

(2015) 02 CAL CK 0080
In the Calcutta High Court
Case No : C.R.A. 223 of 2005

Biren Sarkar and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 20-02-2015

Acts Referred:

Constitution of India, 1950 — Article 15(3)(e), 45, 47
Criminal Procedure Code, 1973 (CrPC) — Section 313
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 15, 16
Juvenile Justice Act, 1986 — Section 2(k), 2(l), 3, 49
Penal Code, 1860 (IPC) — Section 148, 149, 300, 302, 323

Citation : (2015) 02 CAL CK 0080

Hon'ble Judges : Indira Banerjee, J; Sahidullah Munshi, J

Bench : Division Bench

Advocate : Shiladitya Sanyal and Dhruba Mukherjee, for the Appellant; Saibal Bapuli and Aniket Mitra, Advocates for the Respondent

Final Decision : Partly Allowed

Judgement

Indira Banerjee, J.—This appeal is directed against a judgment and order dated 2nd March, 2005, and an order of sentence dated 3rd March, 2005 passed by the Additional Sessions Judge, Cooch Behar in Sessions Trial No. 4(7)2001, corresponding to Sessions Case No. 18/89 whereby the accused appellants have all, inter alia, been convicted of murder under Section 302 of the Indian Penal Code and sentenced to suffer rigorous imprisonment for life for the said offence.

2. It is the case of the prosecution that the accused appellants entered the mustard field cultivated by the de facto complainant, Ananda Mohan Modak, and the members of his family, hereinafter collectively referred to as the Modaks, and started cutting the mustard plants.

3. The de facto complainant Ananda Mohan Modak, Tarani Kanta Modak (deceased), Mangla Chandra Modak and Rabi Kanta Modak, hereinafter referred to by their first names, went to the mustard field to stop the accused appellants

from cutting the mustard plants.

4. The accused appellant No. 1, Biren Sarkar chopped mustard plants at the place of occurrence, with a "benki" in his hand. When Mangla tried to prevent the accused appellants from cutting mustard plants, one of the accused appellants struck him on his back with a bamboo "holonga". Just then, the accused appellant Bipul, struck the de facto complainant on his chest, with a "holonga". After the incident, the accused persons left the place of occurrence and ran to the house of Prafulla, from where three of them were caught. It appears that Ananda and Mangla were injured and Tarani ultimately died.

5. After investigation, charge-sheet was issued against the accused appellants charging the accused appellants inter alia with murder punishable under Section 302 of the Indian Penal Code. In the charge sheet it was alleged that (i) On or about 29th December, 1981, the accused appellants formed an unlawful assembly in prosecution of the common object of assault and murder of Ananda, Tarani and Mangla and to commit the offence of rioting, armed with deadly weapons lathi, ballam, dao etc. and thereby committed an offence punishable under Section 148 of the Indian Penal Code; (ii) the accused appellants had formed an unlawful assembly and had intentionally committed murder of Tarani and thereby committed offence under section 302/149 of the Indian Penal Code; (iii) the accused appellants had voluntarily caused hurt to Ananda and Mangla with sharp cutting weapon and thereby committed offence punishable under Section 324 of the Indian Penal Code; (iv) The accused appellants had committed criminal trespass by entering into the land in possession of Ananda and thereby committed offence punishable under Section 447 of the Indian Penal Code. After the trial commenced, the accused appellant No. 1, Biren Sarkar claimed that he was only 17 years of age on the date of the incident and was, therefore, a juvenile. His claim to juvenility was rejected.

6. As enshrined in Article 1 of the Universal Declaration of Human Rights, all human beings are born free and equal in dignity and rights. Every infant that is born, is equal and has the basic human right to be brought up with love, affection, adequate care, adequate nutrition and the basic necessities of a decent standard of life. As the infant grows into a child, the process of education begins, first at home and then at school. Some children are fortunate to be born in enlightened, educated families and to be able to go to the best institutions in the country, but not all.

7. All children are born innocent. It is the environment in which they grow up, which moulds their tender minds. The behavioral pattern of a child depends on various factors, such as, the love and affection that the child gets, the atmosphere at home, the surroundings in which the child is brought up, the education the child gets, the influence of family, friends, teachers and others.

8. Delinquency amongst children is often the result of neglect, deprivation, improper upbringing bereft of love and affection, unhealthy surroundings, the

bad influence of adults, peer pressure, want and poverty. In fact in the instant case itself, the accused appellant No. 1 was part of a group of 6/7 co-accused persons.

9. Frustration, anger, defiance of authority, obduracy and obstinacy in children are the manifestations of deprivation, emotional as well as material. Delinquent acts are also prompted by a craving for attention. Furthermore, children often become pawns in the hands of scheming adults, anti socials and criminals who use them for their own selfish ends.

10. With adequate love and care, nutrition, good company and good education, the personality of a child blossoms and the child is able to excel in different spheres of life.

11. The primary responsibility of bringing up children, providing them with care, support and protection is that of the family, particularly biological parents. Inability and/or failure of the parents and/or family to discharge their primary responsibility towards children, is a cause of immense concern to the society at large.

