
(2015) 11 CAL CK 0002
In the Calcutta High Court
Case No : CRA No. 810 of 2013

Illiash Mondal and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 23-11-2015

Acts Referred:

Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 161, 172, 208, 209, 235(2)
Evidence Act, 1872 — Section 101, 102, 103, 145, 165
Penal Code, 1860 (IPC) — Section 107, 228, 302, 304, 306

Citation : (2016) 1 CALLT 281

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

Bench : Division Bench

Advocate : Sekhar Basu and Abhijit Ganguly, for the Appellant; Manjit Singh and Pawan Kumar Gupta, for the Respondent

Final Decision : Allowed

Judgement

Debasish Kar Gupta, J.—This appeal is directed against judgment, order of conviction dated September 12, 2013 and sentence dated September 13, 2013 passed by the learned Additional District & Sessions Judge, Fast Track Court-I, Krishnanagar, Nadia, in S.T. No. I/March/2006, arising out of S.C. No. 57 (9) 2005.

2. By virtue of the impugned judgment the appellants were found guilty for commission of offence punishable under Section 302 /34 of Indian Penal Code (hereinafter referred to as the I.P.C.). They were convicted under Section 235 (2) of the Code of Criminal Procedure (hereinafter referred to as the Cr.P.C.). The appellants were sentenced to suffer rigorous imprisonment for life and to pay fine of Rs. 5000/- each in default to suffer simple imprisonment for 3 years more for the offence punishable under Sections 302 /34 of the I.P.C. It was further directed that in the event fine amount was realized, 50% of the same be remitted to the family of the deceased.

3. The backdrop of the prosecution case is discussed in a nutshell hereunder:--

"One Anarul Sk., PW 1, lodged a written complaint to the Officer-in-charge, Tehatta Police Station, District-Nadia. According to the above complaint dated June 8, 1999, the PW 1 and his brother Asadul Sk. were working at "Patal khet". At about 08.00 hours on the above day, PW 1 went to fetch drinking water at a little distance from their aforesaid field. His aforesaid brother (the victim) was working alone at the above field at that point of time. According to the above written complaint, the appellants came there and began to assault the victim on his head, neck and hand with a sharp cutting weapon like "dao". The PW 1 heard the shouting of his aforesaid brother (the victim) but the appellants fled away before his arrival at the place of occurrence of offence. The de facto complainant (PW 1) brought his above brother to home with the help of the PW 2, PW 7 and two others in a dying condition. Thereafter, he was removed to Behrampur Hospital. According to the letter of complaint, the victim was fighting with death at that point of time. Ultimately, the victim expired on the same day at about 15.55 hours in the above hospital."

4. The surathal report over the dead body of the victim was prepared by Shri Sunil Sinha, Assistant Sub-Inspector of Police, Behrampur Police Station, (PW 8) in connection with Tehatta P.S. U.D. Case No. 310/99 dated June 8, 1999. The above dead body was brought from the Behrampur General Hospital, Murshidabad, to the Police Morgue by Sri Mukti Singh, Home Guard attached to Behrampur Police Station on the same date.

5. The formal FIR bearing Tehatta P.S. FIR No. 97/99 was drawn up by Sri Tapan Ghosh, Sub-Inspector of Police, Tehatta Police Station, District-Nadia, (PW 4) on June 8, 1999 at 13.15 hours against the appellants for committing offence punishable under Section 326 /34 of I.P.C. During investigation the deceased succumbed to the injuries and Section 304 of I.P.C. was added.

6. The post mortem examination of dead body of the victim was conducted on June 8, 1999 at 16.00 hours. According to the post mortem report dated June 8, 1999, the victim was assaulted with the help of hard object indiscriminately and brutally causing his death and the same was homicidal in nature.

7. Amulya Charan Hazra, Sub-Inspector of Police, Tehatta Police Station, Tehatta, District-Nadia, was entrusted with the investigation of the case. A charge-sheet dated February 16, 2000 was filed in connection with the above case against the appellants for committing an offence punishable under Section 326 /304 /34 of I.P.C. showing the appellant No. 2 as absconding. Thereafter, the appellant No. 2 surrendered and he was enlarged on bail. Charge against the appellants was framed on December 16, 2005 for committing offence punishable under Section 302 /34 of I.P.C. After considering the evidences on record (both oral and documentary) as also considering the statement of the appellants under Section 313 of Cr.P.C., the impugned judgment, order of conviction and the sentence were passed.

