
(2010) 01 GAU CK 0042
In the Gauhati High Court

Gouranga Das and etc.

APPELLANT

Vs

The State of Tripura

RESPONDENT

Date of Decision : 21-01-2010

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 313

Evidence Act, 1872 — Section 145, 157, 159, 32, 62

Penal Code, 1860 (IPC) — Section 148, 149, 302, 34

Citation : (2010) CriLJ 2125 : (2010) 1 GLT 694

Hon'ble Judges : T.N.K. Singh, J; Maibam B.K. Singh, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Maibam B.K. Singh, J.—These two criminal appeals, being Cri. Appeal No. 76 of 2003 and Cri. Appeal No. 77 of 2003, having been filed challenging the judgment of the learned Sessions Judge, West Tripura, Agartala passed in S.T. (WT/A) No. 32 of 2002 convicting the appellants on 17-9-03 for the commission of the offence u/s 302, I.P.C. read with Section 34, I.P.C. and sentencing each of them on 18-9-03 to imprisonment for life and fine of Rs. 5,000/- and in default, to undergo R.I. for six months, have been heard together. Shri A. Banerjee, learned Counsel appearing on behalf of the appellant, Gouranga Das and Shri S. Sarkar, learned Counsel appearing on behalf of the appellants, Chuni Lal Das and Kshitish Rudrapaul have been heard at length and A. Ghosh, learned Addl. P. P. is also heard on behalf of the respondent.

2. The present appellants, namely, Gouranga Das, Chuni Lal Das and Kshitish Rudrapaul and six other accused persons, namely, Mottlal Das, Mohanlal Das, Dulal Das, Rati Ranjan Das, Kajal Sarkar and Nepal Rudrapaul were jointly charged for the commission of the offence of rioting armed with deadly weapons punishable u/s 148, I.P.C. on or about 9-8-1990 at 11 a.m. at Tuishindrai Market under Teliamura Police Station as well as for the commission of the offence of murder of one Subhas Rudrapaul of South Pulinpur P. S. Teliamura on the same

day and time in furtherance of the common intention of all to cause his death. The specific sections of Indian Penal Code mentioned in respect of the said charge of murder are Section 302, I.P.C. read with Section 149, I.P.C. and Section 302, I.P.C. All the accused persons pleaded not guilty to the said charges and claimed to be tried. Thereafter, all the said 9 accused persons were tried jointly.

3. 14 (fourteen) PWs were examined on the side of the prosecution. All the accused persons were examined u/s 313, Cr.P.C. Purportedly, on not finding sufficient evidences, four of the accused persons, namely, Dulal Das, Rati Ranjan Das, Kajal Sarkar and Nepal Rudrapaul were acquitted of the charges before calling upon the remaining accused persons to enter on their defences. No DW was produced on behalf of the said remaining accused persons. After trial, the learned Sessions Judge, West Tripura, Agartala, vide the impugned judgment, convicted Gouranga Das, Chuni Lal Das and Kshitish Rudrapaul and sentenced them to imprisonment and fine as already mentioned above. The two remaining accused persons, namely, Motilal Das and Mohan Lal Das, were acquitted of the said charges by giving benefit of doubt.

4. On perusal of the statements of the PWs, we find that two of them, namely Pradip Rudrapaul (PW-3) and Amrit Rudrapaul (PW-5) are witnesses who are said to have seen the occurrence in which the said Subhas Rudrapaul was killed. Bikash Rudrapaul (PW-2) is one who is said to have personal knowledge about the facts leading to the occurrence and he is also one who is said to have fled from Tuishindrai Market along with the said Subhas Rudrapaul, Surjya Rudrapaul and Lal Mohon Rudrapaul (PW-1) on the day of the occurrence on learning about the coming of the accused persons armed with deadly weapons to attack them just a short time before the said Subhas Rudrapaul was killed. The original ejahar (Ext. P-8) was filed by the said Surjya Rudrapaul. The informant is said to have expired already and as such, he was not examined as PW Satyendra Ch. Das (PW-6) and Smt. Priyabala Rudrapaul (PW-8) were declared as hostile witnesses and with the permission of the trial Court, they were cross-examined by the prosecution. Dr. Subhendra Chakraborty (PW-12) is the medical officer who performed the post-mortem examination on the dead body. Gopal Sinha (PW-13) and Subrata Chakraborty (PW-14) are the IOs. who investigated the case at different stages. Other witnesses, namely, Nirmal Das (PW- 4), Kebal Rudrapaul (PW-7), Ruhini Chanda (PW-9), Pramode Rudrapaul (PW-10) and Monoranjan Das (PW-11) are found not to have stated anything about the occurrence. Their (PW-4, PW-7, PW-10 and PW-11) statements are found to be of formal nature.

5. Testimonies of two eye-witnesses (PW-3 and PW-5) are to the effect that on 9-8-90 at about 11 a.m. while they were collecting grass at different paddy fields, they heard a hue and cry and that they saw the said Subhas Rudrapaul being chased by three accused persons, namely, Kshitish Rudrapaul, Chuni Lal Das and Gouranga Das armed with lathi and dao. They (PW-3 PW-5) saw two other accused persons, namely, Mohon Lal Das and Motilal Das working in a field.

According to the PW-3 and PW-5, the said Mohon Lal Das and Motillal Das detained the said Subhas Rudrapaul and thereafter, the said Kshitish Rudrapaul hurled a lathi blow on the head of the said Subhas Rudrapaul thereby causing the latter to fall on the ground. Further, according to the PW-3 and PW-5, the said Chuni Lal Das and Gouranga Das assaulted the said Subhas Rudrapaul with their daos. PW-3 and PW-5's statements are to the effect that they saw some other miscreants standing on the other side of a chara and that they could not identify them. The presence of PW 3 at the relevant time of the occurrence near the place of occurrence is found testified by PW-5. Similarly, the presence of PW-5 at the time of the occurrence near the place of the occurrence is found supported by PW-3. Moreover, according to the PW-3 and PW-5, after the said assailants had left the place of occurrence, they (PW-3 and PW-5) rushed to the spot where the said Subhas Rudrapaul was lying and one of them (PW-5), as requested by the other (PW-3); informed the family members of the said Subhas Rudrapaul about the occurrence.

6. Both the eye-witnesses (PW-3 and PW- 5) were cross-examined. Their testimonies of seeing the occurrence of assault made on the said Subhas Rudrapaul by three accused, Kshitish Rudrapaul, Chuni Lal Das and Gauranga Das on that day are found not shaken in the cross-examination. There is nothing to show that these two eye-witnesses (PW-3 and PW-5) are partisan witnesses. There is no suggestion to the effect that they (PW-3 and PW-5) are persons who were personally interested in the result of the case either due to their enmity or clash of interest with the said accused persons. There is nothing to show that PW-3 and PW-5 are persons having interest in seeing the accused persons convicted somehow or other because of having animus against them.

7. Even though the victim, namely, Subhas Rudrapaul was admittedly the cousin of PW-5, the sole fact of the said eye-witness (PW-5) being the relative of the victim is not a valid ground for not relying on the testimony of the eye-witness (PW-5). Normally, a close relative would be the last to screen the real culprit and falsely implicates innocent persons. The witness may be interested in the victim, being his relation or otherwise, and may not necessarily be hostile to the accused. It is well settled that a relationship per se does not affect the credibility of a witness. Merely because the witness happens to be the relative of the victim of the crime, he/she cannot be characterized as an "interested" witness. It is trite that the term "interest" postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or other convicted either because he had some animus with the accused or for some other oblique motive.

