

(2008) 12 CAL CK 0064
In the Calcutta High Court
Case No : Criminal Appeal No. 421 of 1986

Brinchi Shet, Satya Kinkar Shet, Manik Shet, Ashoke Shet, Shyamal Shet APPELLANT

Vs

State of West Bengal RESPONDENT

Date of Decision : 10-12-2008

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 211, 212, 313, 342, 428
Juvenile Justice (Care and Protection of Children) Act, 2000 — Section 7A
Penal Code, 1860 (IPC) — Section 147, 148, 149, 304, 325

Citation : (2008) 12 CAL CK 0064

Hon'ble Judges : Kishore Kumar Prasad, J; Girish Chandra Gupta, J

Bench : Division Bench

Advocate : Dipak Sengupta, Amitava Ganguly and Mritunjoy Chatterjee, for the Appellant; Minoti Gomes, for the Respondent

Judgement

Kishore Kumar Prasad, J.—This appeal is directed against the judgement dated 26th September, 1986 passed by the Learned Additional Sessions Judge, 2nd Court, Murshidabad in sessions trial No. 1 of July 1986 arising out of session serial No. 213 of 1985 convicting the appellants namely Brinchi Shet, Satya Kinkar Shet, Manik Shet, Ashoke Shet and Shyamal Shet under Sections 148 and 304 read with Section 149 of IPC and an order passed on the same date by which the appellants were convicted and sentenced to suffer Rigorous Imprisonment for eight years as also to pay fine of Rs. 1,000/each, in default to suffer further Rigorous Imprisonment for a period six months each for the offence punishable u/s 304 read with 149 of I.P.C. They were also sentenced to suffer R.I. for two years for the offence punishable u/s 148 of I.P.C. The substantive sentence awarded to the appellants were ordered to run concurrently . The fine, if realised had been directed to be paid to the parents of the deceased Joydev Guin of Village Koregram within the limits of Bharatpur P.S., District Murshidabad.

2. Being aggrieved by the orders of conviction and sentence passed by the

Learned Trial Court, the appellants have preferred the present appeal. Prosecution version in a nutshell is that on 24th August ,1984 corresponding to 7th Bhadra 1391 B.S., Friday at about 1 P.M., a quarrel ensued between the appellant Satya Kinkar Shet and the victim Joydev Guin in Koregram Village over the dispute of damaging of paddy by buffaloes of the appellant Satya Kinkar Shet. The said quarrel was aggravated to such an extent that the appellants Ashoke and Brinchi assaulted the victim with fists and blows and the appellants Satya Kinkar Shet, Manik Shet and Shyamal Shet assaulted the victim with lathis and in consequence thereof the victim fell down on the ground. The informant Khirod Kr. Guin (PW 1) along with others took victim Joydev first to Teniya Health Centre. Thereafter, Joydev was admitted in Salar hospital wherefrom he was shifted to Berhampur General Hospital.

3. The informant, Khirod Kr. Guin lodged written complainant (Ext. 1) with the I.C. (investigation centre), Salar Beat House on 25.8.84 at 9.45 hours which was forwarded to O.C. Bharatpur P.S. On the basis of said written complaint, Bharatpur P.S. case No. 8 dated 25.8.84 was registered against the appellants under Sections 147/325 of IPC initially. The victim Joydev succumbed to injuries at Berhampur hospital on 25.8.84. On the prayer of Investigating Officer, the learned Committing Magistrate passed an order for adding Section 304 of IPC in the relevant column of the formal F.I.R. Investigating Agency took up investigation . Inquest and post-mortem were accordingly held on the dead body of the deceased. In the usual course, after completion of investigation charge-sheet under Sections 147/325/304 of IPC was submitted against the appellants. The case was committed to the Courts of sessions.

