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**(1997) 03 CAL CK 0016**

**In the Calcutta High Court**

**Case No :** Criminal Appellate Jurisdiction Criminal Appeal No. 199 of 1993

Badal Sardar and Others

APPELLANT

Vs

The State of West Bengal and Ors

RESPONDENT

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**Date of Decision :** 17-03-1997

**Acts Referred:**

Criminal Procedure Code, 1973 (CrPC) — Section 313  
Penal Code, 1860 (IPC) — Section 302, 34

**Citation :** (1998) 1 CALLT 483 : (1997) 2 CHN 186 : (1997) CriLJ 3530

**Hon'ble Judges :** Gitesh Ranjan Bhattacharjee, J;Debi Prasad Sircar-I, J

**Bench :** Division Bench

**Advocate :** Mr. Tapan Kr. Tiwari, Mr. Kazi Safiuddin Ahmed, Mrs. Jyotsna Roy Mukherjee and Md. Abdul Mabud, for the Appellant; Mr. Sasanka Sekhar Ghose, for the Respondent

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## Judgement

G. R. Bhattacharjee, J.—This criminal appeal is directed against the Judgment and the orders of conviction and sentence passed by the learned Additional Sessions Judge, 2nd Court. Nadia in Sessions Trial No.II of March 1993/Sessions Case No.1 of September. 1990. By his impugned Judgment the learned Additional Sessions Judge convicted all the four accused persons who are appellants in this appeal, u/s 302/ 34. IPC and sentenced them to imprisonment for life and also to a fine of Rs. 500/- each, in default to R.1 for six months more. All the four appellants/accused persons were charged u/s 302/ 34. IPC for murdering one Shyam Sardar at about 8/8.30 p.m. on 8.12.87. The learned Additional Sessions Judge on trial found them guilty of the charge and convicted and sentenced them as stated above. Being aggrieved by the conviction and sentence the appellants/accused persons have preferred the present appeal.

2. The appellants are four in number. The appellant Badal Sardar is the father of the other three appellants Mongal, Budhu, and Goutam. It is the prosecution case that the deceased Shyam Sardar and the accused persons all belong to the same village, Gramsimulia under P.S. Nakashlpara in the district of Nadia. The informant Niranjan Sardar and the deceased Shyam Sardar are uterine brothers

having the same mother but their fathers were different as their mother married twice. The case as stated in the first information report which was lodged by P.W. 1 Niranjana Sardar is that a dispute about cutting of earth over a land adjacent to the house of the informant Niranjana Sardar was going on between them and the accused persons who are their neighbours and over that matter a meeting was going on at Haritala of their village in the evening of the date of occurrence, but neither the informant Niranjana nor his elder brother deceased Shyam was present in that meeting and they were represented by their cousin brothers (the sons of maternal uncle) Sagar Sardar and Nagar Sardar and at that time at about 8/8.30 p.m. when Shyam Sardar was returning after working as a labour in the brick kiln of Sankar Babu near Kathalbere and was proceeding to his house after crossing Haritala he was suddenly chased from behind by the four accused persons with lathi and Kirich in their hands and they caught hold of him on the courtyard of Shasan Sardar (near Shyam's house) and there Shyam was hit near his throat with Kirich by someone of the accused persons and then the accused persons fled away across the field and the injured Shyam ran and came to the house of Bhakta Sardar and fell down on the courtyard. It is also stated in the FIR that on receiving the news of the said incident the villagers who were attending the meeting came to the spot and nursed the injured Shyam and were making arrangement for sending him to hospital but after sometime Shyam expired. It is also stated by the informant in the FIR that on being informed of the incident by Ajit Sardar at the field the informant Niranjana came to the spot. It is further stated in the FIR by the informant that there he learnt from Srimati Puspa Sardar, wife of Shasan Sardar that an altercation and scuffle took place between his elder brother and the accused persons and as there was no other male person there the incident could not be stopped and she raised shouts calling people and in the meantime the incident took place and the accused persons then fled away.

