
(2013) 10 CAL CK 0021
In the Calcutta High Court
Case No : C.R.A. 221 of 1995

Rebati Baidya and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 07-10-2013

Acts Referred:

Citation : (2014) 1 CALLT 73

Hon'ble Judges : Nishita Nirmal Mhatre, J;Kanchan Chakraborty, J

Bench : Division Bench

Advocate : Milan Mukherjee, Mr. Saibal Mondal and Mr. Biswajit Manna, for the Appellant; Prasun Kumar Dutta and Mr. Santanu Deb Roy, for the Respondent

Judgement

Nishita Nirmal Mhatre, J.—This appeal is directed against the judgment of Additional Sessions Judge, 13th Court at Alipore, whereby the appellants have been convicted for having committed offences u/s 302 read with section 34 of the Indian Penal Code. Each of them has been ordered to suffer imprisonment for life and are liable to pay a fine of Rs. 1,000/- (Rupees one thousand only), and in default to suffer one month of rigorous imprisonment. The case of the prosecution is that on 2nd September, 1990 Kartick Baidya, his elder brother Nabakumar Baidya and his younger brother Probhas Baidya (the deceased herein), Haren Chandra Baidya, Tapan Kumar Baidya were on duty as night guards for the village and were keeping a watch from 10/10:30 p.m. onwards. Kartick Baidya and Nabakumar Baidya went home after some time while the others including the deceased Probhas Baidya continued on duty. At about 1:30 a.m. some persons broke the electric bulb behind Kartick's house. Kartick woke up because of the sound of the splintering glass and saw Bibhuti Baidya (Appellant No. 2) with a pipe gun in his hand, Tukaram Baidya (Appellant No. 6) armed with a sword, Sridam Halder (appellant No. 7) holding a bomb, Rebati Baidya (Appellant No. 1), Bhupati Baidya (Appellant No. 3), Arabinda Halder (Appellant No. 5) and many others residing at Gobindapur with them calling out to Kartick to come out of his house and threatening him with dire consequence.

Kartick fled from the house while his wife remained in the room. He heard the sound of a bomb. Probhas Baidya ran towards Kartick's house thinking that Kartick was being assaulted. Bibhuti Baidya shot Probhas Baidya in his chest with a pipe gun. Kartick and his elder brother and others came running towards Probhas who had collapsed to the ground. They lifted Probhas to the verandah outside Haren Baidya's house where Probhas expired. According to Kartick, Rabati assaulted Surajit on his forehead with a tangi and caused a bleeding injury while Tukaram assaulted Tapan with a sword. When he and others raised an alarm, the people of the village came running and the accused fled away. Kartick is the complainant and has stated that the accused shot his brother and made an attempt to murder him and his nephews because of a property dispute.

2. The FIR was lodged by Kartick on 3rd September, 1990 at 6:30 a.m. and was dispatched from the Police Station on 4th September, 1990 at 8 a.m. it was received by the concerned Magistrate on 11th September, 1990. An inquest was held on the same day at 7:30 a.m. The body of deceased Probhas Baidya was sent for the post mortem examination. It was conducted on 4th September, 1990 at 2 p.m. as per the post mortem report.

3. The charge-sheet which was filed against the appellants on 1st December, 1994, mentioned that the appellants were charged for having committed offences punishable u/s 302 read with section 149 of the Indian Penal Code. Several other offences mentioned in the FIR were deleted. A second charge-sheet was filed on 27th July, 1995, after the trial was completed and the statements of the appellants had been recorded u/s 313 of the Cr.P.C.. In the first charge-sheet the name of the deceased was stated as Kartick Baidya whereas the second charge-sheet indicated that the name of the deceased was Probhas Baidya.

4. The prosecution examined 20 witnesses. P.Ws. 1, 2, 3, 5 and 14 were eye witnesses and related to the deceased. P.Ws. 9, 11 and 13 have been declared hostile. P.Ws. 12 and 15 are the Doctors, examined in this case. P.Ws. 16 to 20 are the police personnel including the Investigating Officers were being examined in this case.

