported in 2005 (5) SCC 272. It was the alternative argument of the defence that Section 302 of the Code has no applicability in the present case considering the nature of the offence if at all committed by the appellants then at best it may be an offence under Section 304 Part II of the IPC. On this point he cited the decision of the Apex Court as reported in , 1992 Supp (2) SCC 470 and 2008 (3) All India Criminal Law Reporter-Page-22.

51. Before the learned trial court some decisions of the Apex Court were considered:

"1. , AIR 1985 SC 1384 (State of UP v. Ballabh Das) wherein the Apex Court held the testimony of interested witness is reliable, if otherwise trustworthy but should be evaluated with care and caution. In the fraction - ridden village where independent witnesses are not available, it would be manifestly unjust to reject the prosecution case merely because the witnesses produced by it were interested.

In the said decision it was held that minor contradictions are expected. Merely because of certain omission of contradiction in the prosecution case the entire evidence cannot be thrown out.

2. The decision of the Apex Court as reported in , AIR 1983 Cr.LJ SC 1096 (Bharwada Bhoginbhai Hirjibhai v. State of Gujarat) cannot have any bearing in this case.

3. In , AIR 1988 SC 696 (Appabhai v. State of Gujarat) the Apex Court further illustrated the principle laid down in (State of UP v. Ballabh Das) (supra) that minor contradictions or inconsistencies are immaterial. Discrepancies of minor nature in testimony of witness should not be given undue importance. This decision naturally has bearing in the present case before us.

4. , AIR 1985 SC 48 (State of UP v. M.K. Anthony) wherein the Apex Court held that minor variation or infirmities in the evidence not sufficient to reject the whole evidence and

5. 1977 Cr.LJ Kerala 343 wherein the Hon''ble Court held that the prosecution is not bound to produce all witnesses."

52. On behalf of the respondent No. 2 Menoka Ghosh that is the widow of Batul Ghosh submitted through her advocate that the prosecution case is to be believed and there is no reason to discard the evidence of the eye witnesses and also the evidence of PM doctor. It was submitted by the learned advocate appearing on behalf of the said respondent that the court may take into

consideration the following judgments.

"1. 2010 (1) SCC Cri Page 302 in Para-34 (Vishnu and Ors. v. State of Rajasthan) wherein the Apex Court observed that injured persons who are closely related to the deceased who received injuries in the course of the occurrence, their presence at the spot cannot be denied as injured witnesses would not spare the real assailant and falsely involve innocent persons.

2. 2010 (1) SCC 1108 at Paragraph-14 (Suresh v. State of Rajasthan) wherein it was held by the Apex Court that injured witnesses who have suffered injuries would not have shield the actual culprit and implicate an innocent person.

3. 2010 (1) SCC Cri 275 Para-12 (Vupendra Singh and Ors. v. State of U.P.) on the same point like the other two decisions.

4. , 2010 (1) SCC cri 413 (Pandurang Chandrakant Mhatre and Ors. v. State of Maharashtra), which has been already cited above) wherein the information given to police to rush to the place of incident to control the situation need not necessarily amount to FIR.

1. Learned lawyer appearing on behalf of the prosecution filed a written note of argument and also advanced oral argument by saying that in the present case PWs 1, 2 & 3 are all eye witnesses of this case and of them PWs 2 & 3 are also the victims of the incident. He submitted that naturally those two witnesses are to be believed and PW 3 being another eye witness also cannot be lost sight of the court can very much rely upon on his evidence. On this point he cited a decision of the Apex Court as reported in , 2011 AIR SCW 1877 (The State of U.P. v. Naresh and Ors.) wherein the Apex Court observed that testimony of an injured witness has its own relevancy and efficacy as he sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. It was further observed by the Apex Court that the testimony of an injured witness has been accorded a special status in law as he would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of offence. Regarding the evidence of doctor PW 4 he argued that the said doctor is an independent witness and he can safely be relied upon.