8. The Hon''ble Apex Court in Dalip Singh and Others Vs. State of Punjab, , dispelling the general impression that relatives were not independent witnesses, held at para 26 page 366:

...a witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him

falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with guilty, but foundation must be laid for such a criticism and mere fact of relationship far from being a foundation is sure guarantee of truth.

9. In *Rizan and Another Vs. State of Chhatisgarh*, through The Chief Secretary, Govt. of Chhatisgarh, Raipur, Chhatisgarh, the Hon''ble Apex Court held to the effect that relationship is not a factor to affect credibility of a witness. It is more of ten than not a relation would not conceal the actual culprits and make allegations against the innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the Court has to adopt a careful approach and analyse evidence to find out if it is cogent and credible.

10. In *Namdeo Vs. State of Maharashtra*, the Hon''ble Apex Court held that a close relative cannot be characterized as an "interested" witness. His evidence must be scrutinized carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be passed on the sole testimony of such a witness. Close relationship of witness with the deceased or victim is not a ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.

10.1 There is no need of referring to other decided cases in respect of the above said settled position of law regarding credibility of evidence of relative witness. If necessary, one may refer to *Bhargavan and Others Vs. State of Kerala*, ; *Israr Vs. State of U.P.*, ; *State of A.P. Vs. S. Rayappa and Others*, ; *S. Sudershan Reddy and Others Vs. State of Andhra Pradesh*, ; *Salim Sahab v. State of Madhya Pradesh* (2007) 1 SCC 699 and *Mahesh Gonnade Vs. State of Maharashtra*,

11. In the absence of anything to show that PW-5 was having enmity with the said accused persons or was having interest in seeing the said accused persons convicted somehow or other, the testimony of PW-5 cannot be considered as not reliable on the sole ground that he was a relative of the victim. Submissions made in this regard by the learned Counsel of the appellants are not acceptable in the light of the above said well settled principles of law.

12. Further, even though PW-5 was a student at the relevant time, his presence near the place of occurrence at the relevant time of the occurrence is supported by PW-3. Apart from that, in a village, the fact of a boy going to a field for collecting grass for cattle of his family on a particular day instead of going to his school cannot be considered as something unbelievable or highly improbable. It is also to be noted that as per testimony of PW-2 also, PW-5 was a student as well as a cultivator at the relevant time. The said testimony of PW-2 was never denied. Since PW-5 was a cultivator also at that time, his presence at the paddy field on that day cannot be considered as highly improbable. Further, since the

testimony of PW-5 is not found shaken in the cross-examination and since the presence of PW-5 at the nearby field of the place of occurrence is found supported by unshaken testimony of PW-3, in the absence of any evidence to show that PW-5 was in fact in his school at the relevant time, PW-5's testimony about the occurrence is not to be doubted. Both the learned Counsel appearing on behalf of the appellants submit that the testimony of PW-5 is not to be relied upon inasmuch as his presence near the said place of occurrence at the relevant time is doubtful. This submission is not acceptable and it is rejected.

13. Even assuming that PW-5 was a chance witness who happened to be present at or near the place of occurrence at the time of the said occurrence, although it was not a place ordinarily visited by him, in the present case, reliance can be placed on the testimony of PW-5 inasmuch as the fact of his presence at or near the place of occurrence at the relevant time and his testimony about the occurrence in material particulars are found satisfactorily supported and corroborated by PW-3 and also as we have not found any acceptable reason as to why PW-5 would have falsely implicated the said accused persons.

14. Both the learned Counsel appearing on behalf of the appellants submit that the respective statements of PW-3 and PW-5 are contradictory to their respective statements given to the concerned I.O. of the case during its investigation and that they are not reliable as they improved their respective statements while deposing before the Court.

15. In respect of PW-3, as per his statement given at the time of his examination-in-chief, apart from giving of a lathi blow by Kshitish Rudrapaul and dao blow by Chuni Lal Das on Subhas Rudrapaul, Gouranga Das also assaulted the said Subhas Rudrapaul on his head with dao. At the time of his cross-examination also, PW-3 is found to have stated to the effect that he had stated the same facts to the I.O. of the case during the investigation of the case. The relevant portion of the record of cross-examination of PW-3 is as follows:

The attention of the witness is drawn to his previous statement recorded by the I.O. wherefrom it revealed that he did not specifically stated that Gouranga Das hurled dao blow on the head of the deceased though he had stated that others also assaulted him by various weapon.

The statement of PW-3 in his cross-examination to the effect that he (PW-3) had stated to the I.O. the fact of assault having been made by the said Gouranga Das with dao on the said Subhas Rudrapaul was obviously given when he (PW-3) was asked if he (PW-3) had stated the said to the police during the investigation of the case. The said question should not have been allowed as prohibited u/s 162 of the Cr.P.C. Section 162 of the Cr.P.C. prohibits the use of statements recorded by the police in the course of investigation, for any purpose in any inquiry or trial except to a limited extent, as provided for in the proviso to the said section. By asking the said question in the cross-examination, the defence was trying to show that PW-3's statement before the Court about the said fact was

contradictory to his statement to the police during the investigation as he omitted to state specifically about the fact to the police.

16. As per decision of the Hon''ble Apex Court in *Tahsildar Singh and Another Vs. The State of Uttar Pradesh*, it is not open to cross-examine the witness by asking him as to whether he had mentioned about any particular fact in his statement before the police, if there is no mention as to any such fact in the statement before the police or in the statement of the witness as made in Court, with a view to obtain admission from the witness as to such fact or with the object of contradicting him by showing that he had made no such statement.

17. In *Tahsildar Singh (supra)*'s case, the Hon''ble Apex Court indicated the procedure to be followed in contradicting a witness by confronting him with his previous statement. At para 13 page 1021 of the above said judgment, the Hon''ble Apex Court held:

13. ...The procedure prescribed is that, if it is intended to contradict a witness by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him. The proviso to Section 162 of the Code of Criminal Procedure only enables the accused to make use of such statement to contradict a witness in the manner provided by Section 145 of the Evidence Act. It would be doing violence to the language of the proviso if the said statement be allowed to be used for the purpose of cross-examining a witness within the meaning of the first part of Section 145 of the Evidence Act. Nor are we impressed by the argument that it would not be possible to invoke the second part of Section 145 of the Evidence Act without putting relevant questions under the first part thereof. The difficulty is more imaginary than real. The second part of Section 145 of the Evidence Act clearly indicates the simple procedure to be followed. To illustrate: A says in the witness-box that B stabbed C; before the police he had stated that D stabbed C. His attention can be drawn to that part of the statement made before the police which contradicts his statement in the witness-box. If he admits his previous statement, no further proof is necessary; if he does not admit, the practice generally followed is to admit it subject to proof by the police officer. On the other hand, the procedure suggested by the learned Counsel may be illustrated thus: If the witness is asked "did you say before the police-officer that you saw a gas light?" and he answers "yes", then the statement which does not contain such recital is put to him as contradiction. This procedure involves two fallacies: one is it enables the accused to elicit by a process of cross-examination what the witness stated before the police-officer. If a police-officer did not make a record of a witness' statement, his entire statement could not be used for any purpose, whereas if a police-officer recorded a few sentences, by this process of cross-examination, the witness's oral statement could be brought on record. This procedure therefore, contravenes the express provision of Section 162 of the Code. The second fallacy is that by the illustration given by the learned Counsel for the appellants there is no self-contradiction of the primary statement made in

the witness-box, for the witness has yet not made on the stand any assertion at all which can serve as the basis. The contradiction, under the section, should be between what a witness asserted in the witness-box and what he stated before the police-officer, and not between what he said he had stated before the police-officer and what he actually made before him. In such a case, the question could not be put at all; only questions to contradict can be put and the question here posed does not contradict; it leads to an answer which is contradicted by the police statement. This argument of the learned Counsel based upon Section 145 of the Evidence Act is, therefore, not of any relevance in considering the express provisions of Section 162 of the Code of Criminal Procedure.