3. Now let us look to the evidence on record. P.W. 1 Niranjana Sardar is the informant who lodged FIR. He is the younger brother of the deceased Shyam Sardar. According to his evidence the murder took place at 8 p.m. and at that time he was in his house and was busy in calling people for meeting. The place of meeting, he says, was at Haritala in their village. From him we got that Haritala is intervened by 10/12 residential houses from their residence and that meeting was called for a salish in respect of a piece of land adjacent to his house and that of accused Badal Sardar. He says that from his house he heard a row and went to the house of Puspa Sardar and saw that the dead body of his brother Shyam Sardar was lying in the courtyard of Bhakta Sardar. The deceased, he says had injury on its throat. His evidence is that the house of Puspa was attached to the house of Bhakta and both Puspa and Bhakta had common courtyard. He further says that Puspa told that Badal, Mongal, Coutam and Budhu murdered Shyam Sardar and left the place. According to his evidence the murder was committed in the courtyard of Puspa, but he did not see the accused persons at the spot. He further says that like him many persons such as Netal, Tarak, Bebt and Bhakta

went to the spot and Puspa told about the incident to many persons including himself. This Puspa who has been examined as P.W.4 is the wife of the maternal uncle of P.W. 1 Niranjan Sardar. The name of the husband of Puspa is Shasan Sardar. P.W. 1 Niranjan says that his brother Shyam Sardar used to work in the brick kiln of Sankar babu and he used to return home by 8 p.m. every night. From his evidence we get that Bhakta Sardar now resides at a different place under P.S. Kaligunj. This has been taken from P.W.1 perhaps to explain the non-examination of Bhakta Sardar who was cited as a witness in the charge-sheet. It should be however noted here that this Bhakta Sardar is a person different from the father of Niranjan whose name is also Bhakta Sardar. From his cross-examination we get that the village Kathalberla is to the east of their village and the residence of Puspa is to the south of Haritala intervened by 20/22 houses. We also get from P.W.1 Niranjan that his house is to the east of Haritala intervened by 20/ 22 houses. Although in his examination-in-chief he says that he was at the relevant time in his house busy in calling people for meeting yet in his FIR he stated that at the relevant time he get information about the incident at field from Ajit Sardar.. In his cross-examination however he says that at that time he was in the field situated in the northern side of the village. The learned Advocate for the appellants comments that from the different versions given by the petitioner in the FIR and in examination-in-chief and cross-examination it is difficult to get any consistent idea as to where actually the P.W. 1 Niranjan was present at the relevant time and how he get the information or how he was actuated to come to the spot. . In his cross-examination P.W. 1 Niranjan says that he had no quarrel with the accused Badal Sardar, but Badal Sardar had often quarrels with the deceased Shyam Sardar. He denies the defence suggestion that Shyam claimed share in his homestead and for that reason their relationship was strained and he and Ajit murdered Shyam Sardar and falsely implicated the accused persons.

4. P.W.2 Netal Sardar is the cousin brother (Mastuto Dada) of P.W.1 Niranjan Sardar. The evidence of Netal Sardar is that Shyam Sardar was murdered at 8 p.m. In a winter about 5 years back. He says that a meeting was called at Haritala of their village and within a minute they heard a row from the house of the wife of Shasan (that is, Puspa) and they ran there and found that the body of Shyam was lying in the courtyard of Bhakta. He further says that they found injury on his throat but Shyam could not speak. His evidence is that they arranged to remove him to hospital but in the meantime he expired. He further says that the wife of Shasan told that the accused Badal, Mongat, Budhu and Goutam murdered Shyam and Shyam fell down in the courtyard of Bhakta and the assailants left the place. The accused persons, he says, were not present in the meeting. He also speaks of seizure of soil and clothes of the deceased by the police. He is a seizure list witness. According to his evidence many persons were present in the meeting but the persons against whom the allegation was brought were not present in the meeting. According to his evidence about 60/70 persons were present in the meeting. P.W.3 Tarak Sardar is the son of the deceased