2. It was argued by the learned prosecutor that much was argued by the defence as regards the discrepancy in the version of the witnesses. On this point he submitted that minor discrepancy cannot discard the otherwise established evidence on oath. On this point he cited a decision of the Apex Court in (Subodh Nath and Anr. v. The State of Tripura) as reported in , AIR 2013 SC 3726 wherein the Apex Court observed that there are always normal discrepancies due to normal errors or observation, loss of memory, mental disposition of the witnesses, etc. and unless, such discrepancies are material discrepancies so as to create reasonable doubt about the credibility of the witnesses, the court will not discard the evidence of such witness to supplement the aforesaid decision.

3. He also cited another decision of the Apex Court as reported in , AIR 2013 SC 2059 (The State of Madhya Pradesh and Dal Singh and Ors.). It was further argued by the learned prosecutor that it is a fact that the eye witnesses of the present case before us are the relations and very near ones of the deceased victim but that mere fact cannot in any way question their veracity as observed by the Apex Court in the case of The State of Uttar Pradesh v. Naresh and Ors. as reported in 2011 AIR SCW 1877 wherein the Supreme Court observed that a mere relationship cannot be a factor to affect the credibility of a witness and as such the evidence of a witness cannot be discarded solely on the ground of his relationship with the victim of the offence. He also tried to supplement this point through a decision of the Apex Court as reported in , AIR 2002 SC 50 : 2001 AIR SCW 4558 (Sewaka @ Ramsewak v. The State of Madhya Pradesh and Anr.).

4. As regards the post mortem report it was submitted by the learned Public Prosecutor that post mortem conducted by the PW 11, Dr. J.N. Dey has duly corroborated the evidence of the eye witness in respect of the various weapons used on the victim and the diverse injuries sustained by him. The doctor observed that there were as many as eighteen different and serious wounds on the body of the victim, clearly indicating the heinousness with which the poor and helpless victim was practically butchered and slaughtered by four adult persons. He further submitted that the injuries were so serious to come to this conclusion the victim died for those injuries.

5. Regarding the inconsistencies between the ocular evidence and medical evidence it was argued by the learned prosecutor that simply because of such inconsistencies cannot overthrow the prosecution's case as was held in Darbara Singh v. The State of Punjab as reported in , AIR 2013 SC 840 wherein the Hon"ble Supreme Court observed in Paragraph 5 that so far as the question of inconsistency between medical evidence and ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. It was held by the Apex Court that in the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-?-vis medical evidence. As regards the some defects in the investigation of this case it was submitted by the learned prosecutor by taking me to the evidence of PW 12 Pitadhar Mondal, the investigating officer of this case to say that the investigation of the present case was defective and not up to the mark but the defective investigation cannot lead to the quarrel of the accused.

6. The learned Prosecutor cited another decision of the Apex Court as reported in , (2008) 16 SCC 648 (Indra Pal Singh v. State of U.P with Jagat Singh v. State of U.P) wherein the Apex Court held in a case where there was some delay in filing the FIR on the ground of fear of the accused persons and non-availability of conveyance and the Apex Court accepted such explanation to be satisfactory and convincing. It may be noted that in the present case before us the incident took place at about 7 p.m. and the information reached to the police station at about

1 a.m. on that very intervening night. It is to be considered that the members of the bereaved family were busy with the victim who was murdered.

In that decision as cited above the Apex Court further observed that trial court noticed several contradictions and omissions in the version of the witnesses like P.Ws 1 and 4 thereby rejecting their evidence. High Court reappraised the evidence and found the accused guilty and it was held by the Apex Court that there was minor inconsistencies hence that high court rightly held that trial court gave undue importance to such inconsistency which were very trivial in nature. The Apex Court further observed that both the witnesses stated that four gun shoot were fired at the victim but the post mortem report showed that the doctor found only three fire arms wounds and the Apex Court held that the trial court rightly held that there was no real inconsistency between ocular testimony and medical evidence.

In the said decision the Apex Court also considered the evidence of interested or partitioned witnesses in a murder trial. It was argued before the Apex Court by the appellants that PWs 1 and 4 (eyewitnesses) were interested witnesses and as such no implicit reliance should be placed on their testimonies and the Apex Court held, undoubtedly, PW 1 is the father of the deceased and PW 4 is a co-villager of PW 1 who corroborated the testimony of PW 1 on all material aspects of the case and clearly recognised the accused persons who committed the murder of the deceased. However, the Apex Court also held that both these witnesses were found to be satisfactory, consistent and credible by the High Court and further that both the witnesses were subjected to searching cross-examination by the cross examination by the defence, but no tangible material extracted from their evidence to create any shadow of doubt to disbelieve and discard their truthful testimony.

