

(2016) 05 CAL CK 0066
In the Calcutta High Court
Case No : CRA No. 420 of 2011.

Gopal Chandra Das and Others - Appellants @HASH The State of West Bengal

Date of Decision : 06-05-2016

Acts Referred:

Penal Code, 1860 (IPC) — Section 302, Section 307, Section 34, Section 34

Citation : (2016) 4 CalLT 306

Hon'ble Judges : Debasish Kar Gupta and Md. Mumtaz Khan, JJ.

Bench : Division Bench

Advocate : Mr. Sekhar Basu, Sr. Advocate, Mr. Ranadeb Sengupta and Mr. Kusal Kumar Mukherjee, Advocates, for the Appellant Nos. 1 and 3; Mr. Debasis Roy, Advocate, for the Appellant No. 2; Mrs. Anusua Banik and Mr. Ranabir Roy Chowdhury, Advocates, Mr. Manjit Singh,

Final Decision : Dismissed

Judgement

Debasish Kar Gupta, J. - The subject matter of challenge in this appeal is judgment, order of conviction and sentence dated May 31, 2011, passed by the Additional Sessions Judge, 1st Fast Track Court, Berhampur, District-Murshidabad in Sessions Trial No.2(1)/2009 arising out of Sessions Case No.778/2008.

2. By virtue of the impugned judgment five (5) accused persons, namely, Manas Pramanick @ Baban, Dilip Nath @ Butan, Satya Das, Subrata Bhattacharya @ Bachchu, and Sawkat @ Sabakat @ Jajabar Sk. out of eight (8) were acquitted from the charge framed against them giving them benefit of doubt. The remaining three (3) accused persons (the appellants herein), namely, Gopal Chandra Das, Swarup Mondal @ Buro and Biplab Dey @ Mona were convicted for commission of offence punishable under Sections 302/34 of the Indian Penal Code (hereinafter referred to as the I.P.C.) and sentenced them to suffer imprisonment for life and to pay a fine of Rs.20,000/- each. The appellants were further convicted for commission of offence punishable under Sections 307/34 of the I.P.C. and sentenced to suffer rigorous imprisonment for ten (10) years and to pay a fine of Rs.10,000/- each in default to suffer rigorous imprisonment for one (1) year each.

3. It was further directed by the learned trial Judge that if the fine amount is realised for commission of offence punishable under Sections 302/34 of the I.P.C., 50% of the fine amount would be remitted to the nearest relative of the victim Srijan Mondal @ Trophy towards compensation and if the fine amount is realised from the convicts for commission of offence punishable under Sections 307/34 of the I.P.C., 50% of the fine amount should be paid to the victim Sujoy Brahma towards his medical expenses.

4. However, both the sentences were directed to run concurrently. The detention period, if any, of the appellants during investigation and trial was directed to be set off under the provision of Section 428 of the Cr. P. C.

5. According to the prosecution case, on April 13, 2008 (Sunday), at about 11.00 hours the appellants along with their associates went to the medicine shop of one Srijon Mandal (Trophy), the victim, run under the name and style "Tirupati Medical Store" at Ambikababu Lane, Haribabur Dhal, Police Station Berhampur, District - Murshidabad (hereinafter referred to as the said medical shop). At the material point of time aforesaid Srijon Mandal (victim) was sitting in the front counter of the said medical shop. The PW 3 was working inside the shop. Another employee of the said medical shop, a little boy, namely S. Das (Bittu) was also inside the said medical shop. The appellants along with their associates namely, Manas Pramanick @ Baban, Dilip Nath @ Butan, Satya Das, Subrata Bhattacharya @ Bachchu entered into the said medical shop. The appellant no. 2 asked the victim "How are you?" Suddenly, the appellant no. 3 brought one bomb out of a bag and hurled it aiming at the victim. The victim as also the PW 3 fell down on the ground inside the said medical shop. Receiving multiple injuries on the face, the aforesaid Srijon Mandal died at the place of occurrence. The PW 3 also sustained injury on his back. Thereafter, the appellants and their associates hurled two more bombs and opened one round of blank fire to flee away from the place of occurrence dividing into two groups. One group fled away through narrow lane heading towards Haribabur Dhal while other group disappeared running through the Bhattacharya Para Primary School lane.

6. The PW 1 (de facto complainant) along with PW 2, PW 4 and other local shopkeepers rushed towards the place of occurrence, i.e. the said medical shop. The PW 3 had been removed to the Berhampur General Hospital and he reached there at 11.30 hours on that date.

7. The then I.C., Arun Kumar Das of the Berhampur Police Station on receipt of the above information went to the place of occurrence after noting down the above information under G.D.E No.1146. He was accompanied by Md. Abdur Rahaman (PW 13), Sub-Inspector of Police, attached to the Berhampur Police Station at the material point of time. They reached the place of occurrence at 11.15 hours. one written complaint was handed over to the aforesaid I.C. of the Berhampur Police Station at 12.10 hours by the PW 1 mentioning the name of the appellant no.1 for commissioning of offence along with his 5/6 associates. It was forwarded to the Berhampur Police Station through Badal Dey, a driver of

the police vehicle. Subrata Sarkar (PW 11), Sub-Inspector of Police at the material point of time, was the officer on duty in Berhampur Police Station at the material point of time. On receipt of the above letter of complaint at 12.45 hours, he made an entry bearing no.1150 in the General Diary. The formal FIR was lodged on April 13, 2008 at 12.45 hours on the basis of the GDE No. 1150 having reference to the U/D Case No.238/08 in column No.11 thereof, for initiating a criminal proceeding against the appellant no.1 and his 5/6 unknown associates for commissioning of offence punishable under Sections 302/34/120B of the I.P.C. The Officer-in-Charge of the Berhampur Police Station entrusted the above case to the PW 13 at 13.00 hours.

