

(2016) 03 CAL CK 0018
In the Calcutta High Court
Case No : CRA 366 of 2012

Tajel Sk. and Others

APPELLANT

Vs

The State of West Bengal

RESPONDENT

Date of Decision : 02-03-2016

Acts Referred:

Constitution of India, 1950 — Article 15(3)(e), Article 45, Article 47
Criminal Procedure Code, 1973 (CrPC) — Section 157, Section 157(1), Section 161,
Section 313
Juvenile Justice (Care and Protection of Children) Act, 2000 - Section

Citation : (2016) 03 CAL CK 0018

Hon'ble Judges : Indira Banerjee and Sahidullah Munshi, JJ.

Bench : Division Bench

Advocate : Sandipon Ganguly and Shreyasi Biswas, for the Appellant; Manjit Singh and Pawan Kr. Gupta, for the Respondent

Final Decision : Allowed

Judgement

Indira Banerjee, J.—1. This appeal is against a judgment and order of conviction dated 24th April, 2012 and an order of sentence dated 26th April, 2012 passed by the Additional Sessions Judge, Jangipur, Murshidabad in Sessions Trial No. 3/ July/2002 corresponding to Sessions Case No. 109/2001 whereby the appellants have been convicted of offence under Section 302 of the Indian Penal Code and sentenced inter alia to suffer rigorous imprisonment for life.

2. On or about 25th April, 1999, one Jamirul Hossain, son of Late Mainur Hossain alias Patu Fakir, lodged a complaint in writing with Suti Police Station, Aurangabad, Murshidabad alleging that the accused appellants assaulted his father, Late Mainur Hossain alias Patu Fakir, hereinafter referred to as the deceased with a "cheni", out of previous grudge and in a pre-planned way, as a consequence of which his father died. The accused appellants left the place hurling bombs.

3. Pursuant to the aforesaid complaint, Suti Police Station Case No. 52/1999

dated 25th April, 1999 was started under Section 302/34 of the Indian Penal Code. The Inquest Report reveals deep injury on the left side of the head of the deceased. Deep injury was also found on the throat, neck, shoulder, lower abdomen and chest of the deceased.

4. The preliminary investigation revealed that on 25th April, 1999 at about 7.30 P.M, seven accused persons assaulted the deceased with "cheni". The deceased died at once. Thereafter, the dead body of the deceased was sent to the Jangipur Sub-Divisional Medical Hospital through Constable Chamatkar Saha for post mortem examination.

5. After investigation, charge sheet was issued to the accused appellants inter alia alleging that the accused appellants had in furtherance of common intention, caused the death of the deceased with sharp cutting weapons and thereby committed offence punishable under Section 302/34 of the Indian Penal Code.

6. The 1st Prosecution Witness, Jamirul Sk., son of the deceased, deposed that the incident had taken place about 8 1/2 years ago at around 6:30/7 p.m. in front of the house of the deceased at village Baliaghati.

7. This witness deposed that his father Mainur Hossain had been counting "Tasbir" in front of their house. According to this witness, Nazrul, Tattu, Aktar, Fazu, Hobi, Masu and Tajel came with "Chheni" and started assaulting his father with "chheni". This witness said that this witness, his mother, Manohar Bewa, and his sister Johara saw the incident from inside the house but they could not go out as they were afraid. This witness deposed that after murdering his father the accused persons went away exploding bombs. This witness stated that he saw the accused persons by the light of an electric lamp and recognized them.

8. In cross-examination, this witness admitted that his father was accused in five or six cases and had also been in jail custody in connection with those cases. This witness also stated in cross-examination that to the north of their house there were the houses of Babu Sk. And Sikander Sk., to the south of their house were the houses of Serajul and Mannan. The houses of Krishna Sarkar, Debkari Sarkar, Dwijen and Tamal were about 100 cubits away from their house. None of these persons were examined. This witness, however, denied the suggestion that his father had several old enemies and those enemies had actually killed his father.

9. The 2nd Prosecution Witness, Manahar Bewa, wife of the deceased, stated that the incident had taken place on 8th Baisakh near her house. She further stated that Nazrul, Tattu, Hobi, Akhtar, Faju, Masu and Tajel had assaulted her husband with "hansua, chheni" etc. At that time her husband had been chanting the name of God by counting "Tasbir" after offering Namaj. PW2 stated that Tajel and Nazrul had "chheni" with them Faju and Akhtar had bombs with them, Masu and Tajel had pistols with them. They assaulted her husband and fled away after hurling bombs. This witness did not say which of the accused appellants was carrying "Hansua" (dagger).

10. This witness also stated that there was electricity light in the area. She stated that in her house there were two rooms and there were four bulbs and four switches. The electric metre was in the name of Zamir. She further stated that she was unable to go to her husband out of fear. After the incident the police came and she narrated the incident to the police. She stated that she had seen the incident with her own eyes from her house through her broken boundary wall.

11. The 3rd witness Jahora Bibi, the daughter of the deceased stated that her father Mainul Hossain had been murdered ten years and eight months ago, while he was chanting the name of God by counting the "Tasbir". She said that her father was sitting beside their house. She said that she saw that the accused Nazrul, Tattu, Masu, Tazel, Hobi, Fazu and Aktar assaulting her father with a "Hansua".

