

(2013) 02 GAU CK 0053
In the Gauhati High Court
Case No : Criminal Appeal No. 12 (J) of 2009

Indraban Chakma @ Bijimua

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 26-02-2013

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 161, 174, 313, 374

Evidence Act, 1872 — Section 134

Penal Code, 1860 (IPC) — Section 299, 300, 302, 304

Citation : (2013) 3 GLD 62 : (2013) 2 GLT 1058

Hon'ble Judges : U.B. Saha, J;S.C. Das, J

Bench : Division Bench

Advocate : Ratan Datta, for the Appellant; R.C. Debnath, Addl. PP, for the Respondent

Final Decision : Dismissed

Judgement

S.C. Das, J.—This criminal appeal u/s 374 of Cr.P.C. is directed against the judgment and order of conviction and sentence, dated 20.11.2006, passed by learned Addl. Sessions Judge, Dharmanagar, North Tripura, in case No. S.T. 3 (NT/D) of 2006, whereby learned Addl. Sessions Judge found the accused-appellant, Indraban Chakma @ Bijimua, guilty of committing offence punishable u/s 302 of IPC and sentenced him to suffer imprisonment for life and to pay a fine of Rs. 10,000/- (rupees ten thousand), in default of payment of fine to suffer further RI for one year. Heard learned counsel, Mr. Ratan Datta for the appellant and learned Addl. P.P., Mr. R.C. Debnath for the State respondent.

2. Fact of the case may be summarized thus:-

2.1 The deceased, Yudhya Kr. Chakma was the brother-in-law (sister's husband) of accused Indraban Chakma. Both were the residents of Ugalcherra, a remote tribal hamlet, under PS Pecharthal, North Tripura. On 01.09.2005, at about 9.00/10.00 pm, the accused Indraban came to the house of Yudhya Kr. and was demanding Yudhya Kr. and his family to vacate their homestead land claiming

that the land belonged to him (accused). On that issue he picked up quarrel with Yudhya Kr. and his wife Ajanta and/or Anjana (PW 9) and at that time, suddenly, the accused taken out a dagger/bhojali (a sharp cutting pointed weapon) and struck severe blow on the belly of the deceased in presence of his wife (PW 9) and their children (PWs 2 and 3), as a result, Yudhya Kr. received severe injury and smeared with blood. PW 9, the wife of the deceased, tried to resist her brother Indraban, but she was pushed down. On the alarm raised by PW 9 and her children neighbouring people, including PWs 1, 10, 11 and others rushed to the spot and found Yudhya Kr. with bleeding injury and he was not in a position to speak. PW 1, a nephew of Yudhya Kr. (sister's son), and PWs 11 and 10 (brother and brother's wife of deceased) along with PW 9 (wife of the deceased) shifted Yudhya Kr. to Pecharthal hospital on that night itself, from where he was referred to RGM hospital (District hospital) at Kailashahar and, on the following morning, at about 8.30 am, he succumbed to the injuries. After assaulting Yudhya Kr., the accused left the place leaving the dagger/bhojali near the bamboo fencing. A. Police officer of Kailashahar P.S. prepared inquest report over the dead body and thereafter arranged for postmortem examination of the dead body. On that day in the afternoon, PW 1 went to Pecharthal PS and narrated the occurrence, which was reduced into writing by SI Bidhu Bhushan Das (PW 19), O/C of the PS and, accordingly, he registered Pecharthal PS Case No. 42 of 2005 u/s 302 of IPC and took up investigation.

2.2 In course of investigation, I.O. examined material witnesses and recorded their statements u/s 161 of Cr.P.C., prepared hand-sketch map of the place of occurrence, seized the weapon of offence, i.e. the dagger/bhojali by preparing seizure list, arrested accused Indraban Chakma, collected inquest report(Exbt. 8) from Kailashahar PS, which was prepared by ASI, Sankar Biswas at RGM hospital and also collected postmortem report (Exbt. 5) from RGM hospital and, thereafter, submitted charge sheet.

2.3 Cognizance was taken on the basis of the charge sheet and, thereafter, on commitment of the case to the Court of Addl. Sessions Judge from the Court of Judicial Magistrate, charge u/s 302 of IPC was framed against the accused to which the accused pleaded not guilty and claimed to be tried.

2.4 In course of trial, prosecution examined as many as nineteen witnesses, namely:

PW 1, Sri Sindhumoni Chakma,

PW 2, Smt. Sandhya Rani Chakma,

PW 3, Sri Jayanta Chakma,

PW 4, Sri Indramohan Chakma,

PW 5, Sri Matilal Chakma,

PW 6, Sri Hiralal Chakma,

PW 7, Sri Nabadwip Chakma,
PW 8, Sri Bhagyaban Chakma,
PW 9, Smt. Ajanta Chakma,
PW 10, Smt. Santipati Chakma,
PW 11, Sri Purna Kr. Chakma,
PW 12, Sri Santi Ranjan Chakma,
PW 13, Sri Amlab Bhowmik,
PW 14, Sri Sisir Chakma,
PW 15, Sri Ritan Sarkar,
PW 16, Sri Subir Das,
PW 17, Dr. Sunirmal Nath,
PW 18, Dr. (Mrs.) Anindwita Chakma,
PW 19, Sri Bidhu Bhusan Das.

Prosecution also proved the FIR lodged by PW 1 (Exbt. 1), hand-sketch map with index (Exbt. 7 series), seizure list of dagger/bhojali (Exbt. 3), seized bhojali/dagger [(Exbt. (I)(material object)]. Injury report of the deceased from Pecharthal hospital submitted by PW 18 (Exbt. 6), postmortem report collected from RGM hospital, Kailashahar submitted by PW 17 (Exbt. 5).