5. The first submission of Mr. Milan Mukherjee, learned Counsel for the appellants, is that the FIR has been dispatched and received by the Court after eight days of the incident and, therefore, the contents of the FIR are untrustworthy. He has further submitted that this delay in the receipt of the FIR by the concerned Magistrate is fatal to the prosecution case. He has placed reliance on the judgments of the Supreme Court in the case of Ishwar Singh Vs. State of U.P., Bijoy Singh and Another Vs. State of Bihar, , and Shivlal and Another Vs. State of Chhattisgarh,

6. Mr. Prasun Kumar Dutta, learned Counsel appearing for the State on the other hand submitted that the delayed receipt of the FIR by the Magistrate is merely irregularity and not an illegality which is fatal to the case of the prosecution. He

submitted that in view of the decision of the Supreme Court in the case of Rabindra Mahto and Another Vs. State of Jharkhand, the case of the prosecution cannot be discarded in its entirety because of the delay in either recording the FIR or sending the same to the Magistrate.

7. The FIR was lodged on 3rd September, 1990 at 6:30 a.m. The date and time of occurrence of the incident as mentioned in the FIR is "in the night of 3.9.90 at 01.30 hrs." If this is accepted to be true, it would mean that the incident had occurred in the night between 2nd September and 3rd September, 1990 at 1:30 a.m. The distance between the place of occurrence and the concerned police station as reflected from the FIR is 15 kilometres. The FIR was dispatched from the Police station to the concerned Magistrate on 4th September, 1990 at 8 a.m. However, it has been received by the Magistrate only on 11th September, 1990. There is no explanation whatsoever in the evidence tendered by the prosecution as to why there was a delay in the receipt of the FIR by the Magistrate. An FIR which has been received belatedly by the Magistrate would have to be considered with caution as the possibility of it being tampered cannot be ruled out. Section 157 of the Cr.P.C. mandates that the report should be sent forthwith to the Magistrate empowered to take cognisance of the offence. The Supreme Court has opined in Ishwar Singh's case (supra) that when no explanation is offered for the extraordinary delay in sending the report to the Magistrate, it is a circumstance which provides a legitimate basis for suspecting that the FIR was recorded much later than the stated date and hour, affording sufficient time to the prosecution to introduce improvements and embellishments and to set up a distorted version of the occurrence.

8. A similar view has been taken by the Supreme Court in Bijoy Singh's case (supra) where it is held that the requirement to send the copy of the report to the Magistrate u/s 157 of the Cr.P.C. is an external check on the working of the police agency and it must be strictly followed. Though the delay in sending the report may not by itself render the whole of the case prosecution doubtful, the Court would be guarded while ascertaining whether the version stated in the Court was the same as reported in the FIR or whether it was as a result of deliberations involving persons other than those who are actually involved in the commission of crime. The Court has further held that whenever there is a delay in sending the report u/s 157 of the Cr.P.C. the prosecution is required to explain the same. If the delay is reasonably explained, no adverse inference can be drawn. The Supreme Court has further held that the failure to explain the delay would require the Court to minutely examine the prosecution version to ensure that an innocent person has not been implicated in the crime. The Court has also observed that it is not for the accused to seek an explanation for the delay but for the prosecution to explain such delay in sending the report; if it is found to be reasonable, plausible and sufficient, no adverse inference can be drawn against such a report.

9. In the case of Shivilal & Anr. (supra), the Court has reiterated its earlier view

with respect to the delay in filing a report u/s 157 of the Cr.P.C.. The Court observed that where the copy of the FIR was not sent to the Magistrate at all as required u/s 157(1) of the Cr.P.C., in the absence of any explanation furnished by the prosecution, it would cast a shadow on the case of the prosecution.