12. In her evidence, PW3 has stated that she ran out to save her father from being assaulted and she also pleaded with the accused appellant to spare her father, but they did not listen to her.

13. The 4th witness, Abeda Bibi, daughter of the deceased apparently signed the inquest report. She stated that she was married. She had come to her father's house one hour after the incident. She further stated that she had not been interrogated by the police.

14. The 5th Prosecution Witness Md. Obaidur Rahaman wrote the petition of complaint on the instructions of the 1st Prosecution Witness Zamirul Islam, son of the deceased. He stated that Zamirul put his Left Thumb Impression on the complaint in his presence. He stated that he wrote the FIR as per the instructions of Zamirul. He identified his handwriting and signature. He was also a signatory to the seizure list under which the police had seized a lungi, a "ganji" that is vest, and "tasbir" from the dead body of Mainur. He identified his signature on the seizure list.

15. The 6th Prosecution Witness Dr. T.K. Ghose, a doctor of Berhampore General Hospital, who had been posted at the Jangipur S.D. Hospital at the time of the incident, and had conducted the post mortem examination of the deceased, stated that he had found the following injuries:--

- "1) One 3" sharp-cut injuries over epigastrium, penetrating to abdominal cavity.
- 2) One 6" sharp cut injuries, superficial in nature, upto rectus sheath - one inch above umbilicus situated transversely.
- 3) One 4" sharp cut injuries, superficial in nature, one inch above symphysis pubis - transversely.
- 4) One 2" sharp cut injuries over left femoral area, cutting left femoral vein.
- 5) One 2" sharp cut injuries-medial side of left thigh - in the middle thigh.
- 6) One 2" sharp cut injuries on left shoulder.

7) One 2" sharp cut injuries in between two shoulder blades posteriorly, which is muscle deep.

8) One 3" sharp cut injuries over left temporal area, cutting muscle and bone.

9) One 6" sharp cut injuries over the front of face from left mastoid area cutting jaw bone upto the sternomastoid muscle.

10) One 6" sharp cut injuries-lower part of front of neck, cutting trachea and left sided major vessels, carotid vessels.

11) One three inches sharp cut injuries over right had, cutting proximal falangs of right index finger."

16. This witness opined that the death of the deceased was on account of those injuries and shock which was ante mortem and homicidal in nature. He further opined that the injuries which he found on the dead body might be caused by the assault of a "hansua" that is sickle. The post mortem report does not reveal any bullet injuries or splinter injuries.

17. The 7th Prosecution Witness, Late Chamatkar Saha was a retired constable of police, who had escorted the dead body of the deceased to the Jangipur Morgue. His evidence is not of much relevance to the question of guilt of the accused appellants.

18. The 8th Prosecution Witness, Gautam Biswas, Sub-Inspector of police had received the written complaint from Zamirul Sk., after which he visited the place of occurrence for investigation. He also held inquest over dead body of the deceased. From his oral evidence, it is apparent that no neighbor was examined under Section 161 of the Cr.P.C.

19. This witness identified the sketch map of the place of occurrence prepared by him. In cross examination, he admitted that he had not depicted any electric pole or electric lamp in his sketch map.

20. In his evidence in Court, this witness, did not say that there was any electric lamp at or near the place of occurrence. Moreover he deposed that during interrogation by him, PW2, the wife of the deceased, Mainur, had not stated that there was electric light, by which she could see the accused appellants.

21. No witness was examined on behalf of the defence. The accused appellants were, however, examined under Section 313 of the Criminal Procedure Code. They denied the allegations against them in the evidence and pleaded innocence.

22. The learned Sessions Court, however, held the accused appellants guilty inter alia of murder under Section 302 of the Indian Penal Code and sentenced them inter alia to imprisonment for life.

23. Mr. Sandipan Ganguly appearing on behalf of the accused appellants submitted that the accused appellant No. 2, Habibor @ Habo Sk., was examined under Section 313 of the Criminal Procedure Code on 17th January, 2012. The

learned Sessions Court recorded his age to be 27 years.

24. Mr. Ganguly argued that if the petitioner was 27 years of age as on 17th January, 2012, when he was examined under Section 313 of the Criminal Procedure Code, he should have been about 14 years of age on 25th April, 1999, when the alleged offence was committed by him. Mr. Ganguly argued that the appellant No. 2 was a juvenile and as such his conviction was without jurisdiction.

25. As enshrined in Article 1 of the Universal Declaration of Human Rights, all human beings are born free and equal in dignity and rights. Every child is equal and has the basic human right to be brought up with love, affection, adequate care, adequate nutrition and the basic necessities of a decent standard of life. As an infant grows into a child, the process of education begins, first at home and then at school. Some children are fortunate to be born in enlightened, educated families and to be able to go to the best institutions in the country, but not all.

26. All children are born innocent. It is the environment in which they grow up, which moulds their tender minds. The behavioral pattern of a child depends on various factors, such as, the love and affection that the child gets, the atmosphere at home, the surroundings in which the child is brought up, the education the child gets, the influence of family, friends, teachers and others.

