
(2017) 08 CAL CK 0025
In the Calcutta High Court
Case No : 188 of 2005

Manmatha Dalui & Others

APPELLANT

Vs

The State of West Bengal & Anr.

RESPONDENT

Date of Decision : 18-08-2017

Acts Referred:

Code of Criminal Procedure, 1973, Section 174, Section 428 - Police to enquire and report on suicide, etc - Period of detention undergone by the accused to be set off against the sentence of

Citation : (2017) 08 CAL CK 0025

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

Bench : DIVISION BENCH

Advocate : Siladitya Sanyal, ?Rupa Bandopadhyay, ?Sujoy Sarkar, ?Ranabir Roychowdhury, ?Mainak Gupta

Judgement

1. Appellants have preferred this appeal against the judgment and order of conviction and sentence dated January 31, 2005 passed by the learned Additional District and Sessions Judge, 3rd Court, Suri, Birbhum in Sessions Trial No. 1 of August 2002 arising out of Sessions Case No. 89/1994. By virtue of the impugned judgment appellants along with one Kebla Dalui @ Kebal Dalui were convicted for commissioning of the offence punishable under Section 148, 302 / 149, 307 / 149 and 324 / 149 of the Indian Penal Code (hereinafter referred to as I.P.C .) and were sentenced to suffer rigorous imprisonment (hereinafter referred to as R.I.) for 03 years each for the offence punishable under Section 148 I.P.C., R.I. for 03 years each for the offence punishable under Section 324 / 149 I.P.C., R.I. for 10 years each and to pay a fine of Rs. 2000/- each in default to suffer further R.I. for six months each for the offence punishable under Section 307 / 149 I.P.C. and R.I. for life and to pay fine of Rs.8000/- each in default to suffer further R.I. for 2 years each for offence punishable under Section 302 / 149 I.P.C. with a direction that all the sentences shall run concurrently and the period of detention undergone be set off from the

substantive punishment under section 428 of the Code of Criminal Procedure (hereinafter referred to as Cr.P.C .) and if the fined amount is realized 50 % of the same be given to the legal heirs of the deceased as compensation.

2. The Case of the prosecution, in brief, is that on January 15, 1994 at about 17.00 hours an arrangement for the Puja Gosai Thakur was made by P.W.2 in the temple of Gosai Thakur adjacent to his house. While puja was going on, appellant Jiten Dalui entered there by pushing away the children who were seated there to which Kabul Baidyakar (P.W.5), nephew of P.W.2, protested and pushed Jiten Dalui in order to make place for other persons. Then pushing and dashing between P.W.5 and Jiten Dalui started. On hearing this other appellants including Kebla Dalui being armed with lathi, tangis etc. came there. Mohan Dolui who had two lathies in his hand then handed over one lathi to Jiten Dalui. Jiten Dalui then began to assault Nirmal Baidyakar, the victim. Manmatha then struck the victim on his head with a lathi as a result he fell down on the ground. When P.W.2, P.W.5 and father of P.W.2, Nani Gopal went to rescue the victim then Kebla struck Nani Gopal on his head with a tangi as a result he fell down on the ground. He then noticed Jiten to collect a big stone and threw the same on the chest of the victim. When the mother of P.W.2 went to rescue Nirmal then

3. Manmatha struck her with a lathi on her back and when P.W.2 tried to save his mother then Bisu Dalui struck him with a tangi causing bleeding injury on his left thumb and Goni Dalui struck him with a lathi causing injury on his left knee and back as a result he fell down on the ground. When his sister Jasada Dalui came and tried to save them then Kebla Dalui assaulted her on her head causing bleeding injury as a result she also fell on the ground. Thereafter those accused persons left the place. Injured were taken to Md. Bazar P.S. where a complaint was lodged by P.W.2 (Ext.1) and injured were sent to Patel nagar PHC and therefrom to Suri Sadar Hospital for treatment.

4. On the basis of the above written complaint Md. Bazar P.S. Case No. 10 of 1994 dated January 15, 1994 was started against the appellants including Kebla Dalui @ Kebal Dalui and Godadhar Dalui under Section 147 / 148 / 149 / 324 / 326 / 307 I.P.C. by P.W.13 and he himself took up the investigation of the case. On January 16, 1994 Nirmal Badyakar, the victim, died and as such on the basis of the information given from the Suri Sadar Hospital to a Suri P.S. U.D. Case No. 5 of 1994 dated January 16, 1994 was started.