In that case the Apex Court also considered the value of a related witnesses and held if eyewitness is related to the deceased, his evidence has to be accepted if found to be reliable and believable because he would honestly be interested in ensuring the real culprits are punished.

7. Learned prosecutor also submitted before the bench to consider the decision of the Apex Court as reported in , (2014) C.Cr.L.R (SC) 128 (Guiram Mondal v. State of West Bengal) wherein it was held by the Apex Court that non-mentioning of the name of the accused in the inquest report is non-consequential, that mere delay in sending the FIR to the Magistrate is not a ground to discard the FIR and that evidence of related eye witnesses not to be discarded if otherwise found reliable. In that decision it was observed by the Apex Court that non examination of impartial witness non rendering the prosecution version unreliable.

8. He cited the decision of the Apex Court as reported in , AIR 2010 SC 3178, (C. Muniappan and others v. The State of Tamil Nadu) wherein the Apex Court observed in Paragraph 44 that the defects in the investigation by itself cannot be

a ground for acquittal because if primacy is given to such designed or negligent investigation or to the omission or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. The investigation is not the solitary area for judicial scrutiny in a criminal trial and hence the conclusion of the trial in a case cannot be allowed to depend solely on the probity of investigation."

53. We have gone through the judgement delivered by the learned trial court meticulously. We are to decide now as to whether the learned trial court duly convicted the accused persons in respect of the charge as mentioned in this judgment earlier. Before we proceed further we like to take the readers to the ordering portion of the learned trial court and as per the impugned judgment that all the accused persons were convicted in respect of the charge punishable under Section 302 read with Section 34 of the code and 323 of the Code. The learned trial court sentenced the accused person to undergo imprisonment for life and to pay fine of Rs. 30,000/- in default to suffer rigorous imprisonment for five years more.

54. As ordered by the learned trial court all these four appellants were also found guilty of the offence punishable under Section 323 of the IPC read with Section 34 of the Code and they were convicted on two scores for causing hurt to Pachai Ghosh and Menoka Ghosh and each of the appellants were sentenced to suffer rigorous imprisonment for one year and to pay fine Rs. 5,000/- each in default to suffer further rigorous imprisonment for three months for the offence of causing hurt to Pachia Ghosh and they were further ordered to suffer rigorous imprisonment for one year and to pay fine of Rs. 5000/- in default to suffer rigorous imprisonment for three months for the offence of causing hurt to Menoka Ghosh. In the process of that sentencing the learned trial court must have been influenced by illustration (b) attached to Section 71 of the IPC.

55. The learned trial court further ordered that the sentences passed on the accused persons as stated above will, however, shall run consecutively. This approach of the learned trial court that the sentences will run consecutively has no legislative sanction in view of Section 31 (2) of the Cr.P.C which runs thus:

"31. Sentence in cases of conviction of several offences at one trial.....

(1).....

(2) in the case of consecutive sentences, it shall not be necessary for the Court by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court:

Provided that-

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years;

(b) the aggregate punishment shall not exceed twice the amount of punishment which the Court is competent to inflict for a single offence.

(3) For the purpose of appeal by a convicted person, the aggregate of the consecutive sentences passed against him under this section shall be deemed to be a single sentence.

And in view of Section 71 of the Indian Penal Code.

Section 71 runs thus:

71. Limit of punishment of offence made up of several offence.--Where anything which is an offence is made up of parts, any of which parts is itself an offence, the offender shall not be punished with the punishment of more than one of such his offences, unless it be so expressly provided.

Where anything is an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, or

where several acts, of which one or more than one would by itself or themselves constitute an offence, constitute, when combined, a different offence,

the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences."

