
(2016) 04 CAL CK 0016
In the Calcutta High Court
Case No : CRA No. 543 of 2009

Ram Chandra Mondal and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 07-04-2016

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 156, Section 157, Section 159, Section 174, Section 210 (2), Section 294, Section 311, Section 313
Evidence Act, 1872 — Section 32, Section 60, Section 64, Section 65
Penal Code, 1860 (IPC)

Citation : (2016) 3 CalCriLR 619 : (2016) 3 CalLT 73

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

Bench : Division Bench

Advocate : Sekhar Basu, Sr. Advocate and Kushal Kumar Mukherjee, Advocate, for the Appellant; Prasun Dutta, Additional P.P. and Ranabir Roy Chowdhury, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Debasish Kar Gupta, J.—1. This appeal is directed against the Judgment, order of conviction dated July 15, 2009, and sentence dated July 16, 2009, passed by the learned Additional District & Sessions Judge, 4th Fast Track Court, Jangipur, Murshidabad in Sessions Trial No. 8/May/2007 arising out of G.R. Case No. 277/89 and T.R. Case No. 429 of 2004 convicting thereby the appellants for commission of offence punishable under Section 302/34 of the Indian Penal Code (hereinafter referred to as the I.P.C.) and sentencing them to suffer imprisonment for life as also each of them to pay fine of Rs. 1000/-, in default to suffer rigorous imprisonment for a further period of six month each. The appellants were further convicted for commissioning of offence punishable under Section 324/34 of the I.P.C. and sentenced them to suffer rigorous imprisonment for one year. The appellants were also convicted for commissioning of offence punishable under section 9 (B) (2) of the Indian Explosive Act, as also sentenced them to suffer one year rigorous imprisonment. All sentences were directed to

run concurrently. On payment of fine, a sum of Rs. 1000/- was directed to be paid to the PW 1 as compensation.

2. The case of the prosecution is that on April 28, 1989 one Bibhuti Mondal, the de facto complainant (PW 1) was sleeping on a rope cot beneath a jack fruit tree in the open terrace attached to his partly completed residential house situated at Dwipchar village, District-Murshidabad, with his wife Bharati Mondal, (victim), daughter Pusparani Mondal, since deceased, and two sons, namely, Rupchand Mondal and Dasharath Mondal respectively. At late night, i.e. on April 29, 1989 at 01.00 hours, the de facto complainant awakened hearing the sound of a bomb blast. It was a moonlight night and the PW 1 put on his torchlight. The PW 1 found Ram Mondal (appellant No. 1), Brojen Ghosh (appellant No. 2) and one Chamatkar Mondal of Village-Teghari, District-Murshidabad and 2/3 other persons in front of them. They hurled another bomb causing serious injury to the wife of the PW 1 and his aforesaid children. A third bomb had been hurled by them but no further harm was caused. The condition of the wife of the PW 1 (the deceased) was critical. Subsequently, she breathed her last at the place of occurrence. PW 6 and PW 7 were initially treated at Teghori Block Primary Health Centre. Subsequently, they had to be transferred to Jangipur Sub-Divisional Hospital for their treatment as indoor patient.

3. On April 29, 1989, PW 1 lodged a complaint in the Raghunathganj Police Station, Jangipur, District- Murshidabad. The formal FIR bearing No. 70/89 was drawn on the same day at 12.15 hours against the appellants and one Chamatkar Mondal for commissioning of offence punishable under Sections 302/326/34 of the I.P.C. and Section 9 (B) (2) of the Indian Explosive Act. It was disclosed in the FIR that de facto complainant (PW 1) had a dispute with the accused when he had been staying at Village-Teghori, District- Murshidabad. He had to leave the above village due to torture caused by the appellants and to start living in Village-Dwipchar, District-Murshidabad, constructing a residential house there. According to his complaint, it was the cause of the above attack resulting in death of his wife at the place of occurrence as also sustaining of injuries by his children.

4. On April 29, 1989, surathal report was prepared by the PW 10 on the dead body of the deceased. A rough sketch map of the place of occurrence was also prepared by him. The dead body of the aforesaid victim was sent to Jangipur Sub-Divisional Hospital through the PW 5. Post mortem report dated April 30, 1989, of dead body of the deceased was obtained from Jangipur Sub-Divisional Hospital, District-Murshidabad.

5. Basudev Chackraborty, Sub-Inspector of Police, Raghunathgunj Police Station, Murshidabad, (PW 10), was engaged initially to investigate into the case. Consequent upon his transfer, Amitava Chakraborty, Officer-in-charge of Raghunathganj Police Station, District-Murshidabad, at the material point of time, conducted further investigation. On completion of investigation, he submitted charge-sheet bearing No. 130 dated September 30, 1990, against five accused

persons, namely (1) Chamatkar Mondal, (2) Brojen Ghosh, appellant No. 2, (3) Ramchandra Mondal, appellant No. 1, (4) Binoy Mondal and (5) Bhupen Mondal for commissioning of offence punishable under Sections 302/326/34 of the I.P.C. along with Section 9 (B) (2) of the Indian Explosive Act, showing the accused Nos. 2 to 5 as absconders.

6. In the meantime, the de facto complainant (PW 1) filed another complaint Case No. 215/89 to the Court of learned Sub-Divisional Judicial Magistrate, Jangipur, on the selfsame incident against seven accused persons including the five aforesaid accused persons. The two other persons were Sakhi Mondal and Natobar Mondal. By an order dated May 29, 1991, passed by the above Sub-Divisional Judicial Magistrate, the C.R. Case No. 215/89 was tagged with the G.R. Case No. 277/89 treating the same as if, it was instituted upon Police Report under Section 210 (2) of the Cr.P.C. inserting the names of the aforesaid Sakhi Mondal and Natobar Mondal as accused Nos. 6 and 7 respectively in the instant case. Thereafter, by an order dated April 4, 2005, passed by the aforesaid Sub-Divisional Judicial Magistrate, the aforesaid G.R. Case No. 277/89 and C.R. Case No. 215/89 were committed to the Court of the Learned Sessions Judge for trial. On receipt of the same, the Learned Additional Sessions Judge Jangipur, Murshidabad, transferred the Sessions Trial No. 8/May/07 to the Court of the Learned District and Sessions Judge, 4th Fast Track Court, Jangipur, Murshidabad, by order dated May 14, 2007, for disposal.