8. It is submitted by Mr. Sekhar Basu, learned Senior Advocate, appearing on behalf of the appellants that the impugned judgment, order of conviction and sentence cannot be sustained in law for the following reasons:--

"(i) There were contradictions with regard to the place of occurrence, the role played by the appellants for committing the offence. The contradictions of the evidences of PW 1 and PW 2 with those of PW 5, PW 6 and PW 7 were not taken into consideration by the Learned court below in the light of the established principles of law applicable in respect of the hostile witnesses and the type of weapon of offence used by the appellants.

(ii) It was not possible for the PW 1 and PW 2 to witness the commissioning of offence by the appellants with their own eyes taking into consideration the distance of places where they were present at the material point of time. So, they should not be accepted as eye witnesses.

(iii) During cross-examination of the PW 5, PW 6 and PW 7, the prosecution changed the complexion of the case with regard to the respective/different roles played by the appellants in committing the offence. Due to the death of the Investigating Officer during the pendency the trial, he could not be cross-examined for proving the statements of the above hostile witnesses which had been recorded by him. Nor, the above hostile witnesses could be cross-examined taking recourse to the provision of section 145 of the Indian Evidence Act, 1872, (hereinafter referred to as the Evidence Act) as to their previous statements reduced in writing. So, the appellants could not get the opportunity to deal with contradictions in between the above evidences. But the learned Court below did not avail of the power conferred upon the Court under the provisions of Section 311 of Cr.P.C. to prove the statements of the PW 5, PW 6 and PW 7 which had been recorded by the Investigating Officer.

(iv) No credibility could be given to the evidence adduced by the PW 3 so far as the dying declaration of the deceased was concerned. Consequent upon the death of one of the signatory out of two of the Inquest report before the commencement of trial, the PW 3 became the one living signatory of the above report. Though the above witness deposed at the time of examination-in-chief that the dying declaration had been made at the hospital. According to his statement as evident from the inquest report the deceased was assaulted by unknown person on his head, throat with the help of sharp cutting weapon. It was not open for the learned Trial Court to consider the contents of Case Diary in view of the provisions of Section 172 of Cr.P.C.

(v) The carbon copy of the post mortem report was not taken on record in accordance with the provision of Section 65 of the Evidence Act. Consent of the parties could not prevail over the above statutory provision to treat the same as valid piece of documentary evidence.

(vi) The relevant questions had not been asked to the appellants at the time of recording their statements under the provision of Section 313 of the Cr.P.C. to

prove the prosecution case in the light of the provisions of Sections 101 to 103 of the Evidence Act, which caused immense prejudice to the appellants."

9. Mr. Basu relied upon the decisions of Pandurang, Tukia and Bhillia Vs. The State of Hyderabad, , Mobarak Sk. @ Mobarak Hossain and Others Vs. The State of West Bengal, , Fanil Das Vs. State of West Bengal--> , Mahabub Shah v. Emperor, reported in AIR (32) 1954 PC 118 , Mohinder Singh Vs. The State, , Sukhjit Singh Vs. State of Punjab, , Kuldip Singh Vs. State of Delhi, , Sujit Biswas Vs. State of Assam, , Ch. Razik Ram Vs. Ch. Jaswant Singh Chouhan and Others, , Ram Jattan and others Vs. State of U.P., , Chilamakur Nagireddy and Others Vs. State of Andhra Pradesh, , State of Jammu & Kashmir, 1980 (Supp) SCC 641 , Bawa Singh Vs. State of Punjab, , Unreported Judgement dated July 23, 2014 delivered by a Division Bench of this High Court in Tarab Sk. v. State of West Bengal (in re. CRA 161 of 2012) and Smt. Selvi and Others Vs. State of Karnataka, .

10. On the other hand it is submitted by Mr. Manjit Singh, learned Public Prosecutor, High Court at Calcutta, that the complaint was lodged by the PW 1 and his depositions were corroborating with the evidence of PW 2, PW 5 and PW 7. According to the learned Public Prosecutor, there was no discrepancy in the evidence of the prosecution with regard to the commission of offence by the appellants in view of the evidence of the PW 2.

11. According to the learned Public Prosecutor, the place of commission of offence was a Patal khet. There was no doubt regarding the place of occurrence of offence taking into consideration the rough sketch map and the above place was described as Patal khet or the Parble Field or Parble math or Sumuldanga math.

12. The cross-examination of PW 5, PW 6 and PW 7, who were declared hostile, could not be completed due to the inability of the prosecution to bring their respective statements on record which had been recorded by the Investigating Officer due to his death in the meantime. According to the settled principle of law the non-examination of the Investigating Officer due to his death during the pendency of the trial had no adverse effect on treating the above witnesses as hostile witnesses adhering to the provisions of Section 145 of the Evidence Act. However, according to him, the evidence adduced by the PW 5, PW 6 and PW 7 lost credibility after declaring them hostile.