2.5. Out of the witnesses examined by the prosecution, PW 9 is the wife of the deceased and full-blood sister of the accused and PWs 2 and 3 are the daughter and son of the deceased and PW 9. According to the prosecution, they are eyewitnesses of the occurrence. PW 11 is the elder brother of the deceased and PW 10 is the wife of PW 11 and according to the prosecution PW 10 is also an eyewitness of the occurrence and PW 11 found the accused fleeing away from the house of the deceased.

PW 1 is the nephew of the deceased and is the maker of the FIR as already stated earlier. PWs 4, 5, 6, 7, 8 and 12 are all neighbours of the accused and the deceased and on hearing alarm they went to the house of the deceased and learnt about the incident. Out of them, PW 4 was declared hostile by the prosecution and was cross-examined. PW 13 is another important witness, who accompanied the accused to the house of the deceased and when the accused picked up quarrel with the deceased he left the house. PWs 17 and 18 are the medical officers, as already stated, and PW 19 is the I.O. of the case. PWs 14, 15 and 16 are the formal witnesses.

2.6 Prosecution witnesses were cross examined on behalf of the accused. After closure of the prosecution evidence, accused was examined u/s 313 of Cr.P.C.

and on his turn, accused declined to adduce any defence evidence.

2.7 Learned Addl. Sessions Judge, at the conclusion of trial, found the accused-appellant guilty of the charge framed against him and sentenced him as aforesaid and, hence, this appeal.

3. Let us now travel through the material parts of the evidence on record.

3.1 PW 13 in his deposition stated that the deceased Yudhya Kr. was his brother-in-law and the accused was the cousin of his wife. On the night of occurrence, the accused Indraban took him as his companion and went to the house of Yudhya Kr. stating that he (accused) would go to the house of his sister to visit them. But on their arriving there the accused picked up quarrel with the deceased and his wife stating that they (deceased and his wife) should leave the place where they were residing constructing their house. Seeing them making quarrel he went back to his house. Subsequently, on that night itself he heard about the incident of stabbing of Yudhya Kr. by the accused after his departure from the house.

In cross-examination, he stated that he did not see any weapon in the hand of the accused but he could not say whether the accused was carrying any weapon inside his wearing or not. When the accused took him to the house of the deceased, the accused did not tell him anything that he was going there to assault his brother-in-law. He (accused) simply told him that he was going there to visit them. On arriving in the house of the deceased, after 3/4 minutes he (witness) left the house as they started quarrel almost on the arrival of the accused in their house. He learnt from the neighbouring people that the land where the house of deceased Yudhya Kr. was situated was purchased from the rather of accused and, thereafter, they constructed the house. He denied the suggestion that he made false statement

The above statement of the witness has not been shaken in cross-examination.

It makes clear that the accused went to the house of the victim and picked up a quarrel on the issue that the victim with his family should vacate the homestead land.

3.2 PW 9 is the star witness of prosecution. She is the wife of the deceased and full-blood sister of the accused.

In her deposition she stated that the deceased Yudhya Kr. Chakma was her husband and the accused Indraban Chakma was her full-blood brother. Her husband was stabbed on his abdomen by the accused. Regarding land dispute, her brother (accused) came to their house, perhaps, with a knife and made quarrel with her husband. The accused told them that they should vacate their existing house complex and for that reason the accused started quarrel with them. After making quarrel for about 5/6 minutes, the accused stabbed her husband. She tried to resist the accused to save her husband but the accused pushed her down. Seeing the incident, she raised alarm and so many

neighbouring people arrived there hearing her cry. Her son and daughter, who were in the house of her neighbour for watching TV, also came to the house hearing the noise and they also saw the occurrence of stabbing. The incident took at night but she could not tell the exact time. Her husband subsequently died at RGM hospital.

Learned trial Judge recorded an observation that the witness was a tribal and rustic lady and had no idea about the time.

In cross-examination she stated that the tilla land where she was residing was originally belonged to her father and she purchased the same from her father. Her son and daughter were watching TV in the adjacent hut of their neighbour.

Truthfulness of the statement of PW 9 has not been shaken in any manner. It seems to be cogent, confident and authentic. The sole testimony of PW 9 is sufficient to hold that the accused came to her house, picked up a quarrel on the issue of their homestead land and in the midst of the quarrel the accused stabbed her husband severely with a dagger and as a result, her husband died.

3.3 PWs 2 and 3 also in their deposition stated the fact that they were watching TV in the house of their neighbour and hearing alarm they came to their house and found their father, being stabbed by their maternal uncle (the accused Indraban).

In the deposition of PW 2 the trial Judge recorded an observation that the witness was a rustic tribal lady and could not express very well the matter she wanted to tell before the Court what she had witnessed.

PW 3 further stated that the accused Indraban after the incident fled away and he also identified Exbt. (I), the seized dagger with which his father was stabbed. PW 3 also stated that the occurrence took place at about 10.00 pm.

Both the witnesses stated that their father died at Kailashahar hospital.

Their evidence also is found to be cogent, natural and not shaken in cross examination.

3.4 PW 10 stated that on the night of occurrence, hearing hue and cry, she went to the house of Yudhya Kr. and found a scuffling between Yudhya Kr. and the accused Indraban and at that time Indraban stabbed Yudhya Kr. by a dagger. After giving the knife blow the accused pulled out the dagger and, thereafter, fled away pushing the dagger in the bamboo fencing of the hut.

On going through the cross-examination of the witness it seems that the witness did not tell before the I.O. that she had seen the occurrence but the FIR, which has been proved as Exbt. 1, shows that she also accompanied the deceased to the hospital and went to the house of the deceased immediately after hearing alarm.

Admittedly, alarm was raised by PW 9 and her children when the deceased was

stabbed and after hearing alarm the witness might have gone there and she might or might not see the actual stabbing. Her evidence, therefore, does not inspire confidence as an eyewitness. But it substantially corroborates the evidence of P.Ws. 9, 2 and 3.