8. The PW 13 prepared a rough sketch map of the place of occurrence in connection with Berhampur P. S. Case No. 184/08 both dated April 13, 2008. PW 9, a photographer, took photographs of the place of occurrence on instruction of the PW 13. The PW 13 prepared a surathal report over the dead body of the victim at about 13.15 hours with reference to the above Berhampur P. S. Case after due identification of dead body of the victim by four (4) witnesses namely, Sidhartha Mondal, Subir Pramanik (PW 7), S. Das (Bittu) (one of the employees of the said medical shop) and Asish Moitra (Chattu). Thereafter, the PW 6 brought the dead body of the victim to the Berhampur Police Morgue at 14.35 hours on the above date.

9. The PW 12 prepared the post mortem report No. 301 dated April 13, 2008, of dead body of the victim in after completion of autopsy over the dead body of the victim at 16.30 hours with reference to Berhampur P.S. Case No.184/08 and Berhampur U/D Case No.238/08 both Dated April 13, 2008. According to the opinion of the PW 12, as recorded in the above post mortem report, the cause of death of the victim was of the injury sustained by him from a high magnitude of blast of some explosive.

10. The appellants nos.1, 2 and 3 were arrested on April 20, 2008, July 4, 2008 and July 10, 2008 respectively. After completion of the investigation charge-sheet no.358/08 dated July 17, 2008, was submitted by the PW 13 against eight (8) accused persons including the three (3) appellants. Charge was framed against all the accused persons including the three (3) appellants on January 15, 2009, for commissioning of offence punishable under Sections 302/307/34 of the I.P.C.

11. Thirteen (13) prosecution witnesses were examined during trial. After recording the statements of the appellants under Section 313 of the Cr.P.C., the evidence of one defense witness was also recorded. After consideration of the evidence on record (both oral and documentary) the impugned judgment was passed.

12. According to the Mr. Sekhar Basu, learned Senior advocate, appearing for the appellants nos.1 and 2, submitted that the death of the victim and injury of the PW 3 did not occur in the manner and under circumstances as was appearing

from the prosecution case on the basis of the evidence on record due to the reasons stated below:-

(i) Formal FIR was not drawn on the basis of first GDE No. 1146 dated April 13, 2008. It was drawn on the basis of a subsequent GDE No. 1150 for initiating Berhampur P.S. Case No. 184/08 Dated April 13, 2008 at 12.45 hours.

There was unexplained delay of two days in receiving the above FIR by the Court of the Learned Magistrate concerned.

Though the inquest report was prepared by the PW 13 after the above FIR had been drawn, no name of accused person or time of occurrence was mentioned in the inquest report prepared by him. The above circumstances provided a legitimate basis for suspecting that the above FIR was recorded later than the stated date and hour to implicate the appellants in this case falsely.

(ii) The PW 3 sustained injury on his back. So, his evidence of witnessing the appellants and their associates to commit the offence was not free from all reasonable doubt.

(iii) According to the prosecution case, there was presence of an employee other than PW 3 inside the said medical shop at the material point of time, namely, S. Das (Bittu). He was a "young boy". He was one of the witnesses of the inquest report, seizure list prepared in respect of the article seized from the place of occurrence. He was also shown as prosecution witness in the charge-sheet. So, he was a vital eye witness to prove the prosecution case.

The importance of his (S. Das) evidence could be appreciated from another point of view that the evidence of PW 3 was not free from doubt due to the reason mentioned herein above. So, he was the only person to witness the commission of offence by the appellants and other miscreants. Withholding of his evidence created doubt with regard to the manner and the circumstances, the murder of the victim took place so far as the time and place of occurrence were concerned.

(iv) The following facts and circumstances created doubt and contradictions of material dimension reaching the root of the prosecution case and vitiating the impugned judgement therefor:-

Though PW 1, PW 2 and PW 4 were not eyewitnesses of hurling bomb inside the said medical shop by any of the appellants or their associates. The PW 1 allegedly could recognise the appellant no.1 only at the time he (appellant No.1) was fleeing away with other miscreants. According to his evidence, an unknown person hurled a bomb attempting at the victim.

PW 5, PW 6 and PW 8 were the witnesses of the seized articles. According to the evidence of PW 5, the alamsats in question of this case were found open and in loose condition in Court.

Though PW 7 put his signature on the seizure list of the articles seized from the place of occurrence. He could only read in Bengali.

PW 9 (photographer) was not attached to the police department. He could not produce any requisition for asking him to take the photographs of the place of occurrence. He failed to produce any negatives of the photographs or any record showing receiving of charges for taking those photographs.

The evidence of the PW 10 and the certificate prepared by him in support of the treatment of the PW 3 caused doubt with regard to the injury sustained by him (PW3) as also other information relating thereto.

From the evidence of PW 12, who had conducted and prepared the post mortem report, it was evident that there was no impression in the carbon copy of extreme later part of the post mortem report prepared by him from the original one prepared by him therefore undoubtedly it was not supplied to the defense.

According to the evidence of PW 13, the controlled earth, blood stained earth of the place of occurrence, the apparels of the victim had been sent for forensic examination. But no FSL report was collected by him. The place of occurrence and the blood stained apparels seized by him were not proved beyond doubt.

(v) The PW 3 took the name of six (6) persons as miscreants responsible for murder of the victim, namely, Gopal Chandra Das (appellant no.1), Swarup Mondal @ Buro (appellant no.2), Biplab Dey @ Mona (appellant no.3), Subrata Bhattacharyya @ Bachchu, Dilip Nath @ Butan, Manas Pramanik @ Baban, and 2/3 other unknown persons. No test identification parade of the arrested accused persons was held for their identification. Though trial had been conducted against eight accused persons, five accused persons other than the appellants were acquitted finally.