13. According to him, there was no bar in accordance with law to take into consideration evidence of the PW 3 on the ground that he had not disclosed the names of the appellants in Inquest Report. It is further submitted by him that according to the settled principle of law the evidence of PW 3 regarding the dying declaration of the victim disclosing the of names of the appellants for commissioning the offence could not be ignored on the ground that their names had not been disclosed at the time of preparing Inquest Report.

14. With regard to bringing carbon copy of a post mortem report on record with

consent of the parties, it is submitted by the learned Public Prosecutor that in view of the provision of Section 45 read with that of Sections 62 of the Evidence Act, the same could be treated as primary evidence.

15. It is also submitted by him that in view of the deposition of PW 1 corroborating with the evidence of PW 2, the minor discrepancies mentioned hereinbefore with regard to the description of weapon of offence had no adverse effect on the impugned judgment.

16. It is further submitted by him that considering the bald denial of the appellants in reply to the questions put to them while recording their statements under Section 313 of Cr.P.C., there was no impropriety on the part of the learned trial Judge to arrive at a conclusion beyond any doubt regarding commission of offence by the appellants.

17. It is also submitted by the learned Public Prosecutor that in view of the proof of the motive of the appellants in committing the offence the same would not fall within the mischief of Section 304 Part-II of the I.P.C.

18. The learned Public Prosecutor relied upon the decision of Pedda Narayana and Others Vs. State of Andhra Pradesh, , George and Others Vs. State of Kerala and Another, , Amar Singh Vs. Balwinder Singh and Others, , Radha Mohan Singh @ Lal Saheb and Others Vs. State of U.P., , Satbir Singh v. State of Uttar Pradesh, reported in (2009) 13 SCC 750 , Akhtar and Others Vs. State of Uttaranchal, , Boraiah alias Shekar Vs. State, , Brij Bhukhan and Others Vs. The State of Uttar Pradesh, , reported in Mukul Mahto and Others Vs. State of Jharkhand and Another, , Meharaj Singh (L/Nk.) Vs. State of U.P., , Thanedar Singh Vs. State of Madhya Pradesh, in support of his above submissions.

19. We have heard the learned Counsels appearing for the respective parties at length and we have also considered the facts and circumstances of this appeal.

20. Regarding the question of discrepancy in oral evidence, it is well settled that there are bound to be some discrepancies between the depositions of different witnesses when they speak on details, and unless the contradictions are of material dimension, the same should not be used to jettison the evidence in its entirety. But it has to be distinguished from contradiction. While minor discrepancy or variation in evidence will not make the prosecutions case doubtful, contradiction in the statement of witness is fatal for the case. Reference may be made to the decision of State of Himachal Pradesh Vs. Lekh Raj and Another, and the relevant portion of the same is quoted below:--

"7. In support of the impugned judgment the learned counsel appearing for the respondents vainly attempted to point out some discrepancies in the statement of the prosecutrix and other witnesses for discrediting the prosecution version. Discrepancy has to be distinguished from contradiction. Whereas contradiction in the statement of the witness is fatal for the case, minor discrepancy or variance in evidence will not make the prosecution's case doubtful. The normal course of

the human conduct would be that while narrating a particular incident there may occur minor discrepancies, such discrepancies in law may render credential to the depositions. Parrot-like statements are disfavored by the courts. In order to ascertain as to whether the discrepancy pointed out was minor or not or the same amounted to contradiction, regard is required to be had to the circumstances of the case by keeping in view the social status of the witness and environment in which such witness was making the statement. This Court in *Ousu Varghese v. State of Kerala* held that minor variations in the accounts of the witnesses are often the hallmark of the truth of their testimony. In *Jagadish v. State of M.P.* this Court held that when the discrepancies were comparatively of a minor character and did not go to the root of the prosecution story, they need not be given undue importance. Mere congruity or consistency is not the sole test of truth in the depositions. This Court again in *State of Rajasthan v. Kalki* held that in the depositions of witnesses there are always normal discrepancies, however, honest and truthful they may be. Such discrepancies are due to normal errors of observation, normal errors or memory due to lapse of time, due to mental disposition such as shock and horror at the time of occurrence, and the like. Material discrepancies are those which are not normal and not expected of a normal person."