7. Thereafter Charge was framed against all the seven accused persons under Sections 302/34, 326/34 as also 324/34 of the I.P.C. along with Section 9 (B) (2) of the Indian Explosive Act.

8. According to the prosecution case, out of total thirteen prosecution witnesses, the PW 1, PW 6, PW 7 and Pusparani Mondal, since deceased, had not only witnessed the death of the victim Bharati Mondal but they were also assaulted by the appellants and their associates. Out of them, only Pusparani Mondal, since deceased, could not adduce evidence due to her natural death during the pendency of the trial.

9. After taking into consideration the evidence on record, both oral and documentary, the learned trial Judge acquitted five (5) accused persons, namely, Bhupen Mondal, Binay Mondal, Chamatkar Mondal, Sakhi Mondal and Natobar Mondal from the charge framed against them giving them benefit of doubt. The impugned order of conviction and sentence were passed against the 2 (two) appellants.

10. It is submitted by Mr. Sekhar Basu, learned Senior Advocate, appearing on behalf of the appellant, that the conviction of the appellants cannot be sustained in law due to the errors in the decision making process of the learned trial Judge as follows:--

"(i) According to the evidence adduced by the concerned prosecution witnesses, though the commission of offence of the appellants took place on a moonlit

night, the accused persons were identified in the light of a torch of the PW 1. The above torch had been seized with three battery cells and the zimma of the same was given to the PW 1. According to him, the above source of identification was not proved beyond reasonable doubt in view of the contradiction in evidence of the concerned prosecution witnesses as also the fact of non-production of the aforesaid seized torch before the Court.

(ii) According to the FIR under reference was drawn on April 29, 1989, at 12.15 hours. It was dispatched from police station on April 30, 1989, on 08.00 hours but according to the record, the above FIR reached to the Court on May 22, 1989. There was no explanation for such delay. So, the trial was vitiated due to the unexplained delay in reaching the FIR to the Court.

(iii) The procedure of brining the post mortem report dated April 30, 1989, on record cannot be sustained in law.

(iv) Though the articles like blood stained earth, controlled earth, rope cot used by the deceased, her apparels etc. were seized, neither any attempt was made for obtaining expert's opinion nor those were produced before the Court in course of adducing evidence by the prosecution witnesses. As a consequence, the place, time and date of occurrence were not proved beyond any reasonable doubt.

(v) From the evidence or treatment report prepared by the PW 13 (the doctor), who had treated the PW 5 and PW 6 in Jangipur Sub- Divisional Hospital, District-Murshidabad, the names of the appellants did not surface. So, the cause of injury as alleged by the prosecution created doubt with regard to the commissioning of that offence by the appellants. The appellants were entitled to get the benefit of doubt, so far as the injuries of the above persons were concerned.

(vi) Consequent upon the contradictions and omissions in between the evidence of PW 6, PW 7 and PW 10 (the first I.O.), the commissioning of offence by the appellants had not been proved beyond reasonable doubt.

Due to the major contradiction of the evidence of PW 4 with other oral and documentary evidence the commission of offence by the appellant No. 2, so far as the injury alleged to be sustained by the PW 1 was concerned, was not proved beyond reasonable doubt.

(vii) According to the prosecution case, three bombs were hurled at the place of occurrence at the material point of time of commissioning of offence by the accused persons. The PW 1, PW 6 and PW 7 awoke up after hurling the first bomb. There were contradictions in the evidence of the above prosecution witnesses with regard to the person accused/responsible for hurling the second bomb. That bomb could not be thrown upon four injured person at a time. It was not in dispute that no injury was caused to anybody consequent upon hurling of the third bomb. Therefore, the commissioning of offence by either of the appellant was not proved beyond doubt, so far as the sustaining of injuries by

the deceased wife of the PW 1, PW 6 PW 7 and Pusparani Mondal, the deceased daughter of PW 1, were concerned. The circumstances leading to invoking Section 34 of the I.P.C. was also not proved on the basis of the settled proposition of Law.

(viii) In course of recording the statements of the appellants under Section 313 of the Cr. P.C., no question was put to either of the appellants with regard to availability of moon light for their identification at the time and place of occurrence. No question was put with regard to the injuries or the cause of death as available from the post mortem report of the victim. Therefore, the conviction of the appellants cannot be sustained in law on the above ground."

11. Reliance is placed on the decisions of Lakshmi Singh & Ors. v. State of Bihar, reported in , 1976 SCC (Cri) 671, Jamat Ali Sheikh @ Mondal v. State of West Bengal, reported in , 2011 C Cr L R (Cal) 679, Hamid Mondal @ Hamed Mondal @ Famid Mondal @ Farmed @ Formed @ Formed Sk @ Biswal & Anr. v. State of West Bengal, reported in , 2014 (4) Crimes 501, Arab Sk. v. State of West Bengal, reported in , 2016 (1) Crimes 216, June @ Arjun Mandi v. State of West Bengal, reported in , 1986 C Cr L R (Cal) 138, Vijender vs, State of Delhi, reported in , 1997 (SCC) Cri. 857, Jugal Kishore Singh v. State of West Bengal, reported in , 2002 (2) CHN 64 and Kuldip Singh and others v. State of Delhi, reported in (2004) 12 SCC 528 in support of his above submissions.