27. Delinquency amongst children is often the result of neglect, deprivation, improper upbringing bereft of love and affection, unhealthy surroundings, the bad influence of adults, peer pressure, want and poverty. In fact in the instant case itself, the accused appellant No. 1 was part of a group of 6/7 co-accused persons, of whom atleast five, including the accused appellant No. 2 were of the same family.

28. Frustration, anger, defiance of authority, obduracy and obstinacy in children are the manifestations of deprivation, emotional as well as material. Delinquent acts are also prompted by a craving for attention. Furthermore, children often become pawns in the hands of scheming adults, anti socials and criminals who use them for their own selfish ends, taking advantage of their juvenility.

29. With adequate love and care, nutrition, good company and good education, the personality of a child blossoms and the child is able to excel in different spheres of life.

30. The primary responsibility of bringing up children, providing them with care, support and protection is that of the family, particularly biological parents. Inability and/or failure of the parents and/or family to discharge their primary responsibility towards children, is a cause of immense concern to the society at large.

31. Errant children can be rectified with love, affection, proper care, proper guidance and some disciplining. Juveniles and/or children in conflict with the law, therefore, need to be reformed and not punished. An aberration resulting from immaturity should not become a handicap for life. Utmost endeavour should be

made to heal wounds which are the result, directly or indirectly, of societal shortcomings. The wound should not be allowed to develop into gangrene, that might cause permanent disability. There have, therefore, been deliberations and discussions at various levels in relation to the rights and interests of children, including errant children in conflict with law.

32. On 20th November, 1989, the General Assembly of the United Nations adopted the Convention on the Rights of the Child, wherein a set of standards have been prescribed to secure the best interests of the child. The convention has emphasized social reintegration of children in conflict with the law, to the extent possible, without resorting to judicial proceedings.

33. The Government of India ratified the convention. Parliament, therefore, enacted the Juvenile Justice (Care and Protection of Children), Act 2000 with the view to codify the standards prescribed by the convention, in furtherance of the provisions of Articles 15(3)(e) and (f) and also Articles 45 and 47 of the Constitution of India.

34. The said Act provides for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and also for matters relating to justice of delinquent juveniles.

35. The justice system as available for adults is unsuitable for being applied to a juvenile or to a child. Parliament, thus, decided to lay down the basic principles for administering justice to a juvenile or a child; to create a juvenile system, meant for a juvenile or a child, which was more appreciative of the developmental needs of a juvenile or a child, in comparison to criminal justice system as applicable to adults; to bring the juvenile law in conformity with the United Nations Convention on the rights of the child; and to prescribe a uniform age of juvenility upto 18 years for both boys and girls. One of the principles behind the enactment of the Juvenile Justice (Care and Protection of Children) Act, 2000 was to minimize the stigma, in keeping with the developmental needs of the juvenile or child.

36. Section 2(k) of the Juvenile Justice Act defines Juvenile or child to mean a person who has not completed 18 years of age. Section 2(l) defines Juvenile in conflict with law to mean a Juvenile who is alleged to have committed an offence and had not completed 18 years of age on the date of commission of the offence.

37. Section 3 of the Juvenile Justice Act provides as follows:--

"3. Continuation of inquiry in respect of juvenile who has ceased to be a juvenile.
- Where an inquiry has been initiated against a juvenile in conflict with law or a child in need of care and protection and during the course of such inquiry the juvenile or the child ceases to be such, then, notwithstanding anything contained in this Court or in any other law for the time being in force, the inquiry may be continued and orders may be made in respect of such person as if such person had continued to be a juvenile or a child."

38. Section 7A of the Juvenile Justice Act provides:--

"7-A. Procedure to be followed when claim of juvenility is raised before any court.--(1) Whenever a claim of juvenility is raised before any court or a court is of the opinion that an accused person was a juvenile on the date of commission of the offence, the court shall make an enquiry, take such evidence as may be necessary (but not an affidavit) so as to determine the age of such person, and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be:

Provided that a claim of juvenility may be raised before any court and it shall be recognised at any stage, even after final disposal of the case, and such claim shall be determined in terms of the provisions contained in this Court and the Rules made thereunder, even if the juvenile has ceased to be so on or before the date of commencement of this Act.

(2) If the court finds a person to be a juvenile on the date of commission of the offence under sub-section (1), it shall forward the juvenile to the Board for passing appropriate orders, and the sentence if any, passed by a court shall be deemed to have no effect."

39. Section 49 of the Juvenile Justice Act reads:

"49. Presumption and determination of age. - (1) Where it appears to a competent authority that person brought before it under any of the provisions of this Act (otherwise than for the purpose of giving evidence) is a juvenile or a child, the competent authority shall make due inquiry so as to the age of that person and for that purpose shall take such evidence as may be necessary (but not an affidavit) and shall record a finding whether the person is a juvenile or a child or not, stating his age as nearly as may be.

(2) No order of a competent authority shall be deemed to have become invalid merely by any subsequent proof that the person in respect of whom the order has been made is not a juvenile or a child, and the age recorded by the competent authority to be the age of person so brought before it, shall for the purpose of this Act, be deemed to be the true age of that person."

40. In exercise of powers conferred under Section 68(1) of the Juvenile Justice Act, the Central Government has framed the Juvenile Justice (Care and Protection of Children) Rules 2007, hereinafter referred to as the Juvenile Justice Rules.