(Emphasis supplied)

21. So far as the place of occurrence of the offence is concerned we find that according to the written complaint lodged by Anarul Sk., the brother of the deceased (PW 1), the place of occurrence of the offence was "Patal khet". Anarul Sk. (the de-facto complainant and PW 1) and the victim had been working at the material point of time in the above "Patal khet". According to the evidence of PW 1, the incident took place in the field which was known as "Sumaldanga math" and it was a "Patal khet" belonging to the victim and the PW 1. During cross-examination it was further deposed by the PW 1 that the above field (khet) was a square land comprising of about two bighas of land. It was deposed by him in course of cross-examination that he along with other persons was present at the place of occurrence when the police went there.

22. According to the evidence of PW 2, the incident took place in the "Patal khet" of "Sumuldanga math" while he was cutting "til" in his land adjacent to the place of occurrence. According to his deposition, the victim and PW 1 went to their "khet" for weeding the land of "Patal khet". The description of the place of occurrence shown in the rough sketch map was corroborating with the evidence of PW 1 And PW 2.

23. Though, credibility of the evidence of PW 5, PW 6 and PW 7 (all of them were declared hostile witnesses) will be considered at a latter part of this judgement. It is permissible to observe leaving aside such consideration at this stage, that the PW 5, PW 6 and PW 7 found the body of the victim had been lying by the side of the "aile". None of them deposed that it was the place of commission of offence. Therefore, the impugned judgement does not require our interference

with regard to place of occurrence.

24. So far as the evidence of PW 1 of witnessing the commission of offence by the appellant was concerned, according to the written complaint lodged by the P.W. 1, both the appellants assaulted the victim but according to his deposition, he saw the appellant No. 2 to hold the victim to enable the appellant No. 1 to assault him. According to his evidence, he heard the shouting of his elder brother from the place where he had gone to fetch water and the distance of the above place was three bighas from the place of occurrence. Therefore, doubt of witnessing the commission of offence by the appellants from the above distance cannot be ruled out.

25. So far as the evidence of the PW 2 with regard to witnessing the commissioning the offence by the appellants is concerned, he was cutting "til" in his field which was 500 cubits away from the place of occurrence. He saw the appellant No. 2 to hold the victim while the appellant No. 1 was assaulting him with a "dao". PW 5 and PW 7 were with him at that time. He rushed to the place of occurrence and seeing him the accused persons fled off. The decision making process of the learned trial judge cannot be affirmed in this regard without corroboration of the above part of his evidence with that of the evidence of PW 5 and PW 7, if available on record after ascertaining the credibility of evidence of those witnesses.

26. The PW 5, PW 6 and PW 7 were declared hostile witnesses. It is the accepted principle of law that the prosecution could rely upon that part of the evidence of hostile witness which was corroborating with the other evidence on record. The decision of Periyasami Novanagar Vs. State, is the authority in respect of the above settled proposition of law and the relevant portion of the above decision is quoted below:--

"27. It was submitted that the evidence of PW 15 Periyasamy must be rejected because he turned hostile. It is trite that the evidence of a hostile witness need not be completely discarded. The prosecution can use that part of his evidence which is corroborated by other evidence on record (see Bhajju v. State of M.P.) Moreover, in this case, the facts are peculiar. From 13-9-1996 when PW 15 Sevi Periyasamy was first examined in the court till 25-9-1998, he supported the prosecution. When after five years he was recalled on 19-9-2001, he resiled from his previous statement only to some extent. On 28-9-2001, he confirmed some portion of his earlier statement but resiled to a large extent from his earlier statement. It is obvious that the recording of his evidence was not continuous. There was huge gap of five years between recording of his examination and re-examination. It is also pertinent to note that on 13-9-1996, 3-11-1997, 5-2-1998 and 25-9-1998, when he narrated the sequence of events and explained the role of the accused, he was not cross-examined at all. It is clear from this that recording of his evidence was unduly prolonged, and in that period, an effort was made to win him over. These facts will have to be taken into consideration while considering the evidentiary value of his evidence. We are of

the opinion that it would be safe to rely on that part of the evidence of this witness, which is corroborated by other evidence on record. "

(Emphasis supplied)

27. In view of the above, it was open for the prosecution to use only that part of evidence of the PW 5, PW 6 and PW 7 which was corroborating with the relevant part of the case diary so far as the statements made by them under Section 161 of Cr.P.C. was concerned. It was up to the extent that they found the victim had been lying by the side of the "aile" with bleeding injury, provided, relevant questions were asked to the appellants at the time of recording their statements under Section 313 of the Cr.P.C.