4. In the Court of sessions, charges u/s 148 and u/s 304 read with Section 149 of IPC were framed against the appellants. The appellant pleaded not guilty to the charges framed against them and claimed to be tried. In the Trial Court as many as 13 witnesses were examined on behalf of the prosecution. Two of them namely Baneswar Guin (PW-3) and Rohini Banerjee (PW-4) were tendered for cross-examination (the procedure of tendering a witness without an examination-in-chief is not warranted by law in view of the mandate of the Hon"ble Apex Court in the case of Sukhwant v. State 1995 SCW 2521 as also in the case of Tej Prakash v. State 1996 CrIL.J); Khirod Kr. Ghosh, (PW- 1), Sudhir Guin (PW-6), Sunil Guin (PW -7), Narayan Bhadra (PW-8) were examined as witnesses of the fact. Apart from the aforesaid witnesses , Smt. Maya Shet (PW-2) before whom three bamboo lathis were seized by the police on 25.8.84 from the house of the appellant, Manik Shet ; Dr. Amiya Pal (PW -5) who on 24.8.84 at about 1.30 p.m. clinically examined the victim at Teneya Health Centre ; Dr. Jitendra Kr. Ghosh (PW -9) who conducted post-mortem on the dead body of the deceased on 25.8.84 at 2.30 p.m. at Berhampore police morgue, constable Tapan Ghosh (PW -10) who took the dead body of the deceased from Berhampur General Hospital to Berhampur Police Morgue on 25.8.84 for the purpose of post-mortem examination ; Dulal Ch. Chakraborty (PW -11) who was the then Officer-in-charge of Bharatpur P.S. after receipt written complaint of informant registered

the case ; Shashti Charan Biswas (PW 13), the then S.I. of Bharatpur P.S. who on 25.8.84 at 12.10 p.m. performed the inquest on the dead body of the deceased at Berhampur General Hospital and Investigating Officer Dulal Ch. Bhattacharjee (PW- 12) were also examined.

5. Apart from leading oral evidence, the prosecution also tendered and proved large number of exhibits which were marked as Exts. 1 to 6. Though the appellants were examined u/s 313 of the Cr.P.C., yet there was no adduction of evidence by the appellants. From the trend of cross-examination of PWs and suggestion thrown to the witness, the defence version was that the appellants have been falsely implicated in this case out of revenge and enmity and the incident was not occurred in the manner as stated by the witnesses of fact.

6. Learned Trial Judge disbelieved the defence version. The learned Trial Judge after considering the oral and documentary evidence and hearing the learned Counsel for the parties passed the orders of conviction and sentences against the appellants as indicated above.

7. Out of five appellants, Satya Kinkar Shet and Manik Shet died on 26.2.07 and 28.10.08 respectively that is during the pendency of this appeal. In view of the order passed by the learned Trial Judge imposing fine with default stipulation for the sentence punishable u/s 304 read with Section 149 of IPC in addition to the substantive sentence, this appeal was not ordered to abate against them.

8. Learned Counsel appearing on behalf of the appellants raised before us arguments on the merits of the case and also a legal technical point that the charges framed in this case were materially defective and because of the defective charge, the appellants have been prejudiced at the trial and same has caused the failure of justice. Learned Counsel further contended that the F.I.R. was lodged after inordinate delay and the learned Trial Court was not justified in believing the testimony of the eye witnesses when their evidence were self-contradictory regarding the mode and manner of the incident. Further submission of the Learned Counsel was that there is duty cast down the Courts to question the accused properly and fairly while examining him u/s 313 of the Cr.P.C. so that the case of prosecution is brought home to the accused in clear words which the accused will have to meet and thereby an opportunity is given to accused to explain any such point. According to Learned Counsel, the Learned Trial Judge in the instant case has failed to discharge his duty while recording the statement of the appellants u/s 313 of the Cr.P.C. The Learned Counsel placed reliance on the decision in the case of Ajay Singh Vs. State of Maharashtra, . Alternatively, it was contended by the Learned Counsel that there was no common object of killing the deceased and the incident took place at the spur of moment and the incident, at the most , which can be gathered from the evidence produced by the prosecution, can be to cause injuries to the deceased and not to cause death of deceased and therefore, the appellants can at best, be convicted for the offence punishable u/s 304 Part -II read with Section 149 of IPC.

9. Per contra Learned Counsel appearing for the State respondent supported the impugned judgement passed by the Learned Trial Court. It was urged that the Learned Trial Court had adequately discussed the evidence on record and had assigned adequate reasons for recording its finding of guilt for the offences with which the appellants were charged and no case has been made out for this Court to interfere with the impugned judgement.