17.1 In the same judgment, at para 26 and 27 at page 1206, the Hon^{ble} Apex Court held:

26. From the foregoing discussion the following propositions emerge: (1) A statement in writing made by a witness before a police officer in the course of investigation can be used only to contradict his statement in the witness box and for no other purpose; (2) statements not reduced to writing by the police officer cannot be used for contradiction; (3) though a particular statement is not expressly recorded, a statement that can be deemed to be part of that expressly recorded statement can be used for contradiction, not because it is an omission strictly so-called but because it is deemed to form part of the recorded statement; (4) such a fiction is permissible by construction only in the following three cases (i) when a recital is necessarily implied from the recital or recitals found in the statement: illustration: in the recorded statement before the police the witness states that he saw A stabbing B at a particular point of time, but in the witness box he says that he saw A and C stabbing B at the same point of time; in the statement before the police the word "only" can be implied i.e., the witness saw A only stabbing B; (ii) a negative aspect of a positive recital in a statement: illustration: in the recorded statement before the police the witness says that a dark man stabbed B, but in the witness box he says that a fair man stabbed B; the earlier statement must be deemed to contain the recital not only that the culprit was a dark complexioned man but also that he was not of fair complexion; and (iii) when the statement before the police and that before the Court cannot stand together: illustration: the witness says in the recorded statement before the police that A after stabbing B ran away by a northern lane, but in the Court he says that immediately after stabbing he ran away towards the southern lane, as he could not have run away immediately after the stabbing i.e., as towards the southern lane, if one statement is true, the other must necessarily be false.

27. The aforesaid examples are not intended to be exhaustive but only illustrative. The same instance may fall under one or more heads. It is for the trial Judge to decide in each case, after comparing the part or parts of the statement recorded by the police with that made in the witness box to give a ruling, having regard to the aforesaid principles, whether the recital intended to

be used for contradiction satisfies the requirements of law.

18. In *Shashidhar Purandhar Hegde and Another Vs. State of Karnataka*, the Hon"ble Apex Court held at para 12 page 498; 499:

12. The word "contradiction" is of a wide connotation which takes within its ambit all material omissions and under the circumstances of a case, a Court can decide under the circumstances of a case, a Court can decide whether there is one such omission as to amount to contradiction. See *State of Maharashtra Vs. Bharat Chaganlal Raghani and Others*, and *Raj Kishore Jha Vs. State of Bihar and Others*, The explanation to Section 162 of the Code of Criminal Procedure, 1973 (in short "the Code") is relevant. "Contradiction" means the setting of one statement against another and not the setting up of a statement against nothing at all. As noted in *Tahsildar Singh and Another Vs. The State of Uttar Pradesh*, , all omissions are not contradictions. As the explanation to Section 162 of the Code shows, an omission to state a fact or circumstance in the statement referred to in Sub-section (1) may amount to contradiction if the same appears to be significant or otherwise relevant having regard to the context in which the omission occurs. The provision itself makes it clear that whether any omission amounts to contradiction in the particular context is a question of fact.

19. In our present case, apart from the fact of not cross-examining PW-3 to contradict him in respect of what he asserted in the witness box with what he stated before the I.O. in the manner indicated in *Tahsildar Singh's* case (*supra*), on careful consideration of the facts and circumstances of the case, we do not find any contradiction in between what he (PW-3) asserted in the witness box to the effect that Gouranga Das assaulted the deceased on his head with a dao and what he (PW-3) is found to have stated before the I.O. to the effect that others also assaulted the deceased by various weapons. The portion of the statement of PW-3 given to the I.O. to the effect that others also assaulted the deceased by various weapons is consistent with his testimony before the Court to the effect that Kshitish Rudrapaul, Chuni Lal Das and Gouranga Das assaulted the deceased. In the facts and circumstances, the said omission of the name of Gouranga Das in the said portion of the statement of the witness (PW-3) given to the I.O. cannot be considered as one contradictory to his said statement before the Court on a material point warranting rejection of the statement of PW-3 before the Court. It is also to be noted that as per statement of PW-3 before the Court. It is also to be noted that as per statement of PW-3 before the Court, he had given statement to the I.O. to the same effect as he stated before the Court. In view of this clear statement of PW-3, it is also quite possible that even though PW-3 had given statement to the I.O. to the same effect as he stated before the Court, the concerned I.O. had not recorded it properly. This possibility cannot be ignored in view of the fact that statements of witnesses are often recorded by the concerned I.O."s in a haphazard fashion or in perfunctorily. This fact was noted by the Hon"ble Apex Court in *Tahsildar Singh and Another Vs. The State of Uttar Pradesh*,

16. ...At the stage of investigation, the statements of witnesses are taken in a haphazard manner. The police officer in course of his investigation finds himself more often in the midst of an excited crowd and babble of voices raised all round. In such an atmosphere, unlike that in a court of law, he is expected to hear the statement of witnesses and record separately the statements of each one of them. Generally, he records only a summary of the statements which appear to him to be relevant. These statements are, therefore, only a summary of what a witness says and every often perfunctory. Indeed, in view of the aforesaid fact, there is a statutory prohibition against police officers taking the signature of the person making the statement, indicating thereby that the statement is not intended to be binding on the witness or an assurance by him that it is a correct statement.

20. In the light of the above discussions, we do not find sufficient basis for concluding that the statement of PW-3 given before the Court is contradictory to his statement given to the I.O. of the case during its investigation and that PW-3 improved his statement while deposing before the Court. The submissions made by both the counsel of the appellants in this regard are rejected.

21. PW-5 is also found to have stated before the Court to the effect that he saw some other miscreants standing on the other side of the chara. In his cross-examination, PW-5 is found to have stated to the effect that he could not recollect if he had stated to the I.O. about the said fact of seeing of some other miscreants standing on the other side of the chara or not. As per noting made by the trial Court, attention of the witness was drawn to his previous statement but no statement in respect of the above said fact was found there. In the facts and circumstances of the case, the said omission on the part of PW-5 in mentioning about seeing of some miscreants on the other side of the said chara in his statement given to the I.O. cannot be considered as a statement contradictory to the statement of the said witness (PW-5) before the Court about the involvement of the said Gouranga Das, Chuni Lal Das and Kshitish Rudrapaul in the assault leading to the death of the said Subhas Rudrapaul. The said omission, even assuming there was, does not appear to be significant and otherwise relevant having regards to the context in which the omission occurs. The said omission cannot be considered as of any consequence in the present case in the light of the decision of the Hon''ble Apex Court in Tahsildar Singh's case (supra) as well as the provisions of the explanation to Sub-section (2) of Section 162 of Cr.P.C.