(vi) The act of the appellants in furtherance of their common intention for commission of offence under reference was not proved beyond doubt. According to the eyewitness PW 3, the appellant no.1 asked the victim "How are you?" In that circumstances, it was difficult to believe that the appellant no.3 brought out a bomb from his bag without any provocation for hurling it on the victim.

(vii) According to the statement of the appellant no.3 recorded under Section 313 of the Cr. P.C., he had come to the house of his aunt on a tour on the date of occurrence and he was not aware of the occurrence of murder of the victim. He further adduced evidence through defense witness in support of his above statement. Therefore, there was hardly any scope for holding appellants guilty of commission of offence.

13. Reliance is place by Mr. Basu on the decisions of Arjun Marik & Ors. v. State of Bihar, reported in 1994 SCC (Cri) 1551, Thanedar Singh v. State of M.P., reported in 2002 SCC (Cri) 153, Arab Sk. v. State of West Bengal, reported in 2016 (1) Crimes 216 (Cal.), Hamid Mondal & Ors. v. The State of West Bengal, reported in 2015 (2) C Cr LR (Cal) 882, Mahbub Shah v. Emperor, reported in AIR (32) 1945 PC 118, Parshuram Singh v. State of Bihar, reported in JT 2002 (1) SC 407, Arun v. State by Inspector of Police, Tamil Nadu, reported in (2009)

3 SCC (Cri) 1097, Zahoor & Ors. v. State of U.P., reported in AIR 2011 SC 2501, Bikramaditya Singh v. State of Bihar, reported in (2013) 2 SCC (Cri) 169, Lakshmi Singh & Ors. v. State of Bihar, reported in 1976 SCC (Cri) 671, Vijaybhai Bhanabhai Patel v. Navnitbhai Nathubhai Patel & Ors., reported in 2004 SCC (Cri) 2032, Raj Kumar Jain & Anr. v. Kundan Jain & Anr., reported in 2004 SCC (Cri) 2034, Babuli v. The State of Orissa, reported in AIR 1974 SC 775, Naba Kumar Das v. State of West Bengal, reported in AIR 1974 SC 777, Phoolchand v. State of Rajasthan, reported in 1976 SCC (Cri) 682, Alil Mollah & Anr. v. State of W.B. and Jagjit Singh @ Jagga v. State of Punjab, reported in 2005 SCC (Cri) 893 in support of his above submissions.

14. The aforesaid submissions have also been adopted by Mr. Debasis Roy, learned advocate appearing on behalf of the appellant no.3.

15. It is also submitted by Mr. Ray that from the photographs of the place of occurrence [Ext.-II (i) and (iii)] that the Almira displayed the medicine had not at all been disturbed consequent upon the bomb blast. Therefore, the place of occurrence as claimed by the prosecution was not beyond doubt. It is further submitted by Mr. Roy that though the PW 3 was conscious at the time of his admission in the hospital. He did not disclose the name of a single accused person.

16. It is further submitted by him that the distance of the police station from the place of occurrence was not more than half kilometer. Though the letter of complaint had been received in the police camp of Ambikababur Lane on 12.10 hours, the same reached the Berhampur Police Station at 12.45 hours on the date of occurrence. There was doubt with regard to the time of occurrence of murder of the victim as mentioned in the surathal report in view of the finding on PW 12, recorded in the post mortem report. The above finding suggested that the murder of the victim took place at the early morning and not at about 11.00 hours as stated in the inquest report.

17. On the other hand, it is submitted by Mr. Ranabir Roy Chowdhury, learned advocate, being led by Mr. Manjit Singh, learned Public Prosecutor, High Court, Calcutta, appearing on behalf of the State respondents that the handing over of the written complaint to the I.C. Berhampur Police Station, forwarding of the same to the police station as also drawing of formal FIR after recording the G.D.E., were proved from the evidence of PW 11 and PW 13. Regarding the alleged delay in forwarding the FIR to the Court of the learned Magistrate concerned, it is submitted by Mr. Roy Chowdhury that the date of occurrence was a Sunday. The next date was the New Year's day according to Bengali Calendar which was also a holiday. Those were the reasons of forwarding the FIR to the Court on the next date, i.e. on April 15, 2008. It is also submitted by Mr. Roy Chowdhury that no objection was raised by the learned defense counsels at the time of exhibiting the above FIR. Therefore, there was no scope for the prosecution witness to explain the above delay.

18. Drawing the attention of the evidence of PW 13, it is submitted by him that there was no doubt or dispute with regard to making the G.D. Entry No.1146 by the I.C. of Berhampur Police Station immediately on receipt of the information of the occurrence of incident before proceeding towards the place of occurrence. The post mortem report was prepared with reference to an U.D. Case No.238/08 and Berhampur P.S. Case No.184/08, both dated April 13, 2008. The above information was tagged with the case diary. According to Mr. Roy Chowdhury, there was no contradiction with regard to the information available in the FIR and the information available from inquest report.

19. It is submitted by him that PW 3 was the person not only to witness the above incident but also he had sustained severe injury on his body as a result of hurling of bomb by one of the miscreants (appellant no.3) of the above group. The grievous injury sustained by the PW 3 was corroborated by the treatment papers issued by PW 10 apart from his evidence adduced in Court.

20. With regard to the contention of the appellants of withholding the one important witness, the "young employee" of the said medical shop, it is submitted by him that no specific number of witness was required under Section 134 of the Indian Evidence Act to prove the prosecution case. In the event the prosecution case is proved beyond any reasonable doubt on the basis of the evidence on record, failure on the part of any person who had been shown in the charge-sheet as a prosecution witness, could not vitiate the prosecution case. The bona fide of the prosecution witness was proved in view of showing the above employee as prosecution witness in the charge-sheet.