10. We have given our anxious and thoughtful consideration to the respective contentions of the Learned Counsel for the parties. We have perused the evidence both oral and documentary tendered and proved by the prosecution to substantiate its case and the impugned judgement.

11. There are four witnesses of the occurrence that is PWs 1,6,7 & 8. PW -1, the informant is the brother's son of the deceased. He deposed as follows:

I am a resident of Village Koregram, within PS Bharatpore. On 7th Bhadra, 1391 B.S. (24.8.84) at about 12 noon while I was in my house I heard a golmal in the field of my uncle Sudhir Guin over a dispute of damaging of paddy by two buffaloes of Satya Kinkar Shet. I ran to the field and found that Ashoke Shet and Brinchi Shet were assaulting Joydev with fists and blows. Satya Kinkar Shet, Manik Shet and Shyamal Shet also assaulted Joydev with lathis. At the sight of Sunil Guin, Narayan Bhadra, Sudhir Guin and others including me. The accused persons viz. Satya Shet, Manik Shet, Ashoke Shet, Brinchi Shet and Shyamal Shet fled away.

On getting such assault Joydev fell down on the ground. Along with others I took the injured Joydev first to Tenya Health Centre. After getting Joydev admitted in the said health centre I left to home. At 4 p.m. on the same day I went to Salar hospital. As the condition of Joydev was serious we made arrangement for his removal to Berhampore hospital. I lodged written complaint with the I. C., Salar Beat House. This is the said written ejahar, written and signed by me (the written ejahar is proved and marked Ext.1).

12. PW - 6 is the uncle of the deceased. He deposed as follows:

on 7th Bhadra about two years ago at about 1 p.m. I found my paddy being damaged by buffaloes of Satya Kinkar Shet. I protested. Consequently Asoke Shet and Brinchi Shet were about to assault me, but I fled away. My nephew Joydev was with me. At that time, I found Kalu Shet @ Satya Kinkar Shet in a tea stall near the paddy field. I protested against the action of Birinchi and Asoke to him, but in reply Kalu Shet ordered Birinchi and Ashoke to assault us. Ashoke and Birinchi assaulted Joydev with fists and blows. Satya Kindar assaulted Joydev with lathi and Shyamal assaulted Joydev on his person. I shouted for help and the neighbours rushed to the place. They poured water on Joydev and took him away to the hospital. Being frightened I took shelter in my house.

13. PW -7 is also related to the deceased. He deposed as follows:

P.W. 6 Sudhir Guin is my Jethamasai. On 7th Bhadra about two years ago at

about 12 noon/1 p.m. while I was at home I heard a hue and cry coming from outside. I went out of my house. I rushed towards the right side at a distance of 20 yards from our house. I found Ashoke and Birichi assaulting Joydev with fists and blows. Satya Kinkar Seth assaulted Joydev with a lathi on his head. Joydev fell down on the ground. Manik also assaulted Joydev with lathi. Then says - Shyamal also assaulted Joydev with a lathi. On getting such assault Joydev fell unconscious on the ground. Narayan, Khirod and I took unconscious Joydev to Tenya B.H.C for treatment. All the five accused persons namely Satya Kinkar Shet, Ashoke Shet, Birinchi Shet, Shyamal Shet and Manik Shet are present on the dock (identified).

14. PW 8 is the resident of Village Koregram. He deposed as follows:

I am a resident of Koregram. About two years ago in the month of Bhadra at about 1 p.m. while I was engaged in weaving at my house I heard the shouting voice of Joydev Guin "malo go". On hearing such shouting voice I came out of my house and found Joydev being assaulted by Ashoke Shet and Birinchi Shet with fists and blows at a distance of about 20/25 yards to the east of my house. I also found Satya Kinkar Shet assaulting Joydev on his head with lathi. On getting such assault Joydev fell down on the ground. Manik Shet assaulted Joydev on his left elbow with lathi. Shyamal Shet also assaulted Joydev with lathi on his back. On hearing such golmal the neighbours - Sunil Guin, Mahima Hore, Purna Chandra Guin and others rushed to the P.O. Seeing them the accused persons fled away. About 4/5 persons including me took Joydev to Tenya Health centre.