22. PW-1 is not an eye witness but he (PW-1) is an important witness. His (PW-1) testimony is to the effect that on the said day of the occurrence, he and others, namely, Subhas Rudrapaul, Bikash Rudrapaul (PW-2) and Surjya Rudrapaul had been chased by the said Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others armed with dao and lathi, etc. just a short time before the said Subhas Rudrapaul was found killed. According to PW-1, on 9-8-90, while the said Subhas Rudrapaul, Surjya Rudrapaul and Bikash Rudrapaul were in front of his (PW-1) shop at Tuishindrai Market, Satyendra Ch. Das came there and

informed them about coming of Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others armed with deadly weapons to kill them. Further, according to PW-1, while he was trying to close his shop, after getting the said information, the said Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others were seen coming there armed with dao and lathi, etc. and were heard shouting to catch hold of Subhas Rudrapaul, Bikash Rudrapaul and Surjya Rudrapaul. Thereafter, according to PW-1, he took shelter in the house of one Radhagovinda Nath Bhowmik situated by the side of the market after running from his shop along with the said Subhas Rudrapaul, Bikash Rudrapaul and Surjya Rudrapaul being chased by the said Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others. When he (PW-1) entered into the house of the said Radhagovinda Nath Bhowmik, he (PW-1) noticed Subhas Rudrapaul and Bikash Rudrapaul fleeing through the village road towards east being chased by the said Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others. PW-1's testimony is to the effect that while he was at the house of the said Radhagovinda Nath Bhowmik, he came to know about the fact of the said Subhas Rudrapaul having been killed.

23. As per testimony of PW-1, within a short period before finding the said Subhas Rudrapaul having been killed, the said Subhas Rudrapaul was seen being chased by Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others armed with deadly weapons. This testimony is not found to have been shaken at the time of cross-examination of the witness. In respect of his testimony given during his examination-in-chief that while he was trying to close the door of his shop after getting the said information about the coming of the said Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others armed with deadly weapons, he saw the said persons coming there, he (PW-1) is found to have stated at the time of cross-examination to the effect that he could not remember if he had stated about the same fact to the I.O. of the case during its investigation. As per noting made by the learned trial Judge, no such statement was found recorded in the previous statement of the witness (PW-1) given to the I.O. In respect of the PW-1's testimony given during his examination-in-chief that the said Chuni Lal Das, Kshitish Rudrapaul, Gourariga Das and others were seen coming near his shop armed with dao and lathi, etc. and heard shouting to catch hold of Subhas Rudrapaul, Bikash Rudrapaul and Surjya Rudrapaul, he (PW-1) is found to have stated at the time of his cross-examination to the effect that he stated the same fact to the I.O. during the investigation of the case. As per noting made by the learned Trial Judge, no such statement was found in the previous statement of this witness recorded by the I.O. Further, though PW-1 is found to have stated before the Court that while he was taking shelter in the house of Radhagovinda Nath Bhowmik, he saw the said Subhas Rudrapaul and Bikash Rudrapaul fleeing towards east through the village road being chased by Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others, as per noting made by the learned Trial Judge, no such statement was found recorded in the previous statement of the witness recorded by the I.O. Though PW-1 is found to have given his statement before the Court to the effect that while he was staying in the house of the said

Radhagovinda Nath Bhowmik, he learnt the fact of the said Subhas Rudrapaul having been killed by the said Chuni Lal Das, Kshitish Rudrapaul and Gouranga Das, as per noting made by the learned Trial Judge, no such statement was found recorded in the previous statement of this witness recorded by the I.O.

24. It is however to be noted that the said previous statement of the PW-1 said to have been recorded by the I.O. of the case and on the basis of which the Trial Judge made the above said noting is found not to have been exhibited. The I.O. (PW-14) is, however, found to have admitted in his cross-examination that PW-1 never stated to him about the said facts at the time of recording his statement during the investigation. The learned defence counsel ought to have proceeded with the cross-examination of PW-1 with reference to his previous statement in the manner indicated by the Hon'ble Apex Court in Tahsildar Singh and Another Vs. The State of Uttar Pradesh, thereby he (PW-1) should have been given opportunity to explain. Even assuming that PW-1 omitted to state some facts at the time of giving of his statement to the I.O. of the case, that omission will not be sufficient to discard the testimony of PW-1 wholly without examining the testimony of PW-2 who is also said to one of the persons said to have been chased on that day of the occurrence by the said Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others armed with deadly weapons. At the same time, as already seen from the observation of the Hon'ble Apex Court in Tahsildar Singh's case (supra), at the stage of investigation, the statements of witnesses are taken in a haphazard manner and generally, the I.O. records only a summary of statements which appear to him to be relevant and as such, the statement of witness (PW-1) before the Court is not to be discarded wholly.

25. Bikash Rudrapaul (PW-2) is another witness who was with the deceased Subhas Rudrapaul on the day of the occurrence up to a short time before he was killed. According to PW-2, on 8-8-90, he along with Subhas Rudrapaul, Surjya Rudrapaul and Nirmal Rudrapaul at about 11 a.m., went to the school of the sister of the said Subhas Rudrapaul to enquire about disturbing her by some persons including Chuni Lal Das and Gouranga Das. Further, according to PW-2, they learnt from the Headmaster of the school that the sister of Subhas Rudrapaul had already gone to her home along with a Grade-IV female staff of the school. As per testimony of PW-2, the Headmaster of the school assured them that the matter would be settled but they were threatened by the accused persons and others at the school by saying to the effect that if they tried to protect their sister, somebody would be killed. In the evening of 8-8-90, while he was at his shop, he was asked to return to his home early by Surjya Rudrapaul by saying that the accused persons were planning to assault him and Subhas Rudrapaul. PW-2's testimony is to the effect that on 9-8-1990 at about 10 am, while he, Subhas Rudrapul and Surjya Rudrapaul were at Tuishindrai Market, Satyendra Ch. Das came there and informed them that Chuni Lal Das, Bishnu Das, Kshitish Rudrapaul and Gouranga Das being armed with deadly weapons were coming towards market to attack them. According to PW-2, after getting the said information, he along Subhas Rudrapaul, Surjya Rudrapaul and his uncle

Lalmohan (PW-1) started running from the place and he (PW-2) and Subhas Rudrapaul were fleeing on their respective cycles. PW-2 saw the accused persons chasing them. As per testimony of PW-2, as the road condition was not good enough for riding cycles, both he and the said Subhas Rudrapaul threw their respective cycles away and they proceeded towards the chara on the eastern direction. According to PW-2, after crossing the chara, he proceeded towards south and took shelter in a tribal basti. PW-2 saw Subhas Rudrapaul proceeding towards northern direction after crossing the chara being chased by the accused persons. As per testimony of PW-2, he learnt from the tribal that the said Subhas Rudrapaul had been murdered by the persons who had been chasing him.