12. It is submitted by Mr. Ranabir Roy Chowdhury, learned Counsel appearing of behalf of the State respondents, that according to the FIR, the appellants were identified in the light of torch of the de facto complainant (PW 1) and moonlight. According to the evidence adduced by the PW 6 and PW 7, the appellants, (accused persons) were recognised out of a number of accused persons at the place of occurrence in the moonlight as also with the help of torchlight of the PW 1. The appellants were known to them. The enmity of the appellant No. 1 with the PW 1 was also established. With regard to non-production of the torchlight under reference, it is submitted by Mr. Roy Chowdury that the identification was made with the help of the torchlight of PW 1 as also in the moonlight. According to him, PW 1, PW 6 and PW 7 not only referred to the names of the appellants for commissioning of the offence but also they identified the appellants in Court. According to him, the above evidence was adduced by the aforesaid prosecution witnesses after laps of about 19 years from the date of occurrence.

13. According to him, the FIR was drawn on April 29, 1989, immediately upon receipt of the letter of complaint. It was dispatched on April 30, 1989, to the Court as was evidenced from the above FIR. The names of two appellants appeared in the letter of complaint which had been received on the same date before the FIR was drawn. Other evidence corroborated the contents including the names of the appellants. Therefore, there was no scope to put forth the above explanation in course of adducing evidence or to show that there was no delay in sending the FIR to the Court in accordance with the provision of Section 157 of the Cr. P.C.

14. It is also submitted by Mr. Ray Chowdhury that non- disclosure of names of the accused persons by the PW 6 or PW 7 before the PW 13 could not vitiate the trial because the commission of offence by the appellants was proved beyond reasonable doubt on the basis of the other evidence available on record.

15. It is submitted by Mr. Roy Chowdhury with regard to the bringing of the post mortem report (Ext.-9) on record that on March 18, 2008, i.e., after the closure of evidence, a prayer was made before the learned trial Judge by the learned advocate appearing for the prosecution to exhibit the post mortem report under reference and the treatment papers of PW 1, PW 6 and PW 7. An objection was raised by the learned advocate appearing for the appellant, to allow the above prayer of the prosecution at that stage. After considering the submissions made on behalf of both the parties, the learned trial Judge allowed the above prayer for exhibiting the post mortem report as also fixing the next date for adducing evidence of doctor concern and to bring the treatment papers of the PW 1, PW 6 and PW 7 on record. On the next date of hearing i.e. on April 30, 2008, PW 13, the concern doctor, who had treated the PW 1, PW 6 and PW 7, adduced evidence for bringing the relevant treatment papers on record. The post mortem report was marked as Ext.-9 and the above treatment papers were marked as Exts.-10, 11 and 12 respectively with clarification by an order dated May 17, 2008. There was no challenge to the aforesaid order passed by the learned trial Judge by the appellants. Therefore, there is no scope to raise any objection with regard to exhibiting the post mortem report at that stage in accordance with the settled proposition of law.

16. Regarding the contention of the non-production of seized articles before the Court or to send those articles for forensic laboratory report, it is submitted by Mr. Roy Chowdhury that the commission of offence by the appellants was proved in the trial even in the absence of such forensic laboratory report and non-production of those articles before the Court. He referred to the oral evidence and corroboration of such evidence with the help of documentary evidence in support of his submissions.

17. Regarding the non-inclusion of the date of commissioning of offence in the inquest report and omission on the part of the PW 6 and PW 7 to disclose the names of the appellants before any of the investigating officer, it is submitted by him that the prosecution was able to prove the case leaving aside those errors/ omissions. The evidence of eyewitnesses, the inquest report, post mortem report, treatment papers are relied upon once again by Mr. Roy Chowdhury in support of his above submissions.

18. In connection with the next contention of the appellants of failure on the part of the learned Court below to record the statements under Section 313 of the Cr. P.C. of the appellants for their identification with the help of torchlight, particularly on a night when adequate moon light was available for recognition of the known accused persons, it is submitted by him that the failure of the learned Court below to put relevant question for recording such statement cannot be a

ground for acquittal of the appellants.

19. Regarding the next contention of the appellants that non-identification of a particular appellant out of two separately for hurling the second bomb should not be a ground for attacking the impugned order of conviction in view of their presence in the place of occurrence, post mortem report of the dead body of the victim and the treatment papers of the PW 1, PW 6 and PW 7, showing cause of sustaining injury. According to Mr. Roy Chowdhury, nobody witnessed the hurling of first bomb and the hurling of third bomb did not cause injury to anybody. Therefore, taking into consideration the peculiar facts and circumstances of this case, including the evidence with regard to enmity in between the appellant No. 1 and PW 1 due to the allegation of outraging the modesty of the wife of PW 1, the conviction was awarded to the appellants under Section 302 as also under Section 34 of the I.P.C.

20. Reliance is placed by Mr. Roy Chowdhury on the decisions of Paulmeli & Anr. v. State of Tamil Nadu, reported in , 2014 (13) SCC 90, Ram Manohar v. State of U.P., reported in , 2015 (7) ADJ 226, Nar Singh v. State of Haryana, reported in , 2015 (1) SCC (Cri) 699 and Santosh Kumari v. State of Jammu & Kashmir, reported in , 2011 (3) SCC (Cri) 657 in support of his above submissions.