15. PW 6, 7 and 8 have more or less corroborated PW 1 with regard to the assault by the appellants on Joydev on the relevant date and time. A lengthy cross-examination has been conducted on each of the aforesaid witnesses. Besides some minor wear and tear in their evidence, nothing could be elicited from them in the cross-examination which may render their evidence unreliable as regards time, place as also about the manner and participation of the appellants and lethal weapons wielded by some of the appellants. A sentence from here and a sentence from there cannot be used to condemn the prosecution case as false. Discrepancies are likely to occur for variety of reasons namely the social status of the parties, education and the time when the deposition of witness is recorded. Every witnesses on the scene of occurrence cannot give an identical account of what happened and variations are bound to exist especially with the lapse of time when their statements are recorded after a long period from the date of occurrence. It is only in the case of tutored witnesses that statements flow parrot-like without any contradiction or discrepancy. Hence, the contention that the evidence of PWs 1, 6, 7 and 8 should not be believed because in some particulars they run counter to each other cannot be sustained.

16. The plea relating to interested witness is a regular feature in almost every criminal trial. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. The ground that the witness being a close

relative and consequently being a partisan witness, should not be relied upon was repelled by the Hon''ble Apex Court as early as in Dalip Singh and Others Vs. State of Punjab, in which surprise was expressed over the impression which prevailed in the minds of the members of the Bar that relatives were not independent witness. Speaking through Vivian Bose, J it was observed : (AIR p. 366, para 25).

25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavored to dispel in - " Rameshwar Vs. The State of Rajasthan, . We find, however, that it unfortunately still persists, if not in the judgements of the Courts, at any rate in the arguments of Counsel.

17. Again in Masalti Vs. State of U.P., , Hon''ble Apex Court observed : (AIR pp. 209 -10, para 14).

But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses....The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence ; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.

18. To the same effect are the decisions in The State of Punjab Vs. Jagir Singh, Baljit Singh and Karam Singh, , Lehna Vs. State of Haryana, ; Gangadhar Behera and Others Vs. State of Orissa, and Salim Sahab v. State of M.P. (2007) 1 SCC 425. So the plea regarding relationship witness is without substance. Apart from the evidence of the aforesaid four witnesses, we find the following circumstances corroborate and lend assurance to the prosecution case:

(a) F.I.R. lodged by PW -1 wherein he clearly disclosed the name of the appellants as assailants of the deceased as also the details of the operation of the act of assault.

True, the incident took place on 24.8.84 at about 1 P.M. and the F.I.R. was lodged by PW -1 with the I.C. (investigation centre) Salar Beat House at 9.45 hours on 25.4.84 and the distance of the P.S. from the place of occurrence was 22 kilometres. But it should be pointed out that mere delay in lodging the F.I.R. does not and cannot adversely affect the prosecution in every case. Justification put forth for some delay in lodging the F.I.R. has to be judicially viewed as to whether it is acceptable or not. In the case in hand, the plausible and pertinent explanation has been given by PW - 1 as to why F.I.R. could not be lodged

earlier. PW -1 stated in his evidence in this regard as follows : "On getting such assault Joydev fell down on the ground. Along with others, I took the injured Joydev first to Teneya health centre. After getting Joydev admitted in the said health centre I left for home. At 4 p.m. on same day I went to Salar hospital . As the condition of Joydev was serious we made arrangement for his removal to Berhampur hospital". This explanation furnished by PW 1 is convincing and acceptable that for shifting the injured for treatment firstly to Teneya health centre, thereafter to Salar hospital and lastly to Berhampore General Hospital, he could not lodge F.I.R earlier. Therefore, we are of the view that the delay in lodging the F.I.R. stands very well explained and it does not adversely affect the prosecution.