Shyam Sardar, His age when he deposed in March 1993 was about 22 years and that being so he was about 17 years on the date of occurrence. He says that his father was murdered and thereafter police came and made seizure. He is also a seizure list witness. At the time when they deposed, they, that is, he and his mother P.W.6 Debi Sardar were residing in the house of P.W.1 Niranjan. P.W.4 Puspa Sardar is the wife of Shasan Sardar who claims to be an eye-witness, in fact the only eye witness to the occurrence. The deceased Shyam Sardar was her husband's sister's son (Bhagne). She says that Shyam Sardar was murdered in the winter about five years ago and the time of murder was 8 p.m. At that time she was in the varandah of her house and, as she says, Badal Sardar, Mongal Sardar, Goutam Sardar and Budhu Sardar brought Shyam Sardar in her courtyard and were assaulting Shyam by means of Bakhari (split Bamboo). She further says that the accused Budhu Sardar hit by means of a Kirich in the throat of Shyam. This assaulting, she says, took place in her courtyard and she came down to the courtyard from the varandah and the accused persons left the place after assaulting and stabbing Shyam Sardar.. Injured Shyam Sardar, she says, fell down in the courtyard of Bhakta Sardar. She next says that the courtyard is commonly used by them and Bhakta Sardar. According to her evidence she shouted at the top of her voice and on hearing her shouting Niranjan Sardar, Netai Sardar, Debi Sardar, Bhakta Sardar and many villagers came to the spot and arrangements were made to remove Shyam Sardar to hospital but in the meantime he expired. She says that she found injury on the head and throat of the deceased Shyam Sardar. She further says that she reported the incident to the persons who came there and she told Niranjan, Netal, Bhakta. Debt and others that the accused persons committed murder of Shyam Sardar. She also says that she recognised the accused persons as they were villagers and moreover the night was a moonlit one. According to her evidence her husband and son had gone to attend the village meeting". From her cross-examination we get that to the east of her house there is a pathway stretching north to south and to the east of that road there is the house of Bhakta. It has been argued by the learned Advocate for the appellants that the evidence of Puspa Sardar would thus show that Puspa and Bhakta Sardar had no common courtyard inasmuch as even according to the evidence of Puspa there is a pathway (road) stretching north to south in between the house of Puspa and the house of Bhakta.. In this connection our attention is also drawn by the learned Advocate for the appellants to the statement of Puspa in her cross-examination that there are big trees by both sides of the village road. It was been taken from P.W.4 Puspa in her cross-examination that to the south of her house there are houses of Alo, Tarani, Tentul, Surjit, Arun and others. It is submitted by the learned Advocate for the appellants that none of these neighbouring persons has been examined in this case. Puspa says that Haritala is to the south of her house intervened by 20/22 houses and the house of Shyam Sardar was to the east of Haritala. She further says that people came to the house of Bhakta from Haritala. She also says that Bhakari and Lathi are separate things. She stated to the. I.O. that Shyam Sardar was hit on his head by means of lathi. It is submitted by the learned Advocate

for the appellants that although no Bhakari is mentioned in the FIR the same has been introduced in the evidence of Puspa inspite of the fact that in the FIR lathi, and not Bhakari, was mentioned. In her cross-examination P.W. 4 Puspa says that her house would be 100/150 cubits from the road. It is submitted by the learned Advocate for the appellants that if the road itself is about 100/150 cubits from her house and if the courtyard of Bhakta was on the other side of that road as is the evidence of Puspa, in that case, Shyam Sardar must have gone quite a considerable distance from the courtyard of Puspa after sustaining the bleeding injuries from the accused persons before he dropped down in the courtyard of Bhakta. Puspa says that her courtyard was stained with blood of Shyam Sardar and the police officer saw that place. She further says that the way from her courtyard to the courtyard of Bhakta was stained with the blood of Shyam. The learned Advocate for the appellants also criticises that to the I.O. Puspa did not tell that she recognised the accused persons in the moonlight, but she stated only that she recognised the accused persons. P.W.6 Debi Sardar is the wife of the deceased Shyam Sardar. Her evidence is that at the relevant time she was in her house and on hearing the hue and cry raised by Puspa she rushed to her house and found that the body of her husband was lying in the courtyard of Bhakta Sardar. She says that she found marks of injuries on the head and near the throat of her husband and at that time her husband was alive but he could not speak and he expired within a short time. She says that Niranjan, Netal, Bhakta and 200 persons went there and P.W. Puspa told her that Badal, Mongal, Budhu and Goutam murdered her husband. She further says that her husband tried to escape but he fell down in the courtyard of Bhakta. In her cross-examination she says that she saw a mark of poke injury near the throat of her husband. The learned Advocate for the appellants was critical of this statement as the doctor's evidence does not show any poke injury. P.W. 6 Debi Sardar says that when she went to the house of Puspa no other person was present there and Puspa was alone, but other persons assembled in the house of Bhakta. She says that she did not see the husband of Puspa in that night. She also says that she saw blood-stain in the courtyard of Puspa and she was present at the P.O. till arrival of the police officer and police collected blood stained earth from the courtyard of Puspa. The learned Advocate for the appellants argues that the evidence of I.O. would show that blood stained earth was seized from the courtyard of Bhakta where the dead body was lying but no blood stained earth was seen by the I.O. in the courtyard of Puspa.