26. In respect of PW-2 also, his previous statement said to have been given to the I.O. of the case and on the basis of which the learned Trial Judge made noting about finding some facts having been omitted in respect of which the witness stated before the Court is found not to have been exhibited. In the case of PW-2, the learned defence counsel did not proceed with the cross-examination of PW-2 in respect of his said previous statement in the manner indicated by the Hon"ble Apex Court in Tahsildar Singh's case (supra) and thereby PW-2 was not given proper opportunity to explain about the said contradictions about his statement before the Court and his statement given to the police during the investigation. PW-2 did not state that he saw the accused persons assaulting the said Subhas Rudrapaul. However, PW-2 is found to have supported the testimony of PW-1 substantially to the effect that on 9-8-1990, they along with Surjya Rudrapaul and Subhas Rudrapaul were chased by Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others armed with deadly weapons and that within a short period, the said Subhas Rudrapaul was found killed. PW-2 was not an eye-witness of the assault made on the said Subhas Rudrapaul leading to his death. The facts said to have been omitted by PW-2 are not in respect of main occurrence of assault and as such, there is possibility that the I.O. himself did not consider it necessary to ask question in details in respect of the said facts. We do not find sufficient reason as to why the above said testimony of PW-2 supported by PW-1 about the fact of chasing of the said Subhas Rudrapaul by the said accused persons and also about the fact of finding the said Subhas Rudrapaul having been killed within a short time of the said chasing should not be believed.

27. Nirmal Das is a police constable and his testimony is of formal nature. He (PW4) identified the dead body to the concerned medical officer in connection with the holding of post-mortem examination. According to PW-4, wearing apparel of the deceased marked exhibit M.O. 2 was seized in his presence under seizure list Ext. P-3.

28. Satyendra Ch. Das (PW2) is the one, according to the prosecution, who informed Lal Mohan Rudrapaul (PW-1), Bikash Rudrapaul (PW-2), Subhas Rudrapaul (deceased) and Surjya Rudrapaul while they were in front of the shop of the said Lal Mohan Rudrapaul at Tuishindrai Market on the day of the

occurrence, about the coming of the accused persons, namely, Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das and others armed with deadly weapons to the market to kill them. However, PW-6 was declared as a hostile witness and he was cross-examined by the prosecution with the permission of the trial Court. At the time of his cross-examination, PW-6 denied to have given statement to the I.O. contrary to the statement given by him before the Court. The said statement given to the I.O. was proved by the I.O. (PW-14) as Exbt. P-4. According to PW-6, on the said day, he saw Nantu, Bishnu and others whose names were not known to him moving in the market armed with dao and lathi. Further, P-6 testified that the accused were considered by him as his relative as they were his neighbours. It appears that since PW-6 being a neighbour of the accused persons and since he (PW-6) considered himself as a relative of the accused persons, he did not like to testify about the facts stated to him to the I.O. of the case during the investigation in as much as the said facts would have affected the interest of the accused persons. Most probably, PW-6 was won over by the defence. In this situation, we do not find sufficient ground as to why we should not believe the testimony of PW-1 and PW-2 to the effect that they were informed by the said Satyendra Ch. Das (PW-6) about the coming of the accused persons to the market armed with deadly weapons to attack them.

29. Shri Kebal Rudrapaul (PW-7) is the father of the deceased. According to PW-7, on 9-8-1990, in the morning, while he was performing domestic work, Amrit Rudrapaul (PW-5) came to his house and informed that his son, Subhas Rudrapaul, have been murdered by Motillal Das, Chuni Lal Das, Gouranga Das, Mohon Lal Das and Kshitish Rudrapaul. When he (PW-7) rushed to the spot, he found his son lying death. In the cross examination, the PW-7 is found to have stated that he had given statement to the I.O. mentioning the names of Motillal Das and Mohon Lal Das and others as the assailants on the basis of information he had received from Amrit Rudrapaul. However, as per noting made by the trial Court, he (PW-7) did not mention the names of Motillal Das and Mohon Lal Das specifically in the statement given to the I.O. of the case. This witness (PW-7) was not also cross-examined in respect of his previous statement in the manner laid down by the Hon"ble Apex Court in Tahsildar Singh and Another Vs. The State of Uttar Pradesh, . Further, in view of the above said omission, even though PW-7 is not to be believed in respect of his statement to the effect that he got information from Amrit Rudrapaul (PW-5) about involvement of Motillal Das and Mohon Lal Das also in the assault made to his son, Subhas Rudrapaul, we do not find sufficient ground as to why his (PW-7) testimony about receiving information from PW-5 on the same day of the occurrence within a short period regarding involvement of Chuni Lal Das, Gouranga Das and Kshitish Rudrapaul in the said assault of his son, Subhas Rudrapaul should not be believed. Thus, as per unshaken evidence of PW-7, he received information from PW-5 on the same day of the occurrence within a short period of it about the involvement of the said Chuni Lal Das, Gouranga Das and Kshitish Rudrapaul in the said assault. This testimony in fact corroborates PW-5 to some extent.

30. Smt. Priyabala Rudrapaul (PW-8) was declared as a hostile witness by the prosecution. As per statement of PW-8, before the Court, on the said day of the occurrence, the said Subhas Rudrapaul came to her house and left his cycle at her house. According to PW-8, the said Subhas Rudrapaul ran away from her house after leaving the cycle and informing her that he was being chased by some miscreants to kill him. PW-8 was confronted with her previous contradictory statement marked Exbt. P-5 given to police. In the said previous statement, Smt. Priyabala Rudrapaul is found to have stated to the effect that on the said day, the Subhas Rudrapaul told her that he was being chased by Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das, Nantu, Dulal, Felu and others armed with deadly weapons. As per the said previous statement of PW-8, the said Chuni Lal Das, Kshitish Rudrapaul, Gouranga Das, Dulal and Felu came to her house looking for Subhas Rudrapaul and the said persons proceeded towards east on which direction the said Subhas Rudrapaul had ran away before coming of the said persons. Even though, PW-8 did not disclose before the Court the names of the said miscreants, PW-8 is found to have testified that on her query, the said Subhas Rudra Paul told her that he was being chased by some miscreants to kill him and that after 15/20 minutes of leaving of the said Subhas Rudrapaul, she learnt the fact of his having been murdered on the other side of the river. In our opinion, failure on the part of the PW-8 to disclose the names of the said miscreants and also the fact of their coming to her house looking for the said Subhas Rudrapaul after sometime of his leaving is not sufficient to disbelieve the testimonies of PW-1, PW-2, PW-3 and PW-5. The I.O. (PW-14) proved the said previous statement of PW-8 as Exbt. P/5. There is a possibility (hat PW-8 was not telling the whole truth before the Court in order to save the concerned accused persons. Further, PW-8's statement in the cross-examination to the effect that the road leading to the chara, north of her house was village road on which one could ride cycle is not sufficient for disbelieving the prosecution story that the said Subhas Rudrapaul left his cycle at the house of PW-8 and crossed the river to escape from the said accused persons who were chasing him.

31. Ruhini Chanda (PW-9) is found not to have stated anything as to who had caused death to the said Subhas Rudrapaul. According to PW-9, there was a problem concerning the daughter of the Kebal Rudrapaul (PW-7), father of the deceased in her school and the problem could not be solved. Further, as per testimony of PW-9, Kebal Rudrapaul's (PW-7) son was murdered.

32. Pramode Rudrapaul (PW-10) is one of the witness in whose presence inquest was held. As per testimony of PW-10, Exbt. P/6 is the inquest report prepared by the I.O. and hawai chappal was also seized under the seizure list. Learned Counsel appearing on behalf of the appellant, Gouranga Das, submits that as per previous statement of PW-10 given to the I.O. during investigation of the case, he came to know about the occurrence at 11.30 a.m. on the same day of occurrence and also about the said involvement of Chuni Lal Das and Kshitish Rudrapaul. According to the learned Counsel of the appellants, non-mentioning of the name of Gouranga Das by this witness (PW-10) in his said previous

statement given to the police should be taken into account by the Court to disbelieve the prosecution case about the involvement of Gouranga Das in the occurrence. This submission is not entertainable in view of clear provision of Section 162 of the Cr.P.C. The said previous statement of PW-10 is not a part of the record and in view of Section 162 of the Cr.P.C., the said previous statement of the witness to the police cannot be used for the purpose submitted by the learned Counsel. PW-10 did not testify about the involvement of any of the appellants in the occurrence. The above submission of the learned Counsel appearing on behalf of the appellant, Gouranga Das, is not acceptable.