(b) The evidence of eye witness as regards the nature of assault was corroborated by the injury report (Ext.- 2) given within half an hour of the shifting of the deceased to Teneya health centre which was proved by Dr. Amiya Pal (PW 5) wherein victim Joydev was found to have suffered the following injuries:

1. One violence of the left elbow joint-lateral side - 11/2"" square area - simple -- caused by hard substance.
2. One swelling of the left parital region (Anterior part) - caused by hard substance - serious in nature.
3. One swelling of the tempero mandibular region - simple in nature - caused by hard substance.
4. One erosion with echomosis - right side - it extends from spine of scapula towards lower part of exilluary border - simple - caused by hard substance.
5. One echomosis - 7" - it extends from the right shoulder joint towards the vertibral column, -- simple - caused by hard substance.
6. It is found the back swollen and inflamed (whole part of the back) - caused by hard substance.

It was opined by him that injuries could be caused by hard substance that is bamboo, lathi or iron rod.

(c) The prosecution version was also corroborated by post-mortem report (Ext. 3) conducted on 25.08.84 at 2.30 p.m. at Berhampore General Hospital which was proved by Dr. Jitendra Kr. Ghosh (PW 9) wherein the deceased Joydev was found to have suffered the following injuries:

1. "One big haematoma measuring 3" X 1/2" over the left parital region on the scalp.
2. On dissection extra-vassated antemortem clotted blood is found underneath and the left parital bone is also found fractured.
3. One swelling on the posterior aspect of left leg.

It was opined by him that injuries could be caused by hit of hard substance like bamboo or lathi or iron rod. It was further opined that death was due to shock and hemorrhage as a result of the antemortem injuries suffered by the deceased and could be homicidal.

(d) There was admission on behalf of the defence as regards the participation of the appellants in the crime because of the following appearing in the cross-examination of P.W. 1: "I do not remember whether the inmates of the above 10 to 15 families also assembled there when Joydev was assaulted by the accused persons.

19. It appears to us that the I.O. (PW 12) had not been diligent enough but for that reason we do not feel that reliable and clinching evidence adduced in this case by the material witness should be discarded. In this connection, we may refer to a decision of the Hon'ble Apex Court in Kamal Singh v. State of M.P. 1995 AIR SCW 3644. In the said decision it has been said that in case of defective investigation, it would not be proper to acquit the accused if the case is otherwise established because in that event it would tantamount to be falling in the hands of erring Investigation Officer . It is difficult to believe that only because some of the persons in the vicinage have not been examined, the testimony of the material witnesses of the prosecution cannot be believed. The evidence which is adduced by the prosecution is required to be examined on the touch stone of its truthfulness, when it is found that the evidence which is recorded is truthful, examination of this witness and that witness loses its importance in criminal trial and these are the principles laid down by the Hon'ble Apex Court to appreciate the evidence in criminal trials. We have scrutinized the evidence of the Investigating Officer (PW 12). We find that it was not even suggested to him that though he found incriminating materials on the place of occurrence yet he did not think it to seize the same. The answer given by the I.O. that he did not seize anything from the P.O. could be the result of negligence or carelessness on his part, but the place of incident cannot be doubted thereby. Similarly, the presence of eye witnesses cannot be doubted if there was no blood on their clothes. It was not necessary that their clothes must have caught blood stains while lifting the victim by their hands from the place he had fallen down on receiving injuries and taking him to hospital.

20. So far as the participation of the appellants in the incident is concerned, the prosecution has been able to prove it beyond reasonable doubt. Now we shall consider the submission advanced by the learned Counsel for the appellants regarding the charges framed in this case by the Learned Trial Court.

21. It would be convenient at this stage to set out the charges framed by the learned Trial Court which were in these terms:

I, Shri A.K. Chatterjee, Addl. Sessions Judge, 2nd Court, Murshidabad. Hereby charge you :- 1. Birinchi Shet, 2. Satya Kinkar Shet, 3. Manik Shet, 4. Asoke Shet and 5. Shyamal shet as follows :-

That you on the 24th day of August, 1984 at about 1 p.m. at Village korgam, within P S Bharatpur, Dist. Murshidabad were members of an unlawful assembly and did in prosecution of the common object of such assembly viz. in assaulting one Joydev Guin commit the offence of rioting and at that time were armed with deadly weapon, to wit, lathis which used as a weapon of offence is likely to cause death and thereby committed an offence punishable u/s 148 of the IPC and within my cognizance.