12. Errant children can be rectified with love, affection, proper care, proper guidance and some disciplining. Juveniles and/or children in conflict with the law, therefore, need to be reformed and not punished. An aberration resulting from immaturity should not become a handicap for life. We must try to heal wounds which are the result, directly or indirectly, of societal shortcomings, and not allow the wound to develop into gangrene that might cause permanent disability. There have, therefore, been deliberations and discussions at various levels in relation to the rights and interests of children, including errant children in conflict with law.

13. On 20th November, 1989, the General Assembly of the United Nations adopted the Convention on the Rights of the Children, wherein a set of standards have been prescribed to secure the best interests of the child.

14. The convention has emphasized social reintegration of children in conflict with the law, to the extent possible, without resorting to judicial proceedings. The Government of India ratified the convention. Parliament, therefore, enacted the Juvenile Justice (Care and Protection of Children), Act 2000 with the view to codify the standards prescribed by the convention, in furtherance of the provisions of Articles 15(3)(e) and (f) and also Articles 45 and 47 of the Constitution of India.

15. The said Act provides for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and also for matters relating to justice of delinquent juveniles.

16. The justice system as available for adults is unsuitable for being applied to a juvenile or to a child. Parliament, thus, decided to lay down the basic principles for administering justice to a juvenile or a child; to create a juvenile system, meant for a juvenile or a child, which was more appreciative of the

developmental needs of a juvenile or a child, in comparison to criminal justice system as applicable to adults; to bring the juvenile law in conformity with the United Nations Convention on the rights of the child; and to prescribe a uniform age of juvenility upto 18 years for both boys and girls. One of the principles behind the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2006 was to minimize the stigma, in keeping with the developmental needs of the juvenile or child.

17. Section 2(k) of the Juvenile Justice Act defines Juvenile or child to mean a person who has not completed 18 years of age. Section 2(l) defines Juvenile in conflict with law to mean a Juvenile who is alleged to have committed an offence and had not completed 18 years of age on the date of commission of the offence.

18. Section 3 of the Juvenile Justice Act provides as follows:-

"3. Continuation of inquiry in respect of juvenile who has ceased to be a juvenile. - Where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection and during the course of such inquiry the juvenile or the child ceases to be such, then, notwithstanding anything contained in this Court or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile or a child."

19. Section 7A of the Juvenile Justice Act provides:-

"7-A. Procedure to be followed when claim of juvenility is raised before any court.- (1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Court and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders, and the sentence if any, passed by a court shall be deemed to have no effect."

20. Section 49 of the Juvenile Justice Act reads:

"49. Presumption and determination of age. - (1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or a

child, the competent authority shall made due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is no a juvenile or a child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person."

21. In exercise of powers conferred under Section 68(1) of the Juvenile Justice Act, the Central Government has framed the Juvenile Justice (Care and Protection of Children) Rules 2007, hereinafter referred to as the Juvenile Justice Rules.

22. Rule 12 of the said Rules provides as follows:-

"12. Procedure to be followed in determination of age. - (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that purpose.

(2) The court or the Board or, as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or, as the case may be, the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining-

(a)(i) the matriculation or equivalent certificate, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;

(b) and only in the absence of either (i, (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or, as the case may be, the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law. "

23. In this case, as observed above, the plea of juvenility was taken before the Sessions Court. This plea has been rejected, for reasons discussed in the judgment and/or order under appeal.

24. In every case concerning a child or a juvenile in conflict with law, the age determination enquiry has to be conducted in the manner stipulated in Rule 12(3), by reliance upon the following documents in order of priority.

(i) Matriculation or equivalent certificates if available,

(ii) If matriculation or equivalent certificate is not available, then the certificate from the School first attended, certifying the Date of Birth recorded by the School.

(iii) Birth Certificate given by a corporation or municipal authority or Panchayat.

(iv) In the absence of any of the above documents, the medical opinion is to be sought from a duly constituted Medical Board, which will declare the age of the juvenile.

25. In case exact assessment of the age cannot be done, the Court or the Juvenile Justice Board or, as the case may be, the Child Welfare Committee, for reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year.

26. It is well settled that defence of juvenility can be taken at any time as held by the Supreme Court in *Gopinath Ghosh Vs. The State of West Bengal*, AIR 1984 SC 237 : (1984) CriLJ 168 : (1983) 2 Crimes 937 : (1983) 2 SCALE 756 : (1984) 1 SCC 228 Supp : (1984) SCC 228 Supp : (1984) 1 SCR 803 : (1984) 16 UJ 166 , *Abuzar Hossain @ Gulam Hossain Vs. State of West Bengal*, AIR 2013 SC 1020 : (2012) 4 JCC 2725 : (2012) 10 JT 453 : (2012) 10 SCALE 101 : (2012) 10 SCC 489 : (2012) AIRSCW 5607 and *Pradip Kumar Vs. State of U.P.* reported in (1995) Suppl. 4 SCC 419, cited by Mr. Sanyal, appearing on behalf of the accused appellants.