5. Inquest over the dead body of the victim was held on January 16, 1994 at 15.25 p.m. at Suri Sadar Hospital by P.W.7 in presence of P.W.2 and P.W.5 in connection with Suri P.S. UD Case No. 5 of 1994.

6. PW.12 conducted post mortem examination over the dead body of the victim on January 16, 1994 at 4.45 p.m. and opined that death of the victim was due to the effects of head injury, ante-mortem and homicidal in nature.

7. P.W.13, thereafter, on completion of investigation submitted charge sheet against all the eight FIR named accused persons under section 147 / 148 / 149 /

324 /326/307/302 I.P.C . showing Manmatha Dolui as absconder who subsequently surrendered.

8. On July 13, 2000 charge was framed against the appellants as also Kebla Dalui @ Kebal Dalui and Godadhar Dalui under Section 148, 149 / 302, 307 / 34, 149 / 326, 149 / 324 I.P.C. and after they denied their involvement in the crime trial commenced.

9. Subsequently, in course of trial Godhadhar Dalui expired and as such case was filed against him and proceeded against the rest. Thereafter on completion of trial and after examination of the appellants as also Kebla Dalui @ Kebal Dalui learned court below passed the impugned judgment.

10. During pendency of this appeal appellant No. 4, Kebla Dalui @ Kebal died and as such appeal abated against the said appellant.

11. Mr. Siladitya Sanyal, learned Advocate appearing for the appellants submitted that the impugned judgment, order of conviction and sentence cannot be sustained in law due to delay in sending the FIR to the court and the inquest and the post mortem examination were held only in connection with Suri P.S. UD Case which shows that FIR was ante dated, due to contradictions in between the FIR and inquest report with regard to the start of quarrel as according to FIR quarrel started between Jiten Dolui and P.W.2 whereas as per the inquest report quarrel started between Jiten Dolui and Godadhar Dolui with the victim, absence of any injury on the chest of the victim though according to the eye witnesses stone weighing 5/6 kg. was thrown on the chest of the deceased and the cause of death was only due to head injury, doubt with regard to the place of death of the victim as according to prosecution witnesses victim was taken to Patelnagar PHC from Md. Bazar P.S. where he expired whereas as per the inquest report victim was directly taken to the Suri Sadar Hospital, absence of injury report with regard to the treatment of P.W.2 reportedly sustained injuries due to assault, non-examination of the parents of P.W.2 as also Kamala Badyakar the other injured and the doctor P. Saha who treated them amongst others.

12. Alternatively, it was submitted by Mr. Sanyal that even if it was found that the death of the victim was caused due to assault then also provisions of Section 302 IPC was not attracted as there was no premeditation, intention or any motive in causing the death of the victim and the death of the victim was also not due to any sharp cut injury. According to Mr. Sanyal prosecution has failed to prove the charges against the appellants.

13. Mr. Ranabir Roy Chowdhury, learned Advocate appearing for the state submitted that the entire case is based on the direct evidence of the injured eye witnesses P.W.2, P.W.5, P.W.6 and P.W.8 who have vividly narrated the entire incident and their evidence remained unshaken and the same also found support from the medical evidence. According to Mr. Roy Chowdhury incident was reported to the P.S. on the very day of the incident within 2 hours of the incident and the FIR itself shows that same was forwarded before the Magistrate on the

very next day and no such suggestion was made either to the P.W.2 or the IO that no such complaint was lodged at the P.S. on January 15, 1994. According to Mr. Roy Chowdhury victim died at Suri Sadar Hospital which falls under the jurisdiction of Suri P.S. and as such UD case was started there and the inquest as also the postmortem was held in connection with that UD case and even during inquest held on January 16, 1994 at 15.25 hrs the name of the appellants transpired. According to Mr. Roy Chowdhury prosecution has been able to prove its case beyond all reasonable doubt.