56. Apart from the legislative intent we have the decision on this point as cited in , (2006) 12 SCC 37 : (2007) 2 SCC (Cri) 370 (Chatar Singh v. state of M.P) on the facts stated below where the trial court imposed sentence for ten years for the offence under Section 364 of the IPC, under Section 365 IPC for four years and under Section 120B rigorous imprisonment for five years and under Section 201 of the Code further rigorous imprisonment for two years and it was further ordered that the punishment of the 364 IPC will run consecutively, while for the other offences it was to be run concurrently that is total period of 20 years RI was imposed. The High Court also confirmed the same and in such situation the Apex Court held that provisos appended to Section 31 of the Cr.P.C. clearly mandates that the accused could not have been sentenced to imprisonment for a period longer than 14 years.

57. In the case before this Court the same theory will naturally apply and the court cannot impose any substantive sentence for other offences like Section 323 of the IPC or to direct that the sentences will run concurrently for further period of one year on two counts thus naturally that period of substantive sentence cannot be treated as per law and that portion of the judgment cannot be confirmed.

58. I have already said that the main witnesses of the prosecution are PWs 1, 2 & 3 and the corroborative witnesses are the doctor and the investigating officers.

59. This court being the last fact finding court it must reappraise the evidence on record. PW 1 is Pagal Ghosh that is the full brother of the victim Batul Ghosh he

deposed that on the date of the incident he with his elder brother and Menoka Ghosh the wife of Batul Ghosh went to their field which is situated in the Southern side of the village Ghuska to plaque brinjals and after plaquing brinjals he returned back to his house with a portion of the brinjals and his elder brother and sister-in-law were coming behind and they were some long distance. This witness further deposed that when he was returning home he found that the accused persons namely Aditya Ghorui, Sujit, Saba Ghorui and Arjun Sing all of village Baralalpur were sitting in the lower part of the Northern bank of the tank Talgaria. He further deposed that as soon as he reached home he heard a cry and his father wanted to know as to what was the matter and thereafter this witness went to Talgaria tank and he heard a cry of his elder brother Batul and he reached to the place of occurrence through a short cut route and he found the accused persons named above were beating his elder brother Batul. He also found his father and sister-in-law were lying on the feet and entreating them telling "please do not beat do not beat". This witness also saw the accused persons to hurl blows to his father and sister-in-law and when he reached accused persons they also came to beat him. It is very much clear from his evidence that the father and sister-in-law tried to save the life of his elder brother but the accused persons hurled blows on his father and sister-in-law and thereafter his elder brother failed down on the paddy field then the accused persons hurled blows with "lati". This witness fixed up the time of the incident to be just after the evening but it was a moonlit night. He also deposed that hearing hue and cry many other persons of the village rushed there but the accused persons fled away and this witness found his elder brother dead. This witness was extensively cross-examined. There are some contradictions as regards the incident and the evidence.

60. This witness deposed that he could not identify the voice giving out the alarm at that time this answer is of no significance as this witness in the next paragraph categorically deposed that when he reached the place of occurrence he found four persons were hurling blows on his elder brother with several weapons like tangi, spare, vojali and lati and he also duly identified the persons and named them. It is true that as per evidence some villagers came. It is also true that except PWs 8 & 9 none came to depose in favour of the prosecution. He noticed injuries on the presence of his father and Boudi (elder sister-in-law) he also deposed that there were one and two others in that gang but he could not identify them. This is a natural answer coming from one eye witness. It is very much possible that in such attack the victim party may identify some of the accused persons and some may be left out.

61. It is true that this witness deposed that after the incident some co-villagers came but unfortunately the names of those co-villagers were not taken by this witness. It is also clear from his evidence that when the villagers were approaching to the place of occurrence the offenders fled away. Thus, the offenders were not seen by the villagers. It is very natural that such a person at that point of time could not specifically say which offender was armed with what

type of weapon. Thus, the evidence of this witness cannot be discarded. It is true that Choukidar of Guska area came to the place of occurrence after the incident. Thus, this Choukidar also did not see the incident. We have gone through the searching cross-examination of the witness by the defence but on reading and rereading the evidence we are satisfied that this witness had successfully withstood the cross-examination made by the defence. This witness was a natural eyewitness and his presence at the place of occurrence cannot be ruled out. In one answer in his cross-examination he deposed that he did not see anything about the incident at all and that we do not know actually how my elder brother died, the evidence of a witness is to be taken as a whole and not on piecemeal sentences. The evidence if read as a whole will certainly show that this witness was at the place of occurrence also duly identified the accused persons by name and by face.