27. In the instant case, the accused appellant No. 1 did not have a Matriculation Certificate or any equivalent certificate and there was no question of production of such a certificate. The Sessions Court also rightly did not accept the Certificate of the School, as it was not the School first attended by the accused appellant. Furthermore the learned Court rightly noticed infirmities in the school records, which rendered the Certificate unreliable. The accused appellant No. 1 also could not furnish any Birth Certificate given by any municipal authority or Panchayat or the Corporation. However, even if the School Certificate could not be relied upon, it was incumbent upon the Sessions Court to seek medical opinion of a duly constituted Medical Board. This was not done.

28. This Court is of the view, that it is incumbent to conduct a proper enquiry into the age of the accused appellant No. 1, as the jurisdiction of the Sessions Court to proceed with the trial against the accused appellant No. 1 and to convict the accused appellant No. 1, would depend on whether he was a juvenile at the time of commission of the alleged offence or not.

29. Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000 provides as follows:

"15. Order that may be passed regarding juvenile.- (1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it so thinks fit,-

(a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;

(b) direct the juvenile to participate in group counselling and similar activities;

(c) order the juvenile to perform community service;

(d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;

(e) direct the juvenile to be released on probation of good conduct and placed under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the

Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(f) direct the juvenile to be released on provision of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

[(g) make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit]

(2) The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognised voluntary organisation or otherwise, and shall take into consideration the findings of such report before passing an order.

(3) Where an order under clause (d), clause (e) or clause (f) of sub-section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the juvenile in conflict with law:

Provided that if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour and well-being of the juvenile it may, after making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.

(4) The board shall while making a supervision order under sub-section (3), explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be, under whose care the juvenile has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer.

30. Section 16 of the Juvenile Justice (Care and Protection of Children) Act, 2000 provides that notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law is to be sentenced to death or to imprisonment for any term which may extend to imprisonment for life or be confined to prison for default in payment of fine or for default in furnishing security. In no circumstances can a juvenile be detained beyond 3 years.

31. If as contended, the accused appellant No. 1, Biren Sarkar, was a juvenile, his trial by the Sessions Court and his conviction would be without jurisdiction. In any case, the sentence of imprisonment, which is beyond three years, would have to be set aside as without jurisdiction. It is, therefore, imperative that an enquiry into the age of the accused appellant No. 1, be conducted afresh in the manner indicated above, in strict compliance with Rule 12(3) of the Juvenile Justice Rules.

32. The trial commenced about 20 years after the date of the incident. The prosecution examined twelve witnesses. The accused appellants did not adduce any oral evidence, except to prove the juvenility of the accused appellant No. 1, Biren. They were, however, examined under Section 313 of the Criminal Procedure Code. They took the defence of denial and chose to exercise their right to silence.

33. The Prosecution Witness No. 1, Monoranjan Sarkar deposed that the incident had taken place on the land of Tarani and Ananda in the morning about 15/20 years ago. Ananda and Tarani had purchased the land in question from Khattu. There were mustard crops on the disputed land. Trouble broke out over harvesting of mustard crops. Prafulla, Ananta, Amulya, Bipul, Biren being the accused appellants along with Balaram, an accused, who died before the commencement of trial, had gone to harvest mustard crops, when trouble broke out. There was assault and counter assault between both the parties. Both the parties were armed with deadly weapons. Tarani sustained injury on the back of his head and he subsequently died, a short distance away from the place of occurrence. Ananda and Mangla sustained injury on their persons. Ananda and Mangla were taken to Cooch Behar and admitted in hospital, but later released.

34. In cross-examination, this deponent stated that he did not see who assaulted whom, as there were many persons assembled there. The incident took place in the month of "Pous" when there was deep fog and nothing was visible. It may be noted that the Bengali month of Pous corresponds to the second half of December and the first half of January.

35. The Prosecution Witness No. 2, Chitta Ranjan Sarkar, a resident of village Patchhara, deposed that he knew Ananda as well as Tarani. The incident had taken place about 19 years ago at 7 a.m. He did not know who was in possession of the disputed land at the relevant time. He also did not know who had sowed mustard crops. He, however, knew that there was trouble over the harvesting of mustard between Ananda and others (the Modaks) and the accused appellants and others. This witness deposed that about 35 persons were there. He could not, however, specify the names of the persons who had assembled there, as he had been ploughing his own land. He stated that he came to the place of occurrence after the incident. He saw that Tarani had been murdered. Ananda and Mangla had also sustained injury on their persons. He could not, however, say in which part of their body they sustained injuries. He deposed that the injured persons were taken to hospital. He identified the accused appellants in

Court.

36. In cross-examination, this witness stated that he knew Khattu, who was dead. He, however, could not tell the names of the persons who purchased land from Khattu. He deposed that he knew Balaram. Balaram used to cultivate his land. He further deposed that trouble broke out in respect of the land which Balaram used to cultivate. He deposed that Balaram used to cultivate the disputed land at the relevant time. Balaram as stated hereinbefore, was arrayed as accused in the FIR, but he died before commencement of trial.