14. It was not in dispute that the death of victim Nirmal Badyakar was unnatural. According to the doctor of Suri Sadar Hospital (P.W.12) and the PM report (Ext.8), on January 16, 1994 during postmortem examination over the dead body of the victim, he found two swelling over right upper arm of about 2""x"", two lacerated injuries over head, one anteriorly and another at the middle each of about 2""x 1/3""x1/3"" and on dissection he found main membrane was blood stained and the entire brain was full of blood and there was also sign of blood coming out through mouth and nostril. According to P.W.12 death of the victim was due to effects of head injury which was ante mortem and homicidal in nature. Interestingly he was not challenged by the defence on this score. Defence had also not disputed or denied the injuries found on the person of the victim by the doctor, P.W.12, on January 16, 1994 at the time of conducting postmortem examination and/or the cause of his death.

15. From the evidence of P.W.10, the doctor of Md. Bazar PHC, it appears that on January 16, 1994 at about 12.30 p.m. he examined Abala Badyakar (P.W.6) and found her conscious and during examination P.W.6 stated to him that she was assaulted by Bishu Dalui with a stick over left side of her back and middle side of her right arm on January 15, 1994 at about 5 p.m. at Gosain Tala and also stated about pain at the time of respiration over left side of the back and pain and swelling at the right arm. On examination he found swelling and tenderness over medial aspect of her right arm, bluish over her right medial side measuring 5 cm. X cm. and also bluish over her left serratus muscle 7.5 cm. X cm. and the nature of injuries were simple and the age of the injuries were old and the weapon used was blunt and those may be caused by lathi or stick. According to him as the active bleeding was not found, he mentioned in his report (Ext.4) that the injuries were old. Defence had also not disputed or denied the injuries found on the person of the victim Abala Badyakar by the doctor, P.W.10, on January 16, 1994 at the time of her examination. On the other hand in reply to the defence suggestion he clearly stated that the injuries which were found on the person of the patient may be caused on close contact with any hard and blunt substance.

16. According to the doctor (P.W.11), on January 16, 1994 Kabul Badyakar, Jasoda Badyakar, Kamala Badyakar and Nani Badyakar were admitted under him at Suri Sadar hospital for their treatment on being referred from Patelnagar PHC. He also identified the bed head tickets along with emergency tickets and treatment sheets relating to the treatments of Kabul Badyakar (Exts.5), Jasoda

Badyakar (Ext.6) and Nani Badyakar (Ext.7).

17. According to the doctor (P.W.11), during examination of Kabul Badyakar, he found injury on his occipital region and one tender swelling in the lower part of his back (right side) and the said patient was discharged on January 24, 1994. During examination of Nani Badyakar, he found one stitched injury on his scalp which was made at Patelnagar PHC and after completion of his treatment he was discharged by him. According to him Nani Badyakar immediately after his admission was medically examined by the doctor who was on emergency duty but subsequently he examined him on bed. According to him, Jasoda Badyakar was examined by the doctor who was in emergency duty but subsequently one Sonatan Badyakar, a relative of said patient took away that patient from the hospital at his own risk and accordingly, he did not get any opportunity to examine him. Similarly, Kamala Badyakar though admitted under him but immediately after her admission, she left the hospital and as such he failed to make her treatment also. During cross- examination he admitted that before his examination of Kabul Badyakar and Nani Badyakar primary treatments of those patients were already made and as such there was no scope to ascertain the age of the injuries, cause of assault, mode of injury and history of assault. However, no suggestion was put to the doctor that Kabul Badyakar, Jasoda Badyakar, Kamala Badyakar and Nani Badyakar were not admitted under him at Suri Sadar hospital for their treatment on being referred from Patelnagar PHC and/or that during his examination he did not find any such injuries on the person of Kabul Badyakar and Nani Badyakar.

18. Now the question arises how the above named persons sustained those injuries on their person and/or who caused those injuries resulting in death of one of the injured namely the victim Nirmal Badyakar. In this regard it was the specific allegations of the prosecution that on January 15, 1994 at about 17.00 hours while puja of Gosai Thakur was going on in the temple of Gosai Thakur adjacent to the house of P.W.2, appellant Jiten Dalui entered there by pushing away the children who were seated there to which P.W.5 protested and pushing and dashing started between them and on hearing this Kebla Dalui and other appellants forming an assembly and being armed with lathi, tangis etc. came there and in furtherance of their common object assaulted them causing injuries on their person resulting their hospitalization and death of the victim Nirmal Badyakar. Defence had denied the allegations of the prosecution and had taken the plea of innocence and false implication.