62. Pw 2 is Menaka Ghosh that is the sister-in-law of PW 1. Her evidence is well-supported by her brother-in-law. There are some tit bits in her evidence which may be termed as contradictions but such contradictions are minor contradictions and those cannot be treated as exaggerations or omissions. This court is satisfied that PW 2 is also another eyewitness and not only one eye witness but also one injured eye witness. This court is not unmindful of the fact that she only identified one appellant Aditya Ghorui and that is very natural one. She being a housewife and she saw this accused Aditya Ghorui when he used to come during the election days. This witness sustained injuries for which she was taken to Amarkanan Health Centre along with PW 3 that is her father-in-law. This witness also deposed regarding the further details in what manner the incident took place and also deposed regarding the place of occurrence. On scrutiny of the evidence of this witness this court can safely come to the conclusion that this witness is one eye witness of the incident and there is nothing to discredit this witness.

63. PW 3 also has well supported the evidence of PW 1 and 2. This witness has described the place of occurrence and also the topography of the place of incident. He went to the place of occurrence after hearing the alarm coming from the side of the tank Talgaria and at that point of time he was in his house and thereafter he started running towards that place that is towards the tank Talgaria wherefrom the alarm was coming. This witness identified the voice of his son, Batul and the daughter-in-law of PW 2. He further deposed that on a paddy field, his son Batul was being hurt by Aditya Ghorui, Saba Ghorui, Arjun Singh and Sujit Ghorui and those accused persons were armed with tangi, spear, bhojali and lati. He also deposed that he sustained injuries at his chest, right hand and left side of the back when the accused persons assaulted him. This witness also deposed that accused Aditya Ghorui, Saba Ghorui, Arjun Singh and Sujit Ghorui are the men of Baralalpur and they are known to him since long before. This witness duly identified by the accused persons in that moonlit night.

64. This witness is none else but the ill-fated father of Batul Ghosh, the deceased. Such a witness cannot implicate some others letting of the real

assailants in a case of murder of his son. The ill-fated father we can say is one truthful eyewitness as we get from his total evidence on record. This witness also has the backing of the injury report of the Amarkanan Public Health Centre where he and his daughter-in-law were treated.

65. PW 4 is another important witness from the side of the prosecution. This witness was posted at the Medical Officer of Amarkanan PHC at the material point of time and on 10.10.1984 at about 10 a.m. he examined both PW 2 & 3 of village Palajuria and on examination he found one lacerated wound, one tender swelling and one superficial bruise with tender swelling in the body of PW 3 and on examination of PW 2 Menoka Ghosh he found one lacerated wound on her forehead. It is also clear from his evidence that the patient party told him that they were assailed with lati and some heavy objects by Aditya Ghorui, Arjun Singh and Saba Ghorui. On going through his cross examination we are satisfied that there are no reasons to describe him as untruthful one.

66. PW 5 was then posted as ASI of GangajalGhati Police Station and he received the FIR through the Constable No. C/563 as forwarded by the Officer in charge of the said PS. This witness drew up the formal FIR which he duly proved and as such his evidence is formal in nature.

67. PW 6 is that constable who took the FIR from the place of occurrence to the police station as directed by the OC Gangajalghati PS. This witness also escorted the dead body to the morgue of Bankura and one Sudhir Mitra another constable accompanied him. Thus, this witness is also formal in nature.

68. PW 7 was tendered by the prosecution for cross examination.

69. PW 8 is the co-villager of PWs 1, 2 & 3 and he came to the place of occurrence after the incident was over and the victim was lying dead in a pool of blood this witness also deposed that he saw the PWs 1, 2 & 3 by the side of the body of Batul and he had talked with PW 1 & 3 over the matter and other portion of his evidence was rightly denied by the court being hear say in nature as PWs 1 & 3 did not disclose the incident to this witness. This witness is also witnessed to the seizure but still then this witness is formal in nature as because he did not see the incident.

70. PW 9 is another such witness who came to the place of occurrence after the incident.

71. PW 10 is the second IO of this case. He could not arrest the three absconding accused persons and submitted charge sheet against the four accused persons showing three as absconders under Section 302/34 IPC. There is nothing in the evidence of this witness.