37. This witness (PW 2), however, stated that as he was at some distance away from the place of occurrence, he had not actually seen what had happened. He did not know who assaulted whom. He had not even seen the persons who had sustained injury. He came to know about the injuries from others.

38. The third Prosecution Witness, Ananda, the de facto complainant deposed that Mangla and Tarani, the deceased, were his cousins. The incident took place about 20 years ago at around 8/8:30 a.m. when he was ploughing his land, adjacent to the land on which the incident took place. At that time, his cousin Tarani was ploughing another land.

39. The de facto complainant claimed that he had, along with Tarani, purchased the disputed land, being the place of occurrence of the incident, from Khattu Das about two to three years prior to the date of incident.

40. The de facto complainant Ananda deposed that, Khattu was in possession of the disputed land, when he along with Tarani, purchased the same from Khattu. This deponent further deposed that since the purchase of the land, Tarani and he had been in possession of the land. The name of Khattu was recorded in the record of rights and the purchase was made after perusing the record of rights.

41. This deponent deposed:

".....we sowed mustard crops in that land. The accused persons viz. Balaram, Biren, Bipul, Prafulla, Ananta and others tried to harvest the mustard crops. We resisted them. They were armed with lathi, "benki", "holonga", Khapar etc. I along with my brother Tarani, Mangla, Rabi tried to resist them. As a result, my brother Tarani was murdered. The accused Biren murdered Tarani. Biren assaulted him with a "benki" on his right neck. I saw that Biren struck him thrice. When I tried to save my brother, Accused Bipul assaulted me on my head with a lathi. The accused Prafulla assaulted me on my chest with a Holonge. The accused Amulya and Ananta carried lathis with them. My brother Tarani died subsequently just at a distance from the p.o. in the western side of the P.O. Mangla was also assaulted with "holonga" on his chest. I became seriously ill due to assault and I and Mangal were taken to Cooch Behar hospital. Many persons assembled at the P.O. being attracted by hue and cry. My wife Swetangini Modak, Rabi Modak, Cita Modak, Banabashi Modak came to the P.O. and they saw the incident. I and Mangla were treated at the hospital for 3 days. I lodged oral

complaint to the Darogababu at p.s. Darogababu wrote that complaint as per my version."

42. In cross-examination this witness admitted that there were several litigations over the disputed land between the Modaks and the accused appellants. He admitted that the Modaks had filed a Civil Suit against the accused appellants in respect of the disputed land. He further deposed:

"I know Prafulla Ananta and Amulya. Amulya, Ananta and Prafulla had their lands in the disputed khatian. Amulya, Ananta and Prafulla sold their land to the accused Bipul and Biren from that Khatian. I do not remember the year in which we purchased the land in question. The accused persons viz. Bipul and Biren purchased the land from them but they did not get their possession over the purchased land. It is not a fact that those two accused persons got possession over the purchased land.....

.....Amulya, Prafulla and Ananta are also accused persons of this case and they sold their land in the disputed Khatian to the accused persons, Biren and Bipul."

43. The fourth Prosecution Witness, Gita Rani Modak, daughter of the deceased, Tarani, stated that her father had been murdered about 20-21 years ago. She deposed that her father and her uncle Ananda had purchased the disputed land from Khatu and had sowed mustard crops in the said land. Trouble had started over the land, when the accused appellants came to the land for harvesting mustard crops, armed with lathi, "benki", ballam etc. The accused appellant No. 2 Bipul assaulted her father on his neck with a "benki". Her father died subsequently. Mangla was assaulted by the accused appellant No. 4, Ananta on his chest with a "holonga". Her uncle Ananda was assaulted by the accused appellant No. 3, Prafulla with a "holonga" on his chest. Her uncles Ananda and Mangla were removed to hospital. This witness deposed that trouble continued at the place of occurrence for about an hour. She had also tried to resist but there was no scuffle between her and the accused persons. She returned to her house along with her father.

44. The evidence of this witness is not reliable, as there is a glaring discrepancy between the evidence given by this witness and the evidence given by the previous witness, Ananda, the de facto complainant and an eye witness who was himself injured. While this witness has stated that the accused appellant No. 2, Bipul, had assaulted her father on the head, with a "benki", her uncle, Ananda deposed that the deceased, Tarani, had been murdered by the accused appellant No. 1, Biren Sarkar, who struck the deceased thrice with his "benki". The fifth Prosecution Witness, Swetangini, wife of the de facto complainant, Ananda, also deposed that the deceased Tarani had been struck by the accused appellant No. 1, Biren. Furthermore, this deponent deposed that, the accused appellant No. 4, Ananta assaulted her uncle Mangla with a "holonga" whereas Mangla (PW 9) himself deposed that the accused appellant Ananta assaulted him on his shoulder with a pointed stick.