19. Learned court below took into consideration the evidences of P.W.2, P.W.5, P.W.6, P.W.8, P.W.9 the injured eye witnesses including P.W.3, besides the evidences of the doctors, P.W.10, P.W.11, P.W.12, the I.O., P.W.13, as also the injury reports, bed head tickets (Exts.4, 5, 6, 7) and the P.M. report (Ext.8) to arrive at a conclusion that it was the appellants who in prosecution of their common object by forming an unlawful assembly and being armed with deadly weapons assembled at the place of occurrence, thereby committed an offence

punishable under section 148 I.P.C. and thereafter in furtherance of their common intention caused the death of the victim, Nirmal Badyakar, thereby committed an offence punishable under section 302 / 149 I.P.C, attempted to cause death of Anil Badyakar, Kabul Badyakar, Abala Badyakar, Jasoda Badyakar, Nani Badyakar and Kamala Badyakar by causing hurt to them, thereby committed an offence punishable under section 307 / 149 I.P.C. and also voluntary caused injuries on the above persons, thereby committed an offence punishable under section 324 / 149 I.P.C.

20. Now let us analyse the evidence of the prosecution witness and see how far the prosecution had been successful to bring home the charges against the appellants beyond all reasonable doubt before the learned court below.

21. P.W.2, brother of the victim Nirmal Badyakar, was the FIR maker. On perusal of the evidence of P.W.2 it was evident that he had fully corroborated the FIR and vividly narrated the incident, the role played by each of the appellants and the instruments used in causing injuries on their person including Nirmal Badyakar resulting in death of the victim Nirmal Badyakar. He specifically stated that on the relevant date while said puja was going on appellant Jiten Dalui entered there ousting the children who were seeing the puja. Kabul Badyakar (P.W.5) then requested appellant Jiten Dalui to stand back side of those children as they were facing inconvenience seeing the puja to which he became angry, threatened Kabul by catching his collar, as a result altercation started. Hearing this appellants Manmatha, Dwija, Mohan, Bishu, Goni, and other accused being armed with lathi, tangi etc. came there. Thereafter, Mohan who was armed with two lathis handed over one Lathi to Jiten who then started assaulting Nirmal Badyakar, who was present there, with said lathi and when he and his parents tried to save Nirmal, Manmatha struck Nirmal with a lathi on the head as a result Nirmal fell down on the ground and when his father tried to rescue him Keval Dalui struck his father Nani Gopal on the head with a tangi causing serious bleeding thereon as a result his father fell down on the ground. Then Jiten Dalui took out a stone weighing about 6/7 kgs. and threw the same on the chest of Nirmal. Manmatha also struck his mother Sajani with a lathi on the back of his mother when she went to rescue brother Nirmal and when he tried to save his mother Bishu Dalui struck him on the left thumb with a tangi as a result he sustained serious bleeding injury on the left thumb. Goni Dalui also struck him with a lathi on his left knee and on his back causing injuries thereon as a result he fell down on the ground. When his sister Jasoda Dalui came there and tried to save them then accused Keval Dalui caused hurt on her head causing serious bleeding injury as a result she fell down on the ground and thereafter all those persons left the place after threatening them to kill. Injured were then taken to Md. Bazar P.S. where he lodged the complaint (Ext.1) and therefrom they were sent to Patel Nagar PHC for their treatment where the doctor declared Nirmal Badyakar dead. Accordingly, the dead body of victim was sent to Suri Sadar Hospital where inquest was made in his presence. He identified the appellants in course of his examination before court. He was cross-examined at length but his

evidence remained unshaken and nothing was brought on record to discredit him. Moreover, the above statements of P.W.2 also found corroboration from the other injured eye witnesses namely P.W.5, P.W.6 and P.W.8. They too had vividly narrated the incidents and the part played by each of the appellants in the commission of the offence and even identified them on dock in course of their examination before court. They too were cross-examined at length but their evidence also remained unshaken and nothing was brought on record to discredit them. Their evidence on oath also appear to be trustworthy and reliable.