21. Having heard the learned Counsels appearing for the respective parties as also after considering the facts and circumstances of this appeal on the basis of the evidence on record we find as follows:--

A. Recognition/identification of the appellants at the place of occurrence at the material point of time and the non-production of the seized torchlight in Court:--

22. In analysing the evidence in a criminal trial the application of settled proposition of law always depends upon the facts and circumstances involved in a particular case. Slightest variation in the facts and circumstances changes the analysis of evidence of eyewitnesses in case of recognizing accused person/ persons in the night. In the matter of Nathuni Yadav & Ors. v. State of Bihar & Anr., reported in , (1998) 9 SCC 238, the Hon''ble Supreme Court observed that in ascertaining whether identification of the assailants by the eyewitnesses in a night when there was no moonlight, the proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars and the fact that the murder was committed on a roofless terrace are germane factors to be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. In doing so, the Hon''ble Supreme Court further observed that over and above the above factors, the Court must bear in mind the further fact that the assailants were no strangers to the inmates of the tragedy-bound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers. The relevant portion of the above decision is quoted below:--

"9. We have considered the said contention from all its angles. Even assuming that there was no moonlight then, we have to gauge the situation carefully. The

proximity at which the assailants would have confronted with the injured, the possibility of some light reaching there from the glow of stars, and the fact that the murder was committed on a roofless terrace are germane factors to be borne in mind while judging whether the victims could have had enough visibility to correctly identify the assailants. Over and above those factors, we must bear in mind the further fact that the assailants were no strangers to the inmates of the tragedy-bound house, the eyewitnesses being well acquainted with the physiognomy of each one of the killers...."

23. In the instant case, we find that PW 1, his wife (the deceased person), his two sons (PW 6 and PW 7) and his daughter, since deceased, were sleeping under a jack fruit tree in an open terrace attached to his partly completed residential house situated at Dwipchar village, District-Murshidabad, on the date of occurrence i.e. on April 29, 1989, at 01.00 hours. According to the complaint lodged by the P.W. 1, he awakened hearing the sound of a bomb blast. It was a moonlight night. He put on his torchlight. He found the appellant and one Chamatkar Mondal of village-Teghari, District-Murshidabad and 2/3 other persons in front of them. Then there was hurling of another bomb by the aforesaid accused persons causing serious injuries to his wife (the deceased) and the aforesaid children. When he made an attempt to run after the appellants and his aforesaid associates then they hurled the third bomb aiming at him. He managed to escape. His evidence was repetition and reiteration of the above fact. There was an addition that the appellant No. 1 thrown "kathi" aiming him causing injury on his back. According to his evidence, police seized his aforesaid torchlight and three batteries from him and kept the same in his zimma, amongst others. According to him, it was handed over to the "darogababu" but the same was not found by him at the time of adducing evidence.

24. The evidence of PW 6 (son of PW 1), who was sleeping at the place of occurrence, he could recognise the appellants and his associates in the moonlight as also in the light of the torchlight of his father. It will not be out of context to remember that it was a moonlit night.

25. The recognition of the appellants and his associates at the place of occurrence was further corroborated by PW 7, the other son of PW 1, who was also sleeping at the place of occurrence. While adducing evidence, he did not mention any particular source of light for such identification.

26. The appellants were not strangers to the aforesaid prosecution witnesses. So, the above prosecution witnesses were acquainted with the physiognomy of each and every appellant. The learned trial judge was not inclined to assume that it was not possible for the aforesaid prosecution witnesses to see/recognise the appellants or that there was possibility of making a wrong identification/recognition of them.

27. Taking into consideration the facts and circumstances in the case in hand and applying the settled cardinal principles of analysing the evidences as discussed in

Nathuni Yadav & Others (Supra) to the evidence adduced by the PW 1, PW 6 and PW 7, we are of the opinion that moon light then was available at the place of occurrence apart from the light of the torch, and though the same was meager but it was adequate for the PW 6 and PW 7 to recognise the appellants, who would certainly have pointedly focused their eyes on the faces of the intruders standing in front of them. The evidence of PW 1 was corroborating to that of the aforesaid eyewitnesses.

28. In the decision of Jamat Ali Sheikh @ Mondal (supra), the prosecution witness in course of searching the victim in the field with the help of torchlight found the accused persons to flee away from that field. Similarly, the facts and circumstances of Hamid Mondal (Supra) the appellants were not on intimate terms with the prosecution witnesses who claimed to be their identifiers in pitch dark night while they were running away.

29. In view of the aforesaid distinguished facts and circumstances, none of the aforesaid judgments helps the appellants.

B. Effect of delay in forwarding the FIR to Court of learned Magistrate concerned:

30. Section 157 of the Cr. P.C. provides, inter-alia, that if, from information received or otherwise, an officer in charge of a police station has reason to suspect the commission of an offence which is empowered under Section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report. Section 159 of the Cr. P.C., further provides that, such Magistrate, on receiving such report, may direct an investigation, or, if he thinks it fit, at once proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in the Cr. P.C.

31. While dealing with the question of delay in lodging the FIR or to dispatch the same to the Magistrate, it was observed by the Hon'ble Supreme Court in Tara Singh & Ors. v. State of Punjab, reported in , AIR 1991 SC 63, that there was a tendency to implicate persons belonging to the opposite faction falsely in cases arising out of acute factions. But, at the time of observing the cardinal rule of scrutinizing the evidence of interested prosecution witnesses with grater care and caution to avert the danger of convicting those innocent persons, made it clear in no uncertain terms that unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay for which consideration of the facts and circumstances of each case should not be forgotten. The relevant portion of the above decision is quoted below:--

"4. It is well settled that the delay in giving the FIR by itself cannot be a ground to doubt the prosecution case. Knowing the Indian conditions as they are we cannot expect these villagers to rush to the police station immediately after the occurrence. Human nature as it is, the kith and kin who have witnessed the occurrence cannot be expected to act mechanically with all the promptitude in

giving the report of the police. At times being grief-stricken because of the calamity it may not immediately occur to them to take some time to go to the police station for giving the report. Of course the Supreme Court as well as the High Courts have pointed out that in cases arising out of acute factions there is a tendency to implicate persons belonging to the opposite faction falsely. In order to avert the danger of convicting such innocent persons the courts are cautioned to scrutinise the evidence of such interested witnesses with greater care and caution and separate grain from the chaff after subjecting the evidence to a closer scrutiny and in doing so the contents of the FIR also will have to be scrutinised carefully. However, unless there are indications of fabrication, the court cannot reject the prosecution version as given in the FIR and later substantiated by the evidence merely on the ground of delay. These are all matters for appreciation and much depends on the facts and circumstances of each case..... "

(Emphasis supplied)

32. In *Arjun Marik & Ors. v. State of Bihar*, reported in , 1994 Supp (2) SCC 372, the Hon"ble Supreme Court, after a conjoint reading of the provisions of Sections 157 and 159 of the Cr. P.C., observed reasons for avoiding delay either in lodging FIR to send the same to the Court of Magistrate concerned are as follows:--

"(i) Firstly, to avoid the possibility of improvement in the prosecution story and introduction of any distorted version by deliberations and consultation; and

(ii) Secondly, to enable the Magistrate concerned to have a watch on the progress of the investigation."