28. For the purpose of proving other parts of their statements made under the provisions of Section 161 of Cr.P.C. before the investigating officer, it was open for the prosecution to prove the same giving an opportunity to the appellants in accordance with law. Further, if it appeared to the Learned Court below that bringing of the aforesaid parts of the statement of the appellants on record to be essential to the just decision of the case, the same could be done taking recourse to Section 73 of the Evidence Act or Section 311 of the Cr.P.C., as deemed fit and proper. In the case of Darya Singh and Others Vs. State of Punjab, , the Hon"ble Justice P.B. Gajendragadkar, as His Lordship then was, speaking for a three Judges Bench of the Apex Court described the scope and ambit of Section 73 of the Evidence Act as also Section 311 of the Cr.P.C. (Section 540 of the Criminal Procedure Code, 1898) as follows: -

"11. Mr. Bhasin further argued that the murder having taken place in a locality where a large number of citizens resided, it was the duty of the prosecution to have examined independent persons staying in the locality to support its case against the appellants and he suggested that if the prosecution failed to examine such witnesses, it was the duty of the Court to have exercised its powers under Section 540 of the Criminal Procedure Code and to call such witnesses to give evidence. Mr. Bhasin argues that under Section 172 of the Code, it is competent to a criminal court to send for the police diaries of a case under trial in such Court, and if the Court had seen the police diaries, it would have easily found whether the statements of any independent eye-witnesses had been recorded or not. If it found that some statements of independent eyewitnesses had been recorded, it should have called them in exercise of its powers under Section 540 of the Code; since this has not been done, it has introduced an infirmity in the trial, and this Court should set aside the conviction of the appellants and send the case back with a direction, that the Magistrate should exercise his powers under Section 540 as suggested by Mr. Bhasin. In our opinion, this argument is entirely misconceived. It is well settled that in a murder case, it is primarily for the prosecutor to decide which witnesses he should examine in order to unfold his story. It is obvious that a prosecutor must act fairly and honestly and must never adopt the device of keeping back from the Court eye-witnesses only because their evidence is likely to go against the prosecution case. The duty of

the prosecutor is to assist the Court in reaching a proper conclusion in regard to the case which is brought before it for trial. It is no doubt open to the prosecutor not to examine witnesses who, in his opinion, have not witnessed the incident, but, normally he ought to examine all the eye-witness's in support of his case. It may be that if a large number of persons have witnessed the incident, it would be open to the prosecutor to make a selection of those witnesses, but the selection must be made fairly and honestly and not with a view to suppress inconvenient witnesses from the witness-box. If at the trial it is shown that persons who had witnessed the incident have been deliberately kept back to the Court may draw an inference against the prosecution and may, in a proper case, regard the failure of the prosecutor to examine the said witnesses as constituting a serious infirmity in the proof of the prosecution case. In such a case, if the ends of justice require, the Court may even examine such witnesses by exercising its powers under Section 540; but to say that in every murder case, the Court must scrutinise the police diary and make a list of witnesses whom the prosecutor must examine, is virtually to suggest that the Court should itself take the role of a prosecutor. The powers of the Court under Section 540 can and ought to be exercised in the interests of justice whenever the Court feels that the interests of justice so require, but that does not justify Mr. Bhasin's contention that the failure of the Court to have exercised its powers under Section 540 has introduced a serious infirmity in the trial itself."

29. The above proposition of law was repeated and re-iterated by the Apex Court in *The State (Delhi Administration) Vs. Pali Ram*, . The relevant portions of the above decision are quoted below: -

"22. Let us now compare it with Section 73 of the Indian Evidence Act, which runs as under:

"In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the court to have been written or made by that person may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The court may direct any person present in court to write any words or figures for the purpose of enabling the court to compare the words or figures so written with any words or figures alleged to have been written by such person...."

23. It will be seen that the first paragraph of Section 73 is, in substance, a combined version of Section 48 of the English Act II of 1855 and Section 8 of the English Criminal Procedure Act, 1865. The second paragraph of Section 73 is substantially the same as the English Law condensed by Taylor in the above-quoted portion of para 1871.

24. Just as in English Law, the Indian Evidence Act recognises two direct methods of proving the handwriting of a person:

"(1) By an admission of the person who wrote it.

(2) By the evidence of some witness who saw it written."