10. Similarly, in the case of Rabindra Mahto & Anr. (supra) the Supreme Court has held that the FIR must be received by the Magistrate without undue delay in order to avoid any possibility of improvements in the prosecution story and also to enable the Magistrate to have a watch on the progress of the investigation. The Court has further held that the lacuna on the part of the prosecution cannot be the sole basis for discarding the entire case of the prosecution as a fabricated one if the prosecution had produced the reliable evidence to prove the guilt of the accused persons.

11. Thus it has been the consistent view of the Supreme Court that where there is a delay in receipt of the FIR by the Magistrate, especially in case of a heinous crime, the Court must accept the case of the prosecution guardedly. It is for the prosecution to establish that there was a justifiable reason for the delay in sending the FIR or its receipt by the Magistrate. In the present case there is no explanation whatsoever from the prosecution as to why the FIR which was dispatched on 4th September, 1990 at 8 a.m. from the police station was received by the concerned Magistrate on 11th September, 1990. Therefore, without such an explanation it is necessary for us to consider whether there are any embellishments in the prosecution story. There is no doubt that the mere fact that there is a delay in the receipt of the FIR would not by itself render the case of the prosecution unbelievable. However, the fact that there is no explanation for the delay has caused a shadow of doubt on the story of the prosecution.

12. The next submission of Mr. Mukherjee was that the charge which has been framed against the appellants does not mention the time and the exact scene of the offence. He has further submitted that the failure to mention the precise time at which the offence has allegedly been committed amounts to a failure of justice. He pointed out that even after the charge was amended on 27th July, 1995, neither time nor place of occurrence has been mentioned precisely in the charge. Mr. Mukherjee has relied on the judgments in the case of Mamfru Chowdhury and Others Vs. King-Emperor, Nanak Chand Vs. The State of Punjab, and Sharad Birdhichand Sarda Vs. State of Maharashtra, in support of his submission that the charge framed is illegal.

13. In the present case, as seen from the charge, which was framed on 1st December, 1994, there is no precise indication of the time when the incident occurred or indeed the place where the offence was allegedly committed by the appellants. Furthermore, there is no indication in the charge as to how the offence was allegedly committed. All that is stated in the charge is that the appellants on 3rd September, 1990 were members of an unlawful assembly in prosecution of their common object to kill Kartick Baidya and one of the

members of this assembly had murdered him. Thus it is apparent that the charge is defective, inasmuch as neither the place, nor the time nor the manner in which the offence has occurred has been mentioned precisely. Indeed the charge is faulty, as the common object spoken of in the charge framed was to kill Kartick Baidya when, in fact, Kartick Baidya was the complainant. The offences named in the charge are u/s 302 read with section 149 of the IPC. However, a fresh charge was framed on 27th July, 1995, after the statements of the accused were recorded u/s 313 of the Cr.P.C. and after the arguments were completed. The name of Kartick Baidya was deleted and substituted by that of Probhas Baidya.

14. This defective charge has resulted in an unfair trial against the appellants. Even assuming that both the prosecution and the defence proceeded on the footing that it was Probhas Baidya who had been killed as Kartick Baidya was the complainant, the fact remains that the time, place and manner in which the incident occurred have not been stated precisely. This is, in our opinion, a flaw in the trial as the appellants have been prejudicially affected by the vague charge. Mr. Prasun Kumar Dutta, learned Counsel for the State fairly submitted that the charge against the appellants was vague, but he urged that it could not amount to an illegality. This submission, in our opinion, is untenable. As the charge is vague it was difficult for the appellants to answer the same or to defend themselves effectively. Such a failing cannot be considered as a mere irregularity. It is an illegality.

15. The next submission of Mr. Mukherjee is that the witnesses, examined by the prosecution, have failed to prove the case of the prosecution. He submitted that the testimony of the witnesses was not credible examined and therefore should be discarded. The learned Counsel pointed out that the prosecution had failed to examine independent witnesses when at least two witnesses have deposed that other villagers had reached the scene of offence immediately. The evidence of witnesses who are related should be scrutinised and assessed carefully by the Court before accepting their version.