41. Rule 12 of the said Rules provides as follows:--

"12. Procedure to be followed in determination of age. - (1) In every case concerning a child or a juvenile in conflict with law, the court or the Board or as the case may be, the Committee referred to in Rule 19 of these rules shall determine the age of such juvenile or child or a juvenile in conflict with law within a period of thirty days from the date of making of the application for that

purpose.

(2) The court or the Board or, as the case may be, the Committee shall decide the juvenility or otherwise of the juvenile or the child or, as the case may be, the juvenile in conflict with law, prima facie on the basis of physical appearance or documents, if available, and send him to the observation home or in jail.

(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining -

(a)(i) the matriculation or equivalent certificate, if available; and in the absence whereof;

(ii) the date of birth certificate from the school (other than a play school) first attended; and in the absence whereof;

(iii) the birth certificate given by a corporation or a municipal authority or a Panchayat;

(b) and only in the absence of either (i, (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may, if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year,

and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i), (ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law.

(4) If the age of a juvenile or child or the juvenile in conflict with law is found to be below 18 years on the date of offence, on the basis of any of the conclusive proof specified in sub-rule (3), the court or the Board or, as the case may be, the Committee shall in writing pass an order stating the age and declaring the status of juvenility or otherwise, for the purpose of the Act and these rules and a copy of the order shall be given to such juvenile or the person concerned.

(5) Save and except where, further inquiry or otherwise is required, inter alia, in terms of Section 7-A, Section 64 of the Act and these rules, no further inquiry shall be conducted by the Court or the Board after examining and obtaining the certificate or any other documentary proof referred to in sub-rule (3) of this rule.

(6) The provisions contained in this rule shall also apply to those disposed of cases, where the status of juvenility has not been determined in accordance with the provisions contained in sub-rule (3) and the Act, requiring dispensation of

the sentence under the Act for passing appropriate order in the interest of the juvenile in conflict with law."

42. In every case concerning a child or a juvenile in conflict with law, the age determination enquiry has to be conducted in the manner stipulated in Rule 12(3), by reliance upon the following documents in order of priority.

"(i) Matriculation or equivalent certificates if available,

(ii) If matriculation or equivalent certificate is not available, then the certificate from the School first attended, certifying the Date of Birth recorded by the School.

(iii) Birth Certificate given by a corporation or municipal authority or Panchayat.

(iv) In the absence of any of the above documents, the medical opinion is to be sought from a duly constituted Medical Board, which will declare the age of the juvenile."

43. In case exact assessment of the age cannot be done, the Court or the Juvenile Justice Board or, as the case may be, the Child Welfare Committee, may, for reasons to be recorded by them, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, if considered necessary.

44. It is well settled that defence of juvenility can be taken at any time as held by the Supreme Court in *Gopinath Ghosh v. State of West Bengal* reported in , 1984 Suppl. SCC 228, *Abuzar Hossain v. State of West Bengal* reported in , (2012) 10 SCC 489 and *Pradip Kumar v. State of U.P.* reported in (1995) Suppl. 4 SCC 419.

45. Section 15 of the Juvenile Justice (Care and Protection of Children) Act, 2000 provides as follows:

"15. Order that may be passed regarding juvenile.--(1) Where a Board is satisfied on inquiry that a juvenile has committed an offence, then, notwithstanding anything to the contrary contained in any other law for the time being in force, the Board may, if it so thinks fit, -

(a) allow the juvenile to go home after advice or admonition following appropriate inquiry against and counselling to the parent or the guardian and the juvenile;

(b) direct the juvenile to participate in group counselling and similar activities;

(c) order the juvenile to perform community service;

(d) order the parent of the juvenile or the juvenile himself to pay a fine, if he is over fourteen years of age and earns money;

(e) direct the juvenile to be released on probation of good conduct and placed

under the care of any parent, guardian or other fit person, on such parent, guardian or other fit person executing a bond, with or without surety, as the Board may require, for the good behaviour and well-being of the juvenile for any period not exceeding three years;

(f) direct the juvenile to be released on provision of good conduct and placed under the care of any fit institution for the good behaviour and well-being of the juvenile for any period not exceeding three years;

[(g) make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit]

(2) The Board shall obtain the social investigation report on juvenile either through a probation officer or a recognised voluntary organisation or otherwise, and shall take into consideration the findings of such report before passing an order.

(3) Where an order under clause (d), clause (e) or clause (f) of sub-section (1) is made, the Board may, if it is of opinion that in the interests of the juvenile and of the public, it is expedient so to do, in addition make an order that the juvenile in conflict with law shall remain under the supervision of a probation officer named in the order during such period, not exceeding three years as may be specified therein, and may in such supervision order impose such conditions as it deems necessary for the due supervision of the juvenile in conflict with law:

Provided that if at any time afterwards it appears to the Board on receiving a report from the probation officer or otherwise, that the juvenile in conflict with law has not been of good behaviour during the period of supervision or that the fit institution under whose care the juvenile was placed is no longer able or willing to ensure the good behaviour and well-being of the juvenile it may, after making such inquiry as it deems fit, order the juvenile in conflict with law to be sent to a special home.