These are the best methods of proof. These apart, there are three other modes of proof by opinion. They are:

"(i) By the evidence of a handwriting expert. (Section 45)

(ii) By the evidence of a witness acquainted with the handwriting of the person who is said to have written the writing in question. (Section 47)

(iii) opinion formed by the court on comparison made by itself. (Section 73)"

All these three cognate modes of proof involve a process of comparison. In mode (i), the comparison is made by the expert of the disputed writing with the admitted or proved writing of the person who is said to have written the questioned document. In (ii), the comparison takes the form of a belief which the witness entertains upon comparing the writing in question, with an exemplar formed in his mind from some previous knowledge or repetitive observance of the handwriting of the person concerned. In the case of (iii), the comparison is made by the court with the sample writing or exemplar obtained by it from the person concerned.

29. In addition to Section 73 , there are two other provisions resting on the same principle, namely. Section 165 , Evidence Act and Section 540 CrPC, 1898, which between them invest the court with a wide discretion to call and examine any one as a witness, if it is bona fide of the opinion that his examination is necessary for a just decision of the case. In passing the order which he did, the Magistrate was acting well within the bounds of this principle."

(Emphasis supplied)

30. But the Learned Trial Court did not follow the above decision making process to arrive at definite conclusion that the PW 5, PW 6 and/or PW 7 were concealing the truth to some extent during the trial about the manner of assaulting the victim by the appellants. It was not sustainable in law.

31. The validity of the procedure followed by the learned Court below in recording the statements of the appellants under Section 313 will be considered at the latter part of this judgement.

32. For adjudication of the question of credibility of evidence adduced by PW 3 regarding the dying declaration of the deceased disclosing the names of the appellants as responsible for commissioning of offence, it is the settled principle of law that once the evidence of the prosecution witness concerned corroborates with ocular or documentary evidence the same should be considered as a proof of commissioning of offence by an accused beyond reasonable doubt. But the facts and circumstances involved in a case are to be analyzed carefully and critically.

33. It has been held by a Division Bench of this Court in the matter of Mobarak Sk. @ Mobarak Hossain and Others Vs. The State of West Bengal, that when the name of the accused had been known to the witness concerned, non-disclosure of that name at the time of preparation of inquest report in spite of his presence casts on doubt as to the reliability of the prosecution case. The relevant portion of the above decision is quoted below:--

"11.... It is the case of the prosecution that on being informed by the P.W. 5 Imdadul Haque a FIR was registered, the police came to the spot and undertook the investigation. In course of investigation police prepared the sketch map, held the inquest, sent the dead body for post mortem, seized the bloodstained earth from the place of occurrence and examined the available witnesses. Before us one of the very forceful argument for disbelieving the prosecution case against the appellants is this, although after lodging of the FIR naming the appellants as the assailants, police came to the spot and held the inquest, still in the inquest report it was noted that the victim was assaulted by some miscreants. It is no doubt true that the statement contained in an inquest report is the record of what Investigating Officer himself observed and found and such an evidence is the primary evidence in the case and there is no need to record the details of the prosecution case. But at the same time when the inquest is followed by the registration of a First Information Report as regards to the incident then in that case the gist of the FIR or the cause of death as narrated by the witnesses are also required to be noted. "

(Emphasis supplied)

34. We find, according to the evidence of the P.W. 3, that the victim disclosed the names of the appellants to the above prosecution witness when he had been taken to the home before removing him to the hospital. In cross-examination he deposed that his wife and one Kalimuddin were present at the time of above dying declaration. It is evident from the inquest report that the above prosecution witness was present at that time and he was one of the signatories in the above report. The names of the appellants were not disclosed in the inquest report. The another signatory of the inquest report Kalimuddin breathed his last during pendency of the trial. The wife of the PW 3 was not a prosecution witness. Therefore, considering the above peculiar facts and circumstances of this case, the evidence of the PW 3 with regard to the dying declaration should not have been taken as proved beyond doubt in accordance with law as discussed hereinabove.

35. Considering the facts and circumstances involved in the decisions of Podda Narayan (supra), George (supra), Amar Singh (supra), Radha Mohan Singh @ Lal Saheb (supra) and Satbir Singh (supra), we do not find that the peculiar facts and circumstances of the case was not under consideration in any of the aforesaid decisions. So, the general proposition of law discussed in the aforesaid cases does not help the prosecution case.

36. The question of assaulting the victim with the help of sharp cutting weapon takes us to the scope of considering the opinion of the doctor mentioned in the post mortem report.

37. Under the provisions of Section 45 of the Evidence Act, statement relating to opinion of the doctor concerned, which is incorporated in post mortem report regarding cause of death of the deceased person, is considered as opinion of expert person specially skilled in science. Sub-section (2) of Section 32 of the Evidence Act, provides that when a statement, written or verbal, is made by a person in the discharge of professional duty whose attendance as witness cannot be procured without an amount of delay, the same is relevant and admissible in evidence. In the light of the provision of Section 62 , Explanation 2 off the Evidence Act, carbon copy of post mortem report, which is made by one uniform process, is primary evidence of the contents of the original.