72. PW 11 is the Autopsy Surgeon who saw as many as 18 injuries on the body of the victim. The death of the victim is not dispute in this case and as such considering the evidence of this doctor we are satisfied that such injuries which the doctor saw on the date of the autopsy were sufficient to cause death of one

human being.

73. PW 12 is the first IO of this case who deposed that he came to know as to the incident from the local MLA, Gram Pradhan and a member of Zilla Parishad Bankura that something had happened at village Baralalpur as Batul Ghosh of Palajuria had a clash with some men. The GD entries were duly proved by this witness. This court cannot say that the information given by those political persons could have been treated as FIR. Such cryptic information cannot be treated as FIR. From the evidence of this witness it is clear that when he came to the PO he found the dead body of Batul Ghosh lying about 100 cubits away from the tank called Talgaria on a paddy field and he prepared a sketch map and also prepared the inquest report. He seized some articles by preparing seizure list and also recorded the statement of some witnesses under Section 161 of Cr.P.C. It is further clear from his evidence that he forwarded Pachai Ghosh and Menoka Ghosh to Amarkanan PHC for necessary treatment by sending a requisition to the said PHC. He could arrest one accused Arjun Singh and held raids in the houses of the other FIR named accused persons but failed to apprehend any other accused. We have gone through the cross examination of this witness there is nothing in the said extensive cross examination to brand the witness as one interested police officer. The accused persons were examined under Section 313 of Cr.P.C and they did not make out a case and inform the court that they are innocent and they are falsely implicated in this case. But neither of these accused persons could submit that what was the reason of their false implication in this case. On behalf of the defence it was argued and cross examined that the victim was not a man of good character as he was an accused in a case under Section 396 of the IPC it is a settled proposition of law that bad character of an accused cannot be agitated before the trial court to prove that aspect. However, in case of good character of one accused that is very much admissible.

74. The only plea which the accused persons took is that of false implication. I can refer here the decision of the Apex Court as reported in , 2002 SCC (Cri) 1834: (2002)7 SCC 691 (Ruli Ram v. State of Haryana) wherein the Apex Court held when a plea of false implication is raised by the accused the foundation for the same has to be established. But unfortunately in this case no attempt was made on the part of the accused persons to prove before the court that there was any foundation for their false implication. It is true that the abscondence itself is no ground to presume that the accused/accused persons is/are guilty in respect of the charge but abscondence for a long time will certainly give the court one handle to presume that may be the accused persons had committed any such offence.

75. Here in the present case accused/appellant Arjun Singh could be arrested on 10.10.1984 but the accused Nos. 2, 3 & 4 could be arrested only in April, 1988 whereas this incident took place on 09.10.1984 and certainly we can presume some ill motive of the accused persons who were absconding even considering the legal proposition that mere abscondence of one accused cannot by itself

prove the guilt of the accused. To us it will allow to presume something adverse against the three accused persons.

76. Thus, on assessing the materials before this court, considering the argument put forward by the learned lawyers of the parties, on assessing the value of the witnesses, considering the plea of the accused persons as made out before the trial court and considering the legal position this court is satisfied that the learned trial court rightly convicted all the four accused persons in respect of the charge punishable under Section 302/34 and in respect of the charge punishable under Section 323 read with Section 34 all of the Indian Penal Code. We affirm the order of conviction on all the counts.

77. We have already stated that in view of Section 31 (2) of the Cr.P.C and Section 71 of the IPC there cannot be any sentence to be clubbed together that may keep the convict in jail/correctional home for more than 14 years. Thus, the substantive sentences imposed on two counts in respect of the charge punishable under Section 323/34 of the IPC cannot be allowed to be run separately and we modify the said order to say that the order of conviction under Section 323/34 of the Code will run concurrently.

78. The learned trial court imposed a fine amount is Rs. 5000/-each while passing the additional sentence of fine under Section 323/34 of the Code. This fine amount of Rs. 5000/- each has no legislative sanction and the maximum fine amount which court can impose in a case conviction under Section 323 of the Code cannot exceed Rs. 1000/- each. Thus, the fine amount as imposed by the learned trial court while convicting the accused/appellant in respect of the charge punishable under Section 323 of the Code be reduced to Rs. 1000/- in default to suffer rigorous imprisonment for two months each.