3.5 PW 11 stated that hearing alarm he rushed to the house of the deceased and found accused Indraban was fleeing away from the house. On arrival in the house he found Yudhya Kr. was lying with severe injury in his abdomen.

In cross-examination, he stated that his wife went to the house of Yudhya Kr. before him. He also stated that he told the police officer that he found Indraban to flee away from the house of the deceased.

In his previous statement recorded by the I.O., however, such statement was not found as recorded by the trial Judge.

3.6 Both PWs 10 and 11 are close neighbours of the deceased and they rushed to the spot immediately after the occurrence hearing cries and they along with PW 1 and PW 9 took the deceased to Pecharthal hospital.

They are material witnesses but they might not see the actual moment of stabbing the deceased.

3.7 PW 1 stated that hearing alarm he went to the house of his maternal uncle, Yudhya Kr., the deceased, and found him with bleeding injury and he was told that accused, Indraban stabbed him. He along with PWs 9, 10 and 11 took the deceased to hospital. On the following day he lodged the FIR.

3.8 PW 18, the MO, Pecharthal PHC, stated that he found the following injuries:

- 1). Stab injury over left hypochondrial area just below the ribs medially direction was left to midline of body, it was a deep injury.
- 2). multiple abrasion and bruise marks over both legs;
- 3). multiple abrasion and bruise marks over back and left hand.
- 4). Profuse bleeding present from the said stab wound edge of the injury was sharp out edged. The patient was in shock. The age of the injury was recent, i.e., fresh in nature. Weapon used sharp and pointed.

He further stated that the injuries were grievous in nature. Exbt. I (dagger) was shown to the witness to which he opined that the injury of the victim might be caused by that weapon.

His evidence remained unshaken.

3.9 PW 17 was the medical officer of RGM hospital and in his deposition he stated that he has done P.M. examination over the dead body and he found injury over the left hypochondria (abdomen). He found incised wound--size 2" x 1 x 10"". He also found injuries inside the stomach namely perforation of stomach by incised

wound and also incised wound over spleen measuring 1" x 2". He found another injury in the peritoneal cavity filled with blood and food materials. He collected the portion of stomach, spleen, kidney and sent for forensic examination. In his opinion, the cause of death was due to hemorrhagic shock following injury by sharp and long weapon. The time of death was less than 24 hours prior to the autopsy. He duly proved the post mortem report and his signature therein. He also mentioned in his report about the nature of weapon used namely sharp and long weapon means a sharp pointed long knife or similar instrument. He was shown Exbt. I, to which he stated that the injuries in the stomach of the victim may be caused by that weapon. In cross examination he stated that the depth of injury was about 10" from the skin level. The victim was a stout bodied person. He denied the suggestion that he did not properly conduct the P.M. examination.

4. A meticulous reading of the evidence, as discussed above, makes it abundantly clear that Yudhya Kr. died a homicidal death because of severe stab injury on his abdomen and according to the deposition of the witnesses the accused Indraban Chakma assaulted the deceased with a dagger/bhojali (Exbt. I and, as a result, Yudhya Kr. died.

5. The first argument advanced by learned counsel, Mr. Datta is that the incident occurred on 01.09.2005 during night time at about 9/10 pm and the deceased died on 02.09.2005 at about 8.30 am but the FIR was lodged on that day, i.e. on 02.09.2005, at about 2.45 pm. The delay in lodging the FIR has created a serious doubt in respect of the authenticity of the prosecution case and, therefore, the prosecution case is liable to be disbelieved as stated by the witnesses.

On the contrary, learned Addl. P.P., Mr. Debnath, has submitted that the incident occurred in an extreme interior tribal hamlet and all the witnesses were illiterate or semiliterate and they explained the delay in the FIR itself stating that all the members of the family were busy with the treatment of Yudhya Kr. and, therefore, there was delay in lodging the FIR.

5.1 The explanation given in the FIR (Exbt. 1) has not been controverted. Further there is no universal rule to suspect an FIR simply because of delay in lodging the same. The facts and circumstances of the present case, where the accused and the deceased are close relatives and the incident occurred in presence of full-blood sister of the accused, who has narrated the occurrence, we find nothing to disbelieve the prosecution case as a whole for the delay in lodging the FIR.

5.2 Learned counsel, Mr. Datta, in support of his contention referred the case of Ramesh Baburao Devaskar and Others Vs. State of Maharashtra, wherein we find it was a case of group rivalry between two fighting groups and in that case the FIR was considered as a very important document wherein the names of the accused persons did not appear though, subsequently, the witness, who would lodge the FIR, came before the court as an eyewitness of the occurrence.

The fact of that case is clearly distinguishable to that of the fact of present case and the ratio of the decision, therefore, cannot be applied.

5.3 Learned counsel, Mr. Datta has also referred the case of Radha Mohan Singh @ Lal Saheb and Others Vs. State of U.P., and Ravi @ Ravichandran Vs. State rep. by Inspector of Police, .

On going through both the reported cases we find no relevance at all to apply the ratio of those decisions in the facts and circumstances of the present case.

5.4 An FIR is an information first in point of time of a cognizable offence on the basis of which investigation commences. Since it is the information first in point of time after the occurrence, it deserves a valuable consideration but it cannot be treated as substantive evidence and use of the same is simply for contradicting the witness that is the maker of the FIR.

In the given facts and circumstances of the present case, we find nothing to draw an adverse inference for lodging the FIR on 02.09.2005 at 2.45 pm while it is evident that the wife and relatives of the victim were accompanying him to hospital and the victim died on the following morning and, thereafter, postmortem examination, etc., were done at Kailashahar hospital and subsequent thereto the FIR was lodged at Pecharthal P.S. far away from Kailashahar.