38. But, in a case involving peculiar/distinguishable fact where a document produced is admitted by the parties thereto and then it is marked as exhibit, there is no further burden to lead additional evidence in proof of writing that document. No objection can be allowed to be taken as to its admissibility thereof at a later stage. Reference may be made to the decision of the Hon"ble Supreme Court delivered in the matter of *Narbada Devi Gupta Vs. Birendra Kumar Jaiswal and Another*, and the relevant portion of the above decision is quoted bellow:--

"17. We have already reproduced above the contents of Order No. 53 dated 3-9-1982 of the trial court. The appellant cannot be allowed to question the correctness of the said order. The documents were admitted and then exhibited. The plaintiff did not dispute his signatures on the back of them. There was, therefore, no further burden of proof on the defendant to lead additional evidence in proof of the writing on the rent receipts and its due execution by the deceased landlady."

(Emphasis supplied)

39. In the case in our hand, it was not in dispute that the doctor who had examined the dead body was not a prosecution witness. Nor his signature was proved by a competent prosecution witness. But it was an admitted fact that a carbon copy of the post mortem report of the victim, which had been prepared by one uniform process, was brought on record and the same was marked as an exhibit in the First Court with the consent of the parties. Therefore, it is not permissible to allow the appellants to raise objection before us, i.e. before the court of appeal, with regard to admissibility of the aforesaid post mortem report or to raise any dispute in respect of the opinion the concerned doctor incorporated in that report.

40. However, in the decision of *Malay Kumar Ganguly Vs. Dr. Sukumar Mukherjee and Others*, , it has been held by the Apex Court that in a criminal case, subject to sifting of burden depending upon statues and/or decisions of superior courts, fundamental right of an accused is protected under the provisions of Article 21 of

the Constitution of India. The relevant portion of the above decision is quoted below:--

"36. Kunal, however, would contend that the aforementioned documents (Exts.4, 5 and 6) were exhibited without any demur whatsoever. The respondents, furthermore, did not make any prayer to cross-examine the said witnesses.

37. It is true that ordinarily if a party to an action does not object to a document being taken on record and the same is marked as an exhibit, he is estopped and precluded from questioning the admissibility thereof at a later stage. It is, however, trite that a document becomes inadmissible in evidence unless the author thereof is examined; the contents thereof cannot be held to have been proved unless he is examined and subjected to cross-examination in a court of law. The document which is otherwise inadmissible cannot be taken in evidence only because no objection to the admissibility thereof was taken.

38. In a criminal case, subject of course, to the shifting of burden depending upon the status and/or the decisions of the superiors courts, the right of an accused is protected in terms of Article 21 of the Constitution of India. The procedure laid in that behalf, therefore, must be strictly complied with. Exts.4, 5 and 6, in our opinion, are not admissible in evidence in the criminal trial."

(Emphasis supplied)

41. In view of the above, the propriety of the procedure followed by the learned Court below for protection of fundamental right of the petitioner at the time of consideration of opinion of the doctor which was incorporated in the aforesaid post mortem report, will be examined in course of examining the questions asked to the appellants for recording their statements under Section 313 of the Cr.P.C., at the latter part of this judgement.

42. With regard to nature of weapon of offence, we find from the evidence of PW 1 and PW 2 that the appellant No. 1 assaulted the victim with a sharp cutting weapon taking the help of the appellant No. 2. But according to the opinion of the doctor, who had examined the dead body for preparing the post mortem report, the cause of injury was opined as assaulting the victim with hard object. There was also contradiction with regard to the type of weapon used by the appellants. The above contradiction leads us to interfere with the impugned judgment so far as the nature of weapon of offence is concerned.

43. Regarding recording of statements of accused under Section 313 of the Cr.P.C, (Section 342 of the Criminal Procedure Code, 1898), the statement recorded under the aforesaid statutory provision are most important matter to be considered in a trial. The Hon'ble Justice Fazal Ali, as His Lordship then was, while speaking on behalf of a three Judges Bench judgement of the Apex Court, explained the importance as also the manner of application of the above provision of Cr.P.C. in the decision of *Hate Singh Bhagat Singh Vs. State of Madhya Bharat*, , observing that in England and in America an accused person

could state in his own way in the witness-box. In our country, an accused person is not allowed to enter the box and speak on oath in his own defense. In our country, the statements of an accused recorded under the provision of Section 313 Cr.P.C. (Section 342 of the Criminal Procedure Code, 1898) is intended to take the place what in England and in America he would be free to state in his own way in the witness-box. That statement has to be received in evidence and treated as evidence for the purpose of due consideration at the trial. The relevant portion of the above judgment is quoted below:--