(4) The board shall while making a supervision order under sub-section (3), explain to the juvenile and the parent, guardian or other fit person or fit institution, as the case may be, under whose care the juvenile has been placed, the terms and conditions of the order and shall forthwith furnish one copy of the supervision order to the juvenile, the parent, guardian or other fit person or fit institution, as the case may be, the sureties, if any, and the probation officer."

46. Section 16 of the Juvenile Justice (Care and Protection of Children) Act, 2000 provides that notwithstanding anything to the contrary contained in any other law for the time being in force, no juvenile in conflict with law is to be sentenced to death or to imprisonment for any term which may extend to imprisonment for life or be confined to prison for default in payment of fine or for default in

furnishing security. In no circumstances can a juvenile be detained beyond 3 years.

47. If the appellant No. 2, were a juvenile, at the time when he committed the alleged offence, his trial by the Sessions Court and his conviction would be without jurisdiction. In any case, the sentence of imprisonment, which is beyond three years, would have to be set aside as without jurisdiction. In this case the learned Sessions Court itself has recorded the age of the appellant No. 2 as 27 years on 17th January, 2012, which means he was about 14 years old on 25th April, 1999, being the date of the incident, and therefore a juvenile within the meaning of the Juvenile Justice (Care and Protection of Children) Act, 2000. The appeal of the accused appellant No. 2 is, therefore, allowed and the conviction and sentence of the accused appellant No. 2 is set aside.

48. Mr. Ganguly argued that the deceased was a notorious criminal and had been in custody in connection with five or six criminal cases. The fact that the deceased had been in custody in connection with five or six cases has been admitted by his son, the first Prosecution Witness and the de-facto complainant. Mr. Ganguly rightly argued that no motive has been attributed to the accused appellants. There is only a vague assertion in the charge sheet that the deceased was killed out of previous grudge, and a vague averment in the evidence of PW2, wife of the deceased that there was enmity between the accused appellants and the deceased, which is devoid of any particulars whatsoever.

49. In any case, if the deceased were killed out of grudge, the killers must have been those, who would have some grudge against him. The possibility that enemies on whose complaint and/or against whom the deceased was embroiled in litigation might have killed him out of vengeance, as suggested in defence of the accused appellants, cannot altogether be ruled out.

50. It is true that where it is proved that an accused had intentionally killed the deceased, mens rea would not be relevant. The question is, whether the evidence on record establishes beyond reasonable doubt, that it was the accused appellants who killed the deceased.

51. Mr. Ganguly argued that the First Information Report has been registered on Sunday, 25th April, 1999 at around 11.35 p.m at night. Under Section 157 of the Criminal Procedure Code, it is mandatory for the police to immediately send the copy of the FIR to the concerned Magistrate. The whole object behind Section 157 Cr.PC is to eliminate the chances of subsequent manipulation.

52. Mr. Ganguly argued that in this case, FIR had been sent to the Sub-Divisional Junior Magistrate, Jangipur on Friday, 30th April, 1999 as would be evident from the endorsement of the learned Magistrate at the top of the FIR. There was thus a delay of four days in dispatching the FIR to Court. All those four days were working days. The prosecution however did not come out with any cogent explanation for such inordinate delay. The Investigating Officer did not enlighten the Trial Court on this score.

53. Mr. Ganguly argued that delay in sending the FIR to the Court was not only violative of the mandatory provisions of Section 157 of the Criminal Procedure Code, but also inexcusable for want of reasonable explanation.

54. In *Allachina v. State* reported in , 2003 Cr. LJ 17 (SC) cited by Mr. Ganguly, the Supreme Court held that the expression "forthwith" in Section 157(1) mandated that the FIR has to be sent to the Court with reasonable dispatch. If the delay remained un-explained, that could not in itself be a ground for rejecting the prosecution case, but it would be a strong circumstance for doubting the trustworthiness of the prosecution case. If delay was not explained adverse inference might be drawn against veracity of the prosecution case.

55. In *Arjun Marik v. State* reported in 1994 (Supply 2) SCC 372, the Supreme Court held that Section 157(1) had dual purpose. The first purpose was to avoid the possibility of improvement of the prosecution story and the second was to enable the Magistrate concerned to monitor the progress of the investigation.

56. In *Bijay Singh v. State* reported in , 2002 Cr LJ 2623 (SC), the Supreme Court held that delay by itself would not render the prosecution case unbelievable but when delay was not explained satisfactorily, the Court would have to be on the guard to see whether the FIR was antedated or not. The Supreme Court observed that delay in sending the FIR was required to be explained by the prosecution.

57. Mr. Ganguly also cited *Iswar Singh v. State of U.P.* reported in , AIR 1976 SC 2423 where the Supreme Court considered inordinate delay in sending the FIR as a circumstance which provided legitimate basis for suspecting that the FIR might have been recorded much later than the stated date, affording time to the prosecution to improve and embellish upon its case. The proposition of law which emerges from the judgments cited above is, that an FIR should be sent to the Court with reasonable dispatch. If there was delay, the delay would have to be explained.

58. Unexplained delay would not, in itself render the prosecution case unbelievable. The Court would have to be on the guard to rule out the possibility of the FIR having been ante-dated. The trustworthiness of the prosecution case would carefully have to be examined.