45. The Prosecution Witness No. 5, Swetangini, deposed that her husband Ananda and his brother Tarani were ploughing their land and she was at home. At about 9 a.m. in the morning, the accused appellants, Biren, Bipul, Amulya, Ananta and Prafulla and Balaram (the accused, who died before the trial), came to harvest mustard on the disputed land on which Tarani and Ananda had sown mustard plants. When Tarani and Ananda tried to resist them, the accused appellant No. 1, Biren, assaulted her "Bhasur" (brother in law) Tarani, with "benki" on his neck and shoulder. Tarani fell on the ground. The accused appellant No. 3, Prafulla, assaulted her husband Ananda on his chest, with "holonga" and the accused appellant No. 2, Bipul, assaulted her husband, Ananda, on his head with a lathi. The evidence of this witness that her husband's other brother Mangla was assaulted by the accused appellant No. 5, Amulya, is contrary to the evidence of Mangla (PW 9) himself, who stated that he had been assaulted by the accused appellant No. 4, Ananta.

46. The sixth Prosecution Witness, Banobashini Modak, wife of the deceased, Tarani, deposed that her husband was ploughing the field along with his brother Ananda. The accused persons came to harvest mustard crops on the land that had been purchased by her husband Tarani from Khattu. Her husband and her brother-in-law, Ananda, resisted the accused appellants. She was at home. However, hearing "halla" (noise), she along with her daughter and her husband's younger brother's wife, Swetangini went to the place of occurrence. She found that her husband was standing in the field. The accused appellant No. 1, Biren, assaulted her husband on his shoulder with a "benki". Her husband fell down on the ground. The accused appellant No. 2, Bipul, assaulted Ananda on his head with a lathi and the accused appellant No. 3, Prafulla, assaulted Ananda on his chest with a "holonga". She deposed that Mangla was assaulted on his waist by the accused appellants Amulya and Ananta. Ananda and Mangla were taken to Cooch Behar hospital. Her evidence that Mangla was assaulted by Amulya is contrary to Mangla's own evidence that Ananta struck him.

47. In cross-examination, this witness stated that, at the time of the incident, she was at home doing household chores. Hearing a hue and cry, then went to the place of occurrence, where she found that 200/300 people had gathered. She saw that her husband was lying on the ground with bleeding injuries. Seeing her husband in this condition she became unconscious. She regained her consciousness after she was taken home.

48. From the cross-examination of this witness, it is patently clear that she had not actually seen who had assaulted her husband or his brothers. When she saw her husband lying on the ground, bleeding, she became unconscious and she regained her consciousness only after she was brought back home.

49. Prosecution Witness No. 7, Rabi Chandra Modak deposed that he knew Ananda of his village. Ananda and Tarani had cultivated mustard seeds on their land. On the day of the incident, the accused appellants Bipul, Ananta, Biren, Prafulla, Amulya and Balaram came to the land of Ananda and Tarani armed with

lathi, "benki" etc. and started harvesting mustard seeds. He deposed that "benki" is a kind of "dan" used for the purpose of harvesting jute. It is a sharp instrument.

50. He deposed that Ananda, Tarani and he tried to resist the accused persons. The accused appellant No. 1, Biren, then assaulted Tarani with a "benki" in his hand. He gave three blows on Tarani's shoulder. The accused appellant No. 3, Prafulla, had hit Ananda on his chest, with a sharp edged and pointed bamboo stick. He deposed that his younger brother, Mangla, was also assaulted by one of the accused. He had not seen who had assaulted Mangla.

51. The Prosecution Witness No. 8, Krishnapada Modak, son of the deceased Tarani, also deposed that the accused appellants entered their land armed with benki, sharp edged bamboos, sticks (lathis) etc, and started harvesting mustard. The accused appellant No. 1 Biren had a "benki" in his hand and the accused appellant No. 2 Bipul had a lathi (stick) in his hand. The accused appellants Prafulla and Ananda had also sharp edged and pointed bamboo sticks (holonga) in their hands. The other two accused persons, that is Balaram and Amulya, had no weapons in their hand.

52. The ninth Prosecution Witness, Mangla Modak, deposed that the accused appellants had entered the land of Ananda and Tarani, and tried to uproot the mustard plants. Ananda and Tarani tried to resist them. This witness claimed that he had been working in his land nearby. The accused appellant No. 1, Biren, had an instrument called "benki", used for harvesting of jute. The other accused persons were armed with lathis. When Ananda and Tarani tried to resist the accused appellants, the accused appellant No. 1, Biren, suddenly gave three blows to Tarani with a "benki". The accused appellants Prafulla and Bipul assaulted Ananda on his head with a lathi. The accused appellant Ananta had assaulted Mangla on his left shoulder with a pointed stick.

53. Prosecution Witness No. 10 is the doctor who conducted the post mortem examination over the body of the deceased Tarani. He opined that the death was due to shock and hemorrhage caused by injuries that were homicidal in nature. Prosecution Witness Nos. 11 and 12 are police witnesses.

54. There is preponderance of evidence which establishes beyond any iota of doubt that the accused appellants had gone to the place of occurrence to harvest mustard. The Prosecution Witness No. 1 deposed that the accused appellants along with Balaram (an accused who died before the trial) had come to harvest mustard crops, when trouble broke out. This dependent stated that the Modaks were also armed with deadly weapons. The Prosecution Witness No. 2 stated that he knew there was trouble over harvesting of mustard. It, however, transpires from his evidence, that he was not an eye witness.