33. The Hon"ble Supreme Court further observed that a mere note in the FIR itself that report was dispatched by a special messenger was not enough. But the Hon"ble Supreme Court further observed that quite often there are valid reasons for delay in dispatching of the FIR and the entire prosecution case may not always said to be fabricated taking into consideration a circumstance of delay in forwarding the FIR to the Court of the learned Magistrate concerned. It depends on the facts and circumstances of each case where the circumstances of delay may lead to serious consequences. The relevant portion of above decision is quoted below:--

"26. Even if we ignore the question of delay there is no material on record to show that it was actually despatched and received by the Magistrate concerned and if so on what date and time. A mere note in the FIR itself that report was despatched by special messenger is not enough. There is no mention as to which Magistrate it was despatched. The evidence of investigating officer is totally silent about it. It is true that quite often there are valid reasons for the delay in the despatch of the first information report and it is not always a circumstance on the basis of which the entire prosecution case may be said to be fabricated, but it all depends on the facts and circumstances of each case where the circumstance of delay may lead to serious consequences...."

34. Subsequently, in the matter of Meharaj Singh v. State of U.P., reported in , (1994) 5 SCC 188, the Hon"ble Supreme Court while repeating and reiterating the object of insisting upon prompt lodging of FIR, observed as follows:--

"12. FIR in a criminal case and particularly in a murder case is vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the FIR is to obtain the earliest information regarding the circumstance in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, used, as also the names of the eyewitnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr.P.C., is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR...."

(Emphasis supplied)

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

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

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

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

37. For the purpose of considering the contention of the appellants in this case in the light of the external checks observed by the Hon"ble Supreme Court as discussed hereinabove, we find that according to entry made in the above FIR it was dispatched from the police station on April 30, 1989, at 08.00 hours. From the materials on record learned Chief Judicial Magistrate concerned took cognizance on the above FIR by an order No. 1 dated May 22, 1989. Therefore, prima facie, the possibility of improvement in the prosecution story and introduction of any distorted version of deliberation and consultation might not have been ruled out but after looking for the external checks applying the cardinal principles laid down in the matter of Meharaj Singh (supra), we find that the inquest report of dead body of the deceased person was prepared in this case on April 29, 1989, with reference to Raghunathganj P.S. case No. 170/89 dated April 29, 1989, by the first investigating officer (PW 10), the dead body of the deceased person was sent by PW 10 to Jangipur Sub Divisional Hospital with reference to Raghunathganj P.S. case No. 70/89 dated April 29, 1989, at 15.25 hours and post mortem examination was held in the above hospital on April 30, 1989 at 12.45 hours.

38. In view of the above facts and circumstances, we find no substance in the submissions made on behalf of the appellants with regard to the possibility of recording the above FIR at the time it was alleged to have been recorded.

39. In the decision of Arab Sk. (supra), no material was available on record explaining the admitted fact of delay in sending the FIR in the court of the Magistrate concerned. So, there was no scope for applying the external check as observed by the Hon"ble Supreme Court in the decision of Meharaj Singh (supra) which relates to a case of murder unlike the case in our hand.

40. Therefore, the above decision does not help the appellants in this case.

C. Propriety of the procedure followed to bring post mortem report dated April 30, 1989, on record:

41. It appears from the records of the lower Court that a prayer was made by the learned public prosecutor before the trial Court for the purpose of accepting the post mortem report as also injury report of the deceased person in accordance with law due to expiry of the doctor concerned in the meantime. By order No. 18 dated March 18, 2008, the learned trial Judge considered the above prayer as also the objection raised by the learned Counsel appearing for the defence going through the materials on record available in case diary and the recorded evidence of the PW 1, PW 6 and PW 7, amongst others. The above prayer of the prosecution was lodged for bringing the post mortem report on record adhering to the provision of subsection (3) of Section 294 of the Cr.P.C. Dr. Sankar Kr. Pal, who was the medical officer of Jangipur Sub-Divisional Hospital at the material point of time and treated the PW 1, adduced evidence on December 12, 2008, as PW 13. The above doctor was cross-examined by the learned Counsel appearing for the accused person. The above post mortem report and the treatment papers of PW 1 were brought on record as Exts.-9 and 10 respectively.

42. By virtue of the above order summon was issued by the learned trial Judge invoking the power under Section 311 of the Cr.P.C. The above order reached its finality after taking into consideration the above facts and circumstances, we are of the opinion that our interference with the above procedure followed by the learned trial Judge does not require our interference.

43. In the decision of June @ Arjun Mandi (supra), the factum of holding of post mortem examination of the dead body by the doctor on the date mentioned in that report, the identification of dead body before the doctor and the existence of injuries in the person of the dead body by the doctor were in doubt. In the case of Jugal Kishore Singh (supra), autopsy surgeon conducted autopsy in absence of witness. In Vijender (supra), the carbon copy of the post mortem report produced by the record clerk of the hospital was not proved adhering to the provisions of Sections 60, 64, 65 read with Section 32 of the Evidence Act. In the instant case the post mortem report was exhibited after recalling the witness concerned. That order not only reached its finality but the defense counsel participated in the trial on subsequent date of adducing relevant evidence.