33. Mr. S. Sarkar, learned Counsel appearing in Cril. Appeal No. 77 of 2003 submits that non-mentioning of the names of the eye witnesses in the inquest should be taken into account and the learned Counsel refers to the decisions of the Hon''ble Apex Court in State of Gujarat Vs. Patel Mohan Mulji and another, where the Hon''ble Apex Court held that non-mentioning of the names of the assailants in the inquest was an infirmity in the prosecution case. In the said case, before the Hon''ble Apex Court, one of the witnesses, claimed to be an eye-witness was found not to have disclosed the names of the assailants either to the police or to anybody for some hours even at the time of holding of inquest which took place before registration of the case. In that situation, the Hon''ble Apex Court, held that non-mentioning of the names of the assailants in the inquest was an infirmity in the prosecution case. That decision will not be applicable in our present case. PW-10 who testified about the inquest did not claim that he was an eye-witness of the occurrence and he cannot be disbelieved for not naming the accused persons involved in the murder at the time of holding the inquest.

34. Monoranjan Das (PW-11) was the Sub-Inspector of Police in Bishalarh P.S. at the relevant time and he arrested Gouranga Das in connection with the case.

35. Dr. Subhendu Chakraborty (PW-12) was a medical officer at Teliamura hospital. According to PW-12, he conducted post mortem examination on the dead body of Subhas Rudrapaul in connection with Teliamura P.S. Case No. 4(8) 90 on 10-8-1990 at about 10.30 a.m. PW-12 found the following injuries: (1) one deep incised wound on forehead of the deceased measuring 6" in length in the middle frontal bone placed saggitally; (2) one oblique wound measuring 4" in length on the forehead of the deceased over the frontal bone in the left side; (3) one deep incised wound in the middle of the head placed transversely 8" in length involving both the parietal bone; (4) one deep incised wound over the back of the neck in the middle placed transversely 4" in length over the occipital bone; (5) one deep incised wound over the right side of the back of head over occipital bone. As per evidence of PW-12, all the injuries were ante-mortal and homicidal in nature and the cause of death was due to cardio respiratory failure as a result of shock and hemorrhage due to result of severe deep wounds over different parts of the head caused by heavy sharp cutting weapon. Exbt. P/7 is the report of the said post-mortem examination bearing the signature of the said

doctor.

36. The post-mortem examination was done on the next day of the occurrence. The findings of deep incised wounds on the head of the dead body are consistent with the inquest report, Exbt. P/6. The findings are also compatible with the testimonies of PW-3 and PW-5 to the effect that the said Chuni Lal Das and Gouranga Das assaulted the said Subhas Rudrapaul on his head with dao on the day of the occurrence. Further, PW-12's opinion to the effect that the said injuries could have been caused by heavy sharp cutting weapon is also compatible with the said version of PW-3 and PW-5 to the effect that the said Subhas Rudrapaul was assaulted by the two accused holding daos.

37. Both the learned Counsel appearing on behalf of the appellants submit that the post-mortem report exhibited as Exbt. P/7 is admittedly a carbon copy and it should not have been allowed to be exhibited. Mr. S. Sarkar, learned Counsel appearing in Cri. Appeal No. 77 of 2003 draws our attention to the decision of the Hon'ble Apex Court in *Vijender and Others Vs. State of Delhi*, and submits that as per decision of the Hon'ble Apex Court, only an original postmortem report and not a carbon copy thereof is admissible.

38. As per records, the said post-mortem report was exhibited as Ext. P/7 when the doctor (PW-12) was examined on 24-8-2001 and no objection was raised from the side of the defence when the said post-mortem report was sought to be exhibited and exhibited. Though the said post-mortem report Exbt. P/7 is admittedly a carbon copy, it is found bearing the original signature of the doctor (PW-12). There is no reason for having doubt about the authenticity of the postmortem report, Exbt. P/7. Further, when a number of documents are made by a uniform process, e.g. printing or hand-written using carbon papers, the said documents are not copies in the legal sense of the term. They are counterpart originals and each is primary evidence of the contents of the rest. In the present case also, the said carbon copy postmortem report marked, Exbt. P/7 being one undeniably prepared with others at one time by the uniform process of writing by hand using carbon papers is a counter part original and it is evidence of the contents of the rest. In *Prithi Chand Vs. State of Himachal Pradesh*, at para 4 of the judgment, the Hon'ble Apex Court held to the effect that a carbon copy made by one uniform process was primary evidence within the meaning of explanation 2 to Section 62 of the Evidence Act. There cannot also be any question regarding the authenticity of the contents of Exbt. P/7 inasmuch as the Doctor (PW-12) is found to have put his original signature in ink on the document. In our considered opinion, there was no illegality on the part of the Trial Judge in allowing the prosecution to admit and exhibit the said Exbt. P/7.

39. In the case cited by Mr. S. Sarkar, i.e. *Vijender* (supra) the Doctor who conducted the post-mortem examination was not examined without showing sufficient cause. Further, the original post-mortem report was not produced but only a carbon copy of it was produced by the record clerk of the hospital. In that facts and circumstances, the Hon'ble Apex Court held that the Trial Judge ought

not have allowed the prosecution to prove the post-mortem report which was not an original report but only a carbon copy thereof that too not certified. In the opinion of the Hon''ble Apex Court, u/s 64 of the Evidence Act, documents must be proved by primary evidence i.e. to show by producing the documents itself except in cases mentioned in Section 65 thereof. Since the copy of the post-mortem did not come within the purview of any of the clauses of Section 65, it was not admissible on this score also. The facts and circumstances under which Exbt. P/7 was admitted in our present case were quite different from the facts and circumstances of the above said case before the Hon''ble Apex Court. In our case, the Doctor (PW-12) himself gave his testimony before the Court regarding his finding in the postmortem examination. The said document marked Exbt. P/7 is one bearing the original signature of the Doctor. There is no room for having doubt about the authenticity of the post-mortem report exhibited as Exbt. P/7. We have also decided that the said document marked Exbt. P/7 is a primary evidence within the meaning of explanation 2 to Section 62 of the Evidence Act in the light of the decision of the Hon''ble Apex Court in Prithi Chand (supra). The case cited by the learned Counsel of the appellant will not be applicable in our present case.