21. With regard to the contention of the truthfulness of evidence of PW 1, PW 2, PW 3, PW 4, PW 7, PW 10, PW 12 and PW 13 and minor discrepancies of such evidence with those of PW 13, it was submitted by Mr. Roy Chowdhury that the prosecution case was proved on the basis of such material on evidence considering the same in its entirety. According to Mr. Roy Chowdhury, it was proved from the evidence of PW 1, PW 2, PW 3 and PW 4 that the appellants came to the said medical shop in a group. They fled away after murder of the victim after opening fire and hurling bomb they disappeared into two groups. The cause of injury of the victim was further corroborated by the post mortem report.

22. According to him, there were some bona fide mistakes in preparation of the treatment papers of the PW 3 which was subsequently corrected as appeared from his evidence. Regarding the attempt on the part of the appellants to create confusion of the place of occurrence, it is submitted by him that there was no possibility for bringing the dead body to the said medical shop after the murder of the victim somewhere else.

23. According to the post mortem report prepared by the PW 12, the large intestine of the victim was full of faecal matters. According to him, the place and time of occurrence of murder of the victim as claimed in the prosecution case did not lead to an absurdity or created any doubt on the basis of the above finding.

24. According to him, the evidence on record was sufficient to prove the act of the appellants in furtherance to their common intention to murder the victim.

25. With regard to the contention of the appellants in respect of the statement of the appellant no.3, he submitted that though the above appellant took recourse to a defense line that he was far away from the place of occurrence when the occurrence took place, the burden was upon him to establish the same by positive evidence in view of the provision of Section 11 of the Evidence Act, 1872. The appellant no.3 failed to establish it from the evidence of DW 4 from which the place of his residence was proved.

26. According to Mr. Roy Chowdhury, considering the overwhelming evidences available on record to establish the commission of offence by the appellants, the family of the victim or the society at large should not be deprived of administration of justice by acquitting the appellants only on the ground of fault on the part of the investigating agency to conduct the investigation. According to Mr. Roy Chowdhury, there was no infirmity in the decision making process of the learned trial Judge in passing the impugned judgment.

27. Reliance is placed by Mr. Roy Chowdhury on the decisions of State of Jammu & Kashmir v. S. Mohan Singh & Anr., reported in 2006 (2) SCC (Cri) 484, reported in 2003 SCC (Cri) 641, Akhtar & Ors. v. State of Uttaranchal, reported in 2010 (1) SCC (Cri) 1223, Vijay Pal v. State (GNCT) of Delhi, reported in 2015 (2) SCC (Cri) 733, Hema v. State, thr. Inspector of Police, reported in 2013 (4) SCC (Cri) 755 and Sahabuddin & Anr. v. State of Assam, reported in 2012 (13) SCC 213 in support of his above submission.

28. We have heard the learned councils appearing for the respective parties at length and have considered the fact and circumstances carefully.

29. The contentions of the appellants are considered as follows:-

A. False implication of the appellants in the case in view of Irregularity in drawing formal FIR, unexplained delay in receipt of the same by the Court of the Concerned Magistrate and non-mentioning of the name of any of the accused in the inquest report:-

It was held by the Apex Court in the matter of Pandurang Chandrakant Mhatre v. State of Maharashtra, reported in (2009) 10 SCC 773, When a police officer had no other alternative but to leave the police station on receipt of an information relating to commission of cognisable offence to give first priority to control the incident which had been occurring at the place of occurrence simply after diarising gist of such information, the same cannot be treated be "first information report" under Section 154 (1) of the Cr.P.C. which must contain some essential and details of the incident. The relevant portion of the above decision is quoted below:-

"38. It is fairly well settled that first information report is not a substantive piece of evidence and it can be used only to discredit the testimony of the maker

thereof and it cannot be utilised for contradicting or discrediting the testimony or other witnesses. In other words, the first information report cannot be used with regard to the testimony of other witnesses who depose in respect of incident. It is equally well settled that the earliest information in regard to commission of a cognisable offence is to be treated as the first information report. It sets the criminal law in motion and the investigation commences on that basis. Although first information report is not expected to be encyclopedia of events, but an information to the police to be "first information report" under Section 154 (1) must contain some essential and relevant details of the incident. A cryptic information about commission of a cognisable offence irrespective of the nature and details of such information may not be treated as first information report."

(Emphasis supplied)

30. According to the evidence of the PW 1, PW 2, PW 3 and PW 4, amongst others, the time of occurrence of the incident was on April 13, 2008, at 11.00 hours. According to the evidence of PW 13, the I.C. of Berhampur Police Station, was informed of the incident of hurling bomb at the place of occurrence on April 13, 2008. According to his evidence, the above I.C. and the PW 13 immediately rushed to the place of occurrence with their team after noting down the information in the general diary of Berhampur police station concerned bearing G.D. Entry No.1146 and they reached the place of occurrence at 11.15 hours on the above date. They received a written complaint from PW 1 at the place of occurrence at 12.10 hours. The same was forwarded by the I.C., Berhampur Police Station. According to the evidence of PW 11, G.D. Entry No.1150 was recorded in Berhampur Police Station at 12.45 hours on that date and on the basis of the same the formal FIR bearing Berhampur P.S. Case no.184 of 2008 was also drawn at 12.45 hours on that date having reference to the U/D Case No. 238/08 in column No.11 thereof. Considering the settled principle of law as evident from the decision of Pandurang Chandrakant Mhatre (supra), we are of the opinion that there was no infirmity in the impugned judgment on that ground.