55. The de facto complainant Ananda, (PW3), his wife Swetangini (PW5) his niece, Gita Rani Modak, daughter of the deceased, Tarani (PW4), the widow of the deceased, Banobashini Modak (PW6), the de facto complainant's brother

Mangla who was present at the spot, assaulted and hospitalized (PW9), all deposed that the accused appellants had come to the disputed land to harvest mustard. Krishnapada Modak, son of the deceased, Tarani (PW 8) and Rabi Chandra Modak (PW 7) deposed that the accused appellants along with Balaram entered the land of the deceased, Tarani and Ananda and started harvesting mustard.

56. All the aforesaid witnesses deposed that trouble broke out over the harvesting of mustard. The de facto complainant deposed that he, along with his brothers Tarani, Mangla and Rabi tried to resist the accused appellants, whereupon the accused appellant No. 1, Biren, assaulted and killed Tarani and the accused appellants Bipul and Prafulla assaulted and injured him. The de facto complainant's wife Swetangini (PW 5), his sister-in-law Banobashini, wife of the deceased Tarani (PW 6), his brother Rabi (PW 7), and his brother Mangla (PW 9) also stated in evidence that Tarani, Ananda and Mangla were assaulted, when they resisted the accused appellants.

57. The members of the Modak family (PW 3 to PW 9) are interested witnesses. The Prosecution Witness No. 1, who appears to be an independent and disinterested witness deposed that both the groups, that is, the accused appellants as well as the Modaks, had deadly weapons and there was assault and counter assault. The second witness, also a disinterested witness, stated that trouble had broken out over the harvesting of mustard and about 35 persons had gathered at the place of occurrence.

58. There is no evidence, not to speak of cogent evidence, on the basis of which the charge against the accused appellants of forming an unlawful assembly, in prosecution of the common object of assault or murder of Ananda or Tarani or Mangla, or to commit the offence of rioting with deadly weapons, can be sustained. The charge against the accused appellants of offence under Section 148 of the Indian Penal Code fails.

59. Admittedly, both the Modaks and the concerned accused appellants claimed ownership of the land in question. Both the groups claimed to be in possession of the disputed land. In cross-examination, the PW 2 stated that trouble broke out over the land, which Balaram used to cultivate. The Prosecution Witness No. 3, Ananda Mohan Modak, the de facto complainant, who claimed ownership of the land, along with the deceased, Tarani, admitted in cross-examination, that there were several litigations between the Modaks and the accused appellants in respect of the disputed land. He further admitted that the Modaks had filed a Civil Suit against the accused appellants, in respect of the disputed land.

60. The de facto complainant, Ananda, also admitted in cross-examination that the accused appellant Nos. 3, 4 and 5 (Prafulla, Ananta and Amulya) had sold their land in the same Khatian to the accused appellant Nos. 1 and 2 (Biren and Bipul).

61. Mr. Sanyal appearing on behalf of the accused appellants, submitted that the

Civil Suit filed by the Modaks had been decided in favour of the accused appellants, and he wanted to place the certified copy of the judgment and decree before us. Counsel appearing on behalf of the State, Mr. Bapuli, however, objected to production of the judgement and decree, on the ground that the same did not form part of the proceedings in the Sessions Court.

62. The Court can always look into a judgment and decree of a Civil Court, irrespective of whether the same has been tendered in the proceedings before the Sessions Court. We, however, do not deem it necessary to look into the judgement and decree, which was pronounced after the unfortunate incident.

63. Suffice it to note, that admittedly there were disputes with regard to the land. Both the Modaks and the concerned accused appellants claimed ownership. Both the groups claimed to be in possession. The prosecution has not been able to establish the ownership or possession of the Modaks, of the disputed land. Moreover, as observed hereinabove the accused appellants went there to harvest mustard. Atleast one of the witnesses, namely the Prosecution Witness No.2, deposed in cross-examination, that Balaram (the accused who died before trial) used to cultivate the land on which trouble broke out. The charge of criminal trespass also cannot be sustained.

64. The evidence of the independent witness (PW1) reveals that the Modaks were also carrying deadly weapons and there was assault and counter assault. On careful analysis of the evidence on record, it may reasonably be deduced that the accused appellants retaliated when the Modaks tried to forcibly drive the accused appellants away from the disputed land with lathis and other lethal and/or deadly implements.

65. In view of Exceptions 2 and 4 to Section 300 of the Indian Penal Code, culpable homicide is not murder if (i) the offender in the exercise in good faith, of the right of private defence of person or property, exceeds the power given to him by law and causes the death of the person against whom he is exercising such right of defence without premeditation, and without any intention of doing more harm than is necessary for the purpose of such defence; or if (ii) culpable homicide is committed without premeditation, in a sudden fight, in the heat of passion, upon a sudden quarrel, and without the offender having taken undue advantage or acted in a cruel or unusual manner. If culpable homicide is committed without premeditation in a sudden fight, in the heat of passion upon a sudden quarrel, it is immaterial which party offers provocation or commits the assault first.