22. P.W.3, a co-villager, though admitted his presence at the time of initial altercation between Jiten Dalui and P.W.2 at Gosai Sthan during Gosai puja but claimed that he left the place due to falling of rain in order to save his cows and when he returned back he saw the appellants and others returning from the place of occurrence with lathi etc. and the victim Nirmal, Nanigopal and his wife lying on the ground senseless having bleeding injuries on their persons, Jasoda sitting on the ground with bleeding injuries on her head and Anil with bleeding injuries on his left hand. After being declared hostile by the prosecution and during cross-examination he admitted that the entire incident happened in his presence and he stated to the police about the incident. He also identified the appellants in course of his examination before court. During cross-examination by the defence also he clearly stated that he saw the entire incident by his own eyes and there was no rain fall at the time of occurrence and he made statements to the police about the incident. This also found corroboration from P.W.13, the investigating officer.

23. Thus from the above, we find that the eye witness had given vivid and consistent account of the incident and the part played by each of the appellants. They have clearly stated that appellants along with Kebla Dalu and Gadadhar Dalui, both since deceased, being armed with deadly weapons like tangi, lathi etc. came at the place of occurrence and began to assault the victim Nirmal and his family members who came to rescue him causing injuries on their persons resulting in death of one of the injured namely the victim Nirmal Badyakar. In the instant case, we find that prosecution case was fully established by the direct testimony of the eyewitness, which was corroborated by the medical evidence. In view of the above, there appears no reason why so many eye witnesses should falsely implicate the appellants, and there is in fact, nothing on record to suggest that the witnesses had any reason to falsely implicate them. As such there was no reason to discard their evidences. The evidence of eye witnesses do not suffer from any infirmity and appears to be convincing. No significant contradiction or infirmity has been brought to our notice. The wounds found on the body of the victim Nirmal by P.W.12, the autopsy surgeon, and on the persons of other injured by P.W.10 and P.W.11, the doctors, thus sustain the eyewitnesses' version.

24. Regarding absence of any injury on the chest of the victim though stone weighing 5/6 kg. was thrown on his chest and doubt with regard to the place of

death of the victim, we find that though the injured eye witnesses have stated about throwing of heavy stone towards the chest of the victim but there was no evidence that the stone in question hit on the chest of the victim and/or that due to hitting of the stone victim sustained any injury on his chest which caused his death. On the other hand autopsy surgeon, P.W.12, found only two swelling injuries over right upper arm of about 2"x", two lacerated injuries over head, one anteriorly and another at the middle each of about 2"x 1/3"x1/3" and according to him death of the victim was due to effects of head injury which was ante mortem and homicidal in nature. He was even not challenged by the defence on this score. From the evidence and documents on record it appear that injured were at first taken to Md. Bazar PHC for treatment and therefrom to Suri Sadar Hospital. According to the injured witnesses victim Nirmal was declared dead by the doctor at the primary health centre itself but the same do not find corroboration from the medical papers and documents. On the other hand from the evidence of P.W.7, the police officer who held inquest, the investigating officer, P.W.13, as also the autopsy surgeon it was evident that victim died at Suri Sadar Hospital. Therefore, taking into account the entire circumstances, we are of the opinion that such minor discrepancy will not cause any serious doubt with regard to the prosecution case.

25. Therefore, the impugned judgment need not require our interference on the above ground.

26. Regarding non examination of the parents of the deceased, Kamala Baidyakar and the Dr. P.Saha of Md. Bazar PHC who first examined the injured, we are of the opinion this will not cause any serious prejudice to the appellants as it is for the prosecution to decide whom to examine and how many witnesses they consider it proper to examine to prove their case against the accused persons. However, it is the duty of the court to see whether the evidence adduced by the prosecution was sufficient to warrant conviction of the appellants. Moreover, P.W.11, the doctor of Suri Sadar Hospital specifically stated that on January 16, 1994 Kabul Badyakar, Jasoda Badyakar, Kamala Badya and Nani Badyakar were admitted under him at Suri Sadar hospital for their treatment on being referred from Patelnagar PHC. He was not challenged by the defence on this score. P.W.13 also specifically stated on oath that on February 24, 1994 he collected the injury report ("X" for identification) of the injured from Md.Bazar P.H.C. This document relates to the treatment of six persons at Md.Bazar P.H.C on January 15, 1994 at 8.05 P.M. Interestingly, defence also during cross-examination relied on that document and even put question over the same to the investigating officer, P.W.13. who clearly stated that the injury report "X" for identification shows that in the said report Dr.P. Saha, B.M.O.H. Md. Bazar PHC has mentined " As stated by the patients they were assaulted by 1.Manmatha Dalui, 2.Jiten Dalui 3.Ajit Dalui, 4.Mohan Dalui, 5.Bishu Dalui, 6.Dujo Dalui, 7.Gadadhar Dalui by tangi and stick at their own house" and the said report shows that patients Jasoda Badyakar, Kamala Badyakar, Kabul Badyakar, Nanigopal Badyakar and Nirmal Badyakar were examined by Dr.P.