"(8) Now the statements of an accused person recorded under Ss. 208 , 209 and 342 , Criminal P.C. are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box. They have to be received in evidence and treated as evidence and be duly considered at the trial (Ss. 287 and 342)

This means that they must be treated like any other piece of evidence coming from the mouth of a witness and matters in favour of the accused must be viewed with as much deference and given as much weight as matters which tell against him. Nay more. Because of the presumption of innocence in his favour even when he is not in a position to prove the truth of his story, his version should be accepted if it is reasonable and accords with probabilities unless the prosecution can prove beyond reasonable doubt that it is false. We feel that this fundamental approach has been ignored in this case."

(Emphasis supplied)

44. The above proposition of law was repeated and reiterated by the Hon"ble Supreme Court time and again. The repetition and reiteration of the above proposition of law by the Apex Court in the matter of Amit Kapoor Vs. Ramesh Chander and Another, and relevant portion of the above decision is quoted below:

"29. In the light of the above principles, now if we examine the findings recorded by the High Court, then it is evidence that what weighed with the High Court was that firstly it was an abuse of the process of court and, secondly, it was a case of civil nature and that the facts, as stated, would not constitute an offence under Section 306 read with Section 107 IPC. Interestingly and as is evident from the findings recorded by the High Court reproduced supra that "this aspect of the matter will get unravelled only after a full-fledged trial", once the High Court itself was of the opinion that clear facts and correctness of the allegations made can be examined only upon full trial, where was the need for the Court to quash

the charge under Section 306 at that stage. Framing of charge is a kind of tentative view that the trial court forms in terms of Section 228 which is subject to final culmination of the proceedings.

30. We have already noticed that the legislature in its wisdom has used the expression "there is ground for presuming that the accused has committed an offence". This has an inbuilt element of presumption once the ingredients of an offence with reference to the allegations made are satisfied, the Court would not doubt the case of the prosecution unduly and extend its jurisdiction to quash the charge in haste. A Bench of this Court in *State of Maharashtra v. Som Nath Thapa* referred to the meaning of the word "presume" while relying upon Black's Law Dictionary. It was defined to mean "to believe or accept upon probable evidence"; "to take as proved until evidence to the contrary is forthcoming". In other words, the truth of the matter has to come out when the prosecution evidence is led, the witnesses are cross-examined by the defence, the incriminating material and evidence is put to the accused in terms of Section 313 of the Code and then the accused is provided an opportunity to lead defence, if any. It is only upon completion of such steps that the trial concludes with the court forming its final opinion and delivering its judgment. Merely because there was a civil transaction between the parties would not by itself alter the status of the allegations constituting the criminal offence."

(Emphasis supplied)

45. In course of considering the evidence on record, we do not find from the statements of the appellants recorded under Section 313 of the Cr.P.C., any question inviting answer from any one of the appellant in respect of the evidence of the prosecution which created contradictions, doubts regarding credibility of the same as discussed hereinabove. One of such contradiction was absence of any question regarding nature of weapon of offence as mention in the evidence of PW 1 and PW 2 vis-?-vis the opinion of the doctor concerned incorporated in the post mortem report. No question was asked to the appellants in connection with the aforesaid contradiction. Therefore, the decision making process of the learned Court below with regard to consideration of the statements of appellant recorded under Section 313 of Cr.P.C. cannot be sustained in law applying the above settled principle of law.

46. On the basis of the discussions and observations made hereinabove, we are of the considered view that the decision making process of the Learned Court below to treat the PW 1, PW 2, PW 5, PW 6, and PW 7 as eye witnesses cannot be sustained in law. The decision making process to arrive at a conclusion that dying declaration of the victim had been proved beyond doubt on the basis of the evidence of PW 3 was incorrect. The appellants were also deprived of opportunity of recording their statements adhering to the provision of Section 313 of the Cr.P.C. causing prejudice to them.

47. The impugned judgment, order of conviction and sentence are quashed and

set aside.

48. This appeal is, thus, allowed. The appellants are acquitted.

49. The appellant No. 2 is on bail. The appellant No. 1 is directed to be set free expeditiously unless required in any other criminal case.

50. Let the Lower Court's records be sent back expeditiously.

51. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, on priority basis.

Md. Mumtaz Khan, J.

I agree.