59. In this case, the FIR was lodged promptly, after the incident took place. The delay, if any, of about three days only, is not so inordinate a delay, to render the prosecution case suspect on the ground of delay. There are no materials on the basis of which it may be held that the FIR was either ante-dated or interpolated, whether the allegations against the accused appellants in the FIR are correct or not, is a different issue. It is not the appellant's case that they have been prejudiced by this delay.

60. Mr. Ganguly argued that the absence of the names of the accused appellants in the inquest report was significant. Had the assailants been known, they would

have been named at the time of inquest. However, ordinarily it is not necessary that the inquest report should contain details of the assailants.

61. Mr. Ganguly emphatically argued, and rightly, that as per the prosecution case as made out in the charge, the incident took place at 7.30 p.m in the evening. This is confirmed by the evidence of Prosecution Witness Nos. 1, 2 and 3. None of these witnesses stated that there was any natural source of light. They stated that they had seen the incident by electric light. The evidence of PW2 indicates that there was electricity connection inside their home. The Investigating Officer admitted that there was no mention about electric light in the sketch map. He also admitted that in the background facts of the case, light was an important factor.

62. Both PW1 and PW2 claimed that they had seen the incident from inside their house. The incident had taken place in the open field in front of their house. It is their case that they saw the incident by electric light but in the sketch map there is no mention of the existence of any lamppost near the place of occurrence. There is also no evidence of any lamp post near the place of occurrence. The electricity in the house of the witness would not illuminate the place of occurrence sufficiently to enable the witness to recognize the assailants. Mr. Ganguly rightly submitted that it was nobody's case, and far less the prosecution case, that the witnesses identified the assailants by their voice or gait or features.

63. In *Ballavaram Pedda Narsi Reddy v. State of Andhra Pradesh* reported in , 1991 SCC (Cr.) 586 cited by Mr. Ganguly, the Supreme Court held that "when there is no whisper in Ex. P-1 that there was some source of light at the scene, the omission cannot be ignored as insignificant. Whether the street lights and the petrol bunk/light had been burning at the time of the occurrence and the spot where the incidence happened was so located as to receive the light emanating from these sources are required to be made out by the prosecution. When this significant fact is left out in the earliest record, the improvement in the course of the investigation and trial could be of no avail".

64. Mr. Ganguly also adverted to discrepancies in the evidence of the three eye-witnesses. He pointed out that PW1 had stated that all the accused persons were armed with "chheni" but PW2 and PW3 had claimed that the assailants were armed with "hansua". Furthermore, PW3 contradicted the other witnesses when she stated that she rushed to the spot and tried to save her father. Both PW1 and PW3 claimed that they witnessed the entire incident from inside their house because they could not come out due to fear of life. Finally, Mr. Ganguly argued that none of the neighbours and/or persons of the locality were examined. The blood stained earth from the place of occurrence was not sent for chemical examination.

65. Mr. Ganguly strenuously argued that PW1 and PW2 had both deposed that the victim had been assaulted with a "chheni". However, the post mortem doctor found that the sharp cut injuries might have been caused by "hansua" (sickle), a

sharp cutting weapon. Mr. Ganguly pointed out that two of the prosecution witnesses, PW1 and PW2 claimed that the assailants were armed with bombs and pistols. However, no bombs were found. Nor was any injury caused by fire arms found in the person of the deceased.

66. Opposing the appeal, the learned Public Prosecutor argued that there were three eye witnesses to the murder. Minor discrepancies in the evidence of the respective witnesses ought to be ignored.

67. The learned Public Prosecutor argued that the maxim "falsus in uno falsus in omnibus" (false in one thing, false in everything) has not received general acceptance in criminal jurisprudence in India. Nor has this maxim come to occupy the status of rule of law. It is merely a rule of caution. In such cases it is not that testimony must be disregarded, it may be disregarded. The doctrine merely involves the question of weight of evidence which a Court may apply in a given set of circumstances, but it is not what may be called a mandatory rule of evidence.

68. The learned Public Prosecutor submitted that merely because some of the accused persons have been acquitted, those convicted need not also be acquitted even though evidence against all of them, so far as direct testimony is concerned, was the same.

69. The learned Public Prosecutor also submitted that the entire evidence of a witness need not be rejected just because there may be some untruth in the evidence. If the whole body of the testimony were to be rejected, because the witness was evidently not speaking the truth in some aspect, the administration of criminal justice would come to a dead-stop.

70. In each case, the Court has to assess the extent to which the evidence is worthy of acceptance. Just because the evidence is uncertain or unbelievable in certain respects, it does not necessarily follow, as a matter of law, that the evidence must be disregarded in all respects. The evidence has to be sifted with care, for one hardly comes across a witness whose evidence does not contain a grain of untruth or some exaggeration, embroidery or embellishment. An attempt has to be made to separate the grain from the chaff, the truth from falsehood as argued by the learned Public Prosecutor where, however, the truth and falsity is inextricably mixed up and it is not feasible at all to separate truth from the false. The only available course would be to discard the evidence as a whole.