66. In the instant case, it is patently clear from the evidence on record that there was no premeditation. There appears to have been a sudden fight over harvesting of mustard. None of the accused appellants except perhaps, the accused appellant No. 1, Biren, acted in a cruel or unusual manner or took undue advantage of the situation. There is no reason why the accused appellants, other than the accused appellant No. 1 Biren, should not get the benefit of the

aforesaid exceptions.

67. A careful analysis of the evidence of the Prosecution Witnesses reveals that only the accused appellant No. 1, Biren, who claims to be a juvenile carried a "Benki". Though the "Benki", is a sharp cutting implement, which can even cause death, the implement is generally used for harvesting jute and for cutting plants. This is also evident from the oral evidence of PW 7 Rabi and PW 9 Mangla. The carrying of a "benki" is not in itself an offence. From the tenor of the evidence of the Prosecution Witnesses, it may reasonably be deduced that the "Benki" was being used for harvesting mustard until the Modaks resisted the accused appellants.

68. In any case, the other accused appellants, namely, accused appellant No. 2 Bipul, the accused appellant No. 3 Prafulla, the accused appellant No. 4 Ananta and the accused appellant No. 5 Amulya did not carry any sharp cutting or deadly instruments.

69. All the witnesses except PW 1, PW 2, PW 4, PW 11 and PW 12 deposed that the accused appellant No. 1, Biren, hit Tarani with a "Benki". As observed above, the PW 1 and PW 2 deposed that they had not seen who had assaulted whom and had also not seen exactly what instruments were carried by the different persons who had gathered at the place of occurrence. The material witnesses, PW 3 Ananda, PW 9 Mangla, PW 7 Rabi, who are apparently eye witnesses, all deposed that the accused appellant No. 1, Biren, assaulted the deceased Tarani with a "Benki". The de facto complainant deposed that the accused appellant No. 1, Biren, murdered Tarani.

70. The accused appellant No. 2, Bipul only carried a "lathi" (stick) with which he assaulted the de facto complainant Ananda, as will appear from the evidence of the de facto complainant (PW 3), his wife Setangini (PW 5), Banobashini, wife of the deceased Tarani (PW 6), Rabi, brother of the deceased Tarani (PW 7) and Krishnapada son of the deceased Tarani (PW 8). The Prosecution Witness No. 4 had deposed that the accused appellant No. 2 struck her father Tarani (deceased) with a "Benki", but her evidence cannot be relied upon for the reasons discussed earlier. Her evidence is contrary to that of her injured uncles present at the scene. The other Prosecution Witnesses were the post mortem doctor and the respective police personnel.

71. The accused appellants other than the accused appellant No. 1 did not carry anything apart from lathis (sticks) and holonga (sharp edged bamboo poles). A "lathi" (stick) or a "holonga" (a bamboo pole with a sharp edge) is not a dangerous weapon as contemplated in Section 324 of the Indian Penal Code. The "lathi" or the "holonga" is neither used for shooting, nor for stabbing, nor for cutting, nor is an instrument, which if used as a weapon of offence, is likely to cause death.

72. Carrying of sticks, bamboo poles and/or "holonga" which may be used for cutting plants is not in itself an offence. There is no cogent evidence on the basis

of which the Court can hold that the accused appellants deliberately carried the implements with a view to murder or to cause injury to the Modak brothers, or any of them. It is reiterated that there is preponderance of evidence which shows that the accused appellants went to harvest mustard, after which trouble broke out.

73. The third Prosecution Witness, Ananda the de facto complainant, who was also injured, deposed that the accused appellant No. 1, Biren struck his brother Tarani with a "benki". From his evidence it is clear that no one else assaulted the deceased Tarani.

74. The other important witness, Mangla (PW 9), who was also injured, confirmed that the accused appellant No. 1, Biren, struck the deceased, Tarani, with a "benki".

75. In fact, all the prosecution witnesses except the PW1 and PW2 who had not seen what had exactly happened, the PW 4, whose evidence is not reliable for the reasons discussed above, the post mortem doctor (PW 10) and the police witnesses (PW 11 and 12) stated that the accused appellant No. 1, Biren, had attacked the deceased, Tarani, with a "benki". No one else assaulted him.

76. On an analysis of the evidence of the Prosecution Witnesses, the charges levelled in the charge-sheet cannot be sustained against any of the accused appellants, except the accused appellant No. 1, Biren who allegedly struck the deceased Tarani with a "benki" three times and caused his death.

77. By the judgment and order under appeal the learned Sessions Court held that all the accused appellants had assaulted Tarani, Ananda and Mangla in a pre-planned manner and had caused the death of Tarani and caused grievous hurt to Ananda and Mangla who were treated in a hospital. The finding that all the accused appellants had assaulted Tarani, Ananda and Mangla is not supported by the evidence on record.