Saha, B.M.O.H. Md. Bazar PHC. It is true that Dr.P. Saha was not examined by the prosecution but that would not ipso facto lead to disbelieve the prosecution case nor it would render the prosecution case doubtful and discard the unimpeachable evidence of the eye witness.

27. Therefore, the impugned judgment need not require our interference on the above ground.

28. Regarding the question of FIR being ante dated, it is the settled proposition of law that it is not always a circumstance on the basis of which the prosecution case may be said to be fabricated, but it all depends on the facts and circumstances of each case where the circumstances of delay may lead to serious consequences. In the instant case, we find from the evidence of P.Ws. on record that the incident in question took place on January 15, 1994 at 17.00 hrs. and on the same day written complaint (Ext.1) scribed by P.W.1 was submitted at the Md.Bazar P.S. by of P.W.2. P.W.1 also affirmed the same. From the endorsement made on Ext.1 as also the evidence of P.W.13, it was evident that the same was received at the P.S. on January 15, 1994 at 19.35 hrs. and Md.Bazar P.S. case no. 10/1994 under section 147 / 148 / 149 / 324 / 326 / 307 I.P.C. was started against the appellants along with others. Ext.11, rough sketch-map with index, and Ext.10, seizure list, show that those were also made on the same date in connection with the above case. On January 16, 1994, P.W.13 received R.T. Message from Suri P.S. about the death of the victim Nirmal and starting of UD Case No.5/94 dated January 16, 1994 there and accordingly made prayer before the learned S.D.J.M. Suri for adding section 302 IPC. Consequently, inquest as also the postmortem examination were held in connection with that UD Case. From the inquest report (Ext.2/1) prepared by P.W.7 on January 16, 1994, the history behind the incident on previous day also transpired. P.W.7 also specifically stated on oath that he sent all the papers connected with the Suri P.S. UD Case to the Md. Bazar P.S. as original case over the incident of murder was started there. He was not challenged by the defence on this score. It may be true that the FIR was placed before the Magistrate for obtaining his signature only on January 20, 1994 but surprisingly, defence did not challenge P.W.13, the investigating officer, that the complaint (Ext.1) was not lodged at the Md.Bazar P.S. on January 15, 1994 at 19.35 hrs. nor he forwarded the same to court on the next date. Even no such plea of delay in sending the FIR to court was taken before the trial court. From the FIR (Ext.9) which was exhibited without any objection it was evident that the same was forwarded to the court on the very next date i.e. on January 16, 1994. So the plea of delay in sending the FIR or that it was ante dated did not appear to be correct.

29. Therefore, the impugned judgment need not require our interference on the above ground.

30. Regarding contradictions in between the FIR and inquest report with regard to the person between whom quarrel started, it is the settled proposition of law that the main purpose of the FIR is to satisfy the police officer as to the

commission of a cognizable offence for him to conduct further investigation in accordance with law and the same itself is not the proof of a crime but is a piece of evidence which can be used for corroborating prosecution case. FIR need not be an encyclopaedia of all the facts and circumstances on which the prosecution relies. Similarly, the provision for holding of an inquest and preparing an inquest report is contained in Section 174 Cr.P.C. The requirement of the section is that the police officer shall record the apparent cause of death describing the wounds as may be found on the body and also the weapon or instrument by which they appear to have been inflicted and this has to be done in the presence of witnesses. The section does not contemplate that the manner in which the incident took place or the names of the accused should be mentioned in the inquest report. The basic purpose of holding an inquest is to report regarding the apparent cause of death, namely, whether it is suicidal, homicidal, accidental or by some machinery etc. However, fact remains that inquest report is not a substantive piece of evidence and contents thereof can not be treated as evidence. In view of the above, such minor discrepancy is not going to the root of the case making the prosecution's case doubtful.