44. Therefore, the above decisions have no manner of application in the instant case.

D. Effect of the failure on the part of the prosecution to bring the seized articles as also the forensic laboratory on record:--

45. It is not in dispute that the articles like blood stained earth, controlled earth, rope cot used by the deceased and her apparels were not produced before the Court. No attempt was made for obtaining the report from the forensic laboratory in respect of those articles but such an omission on the part of the investigating agency may not be considered as a flaw such an attempt which could invite the consequences of jettisoning the testimony of the eyewitnesses. Reference may

be made to the decision of Harpal Singh v. Devinder Singh & Anr., reported in , (1997) 6 SCC 660 and the relevant portion of the above decision is quoted below:--

"13. But the trial court which declined to place reliance on him noted some flaws in his testimony: One such flaw is the failure of the police to collect the clothes worn by Harpal Singh which were smeared with blood during the rescue operation. We are unable to appreciate the said approach. If the clothes worn by the injured or the victims were not recovered by the investigating team that perhaps would have provided a handle to the defence to attack the prosecution case. But no investigating agency would normally take the trouble to seize the clothes worn by witnesses at the time they saw the occurrence merely because their clothes too had collected stains of blood during any post-event activities. At any rate, the said omission on the part of the investigating agency is not a flaw of that type to invite the consequence of jettisoning his testimony."

46. In view of the above settled principles of law the evidence of the eyewitnesses, i.e., PW 1, PW 6 and PW 7 should not be discarded taking into consideration the corroboration of the above evidence with the surathal report, post mortem report of the deceased person as also the treatment papers of the PW 1, PW 6 and PW 7 respectively to arrive at a conclusion as to whether the prosecution was able to bring home the charge framed against the accused person leaving aside the seized articles and the forensic laboratory report under reference.

47. The facts and circumstances mentioned hereinabove were not present in Laksmi Singh (supra). In view of the above distinguishable facts and circumstances, the above decision does not help the appellants.

E. The effect of non-disclosure of the names of assailants of PW 1, PW 5 and PW 6 to the doctor concerned:--

48. It appears from the letter of complaint of the PW 1 that the names of the appellants were mentioned therein consequent thereupon the names of the appellants also appeared in the formal FIR. Their names were also available from the evidence of the aforesaid prosecution witnesses, namely, PW 1, PW 6 and PW 7. Therefore, the non-disclosure of the names of the appellants before the doctor, who treated the above prosecution witnesses should not be a ground to face the consequences of jettisoning the above testimony. We are of the opinion that the interference of the decision making process adopted by the learned trial Judge in this regard does not require our interference.

F. Effect of discrepancies and/or contradictions in between the oral evidence adduced by the prosecution witnesses as also with the documentary evidence:--

49. In arriving at a conclusion about the guilt of the accused charged with the commissioning of a crime, the Court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the

final analysis would have to depend upon its own facts. Reference may be made to the decision of State of Punjab v. Jagir Singh, Baljit Singh and Karam Singh, reported in , (1974) 3 SCC 277 and the relevant portion of the above decision is quoted below:--

"23. A criminal trial is not like a fairy tale wherein one is free to give flight to one's imagination and phantasy. It concerns itself with the question as to whether the accused arraigned at the trial is guilty of the crime with which he is charged. Crime is an event in real life and is the product of interplay of different human emotions. In arriving at the conclusion about the guilt of the accused charged with the commission of a crime, the court has to judge the evidence by the yardstick of probabilities, its intrinsic worth and the animus of witnesses. Every case in the final analysis would have to depend upon its own facts. Although the benefit of every reasonable doubt should be given to the accused, the courts should not at the same time reject evidence which is ex facie trustworthy on grounds which are fanciful or in the nature of conjectures."

(Emphasis supplied)

50. In the decision of State of U.P. v. Krishna Master, reported in , (2010) 12 SCC 324, it has been observed by the Hon'ble Supreme Court that minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. The relevant portions of the above decision are quoted below:--

"15. Before appreciating evidence of the witnesses examined in the case, it would be instructive to refer to the criteria for appreciation of oral evidence. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is found, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

16....

17. In the deposition of witnesses, there are always normal discrepancies, howsoever honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due

to mental disposition, shock and horror at the time of occurrence and threat to the life. It is not unoften that improvements in earlier version are made at the trial in order to give a boost to the prosecution case, albeit foolishly. Therefore, it is the duty of the court to separate falsehood from the truth. In sifting the evidence, the court has to attempt to separate the chaff from the grains in every case and this attempt cannot be abandoned on the ground that the case is baffling unless the evidence is really so confusing or conflicting that the process cannot reasonably be carried out. In the light of these principles, this Court will have to determine whether the evidence of eyewitnesses examined in this case proves the prosecution case."

51. Before examining the contentions of the appellants with regard to the alleged discrepancy or contradiction in the evidence of the prosecution witnesses it will not be out of context to refer to the decision of Shamal Ghosh v. State of West Bengal, reported in , (2012) 7 SCC 646 and it has been held by the Hon''ble Supreme Court in the above decision that the Court should examine the statement of a witness in its entirety and read the same along with the statement of other witnesses in order to arrive at a rational conclusion. The relevant portion of the above decision is quoted below:--

"48. To illustrate the irrelevancy of these so-called variations or contradictions, one can deal with the statements of PW 2. PW 4 and PW 6, PW 4 and PW 6 have stated that the deceased had constructed shops along with his brother for the purpose of letting out and it was thereupon that the accused persons started demanding a sum of Rs. 40,000 from the deceased and had threatened him of dire consequences, if their demand was not satisfied. PW 2 has made a similar statement. However, he has stated that Uttam Das and the accused persons had threatened the deceased that if the said money was paid, they would not allow the deceased to enjoy and use the said shops built by him. This can hardly be stated to be a contradiction much less a material contradiction. According to the witnesses, two kinds of dire consequences were stated to follow if the demand for payment of money made by the accused was not satisfied. According to PW 4 and PW 6, they had threatened to kill the deceased while according to PW 2, the accused had threatened that they would not permit the accused to enjoy the said property. Statements of all these witnesses clearly show one motive i.e. illegal demand of money coupled with the warning of dire consequences to the deceased in case of default. In our view, this is not a contradiction but are statements made bona fide with reference to the conduct of the accused in relation to the property built by the deceased and his brother."