5.5 The Supreme Court in the case of Ramdas and Others Vs. State of Maharashtra, in paragraph 24 of the judgment has observed thus--

Counsel for the State submitted that the delay in lodging the first information report in such cases is immaterial. The proposition is too broadly stated to merit acceptance. It is no doubt true that mere delay in lodging the first information report is not necessarily fatal to the case of the prosecution. However, the fact that the report was lodged belatedly is a relevant fact of which the court must take notice. This fact has to be considered in the light of other facts and circumstances of the case, and in a given case the court may be satisfied that the delay in lodging the report has been sufficiently explained. In the light of the totality of the evidence, the court of fact has to consider whether the delay in lodging the report adversely affects the case of the prosecution. That is a matter of appreciation of evidence. There may be cases where there is direct evidence to explain the delay. Even in the absence of direct explanation there may be circumstances appearing on record which provide a reasonable explanation for the delay. There are cases where much time is consumed in taking the injured to the hospital for medical aid and, therefore, the witnesses find no time to lodge the report promptly. There may also be cases where on account of fear and threats, witnesses may avoid going to the police station immediately. The time of occurrence, the distance to the police station, mode of conveyance available, are all factors which have a bearing on the question of delay in lodging of the report. It is also possible to conceive of cases where the victim and the members of his or her family belong to such a strata of society that they may not even be aware

of their right to report the matter to the police and seek legal action, nor was any such advice available to them. In the case of sexual offences there is another consideration which may weigh in the mind of the court i.e. the initial hesitation of the victim to report the matter to the police which may affect her family life and family's reputation. Very often in such cases only after considerable persuasion the prosecutrix may be persuaded to disclose the true facts. There are also cases where the victim may choose to suffer the ignominy rather than to disclose the true facts which may cast a stigma on her for the rest of her life. These are cases where the initial hesitation of the prosecutrix to disclose the true facts may provide a good explanation for the delay in lodging the report. In the ultimate analysis, what is the effect of delay in lodging the report with the police is a matter of appreciation of evidence, and the court must consider the delay in the background of the facts and circumstances of each case. Different cases have different facts and it is the totality of evidence and the impact that it has on the mind of the court that is important. No strait jacket formula can be evolved in such matters and each case must rest on its own facts. It is settled law that however similar the circumstances, facts in one case cannot be used as a precedent to determine the conclusion on the facts in another, (See *Pandurang, Tukia and Bhilla Vs. The State of Hyderabad*,). Thus mere delay in lodging of the report may not by itself be fatal to the case of the prosecution, but the delay has to be considered in the background of the facts and circumstances in each case and is a matter of appreciation of evidence by the court of fact.

5.6. In the case of *Sahebrao and Another Vs. State of Maharashtra*, , the Supreme Court has held--

The settled principle of law of this Court is that delay in filing FIR by itself can not be a ground to doubt the prosecution case and discard it. The delay in lodging FIR would put the court on its guard to search if a plausible explanation has been offered and if offered whether it is satisfactory.

5.7 The Supreme Court in the case of *State of Himachal Pradesh Vs. Gian Chand*, has held--

Delay in lodging the FIR cannot be used as a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is a possibility of embellishment in the prosecution version on account of such delay, the delay would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the delay cannot by itself be a ground for disbelieving and discarding the entire prosecution case.

In the given facts and circumstances of the present case, delay has been explained in the FIR itself on which no question was put to PW 1 by the defence

at the time of cross-examination. Even no question was put to PW 9 or any other witness regarding the delay in lodging the FIR. There is, therefore, no reason to doubt the prosecution case for the delay in lodging the FIR in the facts and circumstances of the present case.

6. The next argument advanced by learned counsel, Mr. Datta is that the inquest report was prepared at Kailashahar hospital on 02.09.2005 at 10.30 am by one ASI of Kailashahar PS and PW 9, the wife of the deceased, was an eyewitness in the inquest. She would lodge the FIR at that time. So, the FIR, which has been recorded subsequent thereto, loses its importance and cannot be regarded as FIR.

Learned Addl. P.P., on the other hand, has submitted that the deceased succumbed to the injury at Kailashahar hospital and an ASI of police of Kailashahar P.S. prepared the inquest report in the hospital in presence of PWs 9 and 10 and police officer would record the FIR at Kailashahar but they did not do so. The incident, admittedly, occurred under the jurisdiction of Pecharthal PS, faraway from Kailashahar and, therefore, on return to the village, PW 1 went to the police station and lodged the FIR. Since the place of occurrence was under the jurisdiction of Pecharthal PS, ASI of Kailashahar PS simply prepared the inquest report and did not take further action. On that ground Exbt. 1, i.e., the FIR, lodged by PW 1 cannot be treated to have lost its credibility.

We have considered the submissions of learned counsel. As already stated above, an FIR is an information in respect of a cognizable offence, first in point of time. In the present case Exbt. 1 is the FIR lodged by PW 1 and, there is no other document to show that any other information about the occurrence was lodged either at Kailashahar PS or at Pecharthal PS. ASI of police, who prepared the inquest report at Kailashahar hospital, would record the statement of the witnesses, who were accompanying the dead body, as FIR and transmit the same to Pecharthal P.S. for registration of the case but that was not done. It was definitely a lapse of the police officer for which in the given facts and circumstances of the present case we find nothing to doubt the conduct of PWs 9 and 10 or that of the Exbt. 1, i.e. the FIR. Further, in our considered opinion, the inquest report was prepared by the police officer in pursuance of the provision prescribed in Section 174 of Cr.P.C., which was tagged with the prosecution case in course of investigation and simply because the inquest report was prepared prior to recording of FIR, in the facts of the present case, where the incident occurred under the jurisdiction of different police station, cannot create any doubt on the veracity or authenticity of the prosecution case.

We may gainfully refer here the observation of the apex court in the case of Nirpal Singh and Others Vs. State of Haryana, wherein it is held--It is not at all necessary in law to incorporate the statements of the witnesses in the inquest report. The inquest report is to be made by the Investigating Officer just to indicate the injuries which he has found on the bodies of the deceased persons. It may be witnessed by one or two persons but it is not at all necessary for the Investigating Officer to record the statements of the witnesses or to get the

statements of witnesses signed on the inquest report and incorporate the same in it which introduces an element of chaos and confusion and demanding an explanation from the prosecution regarding the statements made therein (para 16). It is recommended that in future the investigating officer should not associate any eye witnesses with the recovery memos, because that pertakes of an attempt to make the witness omnibus (para 24).