5. P.W. 5 Dr. Niharandu Deb is the autopsy surgeon who held postmortem examination on the dead body of Shyam Sardar. He found the following injuries on the body of the deceased viz. (1) one cut injury over mid-occipital region transversely placed measuring 3"x 1/2" bone deep and (2) one cut injury over left side of the neck measuring 3"x 1" muscle deep. On dissection he found clotted blood in both cerebral hemispheres. The doctor opines that the death was due to injuries which were antemortem and homicidal in nature. He further says that the cut injury in the neck was caused by means of sharp cutting weapon and

head injury might have been caused by sharp side of the split bamboo.. In his cross-examination he says that injury (1), meaning the head injury, was a clear cut injury and there was no side injury near that injury and he did not notice any laceration at the edge of the injury. He further says in cross-examination that if the injury was caused by means of Bhakari then some sort of laceration was expected. Both the injuries, he says, were not possible by pointed weapons. It is submitted by the learned advocate for the appellants that there is apparent anomaly between the evidence of the doctor and the evidence of the other witnesses regarding the nature and the position of the injuries.

6. P.W.8, S.I. Madhab Chandra Ghosh is the investigating Officer of this case. He visited the spot after the first information report was lodged at the P.S., and he prepared inquest report on the dead body of Shyam Sardar. According to his evidence the inquest report was prepared in the courtyard of Bhakta Sardar, although initially, presumably by mistake, he said that it was done in the courtyard of Shasan Sardar. He also recorded the statements of Puspa Sardar, Bhakta Sardar, Netal Sardar and Debi Sardar. He says that the accused persons could not be available in their houses and in the village. On the next days, that is, on 9.12.87, according to his evidence, he again made raid but the accused persons were not available and thereafter he prayed before the court for issuing warrant of arrest and proclamation (W/PA) against the accused persons. He further says that on 30.12.87 he again held a raid to arrest the accused persons but in vein. On his transfer he made even the charge of further investigation of the case to the O.C on 2.2.88. The FIR was lodged at the P.S. on 12.10 a.m. P.W.8, the I.O. says that he reached the P.O at 1.30 a.m. and he visited the house of Shasan Sardar. He further says that he seized nothing from the house of Shasan Sardar. He says that the P.O. was the house of Shasan Sardar but the victim died in the courtyard of Bhakta Sardar. The assaulting was done, he says. In the house of Shasan Sardar. He however did not prepare any sketch map of the P.O. He says that as the night was dark he could not get trail of blood from the house of Shasan to the courtyard of Bhakta. As we have seen, both the P.W. Puspa and Debt stated that blood was there in the courtyard of Shasan Sardar. As regards the evidence of the I.O. that he could not get trail of blood from the house of Shasan to the courtyard of Bhakta as the night was dark it has to be pointed out here that the learned Additional Sessions Judge has recorded in his judgment, by consulting the almanac that the night was Krishnapakhya Tritia (3rd night after the full moon night). He has also recorded in his Judgment that the full moon night was 5th December, 1987. That being so that moon must have been shining at the mid night on the date of occurrence when the I.O went to the spot. It is argued on behalf of the appellants in this background that the plea of the I.O that he could not get trail of blood in the courtyard of Shasan as the night was dark is not acceptable. The question whether the moon was there in the sky in that night came up for consideration also in view of the evidence of Puspa that she recognised the accused persons as they were her co-villagers and it was a moonlit night. The trial court has recorded that the moon must have