16. Kartick Baidya, the complainant, has stated that at 1:30 a.m. some persons broke the electric bulb at the rear of his house. In his cross-examination he has stated that he heard the sound of a bomb blast after the electric bulb was smashed. He has also stated that he showed the police the remnants of the bomb and the broken pieces of electric bulb. Chayya Rani, Kartick's wife, was examined as P.W. 6. She has stated that at 1 a.m. she heard the sound of electric bulb breaking and of a bomb blast. P.W. 14, Haren, has deposed that the electric lamp behind Kartick's house went off suddenly and that he heard an explosion. However he has not stated that the electric bulb was broken. He has spoken of another electric light situated on the eastern side of Kartick's house going off, although neither Kartick nor his wife have referred to this light. The Investigating Officer P.W. 16 on the other hand has admitted that he did not find the remnants of the bomb at the place of occurrence nor the splintered glass of the electric bulb which was allegedly smashed by the appellants according to the

prosecution. Kartick in fact has stated in his deposition that he pointed out the broken pieces of glass from the electric bulb and the remnants of the bomb to the Investigating Officer. Thus there is a divergence in the version of the witnesses. There is no explanation as to why the Investigating Officer was unable to find the splintered glass of the electric bulb or the remnants of the bomb.

17. As regards the exact place of occurrence, again, there is a discrepancy in the testimony of the witnesses. There is no sketch map in the record received in this Court. Kartick has testified that the deceased was shot at the place where he met the night watch party and that he fell to the ground on the private road adjacent to his (Kartick's) residence. P.W. 2 Nabakumar Baidya, Kartik's brother has stated that the deceased collapsed about 30- 32 cubits from the village path, and 40 feet away from Haren's verandah on receiving a bullet injury. According to him the deceased was at a distance of 3 to 4 cubits away from him. P.W. 4 has stated that the deceased was found lying dead in the passage in front of house of Kartick Baidya. P.W. 5 has stated that the bullet was shot when the deceased was on the road adjacent to the Kartick's verandah. P.W. 6, the wife of P.W. 1 and P.W. 7 Laxmi Rani, the wife of the deceased, have corroborated the testimony of P.W. 1 and P.W. 4 that the deceased was found lying dead on the private passage. P.W. 14 has deposed that the deceased collapsed on being shot, 20 feet away from the private path on the east. Thus the exact place of occurrence of the crime has not been established in view of the differing versions of the witnesses.

18. There is a variance in the versions of the witnesses regarding the placement of the dead body after the deceased was shot. P.Ws. 1 and 14 have stated that the dead body was laid in the verandah of the house of Haren and Biren. However, P.Ws. 2, 6, 7 and 16 have stated that the body was laid in Biren's verandah. On the contrary, P.W. 8 has deposed that the body was set down in Haren's verandah. The inquest report indicates that the body was positioned in the verandah on the eastern side of Biren's tiled roof house. P.W. 7 has stated that Haren and Biren are brothers and are residing in two separate houses with a Courtyard between them. She has affirmed that each house has a verandah. P.W. 14 has stated that the body was laid on a mat while P.W. 9 has denied that a mat was placed under the body. The inquest report also does not indicate that the body was placed on a mat in Biren's verandah. There is thus no consensus among the witnesses about the location of the verandah or the placement of the body. Therefore, it is not possible to believe such evidence as there are far too many inconsistencies.

19. P.Ws. 2, 11 (declared hostile) and 16, the I.O. have stated that it was raining very heavily on the night of the incident. Surprisingly, P.W. 1, Kartick, the first informant has not spoken about this fact. P.W. 16 has stated that the clothes of the deceased did not bear any blood stains as they had been washed off in the rain. If there was in fact a heavy down pour when the incident occurred and the electric bulbs of the street lamps on the pathways had been broken it is very