In the case at hand, Yudhya Kumar died at Kailashahar RGM Hospital. A police officer (ASI) of Kailashahar P.S. prepared the inquest report, who has not been examined. No question put by defence to PW 9 or 10 as to why no FIR was lodged there at Kailashahar. I.O. also was not questioned on that point. Under such circumstances we find nothing to hold that FIR lost its credibility.

7. The next argument advanced by learned counsel, Mr. Datta, is that PW 9 was not examined by I.O. on 02.09.2005, i.e. on the date of lodging the FIR, and so her sole evidence cannot be solely relied for recording a conviction.

Per contra, learned Addl. P.P. has submitted that PW 9 was examined by the I.O. on 04.09.2005. No question was put to the I.O. regarding non-examination of PW 9 on 02.09.2005. No question was also put to her. She lost her husband in the hand of her brother. Her evidence deserves all credibility. While no question was put to I.O., on that score, there is no scope to doubt the evidence of PW 9 on that ground. He relied on the decision of the Apex Court in the case of State of U.P. Vs. Satish, . In paragraph 19 of the judgment, the Apex Court observed thus--

19. As regards delayed examination of certain witnesses, this Court in several decisions has held that unless the Investigating Officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion [See Ranbir and Others Vs. State of Punjab, , Bodh Raj @ Bodha and Others Vs. State of Jammu and Kashmir, and Banti @ Guddu Vs. State of Madhya Pradesh,].

In the case of Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi), , the Apex Court has held that delay in recording the statement of the witnesses do not necessarily discredit the testimonies. The Court may rely on such testimonies if they are cogent and credible.

In the present case, neither in the cross-examination of I.O. nor in the cross-examination of PW 9, no reference made from the defence to doubt the evidence of PW 9 for her examination on 04.09.2005. So, this argument has got no merit at all.

8. The next argument advanced by learned counsel, Mr. Datta is that the deposition of eyewitnesses, i.e., PWs 2, 3, 9 and 10, materially contradicted each other and, therefore, their evidence are liable to be discarded.

Learned Addl. P.P., on the contrary, has submitted that minor contradictions in the statements are guarantee of truth and there is nothing to disbelieve the eyewitnesses, who are close relatives of the accused.

8.1 Learned counsel, Mr. Datta has referred the case of Musheer Khan @ Badshah Khan and Another Vs. State of Madhya Pradesh, .

On going through the judgment of the apex Court in the case of Musheer Khan (supra), we find the fact of that case is clearly distinguishable to the fact of the present case and the principles discussed in that case can have no manner of application in the fact of the present case. In that reported case, the victim Mallu Bhaiya was shot in his vehicle by some persons, who arrived on the spot with a scooter at about 7.30 pm and, immediately after the firing, they escaped with the scooter. The case was based on the evidence of T.I. parade of accused persons and the witnesses, who alleged to have found the miscreants firing on the deceased and thereafter escaped from the scene of occurrence, were found to be contradictory and the Supreme Court, therefore, held that in the given facts and circumstances of that case those witnesses were not worthy enough to record a conviction of the accused persons.

The present case, at hand, stands on a different fact compared to that case and we find nothing to apply the fact and ratio of that decision in the present case.

8.2 Learned counsel, Mr. Datta has also referred the decision of A. Shankar Vs. State of Karnataka, , and on going through that reported case we find that it was also a case of a different and distinguishable fact to that of the case at hand and, so, we find nothing more to discuss the ratio of that in the facts of the present case.

8.3 Learned Addl. P.P. has referred the case of Krishna Mochi and Others Vs. State of Bihar, .

In paragraph 31 of the judgment, His Lordship Hon''ble Justice B.N. Agarwal has observed thus--

31. It is a matter of common experience that in recent times there has been a sharp decline of ethical values in public life even in developed countries much less a developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power. A witness may not stand the test of cross-examination, which may be sometimes, because he is a bucolic person and is not

able to understand the question put to him by the skilful cross-examiner and at times under the stress of cross-examination, certain answers are snatched from him. When a rustic or illiterate witness faces an astute lawyer, there is bound to be imbalance and, therefore, minor discrepancies have to be ignored. These days it is not difficult to gain over a witness by money power or giving him any other allureances or giving out threats to his life and/or property at the instance of persons, in/or close to powers and muscle men or their associates. Such instances are also not uncommon where a witness is not inclined to depose because in the prevailing social structure he wants to remain indifferent. It is most unfortunate that expert witnesses and the investigating agencies and other agencies which have an important role to play are also not immune from decline of values in public life. Their evidence sometimes becomes doubtful because they do not act sincerely, take everything in a casual manner and are not able to devote proper attention and time.

Relying on *Inder Singh and Another Vs. The State (Delhi Administration)*, *State of U.P. Vs. Anil Singh*, *State of West Bengal Vs. Orilal Jaiswal and another*, and the case of *Mohan Singh and Another Vs. State of M.P.*, His Lordship Hon'ble Justice B.N. Agarwal, for the Bench in the Supreme Court, in the case of *Krishna Mochi (supra)* in paragraph 32 observed thus:

32. Thus, in a criminal trial a Prosecutor is faced with so many odds. The court while appreciating the evidence should not lose sight of these realities of life and cannot afford to take an unrealistic approach by sitting in an ivory tower. I find that in recent times the tendency to acquit an accused easily is galloping fast. It is very easy to pass an order of acquittal on the basis of minor points raised in the case by a short judgment so as to achieve the yardstick of disposal. Some discrepancy is bound to be there in each and every case which should not weigh with the court so long it does not materially affect the prosecution case. In case discrepancies pointed out are in the realm of pebbles, the court should tread upon it, but if the same are boulders, the court should not make an attempt to jump over the same. These days when crime is looming large and humanity is suffering and the society is so much affected thereby, duties and responsibilities of the courts have become much more. Now the maxim "let hundred guilty persons be acquitted, but not a single innocent be convicted" is, in practice, changing the world over and courts have been compelled to accept that "society suffers by wrong convictions and it equally suffers by wrong acquittals". I find this Court in recent times has conscientiously taken notice of these facts from time to time.