appeared in the sky in that night at about 8 p.m. and that being so it was also possible for Puspa to see the accused persons at the time of occurrence at about 8.30 p.m.. In the light of the moon. The. I.O., P.W.8 says that he found bleeding injury on the left side of the throat of the dead body and cut injuries on both the cheeks as well as cut injury on the head. He says that he saw those injuries in sufficient light. In his cross-examination he says he did not prepare any nil seizure list as he could not apprehend the accused persons who were not known to him from before. He however volunteers during cross-examination in that connection that Niranjana Sardar helped him a lot at the time of raid, search and seizure. He further says in cross-examination that source was engaged for collecting the whereabouts of the accused persons. He says that Puspa stated to him that Budhu made poke injuries by means of Kirich, but the word "throat" was not used by her. He also says that Puspa stated to him that she recognised the accused persons but did not state that she did that in moonlight. He further says that Puspa did not state to him that the accused persons assaulted the victim by means of Bakhari but she told that the accused persons assaulted the victim by lathi. Puspa however did not state to him, as he says, that she noticed mark of injury on the head of the injured person. We get it from the I.O. that the witness Debi Sardar told him that he saw the accused persons to assault her husband and to leave the place in her presence. Ext. 2 is the seizure list which was prepared by the I.O. at 2.35 a.m. In the night of the occurrence. Under that seizure list some blood stained earth and clean earth from the courtyard of Bhakta Sardar where the dead body of Shyam Sardar was found lying as well as the wearing apparels of the deceased, namely, blood stained doothi, blood stained full shirt and blood stained Khadwar Chaddar were seized by the I.O. In presence of the seizure list witnesses, namely, the P.Ws. Netai Sardar and Tarak Sardar.

7. Now we are required to consider whether the evidence adduced by the prosecution can unhesitatingly lead the court to a conclusion that the prosecution case against the accused persons has been proved beyond reasonable doubt. According to the prosecution case Shyam Sardar was chased and caught by the four accused persons in the courtyard of P.W.4 Puspa at about 8/8.30 p.m. and the fatal injuries were delivered to him there and the accused persons ran away and the injured Shyam Sardar also tried to escape but dropped down in the courtyard of Bhakta Sardar and expired thereafter others came on hearing the hue and cry raised by Puspa Sardar.. It is the prosecution case that Bhakta Sardar and Puspa Sardar have a common courtyard. But from the evidence we have got that as a matter of fact one village pathway or road having big trees on both sides runs in between the houses of Bhakta and Puspa and the distance of the said road from the house of Puspa is about 100/150 cubits. This gives us some idea about the distance of the house of Bhakta Sardar from the house of Puspa Sardar. We however do not get an exact idea from the evidence as to at what place in the courtyard of Bhakta Sardar the injured Shyam Sardar dropped after fleeing from the courtyard of Puspa. The. I.O. has not prepared any sketch