79. Thus, the sentence of imprisonment under Section 302 read with Section 34 of the IPC that is imprisonment for life is hereby confirmed but as regards the sentence of fine it be reduced to 10,000/- (ten thousand) in default to suffer rigorous imprisonment for 2 years more.

80. The trial court ordered that out of the fine amount realised Rs. 1,00,000/- will go to the widow of late Batul Ghosh that is PW 2, Manoka Ghosh of Mouza-Palajuria of PS-Gangajalghati, District Bankura. This amount can no more need be levied from the appellants and all the fine amount will go to the State. Now in criminal procedure code a specific section has been enacted to give compensation to the victims that is Section 357A in which the victim compensation scheme has been prepared almost by every Government including our State.

81. So long we were in the midst of evidence on record and whether the evidence on record can permit us to affirm the order of conviction and the sentence. We have passed necessary order regarding all these. Something is to be done for the main victim of this case that is the widow of Batul Ghosh namely Manoka Ghosh (PW 2) of Village - Palajuria, P.S - Gangajalghati, District -

Bankura, if she has not been remarried but is alive and if she is dead then the children of the said couple so that she or they may be better rehabilitated.

82. When Manoka Ghosh was examined on 25.06.1988 she was 35 years and thus she was roughly 31 years on the date of the incident. The age of Batul as we get from the PM report was 32 years on the date of the incident. Thus, due to this incident Manoka lost her husband and she did not get the consortium of her husband in her youth. This court is willing to give compensation to the victim as provided under Section 357A of the Cr.P.C. It is also true that the family of Manoka needs rehabilitation in these hard days losing her husband even though she has passed her life singly (if not remarried) for 33 years after the incident but the beneficial legislation must follow the victim.

83. It is to be ascertained by the Secretary, District Legal Services Authority, Bankura as to whether Manoka has remarried or not or whether she is alive and if dead who are the legal heirs of Manoka. After this preliminary enquiry the said Secretary will issue one A/C Payee cheque in favour of Manoka or if she is remarried or dead the cheque/cheques be issued in favour of the legal heirs of Manoka covering the amount as mentioned below.

84. It is true that when the incident took place this beneficial section 357A of the Cr.P.C was not there in the statute book but when that has find its place in the statute book now the benefit can surely go to the victim or her legal heirs. This court is fortified with the decision of the Apex Court as reported in AIR 2015 SC 513 (Suresh & Another v. State of Haryana) and in view of the Division Bench decision of this court as passed in CRA No. 284 of 2009 in which myself delivered the judgment on behalf of the Bench on 06.07.2015 (unreported).

85. We are inclined to award compensation under Section 357A of the Cr.P.C in favour Manoka or her legal heirs as the case may be a sum of Rs. 2,00,000/- (two lakh) as per the Victims Compensation Scheme West Bengal of 2012. I reiterate that in case Manoka is dead succeeded by her son or daughter then such amount will go to her legal heirs in equal shares. Such payment must be made only by A/C payee cheque/cheques in the names of the recipients.

86. The Member Secretary, DLSA, Bankura is directed to comply with this order within two months from receipt of a copy of this judgment. He will seek additional allotment from the Secretary, Government of West Bengal, Judicial Department, on this score under the Scheme of 2012 so that the cheque may be delivered to Menoka or her legal heirs within two months from the communication of this judgment.

87. The criminal section is directed to send a copy of the first page and copy of page Nos. 43-45 of this judgment to the Secretary, DLSA, Bankura for compliance as mentioned above.

88. The seized articles be destroyed after the period of appeal is over.

89. The criminal section is further directed to send the lower court records along

with a copy of this judgment to the Additional Sessions Judge, 1st Court, Bankura.

90. The order of bail granted by this Court in favour of the accused appellant is hereby cancelled. They must surrender before the learned trial court within 21 days from this day otherwise the learned trial court will be at liberty to issue warrant of arrest against all these accused appellants to serve out the sentence.

Indira Banerjee, J.—I Agree.