71. As observed by this Court in *State of Rajasthan v. Smt. Kalki* and another reported in , AIR 1981 Supreme Court 1390, normal discrepancies in evidence are those which are due to normal errors of observation, normal errors of memory due to lapse of time or due to mental disposition having regard to shock and horror at the time of occurrence and these are always there however honest and truthful a witness may be. Material discrepancies are those which are not normal and not expected of a normal person. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so.

72. Mr. Sabir Ahmed appearing on behalf of the de facto complainant argued that there were three eye witnesses who had corroborated each other. Even though the eye witnesses were related to the deceased, during cross-examination they did not move an inch.

73. Mr. Ahmed further argued that mere laches on the part of the Investigating Officer or mere defect in investigation cannot be a reason for acquitting the appellant, when the evidence of the eye witness is credible. In support of his submission, Mr. Ahmed cited *Dhanaj Singh @ Shera and Ors. v. State of Punjab* reported in , (2004) 3 SCC 654. The proposition is indisputable.

74. In support of his submission Mr. Ahmed also cited *State of Himachal Pradesh v. Mast Ram* reported in , AIR 2004 SC 5056; *Dharnidhar v. State of U.P. & Ors.* reported in , (2010) 7 SCC 759; *Shri Ram & Shiv Ram & Anr. Etc v. State of U.P. & Ors.* reported in , AIR 1998 SC 49.

75. There can be no doubt, as argued by Mr. Ahmed that the evidence of related witnesses is admissible in evidence. Conviction may be based on the basis of the evidence of eye witnesses, provided of course the evidence is otherwise credible and/or reliable. The Court is required to carefully scrutinize the evidence of interested witness before passing an order of conviction on the basis thereof to eliminate the possibility of false implication, whether deliberate or non-deliberate.

76. Mr. Ahmed argued that PW1 and PW2 had deposed that they could see the assailants as there was electric light. Mr. Ahmed argued that no suggestions were put to those witnesses in cross examination that there was no light. The evidence of those witnesses that there was light should be accepted.

77. Mr. Ahmed further argued that the post mortem doctor (PW6) had opined that the injury was possibly caused by "hansua". In this case, PW1 had stated that Mainur was assaulted with "chheni", but PW2 had stated that he was assaulted with "chheni, hansua" etc. and PW3 stated that Mainur was assaulted with "hansua". The evidence of PW1 cannot be discounted altogether because he had stated that Mainur had been assaulted with "chheni".

78. There are major and notable discrepancies in the oral evidence of the three persons who claim to be eyewitnesses to the murder, namely PW 1, the de facto complainant and son of the deceased Mainur Hossain, PW 2 wife of Mainur Hossain and PW 3, daughter of Mainur Hossain which gives rise to serious doubts about the credibility of those witnesses.

79. In the complaint in writing lodged with the police station, the de facto complainant, PW 1, son of the deceased Mainur stated that Najrul Sk., Tattu Sk., Aktar Sk., Fazu Sk., Hobi Sk., Masu Sk. and Tajel Sk. assaulted his father with "chheni" in front of the house and he died at once. Thereafter, the accused persons left the place of occurrence after bombing. There is no mention in the FIR of any "hansua" or of any "pistol".

80. As argued by Mr. Ganguly, there were no pistol injuries indicated in the post

mortem report. Furthermore there were no bomb splinters found at or around the place of occurrence.

81. There is evidence that there were the houses of Babu Sk. and Sikander Sk., to the north of the house of the deceased, the houses of Serajul and Mannan to the south of the house of the deceased and the houses of Krishna Sarkar, Debkari Sarkar within a distance of 100 cubits.

82. The exploding of bombs would certainly have attracted the attention of the occupants of those houses. None of them were even examined by the Investigating Officer.

83. May be, as argued by the learned Public Prosecutor, as well as Mr. Sabir Ahmed, punishment of the guilty is imperative. The guilty should not be let off just because the investigation has not properly been conducted.

84. At the same time defects in investigation cannot be condoned, if the effect of such condonation would be to absolve the prosecution of its onus to prove the charges against the accused appellants, beyond reasonable doubt.

85. The moot question before us, in this appeal is, whether the evidence of the first, second and third prosecution witnesses is reliable enough for conviction of the accused appellants for murder, entailing sentence of rigorous imprisonment.

86. There are patent discrepancies in the evidence of the three witnesses. The question is, whether these discrepancies are normal discrepancies which are due to normal errors of observation, or normal errors due to lapses of memory by reason of _____ passage of time.

87. The PW1 has, in his evidence, stated that he had, along with his mother Manohara Bewa (PW 2) and his sister Johara Bibi (PW3) seen the occurrence from inside the house. He stated that the witnesses could not go out of the house as they were afraid of their lives. PW 2 also stated that she saw the incident from inside the house through her broken boundary wall but she could not go to her husband out of fear. The evidence of PW3 is, however, contradictory to the evidence of PW 1 and PW 2.

88. PW 3 also stated that she saw the incident through the broken wall of their house in her evidence, but she later stated that she had requested the accused appellants not to kill her father and had tried to shield her father from the assault with her own body. Neither the PW 1 nor the PW 2 stated that the PW 3 had gone out of the house and tried to shield her father from the assault. On the other hand PW 1 clearly stated that all three of them, that is PWs 1, 2 and 3 saw the incident from inside the house, but were afraid to go out of the house.