map of the place where the dead body was found lying in the courtyard of Bhakta. The. I.O. also did not seize any blood or blood stained earth from the courtyard of Puspa Sardar although Puspa Sardar in her cross-examination very specifically says that her courtyard was stained with blood and the police officer saw that place and the way from her courtyard to the courtyard of Bhakta was also stained with the blood of Shyam. Even P.W.6 Debi Sardar, the wife of the deceased Shyam Sardar in her cross-examination says that she also saw stain of blood in the courtyard of Puspa and police collected blood stained earth from the courtyard of Puspa. We have however seen that blood stained earth was collected by the. I.O. from the courtyard of Bhakta and not from the courtyard of Puspa. On the other hand the. I.O. says that he could not get trail of blood from the courtyard of Bhakta as the night was dark. That cannot be a good explanation because it was a moonlit night, only three nights after the full-moon night and the. I.O. came to the spot after midnight when the moon must have been shining very brightly and that being so there should not have been any difficulty for the. I.O. to find blood in the courtyard of Puspa as well as the trail of blood from the courtyard of Puspa to the courtyard of Bhakta where the dead body was found lying, even without the aid of any kerosene lamp or torchlight. After all if he could find blood in the courtyard of Bhakta and seize blood stained earth from that courtyard in that night, dark or moonlit, whatever might it be, there is no reason why he would not be able to find blood in the nearby courtyard of Puspa if really blood had been there also.. It also cannot be said that the. I.O. had no occasion to expect blood in the courtyard of Puspa at all and that is why he did not search for any blood there. It was known to the. I.O. from the FIR itself as well as from the statement of Puspa that the assault took place in the courtyard of Puspa and it was therefore only natural that the. I.O. would have search for blood in the courtyard of Puspa also in the moonlight or with the aid of kerosene lamp or torch light, and had he found any blood there he would have certainly seized the same. Non-seizure of any blood-stained earth from the courtyard of Puspa or from the trail of blood spread over the two courtyards creates a very disturbing confusion, to say the least. Perhaps it could have been argued by the prosecution that since the injured Shyam was wearing dhooti, full shirt, chaddar, it might be that blood coming out from the injuries of the victim at the head and neck initially got soaked in the wearing apparels of the injured without getting sufficient opportunity to drop down on the earth at that stage and in the meantime the injured Shyam moved away from the courtyard of Puspa and arrived at the courtyard of Bhakta and dropped down there as a result of which the earth there only was stained with blood. But this argument would not have been tenable in view of the specific evidence of Puspa and Debi that blood was there in the courtyard of Puspa and on the way from the house of Puspa to the house of Bhakta. The non-seizure of any blood-stained earth from the courtyard of Puspa or from the trail of blood along the way from the courtyard of Bhakta, and even non-finding of such blood by the. I.O. at such location, sought to be covered by the unconvincing plea that the night was dark, is definitely not a comfortable situation for the prosecution. If the existence of

blood in the courtyard of Puspa becomes doubtful, it is prone to have a reflection on the question whether the occurrence really took place in the courtyard of Puspa at all or in the manner in which she wants us to believe. This question assumes significance in the context that Puspa could be an eyewitness from a proximate distance only if the occurrence took place in her courtyard. Non-seizure of blood from the courtyard of Puspa and even non-finding of such blood there by the I.O. in spite of the alleged presence of such blood there as sought to be stated by the P.W.2, Puspa and Debi, really make the matter nebulous regarding the place and manner of occurrence. And if that be so, the proximate presence of Puspa, as the only eye-witness to the occurrence will also be exposed to doubt. Then again, Puspa in her evidence says that after bringing Shyam Sardar in her courtyard the accused persons were assaulting him by Bakhari (split bamboo) and the accused Budhu hit him by Kirich in the throat. As we have seen, the FIR was lodged by P.W.1 Niranjan on the basis of what he heard from Puspa after coming to the spot. Therefore if Puspa had seen the accused Budhu hit at the throat of Shyam with Kirich she would have specifically told the name of Budhu in that connection to Niranjan at that time as she says in her deposition in the court and in that event Niranjan also would have specifically named the accused Budhu as the person who hit Shyam Sardar with Kirich at his throat. But what is stated in the FIR is that someone of the accused persons (instead of specifically naming Budhu) hit Shyam near the throat by Kirich. This discordance between the evidence of Puspa in court and the version given in the FIR about the occurrence on the basis of what was learnt from Puspa immediately after the occurrence is definitely not at all a happy situation and very pertinently raises a question whether the prosecution case or for that matter the evidence of the only eye-witness Puspa is wholly reliable or not. Then again Puspa introduced in her evidence Bakhari but in the FIR which was lodged on the basis of what was learnt from Puspa immediately after the occurrence there is no mention of Bakhari and what is mentioned there is lathi. Lathi and Bakhari, even Puspa in her evidence acknowledges, are two different things. Therefore if really Puspa saw from a close proximity that the victim was being assaulted by the accused persons by Bakhari as she wants to say in her evidence in court, she must have also stated the same to Niranjan immediately after the occurrence and Niranjan also would have mentioned of Bakhari and assault by Bakhari in the FIR. But what we have seen is that there is no mention of Bakhari in the FIR and what is mentioned instead is lathi. To the I.O. also Puspa said of assault by lathi, but in evidence she gives up lathi and imports Bakhari. Such deviation of the prosecution versions at different stages is also not at all a happy one. According to the evidence of Puspa in court the accused persons were assaulting Shyam with Bakhari in her courtyard. Assault with Bakhari was also expected to have caused some visible injury on dead body. But none of the two cut injuries found by the autopsy surgeon, it seems, was caused by Bakhari. Although the doctor in his examination-in-chief said that the head injury might be caused by the sharp side of the split bamboo (Bakhari) yet in his cross-examination he has admitted that if the injury was caused by means of Bakhari