It is a well settled principle of law that evidence is to be considered on the basis of its quality and not the quantity. Section 134 of the Evidence Act is a pointer in that regard. This provision follows the maxim that evidence is to be weighed and not counted. The Apex Court in the case of *Krishna Mochi (supra)*, culled out from *Anil Phukan Vs. State of Assam*, and *Maqsoodan and Others Vs. State of Uttar Pradesh*, held thus:

Appreciation of evidence cannot conceive of any rule of universal application and is certainly not to be treated as a theorem, and there can be no empirical formula. The evidence on the facts of each case has to be analysed and conclusions drawn, and there cannot be pigeonholing of evidence on any set formula. It has not been shown by the accused-appellants as to how evidence of PW 21 suffers from any infirmity. Since in Masalti's case (supra) a rule of caution was laid and not a mandatory rule of universal application, it is certainly not to be treated as a rule of law. There is always peril in treating the words of a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. (See Padmasundara Rao and Others Vs. State of Tamil Nadu and Others,). It is more so in a case where conclusions relate to appreciation of evidence in a criminal trial.

8.4 We have already noted hereinabove the material evidence of the prosecution witnesses. There is no confusion in the deposition of PW 9 that she was present in the house when Yudhya Kr. was stabbed by her brother. PWs 2 and 3 were at the relevant time in a neighbour's house, watching TV programme and, according to them they had witnessed the stabbing of their father by their accused uncle. PW 2 stated that he was called by her mother and PW 3 stated in cross that he came back home after watching TV along with his sister and witnessed the occurrence.

These are all minor contradictions which are liable to be ignored. It is settled law that minor contradictions which do not go to the root of the case and does not shake the basic version of the witnesses should not be attached with undue importance and such minor discrepancies are natural human conduct and are rather guarantee of truth. PWs 2 and 3 are the natural witnesses to the occurrence and there is nothing to doubt their evidence. At least, we find nothing to disbelieve the evidence of PW 9 in any manner. Her evidence remains completely unshaken and is found to have been supported by the evidence of PWs 2, 3 and 10. Other witnesses, i.e. PWs 5, 6, 7, 8 and 12, all neighbours, rushed to the house of the deceased hearing the alarm and found the deceased with severe bleeding injury and they came to know about the occurrence.

9. The next argument advanced by learned counsel, Mr. R. Datta is about the recovery of the weapon of offence i.e., the dagger/bhojali, which is proved as Exbt. (I) (Material Object). He has submitted that the seizure list prepared by the I.O. gives a description that the dagger was seized from a place about twenty feet cubit away from the house of the deceased Yudhya Kr. whereas, the other witnesses stated it was seized from the house of Yudhya Kr. None of the witnesses supported the contention of the I.O. as recorded in the seizure list that the dagger was seized at the instance of the accused. He has also argued that to ascertain as to whether the said dagger was used in the commission of the crime

or not, no forensic examination was arranged by the I.O. after seizure of the dagger.

Learned Addl. P.P., on the contrary, has submitted that there are some minor contradictions in respect of seizure of the dagger but such contradictions are not at all vital in the given facts and circumstances of the case where the evidence of the eyewitnesses of the occurrence remained completely unshaken and established. He has further contended that there was no necessity at all to take the report of forensic expert in respect of bloodstain found in the dagger. Even, if the dagger was not seized, the prosecution case would stand on the oral evidence of the witnesses.

9.1 We have considered the submission of learned counsel of both side.

The seizure list of dagger has been proved as Exbt. 3. It shows that the I.O. has recovered the dagger from a distance of about twenty cubit away from the house of the deceased, Yudhya Kr.

PW 7 is a witness to the seizure and he stated that the seizure was made from the house of the deceased. In cross-examination he clearly stated that it was seized from the dwelling hut of the deceased.

PW 8 is another witness to the seizure and he stated that in his presence the dagger (Exbt. I) was seized by I.O. and in cross-examination he stated that it was seized from the house of the deceased after return of PW 9 at home.

PW 1 stated that the police officer seized the dagger from the house of the deceased and he identified it

PW 3, the son of the deceased, also identified the dagger in the Court.

PW 10 stated that after stabbing the deceased, accused fled away pushing the dagger in the bamboo fencing of the hut of the deceased.

PW 19, the IO of the case, stated that on the basis of the statement of the accused he recovered the weapon of offence from the house of the victim and seized the same by preparing the seizure list. In cross-examination, he stated that he recovered the weapon of offence at a distance of twenty feet cubit away towards west of the house of the deceased.

9.2 A careful reading of the evidence on record makes out a contradiction in respect of the place of seizure. What I.O. stated has not been supported by the seizure witnesses and other eye-witnesses. PW 9 was not cross-examined in respect of seizure of the dagger. I.O. has stated that on the basis of the statement of the accused he recovered the weapon of offence from the house of the victim. There is no statement of accused to show that it was recovered at the instance of the accused or, in other words that the accused led the I.O. or other witnesses to recover the weapon of offence. There is no evidence of leading to discovery but the fact that the dagger was seized from the house of the deceased has been established in the oral evidence of other witnesses, which

cannot be discarded simply because, I.O. has made a statement that it was seized from the house of the victim at a place about twenty cubit away. Such statement of I.O. has not been supported either by the seizure witnesses or other witnesses examined by the prosecution.