Secondly - That you on the same date, time and place were members of an unlawful assembly and in prosecution of the common object of such assembly viz. in assaulting Joydev Guin some of you caused the death of said Joydev Guin with the intention of causing such bodily injury as was likely to cause death or with the knowledge that the act was likely to cause death, which offence you knew to be likely to be committed in prosecution of the common object of the said assembly and you are thereby u/s 149 of the IPC guilty of causing the said offence of culpable homicide not amounting to murder, an offence punishable u/s 304 of the IPC and within my cognizance.

And I hereby direct that you be tried by the said Court on the said charge. Dated this 17th day of January, 1986.

-Sd:

Addl. Sessions Judge, 2nd

Court, Murshidabad.

The charge is read over and explained to the accused persons to which they plead not guilty and claim to be tried.

-Sd:

Addl. Sessions Judge, 2nd

Court, Murshidabad.

22. On going through the contents of charges framed by the Learned Trial Court, we are unable to subscribe to the submission of the learned Counsel that there was a fundamental defect in the framing of charges and because of the defective charges, the appellants have been prejudiced at the trial. Section 211 of the Cr.P.C. dictates the contents of the charge and Section 212 of CR.P.C. deals with the particulars as to time, place and person to be mentioned in the charge.

23. In the present case, the particulars of the charges as also the particulars as to time, place and persons have been mentioned in the charges. True, in the charges there is no mention specifying the particular place where the incident took place. The said omission cannot be characterised as serious and it is not to be regarded as important unless two conditions are fulfilled both of which are in the realm of facts, (1) the accused has "in fact" been misled by it and (2) the omission or error or both have occasioned a failure of justice. This we say

because of the provisions contained in Section 464 of the Cr.P.C. The section deals with the effect of omission, error or irregularity in the charge or absence of it. If Section 464 of the Cr.P.C. is read side by side with other Sections, it is clear that no finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid on account of fact that no charge was framed, or on the ground of any error, omission or irregularity in the charge unless those matters in the opinion of Court of Appeal have, in fact occasioned failure of justice. In considering the question of prejudice, the Hon'ble Supreme Court has said that the Court is bound to examine whether actual prejudice has been caused in the trial of the case. What exactly is prejudice in the context has been said by Willie (William) Slaney Vs. The State of Madhya Pradesh,

Willie (William) Slaney Vs. The State of Madhya Pradesh, thus : "Every reasonable presumption must be made in favour of an accused person ; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself". Truly, the Court is bound to look at the substance of the matter . It is the prime duty of the Court to administer justice. To punish the guilty is part of that administration of justice and is as important as giving protection to the innocent. " Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction". Vide Willie (William) Slaney Vs. The State of Madhya Pradesh, .

24. Considering the facts of this case, we hold that no prejudice had been caused to the appellants in the matter of an omission specifying the particular place of Village Korgram for the commission of the offences in regard to the charges u/s 148 and 304 read with Section 149 of IPC where all other particulars have been clearly mentioned in the charge framed by the Learned Trial Court.

25. It is seen that the appellants were represented by a lawyer before the learned Trial Court. No complaint was raised as regards the said omission. The ocular evidence in this case clearly established the specific criminal acts alleged against each of the appellants. The eye witnesses have said clearly about the involvement of all the appellants and their individual acts of the offences. This witnesses were cross-examined at length. The evidence given by them were analysed by the learned Trial Court.

26. On the facts disclosed in the case, We feel that no prejudice is caused in fact to the appellants in the omission to specify the particular place. Assuming that there is some irregularity in framing of the charges, the facts unfolded in this

case tell us that the appellants have not in fact sustained any prejudice. We feel that there is no merit in the technical point raised by the Counsel for the appellants.