31. The fact of delay in forwarding the FIR to the Court of the learned Magistrate concerned was elaborately discussed by us in a judgment dated April 7, 2016, delivered in the matter of Ram Chandra Mondal @ Ram Mondal & Anr. v. The State of West Bengal. The age old well settled principle of law in this regard was discussed by us in the above judgment taking into consideration of the Hon''ble Supreme Court in the matters of Tara Singh & Ors. v. State of Punjab, reported in AIR 1991 SC 63, Arjun Marik & Ors. v. State of Bihar, reported in 1994 Supp (2) SCC 372, Meharaj Singh v. State of U.P., reported in (1994) 5 SCC 188 and as also the decision of Thaneder Singh v. State of M.P., reported in (2002) 1 SCC 487. It will not be out of context to observe that the legal proposition laid down in Meharaj Singh (supra) was affirmed by a Constitution Bench of the Hon''ble Supreme Court consisting of Three Hon''ble Judges in the matter of Thaneder Singh (supra). The relevant portions of the above judgment delivered by us in the case of Ram Chandra Mondal @ Ram Mondal is quoted below:-

"By virtue of the above judgement, the Hon"ble Apex Court laid down the guideline to scrutinise the evidence of interested witnesses with greater care and caution separating grain from the chaff to determine whether the FIR had been lodged at the time it was alleged to have been recorded, looking for certain external checks as follows:-

(i) The receipt of the copy of FIR, called a special report in a murder case, by the Local Magistrate. If this report was received by the Magistrate late it could give rise to an inference that the FIR had not been lodged at the time it was alleged to have been recorded, unless of course the prosecution could offer a satisfactory explanation for delay in dispatching or receipt of the copy of the FIR by the Local Magistrate.

(ii) The sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 of the Cr. P. C., was aimed at serving a statutory function; to lend credence to the prosecution case, the details of FIR and the gist of statements recorded during inquest proceeding got reflected in the report. The absence of those details was indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged.

Ultimately, the above legal proposition laid down in *Meharaj Singh (Supra)*, was affirmed by a Constitution Bench of the Hon"ble Supreme Court consisting of Three Hon"ble Judges, in *Thaneder Singh v. State of M.P.*, reported in (2002) 1 SCC 487."

32. In the instant case, FIR was lodged on April 13, 2008 at 12.45 hours on the bases of the GDE No. 1150 having reference to the U/D case No. 238/08 in column No.11 thereof which had already been initiated earlier. Inquest report of dead body of the victim was prepared at 13.15 hours on that day having reference to the FIR bearing Berhampur P.S. Case No. 184 of 2008. The dead body of the victim was forwarded for post mortem examination together with the surathal report having reference to the above formal FIR. From the post mortem report, which was prepared at 16.30 hours on the date of occurrence, we find that the same was prepared with reference to FIR bearing Berhampur P.S. Case no.184 of 2008 dated April 13, 2008 having reference to the U.D. Case no.238 of 2008 in column No. 11 thereof which had been initiated earlier. In the above formal FIR the name of the appellant no.1 was incorporated as the person accused for commissioning the offence with 5/6 unknown persons. According to the evidence of the PW 13 adduced in course examination, which was corroborating with the date endorsed in the FIR at the bottom with the signature/thumb impression of the complainant/informant, the above FIR was forwarded to the Court of Learned Chief Judicial Magistrate, Murshidabad on April 14, 2008. It was placed before the Court on April 15, 2008. The availability of above details was indicative of fact that the prosecution case was not ante-timed.

33. With regard to the contention of the appellants of non - mentioning of names of the appellants in the inquest report, we find that the PW 1, PW 2, PW 3 and PW 4 were interrogated by the PW 13 (I.O.) after the inquest report had been prepared by him. Besides, the action of the police agency in drawing the FIR, preparation of the inquest report and post mortem report of dead body of the victim has already been tested in the touchstone of the decision of Meheraj Singh (supra) and Thaneder Singh (supra) herein above.

34. That apart, in the case of Pedda Narayan v. State of A.P., reported in (1975) 4 SCC 153, the Apex Court observed with reference to Section 174 of the Cr. P.C. as follows :-

"A perusal of this provision would clearly show that the object of the Proceeding under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under Section 174. In these circumstances, therefore, neither in practise nor in law was it necessary for the police to have mentioned these details in the inquest report."

35. The above proposition was followed by a Three Judges" Bench of the Hon"ble Supreme Court in Khujji v. State of M.P., reported in (1991) 3 SCC 627.

36. Therefore, the decision making process of the learned trial court does not require our interference upon scrutiny in the touch stone of the external checks prescribed by the Hon"ble Supreme Court in the case of Meharaj Singh (supra) and upheld by a decision of a Three Judges Bench of the Apex Court in the case of Thaneder Singh (supra).

37. The facts and circumstances involved in the case of Arjun Marik (supra) is distinguishable in view of unexplained delay of forwarding the FIR to the Court of the learned Magistrate concerned but we have decided this case examining the facts and circumstances involved in it in the touch stone of external checks prescribed by the Hon"ble Supreme Court in the matter of Meharaj Singh (supra) as affirmed in the case of Thaneder Singh (supra). For the same reason the decision of Arab Sk. (supra) and Hamid Mondal (supra) do not help the appellants on the ground of delay in forwarding the FIR to the Court of learned Magistrate concerned.

38. B. Doubt in respect of the evidence of the PW 3 in witnessing the Appellants to commit the offence:-

The age old settled principles of law of scrutinising the evidence of a witness belonging to the group of the deceased was sufficient to show the interested nature of evidence. But it was not the law that the evidence of an interested witness should be equated with that of a tainted evidence or that of an approver

so as to require corroboration as a matter of necessity. All that the Courts required as a rule of prudence, not as a rule of law, was that the evidence of such witness should be scrutinised with a little care to satisfy that the evidence of that witness formed a ring of truth. Reference may be made to the decision of Sarwan Singh & Ors. v. State of Punjab, reported in (1976) 4 SCC 369 and the relevant portion of the above decision is quoted below:-

"10. . . . Moreover, it is not the law that the evidence of an interested witness should be equated with that of a tainted evidence or that of an approver so as to require corroboration as a matter of necessity. The evidence of an interested witness does not suffer from any infirmity as such, but the courts requires as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration. Indeed there may be circumstances where only interested evidence may be available and no other, e.g. when an occurrence takes place at midnight in the house when the only witnesses who could see the occurrence may be the family members. In such cases it would not be proper to insist that the evidence of the family members should be disbelieved merely because of their interestedness."