It is settled principle of law that the evidence should be taken into consideration as a whole and not an isolated scrutiny.

Learned counsel, Mr. Datta, in context of the present case, has referred the case law of Madan Malakar Vs. The State of Tripura, and Aghnu Gowala Vs. State of Assam, . The facts of both the cases are clearly distinguishable to that of the fact of the present case.

In the case at hand, forensic expert report of the seized dagger was not obtained. Such a report would strengthen the prosecution case but because of not taking the forensic expert report, no adverse inference can be drawn in the present case in view of the fact that there is direct evidence of eyewitness. We find nothing to apply the ratio of those decisions in the fact of the present case.

9.3 Referring to paragraph 37 of Krishna Mochi(supra) learned Addl. P.P. has submitted that non-recovery of the weapon of offence cannot be a ground to exonerate the accused from the charges when the participation of the accused in the commission of the crime has been otherwise established.

In the case of Krishna Mochi (supra), His Lordship, Justice B.N. Agarwal observed that non recovery of incriminating material from the accused cannot alone be taken as a ground to exonerate from the charges, more so when the participation in the crime is unfolded in ocular account of the occurrence given by the witnesses, whose evidence has been found to be unimpeachable.

10. The last and most material argument advanced by learned counsel, Mr. Datta is that, in the given facts and circumstances of the case, if the evidence of PWs 2, 3 and 9 are relied on, it may be a case of culpable homicide not amounting to murder and the offence may come under the purview of Section 304 P-II of IPC. It is in the evidence of the eyewitnesses that there was a quarrel between the accused and the deceased and in the midst of the quarrel the accused might have dealt a dagger blow without premeditation, in the heat of passion because of sudden quarrel and, so, the case cannot come under the purview of "murder" as defined in Section 300 of IPC.

Learned Addl. P.P. has submitted that the accused along with PW 13 came to the house of the victim with a preparation to eliminate the deceased and he brought the dagger with him under his garments, which is evident from the facts and circumstances of the case. There is not even a suggestion from the defence that Exbt. I (seized dagger) was picked up from the house of the deceased in the midst of the quarrel and the deceased was stabbed in the heat of passion. The definite evidence is that the accused was demanding homestead land and insisting the family of the deceased to vacate the land. PW 13 has corroborated

PW 9 stating that the accused after coming to the house of the deceased at once picked up quarrel on the issue of vacating the land. Under such circumstances, it should be presumed that the accused with the intention of killing the deceased picked up the issue of vacating the land and struck the fatal dagger blow in the belly of the deceased, as a result of which Yudhya Kr. died.

10.1 We have meticulously examined the evidence on record and considered the submission of learned counsel of both side.

10.2 Section 299 of IPC defined "culpable homicide" thus:

Whoever caused death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide.

The word, "murder" has been defined in Section 300 of IPC which prescribes thus:

Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or--

Secondly.--If it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or--

Thirdly.--If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or--

Fourthly.--If the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid.

10.3 A culpable homicide is not murder if it comes under the purview of any of the five exceptions as defined in Section 300 of IPC. According to learned counsel, Mr. Datta, Exception-4 shall apply in the case of the accused. Exception-4 reads thus--

Exception 4.--Culpable homicide is not murder if it is committed without premeditation in a sudden fight in the heat of passion upon a sudden quarrel and without the offender having taken undue advantage or acted in a cruel or unusual manner.

Explanation.--It is immaterial in such cases which party offers the provocation or commits the first assault.

10.4 After careful perusal of the evidence on record we find no iota of evidence that there was a sudden fight between the accused and the deceased. Rather we find that the accused came to the house of the victim certainly armed with a

dagger and he brought with him PW 13 but PW 13 left the house seeing the quarrel picked up by the accused with the deceased on land issue. PW 9 categorically stated that the accused picked up quarrel with her husband on the issue of vacating the homestead land and the accused attacked her husband with the dagger. When she tried to resist the accused she was pushed down. There is no iota of evidence that there was a sudden fight or that in the heat of passion the accused committed the offence. In his cross-examination u/s 313 of Cr.P.C. the accused simply stated that he was innocent. There is also no other evidence on record to support the contention. There is no scrap of evidence that there was a fight between the deceased and the accused and in the midst of sudden fight the accused stabbed the deceased. To draw an inference that the case comes under the purview of Exception-4, as defined in Section 300 of IPC, there must have some definite evidence from which some inference may be drawn. Intention is a matter of mind. An inference about an intention is to be gathered from the facts and circumstances of a particular case. Here, the aggravating circumstances are--

(i) The accused was demanding that the deceased and his family should vacate the homestead land and that the land belonged to him. The accused came to the house of the deceased at night time and picked up quarrel with the deceased on the issue of vacating the land.

(ii) In the midst of quarrel the accused struck a fatal dagger blow in the belly of the deceased causing injury as a result of which the deceased died.

(iii) The circumstances clearly established that the accused brought the dagger with him with which he struck the blow on the belly of the deceased.

(iv) He inflicted the injury in presence of PWs 9, 2 and 3.

10.5 In view of the unimpeachable evidence of the eyewitnesses and in the absence of any mitigating circumstances that there was no premeditation on the part of the accused we find no other alternative but to arrive at a conclusion that the accused had the intention of causing such bodily injury on the person of the deceased having the knowledge that the injury was likely to cause death of the deceased and, therefore, the case comes under the purview of the definition of "murder" as prescribed in Section 300 of IPC.