40. Apart from the above consideration, the said post-mortem report of the Doctor in his previous statement based on his examination of the dead body. It cannot be considered as substantive evidence. The Doctor (PW-12)'s statement in the Court is alone the substantive evidence. The post-mortem report can be used only to corroborate his statement u/s 157 of the Indian Evidence Act, or to refresh his memory u/s 159 of the Act or to contradict his statement in the witness box u/s 145 of the Act. In the present case, the defence did not put any question to the Doctor (PW-12) to contradict the statement before the Court with reference to the contents of the said post-mortem report. On the other hand, the prosecution utilized the said postmortem report to refresh the memory of the Doctor as well as to corroborate his statement before the Court. In the present case, the substantive evidence of the Doctor (PW-12) given before the Court is found not to have been shaken. It is also ascertained that no prejudice was caused to the defence in cross examining the Doctor due to illegibility or otherwise of the said post-mortem report, Exbt. P/7. As per records in respect of the proceeding of the case on 27-7-2001, 13-8-2001 and 24-8-2001, when it was brought to the notice of the Trial Court by the defence regarding illegibility of the copy of the post-mortem report supplied to the defence and thereby of facing hardship in cross examining the Doctor, the Trial Court arranged to supply a legible copy of the post-mortem report with the knowledge of both sides. In the facts and circumstances, we do not find any basis for concluding that any prejudice was caused to the defence in cross examining the said Doctor.

41. Shri Gopal Sinha (PW-13), who was posted as Sub-Inspector of Police at Teliamura P.S. at the relevant time, took up the investigation of the case after the earlier I.O., namely, S.I. Subrata Chakraborty (PW-14) had been transferred from Teliamura P.S. According to PW-13, the investigation of the case was

already completed by the earlier I.O. of the case and as such, he, with the permission of the higher authority, submitted the charge-sheet as against the accused persons.

42. Shri Subrata Chakraborty (PW-14) was the I.O. who completed the investigation of the case. According to him (PW-14), on 9-8-1990 at about 11.45 a.m., while he was at Teliamura P.S., he received information through telephone from Teliamura hospital about a dead body having been brought to the hospital by some persons and on receipt of the said information, he entered the matter in the G.D. Book of P.S. vide G.D. Entry No. 275 dated 9-8-1990 and rushed to the place of occurrence at South Pulinpur. Further, according to PW-14, at Tuishindrai Market, he met Surjya Mohan Rudrapaul, who informed him that one Subhas Rudrapaul had been murdered at South Pulinpur. He (PW-14) rushed to the place of occurrence and found clotted blood mixed with water and a pair of hawai sandal of the deceased at the place of occurrence. PW-14 seized the pair of hawai sandal marked Exbt. M.O./1 under the seizure list marked Exbt. P/1 in the presence of witnesses. As per evidence of PW-14, he reduced into writing the report from Surjya Mohan Rudrapaul. The said report/ejahaar is found to have been exhibited as Exbt. P/8 having endorsement of PW-14 at Exbt. P/8(1). Moreover according to PW-14, after the registration of the case, the O.C. entrusted the case to him for investigation. Exbt. P/9 is the FIR form duly filled up by the O.C. Exbt. P/10 is the sketch map of the place of occurrence and Exbt. P/11 is its index. According to PW-14, he seized wearing apparels of the deceased marked as M. O./2 under seizure list marked as Exbt. P/3 in presence of witnesses and he also recorded the statements of witnesses u/s 161 Cr.P.C. During the course of investigation, he arrested some of the accused persons. As per testimony of PW-14, he completed the investigation of the case but he could not submit the charge-sheet as he was transferred from Teliamura P.S. Exbt. P/4 and Exbt. P/5 were proved by PW-14 as the previous statements given to him by PW-6 and PW-8 respectively. PW-14 is found to have been cross-examined at length but his testimony is not found to have been shaken in respect of any material facts.

43. As per testimony of PW-14, the report/ejahaar (Exbt. P/8) was written by him on the basis of the oral report made to him by Surjya Mohan Rudrapaul. The said report/ejahaar (Exbt. P/8) was the first information in connection with the commission of the cognizable offences u/s 148 and 302 of IPC, etc. It is, however, not a substantive evidence in support of its contents. Its importance arise out of the fact that it can be used for corroborating the evidence as given in Court by the person on whose statement it was recorded, in accordance with the provision of Section 157 of the Evidence Act, as well as for contradicting such evidence in accordance with Section 145 of the Evidence Act. Being the earliest recorded statements of the informant, it is of great value to the prosecution as well as to the accused for showing if the allegations as made out by the informant in Court at the time of trial are substantially the same as made out in his first information report, or if attempts are being made to develop the case by

making new allegations as the facts or by implicating persons not named previously. In our present case, there is no dispute that the informant namely, Surjya Mohan Rudrapaul was not examined by the prosecution as he had already expired before his examination. In this situation, Exbt. P/8 is not of any use except for showing that it was a first information report made in respect of the commission of the above said cognizable offences. It cannot be used for contradicting or corroborating any of the witnesses examined in the case.

44. Mr. S. Sarkar, learned Counsel appearing in Cril. Appeal No. 77 of 2003 submits that non mentioning of important facts and non-mentioning of names of witnesses in the FIR create doubt to the prosecution case. The learned Counsel refers to Mousam Singha Roy and Others Vs. State of West Bengal, and Ram Kumar Pandey Vs. State of Madhya Pradesh, in support of his submission that omission of important facts in the FIR will affect the probabilities of the case.

45. In our considered opinion, in the facts and circumstances of our present case, the decision of the Hon'ble Apex Court in the above cited two cases will not be applicable. In our present case, the informant was not examined as he had already expired. As already mentioned, the statements as made in the FIR do not constitute substantive evidence except when admitted u/s 32(1) of the Evidence Act. The same may be used for contradicting the testimony as given in Court by the maker of the FIR in accordance with the provisions of Section 145 of the Evidence Act or for corroborating the same in accordance with Section 157 of that Act. In determining if an omission made in an FIR can be treated as amounting to contradiction, the principles laid down in Tahsildar Singh and Another Vs. The State of Uttar Pradesh, as well as provisions of the explanation in Section 162 of the Cr.P.C. have to be kept in view. In our present case, since the informant was not examined as he had already expired, there is no any situation of the informant having given statement contradictory to the FIR.

46. It is also necessary to bear in mind the object of an FIR is to give requisite information to the police officer as to the commission of a cognizable offence so that he may proceed to take up the investigation of the case. Accordingly, an FIR is not intended to contain a broad or comprehensive details as to the occurrence or the attended circumstances as are elicited during an examination of a witness in a Court. Moreover, the informant may not be having knowledge of all the facts about the occurrence. Hence, the mere omission in an FIR should, by itself, never be held as amounting to contradiction for the purpose of Section 145, Evidence Act and as being, by itself, a sufficient ground for disbelieving the testimony of the witness informant as given in Court, unless such omission can be treated as amounting to contradiction in accordance with the principle laid down in Tahsildar Singh's case (supra) as well as the provisions of explanation to Section 162 of the Cr.P.C. In this connection, one may refer to the decisions of the Hon'ble Apex Court in Laxman and Others Vs. The State of Maharashtra, and Pedda Narayana and Others Vs. State of Andhra Pradesh, In our present case, since the informant did not give his statement before the Court, there is no need

of making further discussion on this point.

47. The learned Counsel appearing on behalf of the appellant, Gouranga Das, draws our attention to the statement of PW-14 to the effect that on receipt of the information regarding the bringing of the dead body to the hospital, he made entries in the G.D. book and rushed to the place of occurrence at South Pulinpur. The learned Counsel submits as to from where the I.O. came to know that the place of occurrence was at South Pulinpur. No doubt, there is a little confusion in the statement of the I.O. when he testified to the effect that after making the entries in the G.D. book, he rushed to the place of occurrence at South Pulinpur without disclosing clearly at the said stage as to whether if he knew the said place of occurrence and if yes, from whom he came to know that the place of occurrence was at South Pulinpur. However, the I.O.'s statement is not to be discarded on the ground of the said lack of clarity. In the very next line of his statement, PW-14 is found to have stated to the effect that he met Surjya Mohan Rudrapaul at Tuishindrai Market and that he came to know about the location of the place of occurrence from the said Surjya Mohan Rudrapaul. There is no sufficient reason to have doubt in respect of the testimony of PW-14 to the effect that he rushed to the place of occurrence within a short time of recording information in the G.D. Book.