(Emphasis supplied)

52. The sustaining of injury by Bharati Mondal, the deceased, from the second bomb hurled on her by one of the appellants resulting in her death was evidence from the evidence of eyewitnesses PW 1, PW 6 and PW 7. The hurling of three (3) bombs by the appellants was also corroborated from the evidence adduced by the above eyewitnesses.

53. While considering the evidence on record, we find that according to the evidence of PW 1, presence of the appellants at the place of occurrence, hurling of bomb by the appellants concerned, assaulting him with the help of "kathi" by the appellants concerned, death of his wife and sustaining of injury of himself, PW 6 and PW 7 were evident. Though the recognition of the appellants by him was possible consequent upon the availability of the torchlight in a moonlight night, the evidence was corroborated by the evidence of PW 6 with further deposition that the appellants were recognised in the moonlight as also light available from the torch of his father. The sustaining of injury by PW 6 and PW 7 apart from the injury he himself sustained wherein corroboration with the evidence of PW 1. The evidence of PW 7 was also corroborated with that of the PW 1 and PW 6 with regard to hurling of three (3) bombs by the appellants assaulting PW 1 with the help of "kathi". PW 4 was not an eyewitness.

54. In view of the above, we are of the opinion that the decision making process of the learned trial Judge in examining the statements of the above witnesses in its entirety and to read the one of the evidence of the above witnesses along with that of others to arrive at a rational conclusion does not require our interference on the basis of the discrepancies mentioned on behalf of the appellants before us which were not of material dimension going to the root of the prosecution case. Necessary to mention here the invoking of Section 34 of the I.P.C. the time of convicting the appellants will be discussed hereunder separately.

G. Doubt with regard to the commissioning of offence by either of the appellants and propriety of conviction of the appellants invoking the provisions of Section 34 of the I.P.C.:--

55. In the instant case, the appellants were convicted for commission of offence punishable under Sections 302/34 and 324/34 of the I.P.C. The I.P.C. was introduced in 1860. Section 34 originally stood in the I.P.C. as under:--

"When a Criminal act is done several persons, each of such persons is liable for that act in the same manner as if the act was done by him alone."

56. In 1870, the above provision was amended as under:--

"When a Criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone"

57. By virtue of the amendment, the words "in furtherance of the common intention of all" were incorporated after the word "persons" and before the word "each".

58. While interpreting the above amended provision, the Privy Council expressed the observation in *Barendra Kumar Ghosh v. Emperor*, reported in AIR 1915 PC 1 (at page 6) as under:--

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

59. In *Mahabub Shah v. Emperor*, reported in AIR (32) 1945 PC 118, the Privy Council repeated and reiterated the same view as also observed that in most cases it was difficult, if not impossible, to procure direct evidence to prove the intention of an individual and in most of the cases it had to be inferred from his act or conduct or other relevant circumstances of the case and the relevant portion of the above decision (at page 120) is quoted below:--

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

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

"33. Now in the case of Section 34 we think it is well established that a common intention presupposes prior concert. It requires a pre-arranged plan because before a man can be vicariously convicted for the criminal act of another, the act must have been done in furtherance of the common intention of them all: *Mahbub Shah v. King Emperor*. Accordingly there must have been a prior meeting of minds. Several persons can simultaneously attack a man and each can have the same intention, namely the intention to kill and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously convicted for the act of any of the others; and if the prosecution cannot prove that his separate blow was a fatal one he

cannot be convicted of the murder however clearly an intention to kill could be proved in his case: *Barendra Kumar Ghosh v. King- Emperor* and *Mahbub Shah v. King-Emperor*. As Their Lordships say in the latter case, "the partition which divides their bounds is often very thin: nevertheless, the distinction is real and substantial, and if overlooked will result in miscarriage of justice".

(Emphasis supplied)

61. The above well settled proposition of law was repeated and reiterated time and again by the Apex Court. It would not be out of context to refer to one of such deception in *Joginder Singh v. State of Haryana*, reported in , 1995 SCC (Cri) 178, to take care of the observation made therein that the totality of the circumstances must be taken into consideration in order to arrive at a conclusion whether the accused had a common intention to commit the offence under which they could be convicted and the prearranged plan might develop on the spot. The relevant portion of the above decision is quoted below:--

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

(Emphasis supplied)

62. In this case, Both the appellants were residents of village-Teghori, District-Murshidabad. According to the FIR as also the evidence of PW 1, he and his family members were the erstwhile residents of the aforesaid Village- Teghori, District-Murshidabad. There was no cross-examination to the above statement of PW 1. From the FIR as also the further evidence of the PW 1, his enmity with the appellant No. 1 on the allegation of outraging of modesty of the wife of the appellant No. 1 while living at Village-Teghari, District-Murshidabad, as a result of which the properties in the house of PW 1 were damaged at the instance of the appellant No. 1. It was the cause of shifting of his residence to Dwipchar, District-Murshidabad, as a consequence of such enmity was evident.