27. So far as the contention of the Learned Counsel to the effect that the trial Judge has failed to discharge his mandatory duty while recording the statement of the appellants u/s 313 of the Cr.P.C., we find substance in it. We have carefully gone through the statement recorded u/s 313 of the Cr.P.C. by the Learned Trial Judge and having done so we see though the Trial Judge had put material questions to the appellants affording opportunity to explain the circumstances alleged against them but he failed to put any question to the appellants with regard to the other circumstances appearing against them in evidence. The said omissions in our opinion could only amount to an irregularity and are curable u/s 465 of Cr.P.C. particularly when the learned Trial Judge put question to the appellants whether they wanted to adduce evidence in support of their defence and in reply to the said question, appellants stated as follows "No". In such circumstances, the aforesaid irregularity has not occasioned injustice nor it has caused any prejudice to the appellants. In this connection reference may be made in case Ram Shankar Singh and Others Vs. State of West Bengal, where the Hon'ble Apex Court held that there may be error and omission in complying with Section 342 of the Cr.P.C. (corresponding to new Section 313 Cr.P.C.) correctly but that does not by itself vitiate the trial unless injustice is shown to have resulted therefrom. Having given anxious consideration to the entire matter in issue, our views tuned by the voice of evidence on record are that the appellants did participate in the incident and they formed an unlawful assembly in the prosecution of common object of which the act of assault by them upon the deceased resulting injuries on his persons initially and ultimately causing his death at Berhampore General Hospital some times before 12 A.M. on 25.8.84. The appellants Satya Kinkar Shet, Manik Shet and Shyamal Shet were armed with lathi. A lathi is a lethal weapon and anyone who used it on the head of another with such force as to fracture his skull must know he was doing an act which in probability must cause death. Therefore, the ingredients of the offences u/s 148 of IPC stand established as the violence has been used by the members of unlawful assembly in prosecution of the common object of that assembly and therefore they were rightly convicted for the said offence by the Trial Judge. Accordingly, we upheld the conviction of the appellants u/s 148 of IPC and the jail sentence of two years R.I. imposed upon them on that count excepting appellant Shyamal Shet for the time being for the reasons which we shall discuss in the latter part of our judgement.

28. There remains consideration of this aspect of the matter as to what offences the appellants committed in cutting short the life of Joydev Guin. Except one injury, the remaining injuries sustained by the deceased were of simple in nature as also were of blunt weapon such as lathi wielding by the appellants Satya Kinkar Shet (died during pendency of the appeal), Manik Shet (died during pendency of the appeal) and Shyamal (claimed to be juvenile). In fact one injury

was inflicted on the head region resulting fracture of left parital bone and cause of death was of head injury. That apart, it is apparent from the evidence on record that the deceased was not killed on the spot but he succumbed to injuries almost 24 hours after the incident at Berhampore Hospital. It is also apparent from the evidence on record that prior to assault, a quarrel ensued between the appellant Satya Kinkar and the deceased over the dispute of damaging paddy by the buffaloes of the appellant Satya Kinkar and the said quarrel was aggravated to such extent that the appellants started assaulting the deceased with blows, fists and lathis. The whole thing happened in a sudden manner. There is no evidence that the deceased was even beaten even after he had fallen down. Therefore, on the analysis of the medical evidence and the circumstances appearing in the case and having regard to the fact that only blows, fists and lathis were used in the incident, the proper legal and reasonable inference to be drawn from all circumstance is that the intention of the appellants was not to kill or cause such bodily injury as was sufficient in the ordinary course of nature to cause death but they as member of unlawful assembly knew that death was the likely result of the injuries caused to the accused as contemplated by the second part of Section 304 of IPC.

29. In this view of the matter, the appellants are to be held guilty u/s 304 Part II read with Section 149 of I.P.C.

30. Coming to the questions of sentence , we find that the incident had occurred 24 years ago, two of the appellants namely Satya Kinkar Shet and Manik Shet died during the pendency of appeal, the appellants Shyamal Shet, Ashoke Shet and Brinchi Shet are now aged within 40 to 47 years and with the passage of time their socio-economic conditions must have undergone radical change during this long interval. Looking to these facts and having regard to the circumstances in which the crime was committed , to the kind of weapon used (ordinarily lathis in this case), the nature of injuries caused, the antecedents of the appellants etc. it would not be reasonable to award severe punishment to the appellants and in our opinion the ends of justice would sufficiently be met if each of them excepting Shyamal Shet for the time being for whom prayer was made for determination of age u/s 7A of the Juvenile justice (Care and Protection of Children) Act, 2000 is sentenced to 5 years R.I. and to pay fine of Rs. 1000/- in default to suffer further R.I. for a period of six months for the offence u/s 304 part-II read with Section 149 of IPC. The sentence as awarded by the Trial Court for the offence u/s 148 of IPC shall remain the same and both the substantive sentence shall run concurrently. The amount of fine if realised, shall be paid to parents/legal heirs of the deceased Joydev Guin towards compensation. The estate of the deceased appellants namely Satya Kinkar Shet and Manik Shet is liable for payment of fine. The appellants shall get the benefit of set off in terms of Section 428 of Cr.P.C. out of the period of imprisonment already undergone.