48. Both the learned Counsel appearing on behalf of the appellants submit that though as per testimony of both the eye-witnesses (PW-3 and PW-5), Kshitish Rudrapaul hurled lathi blow on the head of Subhas Rudrapaul, no injury which could have been caused by the lathi blow was found by the Doctor (PW-12) who performed the post mortem examination on the dead body. According to the learned Counsel, since no injury which could have been caused by the lathi was found on the head of the said Subhas Rudrapaul, the said testimony of PW-3 and PW-5 is not supported by the Doctor (PW-12) and as such, the testimony of PW-3 and PW-5 is not to be relied upon. We cannot accept this submission. PW-3 and PW-5 nowhere stated that as a result of hurling of the said lathi blow by the accused Kshitish Rudrapaul, a severe injury was caused on the head of the said Subhas Rudrapaul. Merely on the ground that the Doctor (PW-12) nowhere stated about finding of any injury which could have been caused by a lathi, it cannot be concluded that PW-3 and PW-5 were not speaking the truth. It is quite possible that on findings five deep incised wounds on the head of the said Subhas Rudrapaul, the Doctor (PW-12) overlooked the minor injury which could have been caused as a result of the said hurling of lathi blow. In fact, defence never put any question to the said Doctor in this regard. In the facts and circumstances, the unshaken testimony of PW-3 and PW-5 cannot be disbelieved merely on the ground of the said omission in the testimony of PW-12.

49. Another point submitted by the learned Counsel of the appellant, Gouranga Das, is that non-mentioning of the place where grasses were growing in the sketch map prepared by the I.O. creates doubt to the prosecution case that PW-3 and PW-5 were collecting grass near the place of occurrence. In our considered

opinion, the omission on the part of the I.O. to indicate specifically the places where grasses were growing in the sketch map is not sufficient to discard the unshaken testimony of PW-3 and PW-5. It is also to be noted that even though the sketch map prepared by the I.O. is found not to have disclosed specifically where the grasses were growing, the said map is found to have indicated clearly the places where PW-3 and PW-5 were at the time of the occurrence. The above submission on behalf of the appellant, Gouranga Das, is not of any significance.

50. Both the learned Counsel of the appellants submit that the prosecution case is not to be believed because it is based on the statements of relative witnesses and not of statements of independent witnesses. The learned Counsel of the appellants, Chuni Lal Das and Kshitish Rudrapaul, draws our attention to the decision of this Court in *Shri Parimal Gowala and Others Vs. State of Tripura*, and also to the decision of the Hon"ble Apex Court in *Jang Singh and Others Vs. State of Rajasthan*, and submits that non-examination of available independent witnesses creates a serious doubt in the prosecution case.

51. In our present case, as per finding in the investigation made by the I.O., PW-3 and PW-5 witnessed the assault made by the present appellants on the said Subhas Rudrapaul. There is nothing to show that any person other than PW-3 and PW-5 also saw the occurrence. In the facts and circumstances, there is no question of withholding of any available eye-witnesses from examination during the trial. The above cited decisions will not be applicable in the facts and circumstances of our present case insofar as the fact of assault of the deceased on that day is concerned. In respect of the said fact, only two witnesses (PW-3 and PW-5) were available and both of them were examined. We have already noted also that PW-3 and PW-5 are not partisan witnesses and that mere fact of PW-5 being a relative of the deceased is not also a ground for disbelieving his testimony supported by PW-3.

52. In respect of the fact of coming of the present appellants along with others armed with deadly weapons at the market on the said day of the occurrence looking for the said Subhas Rudrapaul, Surjya Mohan Rudrapaul, Lal Mohan Rudrapaul and Bikash Rudrapaul, the said Lal Mohan Rudrapaul (PW-1) and Bikash Rudrapaul (PW-2) were examined. As per evidence before the Court, Surjya Mohan Rudrapaul is no more. There is no requirement in law that any particular number of witnesses should be examined for proving a fact. It appears that the prosecution examined witnesses (PW-1 and PW-2), who were having first hand knowledge about the said fact and whose evidences were having bearing in respect of the said fact. Only on the ground that there were many other witnesses who were at the said market at the relevant time, the prosecution was not supposed to go on multiplying witnesses who would merely repeat the evidence already given by PW-1 and PW-2. Since the prosecution examined the witnesses who were necessary for unfolding the narrative on which prosecution was based, it cannot be blamed for non-production of other witnesses. It is common experience that witnesses are terrorized or gained over

on behalf of the accused. At the same time, it is also common experience that the members of the public are generally insensitive and reluctant to come forward to report and depose about the crime even though it is committed in their presence. In our considered opinion also, even otherwise, it will be erroneous to lay down as a rule of universal application that non-examination of a public witness by itself give rise to an adverse opinion against the prosecution or that the testimony of a relative of the victim, which is otherwise trustworthy cannot be relied upon unless corroborated by public witnesses. In this connection, one may refer to Ashok Kumar Chaudhary and Others Vs. State of Bihar, , Mahesh Gonnade Vs. State of Maharashtra, , Appabhai and Another Vs. State of Gujarat, We have already seen that PW-6 was gained over on behalf of the accused. We do not find any valid reason for disbelieving the prosecution case in respect of the fact of coming of the present appellants along with others armed with deadly weapons at the market looking for the said Subhas Rudrapaul, Surjya Rudrapaul, Lalmohan Rudrapaul and Bikas Rudrapaul merely on the ground that over and above these witnesses who were having direct first hand knowledge in respect of the fact, some other witnesses were not examined. If the present appellants felt that evidence of any witness who had not been examined by the prosecution would support the defence's case, the appellants should have examined the witness as a defence witness after the closure of the prosecution case and that was also not done by the defence. We do not find any merit in the submission of the learned Counsel of the appellants in this regard. It is not a situation in which we were required to decide guilt or otherwise of the present appellants only on the basis of the fact testified by PW-1 and PW-2. The facts testified by PW-1 and PW-2 are in our opinion, consistent with the broad spectrum of the prosecution case and also compatible with the testimonies of the eye-witnesses (PW-3 and PW-5) about the attack made on the said Subhas Rudrapaul leading to his death.

53. None of the grounds submitted by the learned Counsel of the appellants is sustainable. It is well settled that exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicions thereby destroying social defence.

54. On consideration of the materials before the Court, we are of the opinion that there are cogent and reliable materials to prove beyond reasonable doubt that the three appellants, Chuni Lal Das, Gouranga Das and Kshitish Rudrapaul committed the offence u/s 148 IPC and also the offence u/s 302 IPC read with Section 34 IPC. We do not find sufficient ground for interfering with the impugned order of conviction and sentence passed as against the present three appellants by the learned Sessions Judge, West Tripura, Agartala in ST (WT/A) 32 of 2002. Accordingly, these two appeals are dismissed as having no merit.

55. Send a copy of this order to the concerned trial Court along with the LCR for information.