then some sort of laceration was expected which however he did not notice. We have already noticed that to the I.O. P.W.6 Debi Sardar claimed to have seen the accused persons to assault her husband but in evidence of course she did not say so. We have also seen from the evidence that many persons came to the spot while the deceased was lying in injured condition, but the persons who have been examined in this case as witnesses for the prosecution are all close relations of the deceased and no independent neighbouring persons have been examined.. It is true that there is no bar for convicting an accused solely on the basis of evidence of the relations of the victim or even on the basis of a lone eye-witness provided the evidence is convincingly consistent and reliable, leaving no scope for any reasonable doubt to creep in. But in my opinion. In the present case, by reason of the inconsistencies in respect of certain matters of significance relating to the place and manner of occurrence as pointed out earlier, it is difficult to hold that the prosecution have been able to prove the case against the accused persons beyond reasonable doubt.

8. In this connection it is also to be noted here that according to the evidence of the I.O. In spite of raids he could not find the accused persons and he had to apply for warrant of arrest and proclamation against the accused persons. From the order sheets of the court of the Committing Magistrate I however find that the accused Badal Sardar and his son Goutam Sardar surrendered in court on 5.1.88, the accused Budhu Sardar surrendered on 19.1.88 and the accused Mongal Sardar surrendered on 11.7.88. It has however not been specifically argued on behalf of the prosecution in the trial court or on behalf of the State respondents in this appeal that the accused persons absconded immediately after the occurrence and such conduct of the accused persons lend credence to the prosecution case that the accused persons committed the offence they have been charged with. But even assuming that such an argument in favour of the prosecution has been raised, yet the court will have to be very careful in applying this factor for coming to a finding on the basis of other evidence that the accused persons are guilty of the charge framed against them where the quality of such evidence as adduced by the prosecution is not free from disturbing inconsistencies and anomalies 35 in the present case which we have already discussed. One great hurdle in pressing into service the theory of abscondence/ against the accused persons, particularly in the background that they surrendered in the court, is that this circumstance, namely, the circumstance of abscondence was not at all put to the accused persons while they were examined u/s 313 Cr.PC. It is by this time the settled law that a circumstance which has not been brought to the notice of the accused specifically and precisely while examined u/s 313 Cr.PC cannot be used against him where the failure to giving an opportunity to explain the same u/s 313 Cr.PC has caused or is likely to cause prejudice to him. Now in the present case we cannot say that failure to give opportunity to explain this circumstance u/s 313 Cr.PC will not cause any prejudice to the accused persons if the same is sought to be used against them. This exercise at this distance of time by requiring the accused persons to give

explanation now is also not at all desirable in the facts and circumstances of the case because nearly ten years have elapsed after occurrence and the appellants have already served a considerable part of the sentence. Having regard to the facts, circumstance and evidence on record as discussed. I am constrained to hold that the accused persons are entitled to the benefit of doubt and that being so we allow the appeal, set aside the conviction and sentence and acquit them of the charge framed against them by giving them the benefit of doubt. They be released forthwith if not wanted in connection with any other case.

D. P. Sircar -. I, J.—I agree.

2. Appeal allowed