78. The learned Sessions Court held that the prosecution had been able to prove the charges under Sections 148, 302/149, 324 and 447 of the Indian Penal Code beyond any reasonable doubt. The Sessions Court convicted the accused appellant No. 1, Biren Sarkar under Sections 148, 302/149 and 447 of the Indian Penal Code, and the other four accused appellants under Section 148, 302/149, 324 and 447 of the Indian Penal Code. All the accused appellants have inter alia been sentenced to suffer rigorous imprisonment for life for offence under Section 302 of the Indian Penal Code.

79. The accused appellant No. 3, Prafulla apparently carried "holonga", ie. sharp edged bamboo poles, which have multifarious uses and are often used to uproot plants from the soil. The de facto complainant deposed that the accused appellant No. 3 had hit him on the chest with a "holonga".

80. The PW5, PW6, PW7, PW8 and PW9 also confirmed that the accused appellant No. 3, Prafulla assaulted Ananda with a "holonga" and the accused

appellant No. 2, Bipul hit him with a "lathi". Only the Fourth Prosecution Witness stated that the accused appellant No. 2, Bipul had assaulted her father on his head with a "benki", but her evidence, as observed above, is contrary to the evidence of eye-witnesses and, therefore, unreliable.

81. There is some contradiction in the evidence of the Prosecution Witnesses as to whether the accused appellant No. 4, Ananta, who allegedly assaulted Mangla (PW9) carried a "stick (lathi)" or a "holonga". The PW9, Mangla who appears to have been assaulted by the accused appellant No. 4, Ananta, deposed that the accused appellant No. 4, Ananta had hit him on his chest with a sharp edged bamboo pointed stick. The de facto complainant (PW3) however deposed that the accused appellant No. 4, Ananta carried a stick. The Prosecution Witness Nos. 4 and 8 deposed that the accused appellant No. 4 had "holonga" and/or sharp edged pointed bamboo sticks in his hands.

82. There does not appear to be any evidence with regard to the nature of the injuries suffered by the de facto complainant, Ananda and his brother, Mangla. The finding of the Sessions Court that they suffered grievous injury, is not substantiated by the evidence adduced at the trial.

83. In any case, there is no evidence at all to implicate the accused appellant No. 5, Amulya in any of the charges levelled in the charge sheet. As observed above, no one, except the accused appellant No. 1, Biren, assaulted the deceased, Tarani. Ananda, as per his own evidence was assaulted by the accused appellant No. 2, Bipul, and the accused appellant No. 3, Prafulla. Mangla, as per his own evidence, was assaulted by the accused appellant No. 4, Ananta. The Prosecution Witness No. 8, Krishnapada Modak, son of the deceased, Tarani deposed that the accused Balaram who died before commencement of the trial and the accused appellant No. 5, Amulya had no weapons in their hands.

84. It is true that the de facto complainant's wife, Swetangini (PW5) and deceased, Tarani's wife, Banabashi (PW6) deposed that Mangla had been assaulted by the accused appellant No. 5, Amulya, but the evidence of this deponent is contrary to the evidence given by Mangla (PW9) himself, and, therefore, cannot be relied upon.

85. On analysis of the evidence given by the Prosecution Witness Nos. 1 to 10, we do not find anything at all, on the basis of which the accused appellant No. 5, Amulya could have been convicted of any offence, not to speak of murder under Section 302 of the Indian Penal Code, for which he has been sentenced to suffer imprisonment for life.

86. The accused appellant No. 2, Bipul, the accused appellant No. 3, Prafulla and the accused appellant No. 4, Ananta at best committed assault entailing punishment of 1 year under Section 323 of the Indian Penal Code.

87. The appeal is allowed in part.

88. The Sessions Court shall reconsider the claim of the accused appellant No. 1

to juvenility in accordance with Rule 12 of the Juvenile Justice (Protection and Care) Rules 2007, by taking into account the documents specified in the said Rule, if available, and if not, by obtaining medical opinion. The Sessions Court shall submit its report to this Court, within 30 days from the date of communication of this judgment and order, after which the appeal against the conviction of this appellant, under Section 302 and 324 shall be heard and disposed of.

89. The conviction of the accused appellant No. 5, Amulya, who neither carried any weapons nor committed any assault is set aside. The accused appellant Amulya is held not guilty and acquitted of all the charges under Sections 148, 149, 302, 324 and 47 of the Indian Penal Code. The accused appellant No. 5, Amulya shall immediately be set free, unless he is wanted in connection with any other case.

90. The conviction of the accused appellant No. 2, Bipul Sarkar, the accused appellant No. 3, Prafulla Roy and the accused appellant No. 4, Ananta Roy under Sections 148, 149, 324, 302 and 447 cannot be sustained, and their conviction under the said sections is set aside. The accused appellant No. 2, Bipul Sarkar died during the pendency of this appeal. The accused appellant No. 3, Prafulla Roy and the accused appellant No. 4, Ananta Roy are, however, convicted under Section 323 of the Indian Penal Code and sentenced to suffer imprisonment for a term of one year. However, since these accused appellants have already been in custody for over 1 year, they may forthwith be set free, unless wanted in connection with any other case.

91. Urgent xerox certified copy, if applied for, be delivered to the learned counsel for the parties, upon compliance of all usual formalities.

Sahidullah Munshi, J.

I Agree.