(Emphasis supplied)

39. Further, the testimony of an injured witness is accorded a special status in law which has been observed by the Hon"ble Supreme Court in the case of The State of Uttar Pradesh v. Naresh & Others., reported in (2011) 4 SCC 324 as follows:-

"27. The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein. (Vide Jarnail Singh v. State of Punjab, Balraje v. State of Maharashtra and Abdul Sayeed v. State of M.P.)"

(Emphasis supplied)

40. According to the evidence of PW 3, he was facing towards the appellants when the appellant no.3 lifted one bomb from a bag and hurled it aiming at the victim. Smoke curled out with huge sound. He fell down inside the said medicine

shop on pain sustaining injury on his back. He did not become totally senseless. Some persons removed him to Berhampur New General Hospital. According to the evidence of PW1, PW 2 and PW 4, he was found lying inside the said medical shop sustaining injury when he entered into the shop room after hearing the sound of hurling the bomb. According to the evidence of PW 4, he arranged to the PW 3 to the hospital with the help of other persons immediately after the occurrence of the incident. According to the treatment papers of the PW 3, he was admitted in the above hospital at 11.15 hours on April 13, 2008 and he was under the treatment of PW 10 from April 13, 2008 to May 6, 2008, as an indoor patient in the above hospital. According to the evidence of PW 3, he (PW 3) was under his treatment in the above hospital for sustaining injury on his back out of bomb blast for the aforementioned period. His statement was recorded by the PW 13 (I.O.) under Section 161 of the Cr.P.C. in the evening on the date of his admission in the hospital. The appellants were identified by him in Court. Besides, sustaining of injury on the back of the PW 3 could not be a ground for leading his testimony to an absurdity. It was quite possible for him to turn back as a spontaneous reaction of saving himself from possible injury receiving a command from his brain at the time of hurling a bomb on the victim sitting nearby inside the said shop room.

41. So, the decision making process of the learned Court below does not require our interference on the above ground.

42. C. Withholding of the evidence of an employee of the said Medical shop other than the PW 3:-

In the matter of Vadivelu Thevar v. State of Madras, reported in AIR 1957 SC 614, Hon"ble Justice Bhuvaneshwar Prasad Sinha, as His Lordship then was, speaking for a Three Judges Bench of the Apex Court, observed as follows:-

"11. ?. ?. ?. ?. The Indian Legislature has not insisted on laying down any such exception to the general rule recognised in Section 134 quoted above. The Section enshrines the well recognised maxim that "Evidence has to be weighed and not counted". Our legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime has been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected."

43. The above settled principle of law has been repeated and reiterated by the Apex Court time and again. One of such reference may be given to the decision

of Amar Singh v. Balwinder Singh & Others., reported in (2003) 2 SCC 518.

44. Taking into consideration the discussion made hereinbefore regarding credibility of testimony of the PW 3, we are of the opinion that the learned trial Judge had no reason to refuse to act upon the testimony of the PW 3 in absence of the other young employee of the said medical shop before the Court as prosecution witness.

45. That apart, our attention has been drawn by Mr. Ray Chowdhury, learned State Advocate, towards an order No.14 dated March 27, 2009 passed by the learned trial Judge granting the prayer of the PW 2 of police protection to him. Therefore, the presence of the element of threat to the prosecution witnesses and particularly in case of the other young employee of the said medical shop cannot be ruled out.

46. D. Major contradictions of material dimension reaching the root of prosecution case :-

It is the age old settled principle of law that minor discrepancies on trival matters not touching the core of the case or some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Reference may be made to the decision of State of U.P. v. M.K. Anthony, reported in (1985) 1 SCC 505 and the relevant portion of the above decision is quoted below:-

"10. ?. ?. ?. ?. Minor discrepancies on trival matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. If the court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the trial court and unless there are reasons weightly and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details. Even honest and truthful witnesses may differ in some details unrelated to the main incident because power of observation, retention and reproduction differ with individuals."

(Emphasis supplied)

47. The above principle of law has been repeated and reiterated by the Hon"ble Supreme Court in Leela Ram v. State of Hariyana, reported in (1999) 9 SCC 525, State of M.P. v. Lekh Raj, reported in (2000) 1 SCC 247, State of U.P. v. Krishna Master, reported in (2010) 12 SCC 324, C.M. Sharma v. State of A.P., reported in (2010) 15 SCC 1 and Shyamal Ghosh v. State of West Bengal, reported in (2012) 7 SCC 646, amongst other judgements.

48. According to the evidence of the PW 1, PW 2 and PW 4, they did not witness

the incident of hurling the bomb by any of the appellants to hurl the bomb on the face of the deceased. All of them were present in the close vicinity of the said medical shop at the time of occurrence of the above incident. After hearing the sound of blasting of bomb inside the said medical shop, all the above prosecution witnesses witnessed the fleeing away of the appellants from the place of occurrence dividing into two groups through narrow lane heading towards Haribabur Dhal and Bhattayacharya Para Primary School Lane respectively, after dispersing the mob by hurling two more bombs and opening one round of fire. All of them found the victim dead sustaining bomb injury on right side of his face as also PW 3 to lay down on the floor with injury of similar nature on his back while they had entered into the said medical shop immediately after the occurrence of the incident. Their statements were recorded by the PW 13 (I.O.) under Section 161 of the Cr.P.C. They removed the PW 3 to the hospital. All of them identified the appellants in Court. The evidence of the PW 3 was corroborating with those of the above witnesses as a whole.