89. While the PW 1 in his oral evidence deposed that Najrul, Tattu, Akhtar, Faju, kabi, Masu and Tajel came with "chheni" and started assaulting his father with "chheni" PW 2 deposed that Tattu and Najrul had "chheni" with them Faju and Akhtar had bombs with them and Masu and Tajel had pistols with them. She

stated that Najrul, Tattu, Hobi, Akhtar, Faju and Masu assaulted her husband. Mainul with "chheni", Hansua, (that is, sickle) etc. PW 3 daughter of Mainul deposed that on the day of the incident at about 7/7:30 p.m. she saw the accused Najrul, Tattu, Masu, Tajel, Hobi, Faju and Akhtar assaulting her father with a "hansua" which is sickle. This witness said that all the accused persons had "hansua" and pistol with them.

90. The evidence of the PW 1 that the accused appellants came with "chheni" and killed his father with "chheni" is not supported by the evidence of the post mortem doctor or the post mortem report. As per the opinion of the post mortem doctor, the weapon used was "hansua" or sickle. The evidence of this witness cannot be believed.

91. It is true that PW 3 wife of the deceased stated that the accused appellants assaulted her husband with "hansua" and "chheni". The question is whether her evidence can be believed. This deponent (PW 2) deposed that Tattu and Najrul had chheni with them, Fazu and Aktar had bombs with them and Masu and Hobi had pistol with them. She saw them by electric light through the broken boundary wall of a passage, but from inside the house.

92. It is difficult to believe that a traumatized wife, seeing her husband being hacked to death, in front of her own eyes, would notice exactly which of the assailants had chheni with them, which of them had bombs and which of them had pistols, and that too from inside the house through a broken boundary wall, when it was dark. There appears to be deliberate embellishment in her evidence.

93. Significantly, this witness said that there was enmity between the accused persons and her husband. She did not however specify the cause of enmity. Enmity can lead to murder. Enmity can also lead to false implication. Evidence of close relatives of the deceased may be clouded by strong suspicion and/or belief of involvement. The discrepancies clearly indicate deviation from truth. Significantly almost all the accused appellants belong to the same family.

94. PW 3 said that she saw the accused appellants assaulting her father with a "hansua" whereas her mother (PW 2) stated "chheni" and "hansua" and further stated that some of them carried pistols and bombs and her brother (PW 1) stated that they only carried "chheni" and assaulted the deceased with "chheni".

95. In any case, as observed above, this witness stated that she pleaded with the accused appellants not to kill her father, she even tried to shield her father with her body. However, there were no blood stains in her apparel and her evidence was totally contrary to the evidence of her brother PW 1 and her mother PW 3. Two witnesses (PW 1 and PW 2) have stated that they stayed inside the house out of fear and one of them (PW 1) specifically stated that all the three witnesses saw the assault from inside the house. This major discrepancy in the evidence of PW 3 cannot be a bona fide error by reason of lapse of memory, confusion due to shock etc. This witness (PW 3) cannot be believed.

96. Both PW 1 and PW 2 stated in Court that after killing Mainul, the accused persons went away hurling bombs. PW 3, however, did not say that the accused appellants hurled bombs while they were leaving. Moreover, there being so many houses located near the house of the deceased, some of the neighbours would at least have heard the bomb blasts. There is no evidence of people having gathered at the place of occurrence. None of the neighbours were examined.

97. The incident took place at around 7/7.30 p.m when it was dark. It seems unlikely that the three alleged eye witnesses could actually have recognized all the assailants from their own room, through a broken boundary wall without any direct light.

98. The sketch map prepared by the Investigating Officer and provide by the said Investigating Officer in Court reveals that the place of occurrence was a field, near the house of the deceased but not immediately contiguous to his house.

99. The incident took place some distance away from the house of the deceased. The place of occurrence was neither a public road nor contiguous to any public road or any house.

100. There is no evidence of any separate lamp post or electric light connection at the field. As per the evidence of PW 2, there were four electric bulbs in the house. There were no electric light outside the house.

101. It is difficult to believe that electric bulbs inside the house would enable the three witnesses to see and to recognize seven assailants at the place of occurrence in front of the house, but a little distance away, though a broken boundary wall.

102. In the compliant in writing the de facto complainant alleged that the accused appellants had killed his father with a "chheni". In his oral evidence he stated that the accused appellant had come with "chheni" and killed his father with a "chheni". However, the post mortem report as well as the post mortem doctor's evidence shows that the weapon used was "hansua" that is sickle and not a "chheni".

103. A person is presumed to be innocent unless proved guilty beyond all reasonable doubt. We have serious doubts with regard to the credibility of the alleged eye witnesses, having regard to patent contradictions in their evidence, which in our view are not minor. We therefore, hold that the accused appellants would be entitled to benefit of doubt.

104. The appeal is therefore, allowed.

105. The order of conviction is set aside. The accused appellants may be set free.

106. Urgent Photostat certified copy, if applied for, be delivered to the learned counsel for the parties, upon compliance of all usual formalities.

Sahidullah Munshi, J.—I Agree.