31. Therefore, our interference with the impugned judgment is not required on the above ground considering the same was not contradiction of a material dimension affecting the credibility of the evidence of the eye witnesses concerned.

32. The next issue which needs our consideration is whether the case falls under the provisions of Section 302 IPC, as raised by the learned Advocate for the appellants. We find that the eye witnesses have clearly stated that hearing altercation in between appellant Jiten Dalui other appellants along with deceased Kebila Dalui and Gadadhar Dalui being armed with tangi, lathi etc. came at the place of occurrence and began to assault thereby causing injuries on the person of the victim Nirmal and his family members who came to rescue him as a result Nirmal fell down on the ground being hit on the head by lathi and subsequently died in the hospital. The role played by each one of appellants in causing injuries on those injured have been described by the witnesses. It is true that according to eye witnesses victim Nirmal was assaulted at first by Jiten Dalui on the different parts of his body by lathi and thereafter Manmatha struck him on his head by a lathi as a result he fell down on the ground and as per autopsy surgeon cause of death was due to head injury. The evidence on record clearly suggest that the appellants in prosecution of common object forming an unlawful assembly and being armed with deadly weapons committed the offence of assault. So, every member of that assembly was guilty of that offence. As such, we do not any fault in decision making process of the learned court below in convicting the appellants under section 148 I.P.C. as also under section 324 / 149 I.P.C. But in so far as the conviction of the appellants under section 307 / 149 I.P.C. and 302/149 I.P.C . was concerned, we do not find any evidence on record that there was motive to kill the deceased. The evidence on record suggest it was not a preplanned cold blooded murder on the basis of long time

conspiracy but it was at the spur of the moment in a fit of anger during altercation between P.W.5 and appellant Jiten Dalui over the issue of obstruction in viewing Puja to the children present there. In such circumstances, taking into consideration the totality of the circumstances, there was no scope for the learned Court below to convict and sentence the appellants either under section 307 read with section 149 I.P.C or under Section 302 IPC read with section 149 I.P.C. The learned Court below failed to consider at the time of passing the judgment that no evidence was brought on record to prove that appellants attempted to cause death and/or there had been an intention to cause death and/or that it was a preplanned cold blooded murder on the basis of long time conspiracy. The death of the victim Nirmal Badyakar, as per autopsy surgeon, was due to the effects of the head injury. According to the eye witnesses it was appellant Manmatha Dalui only who inflicted the fatal injury by lathi on the head of the victim Nirmal Badyakar resulting in his death. So, appellant Manmatha Dalui alone was responsible for that fatal blow which caused the death of the victim Nirmal Badyakar and not the other appellants. Therefore, the impugned judgment and the order of convictions and sentences are liable to be interfered with.

33. Therefore, taking into account the entire circumstances, we affirm the conviction and sentence of the appellants under under section 148 of the Indian Penal Code as also under section 324 / 149 of the Indian Penal Code and alter the conviction under section 302 / 149 of the Indian Penal Code to one under Section 304 Part-I of the Indian Penal Code only against the appellant Manmatha Dalui and acquit the appellants Jiten Dalui, Dwija Dalui, Mohan Dalui, Bishu Dalui and Goni Dalui from the charge under section 302 / 149 of the Indian Penal Code. We, also quash and set aside the conviction and sentence of the appellants under Section 307 / 149 of the Indian Penal Code and acquit them from the said charge.

34. For the altered conviction to one under Section 304 Part-I of the Indian Penal Code, appellant Manmatha Dalui is sentenced to suffer rigorous imprisonment for a period of seven years and to pay a fine of Rs.10,000/- (rupees ten thousand) in default to suffer rigorous imprisonment for one year more. All the sentences shall run concurrently. The period of detention of the appellants undergone during the investigation, inquiry or trial be set off against the period of substantive sentence of imprisonment stated herein above, in accordance with the provisions of Section 428 Cr. P. C. and if the fined amount is realized 50 % of the same be given to the legal heirs of the deceased as compensation.

This appeal is thus disposed of with partial alteration of the order of conviction and sentence as indicated herein-above.

Copy of this judgement along with the lower court records be sent down to the trial court immediately by special Messenger for information and taking necessary action.

Urgent photostat certified copy of this judgement, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.