63. The presence of the appellants at the place of occurrence, i.e. at the residence of the PW 1 at Village-Dwipchar, District-Murshidabad, at late night on the date occurrence, i.e. at 01.00 hour on April 29, 1989, was evident from the evidence of the P.W. 1, PW 6 and PW 7. All of them happened to be the eyewitnesses of the incident from stage of the hurling of the second bomb by one of the appellants. According to the evidence of all of the aforesaid three eyewitnesses, the wife of the PW 1, PW 6 and PW 7 sustained injuries consequent upon hurling of the aforesaid second bomb. There was corroboration

of the evidence of PW 1, PW 6 and PW 7 with the post mortem report so far as the cause of death of the wife of PW 1 was concerned. The corroboration of the evidence of PW 6 and PW 7 with their treatment papers were also evident. Sustaining of injury by the PW 1 as a result of throwing "kathi" by the appellant No. 1 was also evident from the evidence of PW 1 and PW 7.

64. Therefore, we find no infirmity in the decision making process of the Learned trial judge to invoke the aid of Section 34 of the I.P.C. to convict the appellants for commission of offence punishable under Sections 302 as also 324 of the I.P.C. upon arrival at a conclusion that the Criminal act complained against was done by the accused persons in furtherance of common intention of all applying the time tested settled proposition of law in this regard.

H. Recording of the statement of the accused under Section 313 of the Cr.P.C.:--

65. The settled principles of law in examining the propriety of the decision making process of a trial in respect of the issue under reference was decided by us by a judgment dated November 23, 2015, passed in Illiash Mondal & Anr. v. The State of West Bengal (In re: CRA 810 of 2013). The above judgment was delivered taking into consideration the decisions of Hate Singh Bhagat Singh v. State of Madhya Bharat, reported in , AIR 1953 SC 468 and Amit Kapoor v. Ramesh Chander, reported in , (2012) 9 SCC 460, and the relevant portions of the above decision is quoted below:--

"Regarding recording of statements of accused under Section 313 of the Cr. P.C., (Section 342 of the Criminal Procedure Code, 1898), the statement recorded under the aforesaid statutory provision are most important matter to be considered in a trial. The Hon''ble Justice Fazal Ali, as His Lordship then was, while speaking on behalf of a three Judges Bench judgment of the Apex Court, explained the importance as also the manner of application of the above provision of Cr. P.C. in the decision of Hate Singh Bhagat Singh v. State of Madhya Bharat, reported in , AIR 1953 SC 468, observing that in England and in America an accused person could state in his own way in the witness-box. In our country, an accused person is not allowed to enter the box and speak on oath in his own defense. In our country, the statements of an accused recorded under the provision of Section 313 Cr. P.C. (Section 342 of the Criminal Procedure Code, 1898) is intended to take the place what in England and in America he would be free to state in his own way in the witness-box. That statement has to be received in evidence and treated as evidence for the purpose of due consideration at the trial."

66. In view of the settled principles of law the statement of an accused recorded under Section 313 of the Cr. P.C. has to be received in evidence and treated as evidence and be duly considered at the trial.

67. While considering the contentions of the appellants in this case, an important cardinal rule of recording the statement of an accused under Section 313 of the Cr. P.C. is required to be considered. It is a part of fair trial to give opportunity to

an accused while recording his statement under Section 313 of the Cr. P.C., to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. It means and purports that the entire prosecution evidence need not be put to the accused for obtaining elicited answer thereto but failure to put those circumstances which are adverse to him and obtaining of explanation thereto which would help the Court for evaluating the evidence properly would vitiate the trial provided when on fact it is found that it had occasioned a failure of justice. Reference may be made to the decision of *Dharampal Singh v. State of Punjab*, reported in , (2010) 9 SCC 608 and the relevant portion of the above decision is quoted below:--

"21. As part of fair trial, Section 313 of the Code of Criminal Procedure requires giving opportunity to the accused to give his explanation regarding the circumstance appearing against him in the evidence adduced by the prosecution. The purpose behind it is to enable the accused to explain those circumstances. It is not necessary to put the entire prosecution evidence and elicited answer but only those circumstances which are adverse to the accused and his explanation would help the court in evaluating the evidence properly. The circumstances are to be put and not the conclusion. It is not an idle formality and questioning must be fair and couched in a form intelligible to the accused. But it does not follow that omission will necessarily vitiate the trial. The trial would be vitiated on this score only when on fact it is found that it had occasioned a failure of justice."

(Emphasis supplied)

68. In order to examine the contentions of the appellants question No. 3 and 4 respectively relating to the source of light for their identification recorded under Section 313 of Cr.P.C. are quoted below:--

"Appellant No. 1

Q. 3:-- It appears from the evidence of P.W. 5 that on the date of occurrence at night P.W. No. 1, his wife, daughter and sons (P.W. No. 6 and P.W. No. 7) and his mother were sleeping under the Jack fruit tree. At that time at about 1 P.M. awoken by receiving the sound of Bombing. Thereafter they found you and other accd. Persons on the torch light. What do you want to say about this?

Ans.:-- False.

Appellant No. 2

Q. 4:-- It appears from the light of Torch light that you and Bhupen again thrown Bomb thereafter his wife were again injured by Bombing. Later, the accd. Dinu Bombing to him but he saved himself from Bombing. Thereafter the other accused persons throw Bomb to Ram Mondal and Ram Mondal were injured by Bombing on his back. He also found to the accd. Persons Chamatkar Mondal, Natabar Mondal and Sakhi Mondal by weaponing had standing there. What is your opinion about this?

Ans.:-- False."

69. From the aforesaid statements it is evident that both the appellants denied their presence at the place of occurrence at the material point of time in reply to the aforesaid questions. After denial of their presence at the place of occurrence, there was no scope for the appellants to give explanation with regard to various sources of light for their identification at the place of occurrence at the material point of time. Neither it was an omission nor would it vitiate the trial. Therefore, our interference into the impugned judgment in this regard is not necessary.

70. This appeal is, thus, dismissed.

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

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

Md. Mumtaz Khan, J.—I agree.