difficult to believe that the prosecution witnesses were able to identify the appellants. Mr. Dutta, learned Counsel appearing for the State has submitted that the identification of the accused has not been challenged by them at any point of time, and therefore, must be taken to be admitted. He has stated that P.W. 11 who has been declared hostile has deposed that the accused could be identified because some of the villagers, who had rushed to the aid of Kartick, were using torch lights. The learned Counsel for the State has relied on the judgment of the Supreme Court in the case of Ramesh Harijan Vs. State of U.P., in support of his submission, that, the entire testimony of a hostile witness need not be discarded. The Supreme Court has considered its earlier judgments on the acceptability of the evidence of a prosecution witness who has been declared hostile. The Court opined that the evidence of the hostile witness cannot be discarded as a whole and relevant parts thereof which are admissible in law can be used by the prosecution or the defence. This judgment does not take the case of the prosecution any further as we have found that it is only P.W. 11 who has spoken about the torch lights with which it was possible to identify the appellants.

20. As regards the nature of the weapon used to allegedly kill the deceased, the witnesses have stated that it was a pipe gun. P.W. 5 Tapan Baidya has admitted in his cross-examination that he asked the constable if the bullet fired at the deceased was from a gun or from a pipe gun. He was told that it had possibly been fired from a pipe gun. There is no seizure of weapons used. P.W. 15, the doctor who performed the post mortem has deposed that a brass metallic object was lodged between T-2 and T-3 showing a fracture of the vertebrae anteriorly. He has stated that the bullet recovered from the body was sealed by him. He has opined that the injuries indicated that the bullet had been fired from very close quarters, and that the injury was sufficient in the ordinary course of nature to cause death. However he has not stated that a pipe gun could have caused the fatal injury. P.W. 16 who performed the inquest has stated that he searched for a pellet at the place of occurrence of the offence. P.W. 18, a constable who took the body to the morgue, has stated that P.W. 15, had handed over the clothes of the deceased and the bullet and other articles which he given to P.W. 19 who has admitted that he received one pellet under a sealed cover and the other articles. P.W. 20 who took over the investigation has admitted that there was no note in the case diary that he had made any attempt to get the pellet or bullet examined by an expert.

21. As mentioned earlier, this bullet or pellet recovered from the body of the deceased was not sent to the ballistic expert. There is no expert evidence on whether it was a bullet or pellet and whether it could have been fired from the pipe gun. In fact, the pipe gun has not been seized. Thus the investigation has been conducted in a perfunctory manner. Apart from this, the witnesses have stated that they lifted the deceased and placed the dead body in the verandah which was adjacent to Biren's house. However, all the witnesses who lifted the body have stated that none of them had any blood stains on their clothes. The inquest report does not indicate that there was a seizure of the clothes of these

persons. There is no indication in the evidence of P.W. 16 who performed the inquest whether the blood stained clothes of the deceased had been sent for analysis. In fact, he has stated that because of the heavy shower, the blood stains on the clothes were washed off. He has also stated that he did not find any blood stains at the spot where the dead body was placed. This statement is not credible as other witnesses have stated that the wound was bleeding. Moreover, P.W. 15, the doctor who performed the post mortem, has stated that there were bleeding injuries on the body.

22. The Investigating Officer P.W. 16 has also admitted that he did not find the remnants of the bomb at the place of occurrence and that he did not attempt to search for the broken pieces of glass from the electric bulbs which were allegedly smashed by the appellants. He has further admitted that the clothes of the other persons who had lifted the dead body were not shown to him. It is evident, therefore, that the investigation which was carried out was done in a very shoddy and casual manner. Therefore, it is difficult to believe the version of the prosecution regarding the manner in which the incident occurred. The discrepancies in the testimony of the witnesses are far too many to be ignored. There is no certainty about the pipe gun being the cause of death. In *Ishwar Singh's* case (*supra*) the Supreme Court has observed that it is the duty of the prosecution and the Court to ensure that the alleged weapon of offence is shown to the medical witness and invite his opinion as to whether the injuries on the deceased could be caused by the weapon. Failure to do so could sometimes lead to an aberration in the course of justice. As we have stated earlier there is no seizure report indicating that the pipe gun was recovered. Whether the metal object recovered from the body of the deceased of pellet or bullet has also not been stated with certainty. Therefore, the cause of death has not been established with exactitude.