49. None of the discrepancy in respect of the evidence of other prosecution witnesses or any technical error at the instance of the investigating agency including failure to collect the Forensic Laboratory Report of the seized fresh blood or apparels of the victim would permit rejection of the prosecution witnesses.

50. In the decision of Lakshmi Singh & Ors. (supra), the Apex Court took into consideration the contradiction of the medical evidence and the doctor with those of all other eyewitnesses to arrive at a conclusion that the failure on the part of the investigating agency to send the blood stained earth found at the place of occurrence for chemical examination cast reasonable doubt at the prosecution case. The distinguishable feature of the case in hand is this the commission of offence by the appellants has been proved beyond doubt leaving aside the failure of the investigating agency to collect the Forensic Laboratory Report of the blood stained earth found at the place of occurrence or that all the apparels of the victim. Therefore, the above decision does not help the appellants in any way.

51. In the decisions of Vijaybhai Bhanabhai Patel (supra), Phoolchand (supra) and Jagjit Singh @ Jagga (supra), the Hon'ble Supreme Court took into consideration the unexplained delay in recording the statements of eyewitnesses under Section 161 of Cr.P.C. But in the instant case, the statement of the most important injured eyewitness was recorded in the evening on the date of occurrence while he was under treatment in the Berhampore General Hospital. In the above statement the names of the appellants were evident. Therefore, in view of the above distinguishable fact the above decisions are not applicable in this case.

52. So far as the decisions of Babuli (supra) and Alil Mollah & Anr. (supra) are concerned, the Hon'ble Supreme Court took into consideration of non-disclosure of the names of the appellants by the eyewitnesses in their statements recorded under Section 161 of Cr.P.C. Unlike the facts and circumstances of the case in

hand at the cost of repetition as it has already been recorded herein above that the names of the appellants surfaced in the statement of the main injured eyewitness (PW 3) recorded under Section 161 of Cr.P.C. in the evening on the date of occurrence commission of the offence under reference while he had been under treatment as an indoor patient in Berhampore General Hospital for his injury.

53. E. No test identification parade was arranged to identify the arrested accused persons:-

The test identification parade is not substantive evidence. It is a part of investigation which is useful in a case where the accused are not known to the witnesses. The accused is entitled to demand that an identification should be held at or before the inquiry of the trial. Reference may be made to the decision of *Mulla v. State of U.P.*, reported in (2010) 3 SCC 508 and the relevant portion of the above decision is quoted below:-

"41. ?. ?. The evidence of test identification is admissible under Section 9 of the Evidence Act, 1872. The identification parade belongs to the stage of investigation by the police. The question whether a witness has or has not identified the accused during the investigation is not one which is in itself relevant at the trial. The actual evidence regarding identification is that which is given by the witness in court. There is no provision in the Cr. P.C. entitling the accused to demand that an identification parade should be held at or before the inquiry of the trial.

The fact that a particular witness has been able to identify the accused at an identification parade is only a circumstance corroborative of the identification in court."

54. In this case, the appellants were not unknown to the PW 1, PW 2, PW 3 and PW 4. They identify all the appellants in Court. No challenge was thrown over their identifications. Therefore, we are not inclined to interfere with the impugned conviction or sentence on the above ground.

55. F. Proof of act of the appellants in furtherance of their common intention:-

The cardinal principle of analysing the evidence to find out the answer to the question of a criminal act of the accused in furtherance of their common intention was laid down by Privy Council in the in *Barendra Kumar Ghosh v. Emperor*, reported in AIR 1915 PC 1 (at page 6) as under:-

"??S. 34 deals with the doing of separate acts, similar or diverse by several persons; if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for "that act" and "the act" in the latter part of the section must include the whole action covered by "a criminal act" in the first part, because they refer to it."

56. In *Mahabub Shah v. Emperor*, reported in AIR (32) 1945 PC 118, the Privy

Council repeated and reiterated the same view as also observed as follows:-

"?? Section 34 lays down a principle of joint liability in the doing of a criminal act. The section does not say "the common intention of all" nor does it say "an intention common to all." Under the section, the essence of that liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. To invoke the aid of Section 34 successfully, it must be shown that the criminal act complained against was done by one of the accused persons in the furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone. This being the principle, it is clear to their Lordships that common intention within the meaning of the section implied a pre-arranged plan, and to convict the accused of an offence applying the section it should be proved that the criminal act was done in concert pursuant to the prearranged plan. As has been often observed, it is difficult if not impossible to procure direct evidence to prove the intention of an individual; in most cases it has to be inferred from his act or conduct or other relevant circumstance of the case."

57. The above proposition of law was adopted by a Bench consisting of three Hon"ble Judges of the Supreme Court in Pandurang, Tukia and Bhillia v. State of Hyderabad, reported in AIR 1955 SC 216, and the relevant portion of the above decision is quoted below:-

"33. Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a prearranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: Mahbub Shah v. King Emperor. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case: Barendra Kumar Ghosh v. King Emperor and Mahbub Shah v. King-Emperor. As Their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

(Emphasis supplied)

58. The above well settled proposition of law was repeated and reiterated time and again by the Apex Court. It would not be out of context to refer to one of such decision in Joginder Singh v. State of Haryana, reported in 1995 SCC (Cri)

178. In order to take care of the observation made therein the relevant portion of the above decision is quoted below:-

"7. It is one of the settled principles of law that the common intention must be anterior in time to the commission of the crime. It is also equally settled law that the intention of the individual has to be inferred from the overt act or conduct or from other relevant circumstances. Therefore, the totality of the circumstances must be taken into consideration in order to arrive at a conclusion whether the accused had a common intention to commit the offence under which they could be convicted. The prearranged plan may develop on the spot. In other words, during the course of commission of the offence, all that is necessary in law is the said plan must proceed to act constituting the offence."