31. It appears from the record of the Learned Committing Magistrate that one affidavit had been filed before the Court of Learned Committing Magistrate

claiming and contending that the appellants Shyamal Shet was minor on the date of commission of the offence that is on 24.8.84 and on the basis of said contention he was enlarged on bail by the Learned Magistrate vide order No. 2 dated 29.10.84. Despite plea taken in writing by way of affidavit sworn by his father Satya Kinkar Shet, one of the appellants of this case (since deceased), the learned Magistrate instead of determining the age of the appellant in accordance with law proceeded with the case during the course of investigation and enquiry in a cavalier fashion.

32. Considering that an affidavit had been filed for determination of age of the appellant Shyamal Shet, the appeal concerning him in relation to sentence is kept pending. The Ld. Trial Court is directed to take evidence in accordance with law for determining the following question:

whether the appellant Shyamal Shet was juvenile on the date of incident that is on 24.8.84?

33. It appears from the records that the appellant Shyamal Shet was granted bail by the Division Bench of this Court. He is permitted to continue on the same bail bond until further order by this Court. He is directed to appear before learned Lower Court within 15 days for the purpose of adducing evidences for determination of the aforesaid question. The records of evidence should forthwith be sent back to this Court for determining the question indicated above. For that purpose the matter shall also remain part-heard.

34. The remaining appellants namely Brichchi Shet and Ashoke Shet (who are alive) were also enlarged on bail by an order of Division Bench of this Court. Their bail bonds are cancelled. They are directed to surrender forthwith before the Ld. Trial Court to serve out the remainder part of their sentences subject to alteration of the conviction and sentences as indicated above. The fate of the appeal as regards the sentence against the appellant Shyamal Shet shall be considered after the question as formulated above is decided. Learned Trial Court is directed to take evidence and remit the record as early as possible preferably within a period of three months from the date of receipt of lower Court records.

35. Learned Trial Court will take necessary steps for the purpose of adducing evidence in support of the claim of the appellant Shyamal Shet that he was juvenile on the date of incident that is on 24.8.84. If necessary, the Learned Trial Court may refer the aforesaid appellant to the medical board or the civil surgeon as the case may be for obtaining creditworthy evidence about his age. Before we part with the judgement, we must observe that in the recent past, in this Court, contention about the age of the convicts and prayers claiming benefit under the relevant provisions of the Juvenile Justice (Care and Protection of Children Act) 2000, which came into force on 1st April 2001, have repeatedly been raised for the first time in this Court. Ordinarily this Court would be reluctant to entertain a contention based on factual averments raised for the first time before it. However, this Court is equally reluctant to ignore, overlook or nullify the

beneficial provisions of the statute. We are therefore of the opinion that whenever a case is brought before Magistrate and/or Trial Court and the accused appears to be juvenile, the age of the accused on the date of occurrence should be ascertained before proceeding with the trial. This procedure, if properly followed, would avoid a journey up to this Court and return journey to the grass-root Court. If necessary and found expedient, this Court may on its administrative side issue necessary instructions to cope with the situation herein indicated.

36. The appeal is disposed of except as indicated above.

37. Lower Court records with a copy of this judgement be sent down forthwith to the learned Trial Court for information and necessary action. The lower Court records along with the evidence about the age of the appellant Shyamal Shet should be sent back in order to dispose of the appeal concerning the aforesaid appellant.

38. The Criminal Section of this Court is directed to put up the file of this appeal before this Court immediately after receipt of the lower Court records. Urgent xerox copy of this judgement, if applied for, be delivered to the learned Advocate for the parties upon compliance of all formalities.

I agree.