23. Considering the evidence as a whole it appears to us that there are several embellishments in the testimony of the witnesses, especially of those who are related to the deceased. In the case of *Sharad Birdhichand Sarda* (*supra*), the Supreme Court has cautioned that the testimony of close relatives and friends of the deceased is to be considered after sifting the chaff from the grain. The Court has observed thus in Para 48 of the judgment:

48.....In view of the close relationship and affection any person in the position of the witness would naturally have a tendency to exaggerate or add facts which may not have been stated to them at all. Not that this is done consciously but even unconsciously the love and affection for the deceased would create a psychological hatred against the supposed murderer and, therefore, the Court has to examine such evidence with very great care and caution. Even if the witnesses were speaking apart of the truth or perhaps the whole of it, they would be guided by a spirit of revenge or nemesis against the accused person and in this process certain facts which may not or could not have been stated may be imagined to have been stated unconsciously by the witnesses in order to see that

the offender is punished. This is human psychology and no one can help it.

24. Having regard to the observations of the Supreme Court we are convinced that the testimony of the witnesses who are related to the deceased lacks credibility.

25. The inquest was carried out at 7:30 a.m., i.e., over 6 hours after the alleged incident. The post mortem report shows that it was performed on 4th September, 1990 at 2 p.m., almost 36 hours after Probhas had allegedly been shot at. However, P.W. 15 the Doctor who carried out the post mortem examination has stated that the bullet wound, was bleeding. It is difficult to accept this when the inquest report indicates that the body was covered with mud and rigor mortis had set in. The inquest shows that there was a bleeding injury on the chest of the deceased. If such a bleeding injury was present, it is difficult to understand as to how and why the Investigating Officer did not find it necessary to examine the floor under body or surrounding it for blood stains. Moreover, if there was such a bleeding injury then it is also not possible that those persons, who had lifted the body, would not have stained their clothes with Probhas' blood. As we have stated earlier neither the remnants of the bomb nor the shards of splintered glass from the electric bulb have been recovered. All the persons who signed the inquest report have not been examined. P.W. 1 and P.W. 2, the brothers of the deceased and Haren who has been examined as P.W. 14 have signed the inquest report. However, the other signatories to the inquest report, who are independent witnesses, have not been examined by the prosecution. Their evidence would have had some value as they are not related to the deceased.

26. Mr. Dutta appearing for the State has submitted that all the witnesses have testified that Bibhuti shot the deceased. He has stated that civil litigations were pending between Bibhuti and Kartick, and therefore, the possibility of Bibhuti having a motive to kill Probhas, who was Kartick's younger brother, cannot be ruled out. Mr. Mukherjee, on the other hand, submitted that Kartick and Probhas, the deceased had litigation regarding their property pending inter se, and therefore Kartick also had a motive for doing away with his brother. He has submitted that Bibhuti's motive for killing Probhas has not been established by the prosecution. Therefore, the case of the prosecution is untenable. There is no doubt that civil litigation was pending between both Kartick and Probhas, and Bibhuti and the family of Kartick. However, there is no reason to believe that Bibhuti had any motive to kill Probhas.

27. The next criticism of Mr. Mukherjee against the judgment of the Sessions Court is that although the charge was framed against the appellants was u/s 302 read with section 149, they have been convicted u/s 302 read with section 34. He pointed out that the charge was altered after the statements of the accused had been recorded u/s 313 of the Cr.P.C.. No case had been put to the accused that they had committed offences u/s 302 read with section 34. All the questions asked to the accused related to offences u/s 302 read with section 149. Mr. Mukherjee submitted that there is a vast difference between section 34 and

section 149 by relying on the judgments in the case of Nanak Chand (supra). He fortified his argument that the accused were thus greatly prejudiced at the trial by relying on the judgments in Inspector of Customs, Akhnoor J and K Vs. Yash Pal and Another, and in the case of Sharad Birdhichand Sarda (supra).