(Emphasis supplied)

59. Therefore, under the provisions of Section 34 of the Cr.P.C., in the event separate criminal acts, similar or diverse, are done by several persons in furtherance of a common intention, each person is liable for the result of them, as if he had done all those acts himself. In other words, to convict the accused of an offence applying the Section it should be proved that the criminal act was done in concert pursuant to pre-arranged plan. It was observed in the decision of Pandurang, Tukia and Bhillia (supra) as prior meeting of mind. So, simultaneous criminal act could be done by several persons, each having the same intention and yet none would have the common intention required by the section because there was no meeting of minds to form a pre-arranged plan. In a case like that, each would be liable for the injury caused by him only but no one could be convicted for the act of any of the others. The partition which divides the aforesaid two types of criminal acts by several accused, is often very thin but, as observed by the Apex Court in the above case, if overlooked, will result in miscarriage of justice. In most of the cases it was difficult, if not impossible, to procure direct evidence to prove the intention of an individual and in most of the cases it had to be inferred from his act or conduct or other relevant circumstances of the case.

60. The repetition and reiteration of the facts and circumstances is not required to prove that there was pre-arranged plan behind the movement of the appellants in furtherance to hurl bomb on the face of the victim by one of them (appellant no. 2) entering into the said medicine shop and two flee away dividing into two group in a pre-planned manner after hurling two further bombs and opening one round of fire by different appellants in order to disperse the mob. Noteworthy, that the learned Court below correctly acquitted five other accused persons in absence of their proper identification by the prosecution witnesses.

61. So, we find no substance in the above contention of the appellants.

62. In the matter of Parshuram Singh (supra), the distinguishable fact that the common intention of two accused namely, A1-Rameshwar Singh and A4-Parshuram Singh was not proved beyond reasonable doubt, they were acquitted.

In the matter of Arun (supra), the common intention of the appellant was not proved beyond reasonable doubt. In view of the facts and circumstances involved in that case the fact that the evidence of PW 1 and PW 2 does not suggest that any common intention developed on the spur of the moment leading to the murder of the deceased by A-4, the appellant was acquitted from the offence punishable under Section 302 read with Section 34 of the I.P.C. In the matter of Zahoor and Subrati, had not caused any injury to the deceased or anybody else and the only allegation against them that they had exhorted their co-accused to shoot at the deceased. The Hon''ble Supreme Court held that there was absence of prior planing or pre-concept of mind even during the incident. In the matter of Bikramaditya Singh (supra), the Apex Court extended the benefit of doubt with regard to the role attributed to the appellant taking into consideration the evidence of eyewitness. But in the instant case, the appellant in furtherance to their common intention was evident after scrutinising the facts and circumstances on the basis of the evidence on record in the light of the settled principle of law as discussed herein above.

63. Therefore, none of the above decisions help the contention of the appellants in this regard.

64. G. Effect of evidence adduced by the defense witness in support of the plea of alibi of the appellant No.3:-

The meaning of the Latin word "alibi" in English is "elsewhere". An alibi is a rule of evidence that facts which are inconsistent with the fact in issue are relevant. It is recognised under the provisions of Section 11 of the Evidence Act. It is not viewed as an exception under the Indian Penal Code or any other law. In *Dudh Nath Pandey v. State of U.P.*, reported in (1981) 2 SCC 166, it was observed that the plea of alibi can succeed only in the event of showing that the accused was so far away at the relevant point of time that he could not be present at the place of occurrence of the crime. The relevant portion of the above decision is quoted below:-

" 19. ?. The plea of alibi postulates the physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea can therefore succeed only if it is shown that the accused was so far away at the relevant time that he could not be present at the place where the crime was committed. ?. ?."

65. In *State of Maharashtra v. Narsingrao Gangaram Pimple*, reported in (1984) 1 SCC 446, the Apex Court repeated and reiterated the settled principle of law in this regard that a plea of alibi must be proved with absolute certainty so as to completely exclude the possibility of the presence of the person concerned at the place of occurrence.

The above proposition of law was repeated and reiterated once again by the Hon''ble Supreme Court in *Vijay Pal v. State (GNCT) of Delhi*, reported in (2015) 4 SCC 749.

66. The appellant No.3, adopted the defense of alibi that he was a resident of Dakshin Dinajpur and he had come to the house of his aunt situated in the district of commission of offence on a tour at the time of occurrence of offence. In order to substantiate the plea of alibi, a residential certificate issued in his favour by the Pradhan of No.4 Shibpur Gram Panchayat, District-Dakshin Dinajpur, was produced by the DW 1 in Court. The above evidence of the defense witness was not at all relevant to substantiate that the appellant no. 3 was so far away at the relevant time that he could not be present at the place where the crime under reference was committed. In view of the above facts and circumstances, there was no infirmity in the decision making process of the learned trial court to hold that there was no truth in the plea of alibi of the appellant no. 3.

67. The discussions and observations made herein above settle the issue of guilt of the appellants. We agree with the view of the Court of Additional Sessions Judge, 1st Fast Track Court, Berhampur, District-Murshidabad and uphold the impugned conviction and sentence of the appellants.

The appeal is, therefore, dismissed.

Let this judgment together with the Lower Court's records be sent back to the learned Court below expeditiously.

Urgent photostat certified copy of this judgment, if applied for, be given to the parties, on priority basis.

Md. Mumtaz Khan, J. - I agree