10.6 Learned counsel, Mr. Datta, in support of his contention, relied on the decision of the Apex Court in the case of Gurmukh Singh Vs. State of Haryana, . In that reported case a single "lathi" blow was dealt on the head of the deceased in the midst of a dispute over a tractor and a tiller and it was found that there was no intention or premeditation in the mind of the appellant to inflict such injury to the deceased as was likely to cause death in the ordinary course of nature. The deceased was hospitalized and died after six days. But in the present case, the deceased was in his house. The accused came there and picked up a quarrel with the deceased on the issue of vacating the homestead land and in the midst of quarrel he dealt the fatal blow. The injury inflicted was extremely fatal

perforating the stomach to the extent often inches as a result of which the deceased died within ten hours of the incident and he could not even speak. The fact of Gurmukh Singh (supra), therefore, is clearly distinguishable from the fact of the present case.

10.7 In the case of Santosh Vs. State of Madhya Pradesh, , the Apex Court has held that an intention to kill is not required in every case. A knowledge that the natural and probable consequences of an act would be death will suffice for a conviction u/s 302 of IPC.

10.8 In the case of State of Andhra Pradesh Vs. Rayavarapu Punneyya and Another, the Supreme Court has held that the intention to cause death is not an essential requirement of clause (2). Only the intention of causing bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim is sufficient to bring the killing within the ambit of this clause. In paragraphs 13, 14 and 15 of the judgment, the Apex Court prescribed thus--

13. The academic distinction between "murder" and "culpable homicide not amounting to murder" has vexed the courts for more than a century. The confusion is caused, if courts losing sight of the true scope and meaning of the terms used by the legislature in these sections, allow themselves to be drawn into minute abstractions. The safest way of approach to the interpretation and application of these provisions seems to be to keep in focus the key words used in the various clauses of Sections 299 and 300. The following comparative table will be helpful in appreciating the points of distinction between the two offences.

14. Clause (b) of Section 299 corresponds with cls. (2) and (3) of Section 300. The distinguishing feature of the mens rea requisite under Clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or state of health that the intentional harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary way of nature be sufficient to cause death of a person in normal health or condition. It is noteworthy that the "intention to cause death" is not an essential requirement of clause (2). Only the intention of causing the bodily injury coupled with the offender's knowledge of the likelihood of such injury causing the death of the particular victim, is sufficient to bring the killing within the ambit of this clause. This aspect of clause (2) is borne out by illustration (b) appended to Section 300.

15. Clause (b) of Section 299 does not postulate any such knowledge on the part of the offender. Instances of cases falling under Clause (2) of Section 300 can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of

the victim, nor an intention to cause death or bodily injury sufficient in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

10.9 In view of the discussions made above we find no force in the argument of learned counsel, Mr. Datta to hold that the offence alleged to have been committed by the accused may be termed as one of culpable homicide not amounting to murder punishable u/s 304 Part-II of IPC.

11. Learned counsel, Mr. Datta has further argued that the injury was ten inches in depth, whereas the iron portion of the seized dagger was about seven inches in length and, so, the injury cannot be caused by the seized dagger. Exbt. I i.e. the seized dagger was shown to both the Medical Officers i.e. PW 17 and PW 18 and they have stated that the injury may be caused by that dagger. Admittedly, the injury was in the belly/stomach of the deceased, a soft part of the body where such an injury, which is ten inches in depth, may be caused by Exbt. I, having seven inches length sharpen iron part. We find nothing to draw an adverse inference on this ground.

12. Before parting with the case record we are constrained to observe that during cross-examination of the witnesses certain contradictions were recorded but those were not in conformity with the provisions prescribed by law. For example, cross-examination of PW 2 reflects--

I told to the darogababu that I saw the stabbing of my father by the accused arriving in the house. But no such specific statement, but a statement that a weapon like dagger was blown on the abdomen of her father.

Cross-examination of PW 10 reflects--

I told that Darogababu at Kailashahar hospital about seeing the incident by me. No such statement found recorded by I/O u/s 161 of Cr.P.C.

The above recorded statements show that the attention of witnesses were not drawn to the previous statements recorded by the I.O. Simply the Court recorded its own observation which is not permissible by law. The law regarding recording of contradictions has now been settled by catena of decisions of the Hon'ble Apex court and this Court, which trial Courts require to follow and abide by it. The Division Bench of this Court in the case of Ranjit Sarkar Vs. State of Tripura in CrI.A.(J) 155 of 2008, while speaking for the Bench, one of us (Das, J), relying on the decision of the Apex Court in the case of Tahsildar Singh and Another Vs. The State of Uttar Pradesh, and Sunder Singh Vs. State of Uttaranchal, , held thus--

10.8 Statements made by the witnesses before the investigating officer, being the earlier statements made by them with reference to the facts of the case are, no doubt, a valuable material for testing the veracity of the witnesses examined before the Court with reference to those statements, which happened to be at variance with the earlier statements. The statements made during police

investigation are not itself substantive evidence. If a witness during examination makes a statement that he made such statement to the police officer but he is not contradicted with his previous statement as per the procedure prescribed by law, defence cannot claim advantage of the same. In the statements of the witnesses recorded during cross-examination as reproduced above, to which our attention has been drawn, cannot be attached with any importance since it was not recorded according to the procedure prescribed by law drawing attention of the witness to such statement and contradicting him thereby. The observation of the Court, whether such statement was there or not, in the previous statement, recorded by IO is of no consequence at all. We hope that the trial Courts should follow the procedure prescribed by law in respect of recording of contradictions and should not take an easy approach to just record its own observation while recording deposition of witnesses.

13. We would like to further observe that learned Addl. Sessions Judge acted like a silent spectator in course of recording of deposition of witnesses. Even the recorded statements were not corrected by the learned Addl. Sessions Judge, where defects in construction and typographical errors are apparent. It is the duty of the trial Judge to see and to find out all the material aspect of evidence of the case before the Court. A trial Judge cannot be a mere spectator but should control a criminal trial by actively participating therein to find out the truth.

14. In view of the discussions made above, we are of the considered view that in the facts and circumstances of the case the punishment inflicted by the trial Judge does not deserve any interference and, hence, the appeal stands dismissed. The judgment and order of conviction and sentence is affirmed. Send back the LC records along with a copy of this judgment.