28. In the case of Nanak Chand (supra) the Supreme Court has succinctly articulated the difference between sections 34 and section 149 of the IPC thus:

There is a clear distinction between the provisions of sections 34 and 149, IPC and the two sections are not to be confused. The principal element in section 34, IPC is the common intention to commit a crime. In furtherance of the common intention several acts may be done by several persons resulting in the commission of that crime. In such a situation section 34 provides that each one of them would be liable for that crime in the same manner as if all the acts resulting in that crime had been done by him alone. There is no question of common intention in section 149, IPC. An offence may be committed by a member of an unlawful assembly and the other members will be liable for that offence although there was no common intention between that person and other members of the unlawful assembly to commit that offence provided the conditions laid down in the section are fulfilled. Thus if the offence committed by that person is in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object, every member of the unlawful assembly would be guilty of that offence, although there may have been no common intention and no participation by the other members in the actual commission of that offence.

29. While examining the accused u/s 313 of the Cr.P.C., the questions put to them indicated that the charge against each of them was that they were part of an unlawful assembly having a common object to kill Probhas. Surprisingly each of the accused has been put the same question, that he threatened to murder Kartik and when Probhas stepped forward, he murdered him. In fact, one of the questions asked of appellant No. 5 is ".....You had a bhojali in your hand, When Probhas came forward and resisted you, you murdered him with a bullet from a pipe gun....". Similarly, appellant Nos. 6 and 7 have also been put the same question that though they were armed with other weapons which have been named like a tangi, a sword, a bomb, they had killed Probhas with a pipe gun. However, it was always the prosecution case that it was Bibhuti who had fired the fatal shot at Probhas. Thus the failure of the Court to put the case of the prosecution as adduced in the evidence to the accused has led to injustice. In Inspector of Customs, Akhnoor, Jammu and Kashmir's case (supra) the Court had observed that the object of examining the accused u/s 313 was for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him. The principle enshrined in section 313 of the Cr.P.C. is to afford the accused natural justice. A circumstance about which the accused was not asked to explain cannot be used against him. The Supreme

Court reiterated its earlier view expressed in Sharad Birdhichand Sarda's case (supra).

30. The Sessions Court has convicted the accused u/s 302 read with section 34. It was necessary for the Court to first put questions to the accused regarding their common intention to slay Probhas. Indeed, the line of questioning of the accused u/s 313 of the Cr.P.C. indicates that they were a part of an unlawful assembly having the common object of killing Probhas. In our opinion, therefore, the conviction of the accused u/s 302 read with section 34 is unsustainable.

31. Thus, taking an overall view of the matter it is obvious that the prosecution failed to prove its case to the hilt. The tardy dispatch of the FIR and its belated receipt by the Magistrate has cast a shadow of doubt on the contents of the FIR. The charge framed against the accused does not mention the time or place of the offence or the manner in which the offence has been committed. This amounts to an illegality and not merely an irregularity. The witnesses examined have not corroborated each other's testimony. There are too many discrepancies and contradictions in the evidence. Independent witnesses who were allegedly present at the scene of offence have not been examined. The investigation has been haphazard, cursory and perfunctory. The cause of death has not been pin pointed to a pipe gun allegedly fired by Bibhuti. The conviction u/s 302 read with section 34 is unsustainable when the charge was altered after the evidence was recorded and the statements of the accused had been recorded u/s 313 of the Cr.P.C.. This has led to a failure of the principles of natural justice and has caused prejudice to the accused. The precise circumstances in which the incident has occurred have not been proved against the accused. Hence, the appeal is allowed. The judgment of the Sessions Judge is set aside. The conviction and sentence of the accused is set aside. The accused be set at liberty and their bail bonds be discharged.

Urgent certified photocopies of this judgment, if applied for, be given to the learned advocates for the parties upon compliance of all formalities.