

Sl. No. 2

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Joymalya Bagchi

And

The Hon'ble Justice Ananya Bandyopadhyay

C.R.A. 319 of 2019
With
CRA 361 of 2019
Bhuna Khan @ Samsur Khan
And
Sk. Majahar @ Sk Kalu
Vs.
State of West Bengal

For the Appellant No.1 : Mr. Moinak Bakshi
Mr. Santanu Talukdar

For the Appellant No.2 : Mr. Partha Pratim Das
(Amicus Curiae)

For the Appellant No.2: Mr. Samiran Mandal
(Ld. Advocate on record) Mr. Abhinaba Dan

For the Appellant No.2: Mr. Jayanta Narayan Chatterjee
(From the Legal Aid)

Mr. Moumita Pandit
Ms. N. Chatterjee
Mr. N. Ahmed
Ms. J Patra
Ms. S. Ghosh
Ms. R Banerjee

For the State : Mr. Saibal Bapuli
Mr. Bibaswan Bhattacharyya
Mr. Arani Bhattacharya

Heard on : 25.08.2022
Judgment on : 23.12.2022

Ananya Bandyopadhyay, J.:-

This appeal is preferred against the judgment and order of conviction dated 23.04.2019 and 24.04.2019 passed by Ld. Additional District and Sessions Judge, 3rd Court, Tamruk in Sessions Trial No. 01(04)2017 convicting the appellants under Sections 302/34 of the Indian Penal Code sentencing them to suffer imprisonment for life and to pay a fine of Rs.20,000/- each and for their conviction under Section 307/34 of IPC further sentenced them to suffer imprisonment for 5 years and to pay a fine of Rs. 5,000/- each and for their conviction under Section 323/34 of IPC to suffer imprisonment for one year and to pay a fine of Rs. 1000/-each.

The prosecution case emanated from a complaint dated 12.11.2015 wherein the complainant Shri Samaresh Mondal stated on 12.11.2015 two appellants had attacked the victims with sticks on the grudge of organising Kali Puja at the Muslim locality. It was about 1.30 am in the night when light, mike and other necessary articles were being assembled after immersion of the Goddess Kali. The appellant Bhuna Khan hit on the head of the victim Dipankar Mondal from behind forcefully with a stick to kill him resulting in his fall on ground with injuries. Samiran Mondal and other victim came to the spot and was similarly hit on his head injured him. The complainant, one Jaydeb and Gopal hearing the shout went to the spot to save them. If the complainant and others had not gone to the place of occurrence the appellants would have

killed the victims and hidden their deadbodies. Witnessing the assemblage the accused persons fled, hurling abusive language, threatening them given a chance they would kill them and hide their dead-bodies. The victims had been assaulted to such an extent that they were fighting with death and prayed for punishment of the appellants.

Based on the written complaint Haldia PS Case No. 120/15 dated 12.11.2015 under Sections 326/307/34 IPC was instituted against the appellants. A formal FIR was registered against the appellants on 11.12.2015. One of the victims Samiran Mondal died on 12.12.2015. The prayer to add section 302 of IPC was allowed. After the completion of investigation chargesheet no. 06/16 dated 04.02.2016 under Section 323/307/302/34 of IPC was submitted. Charges under Section 323/307/302/34 of Indian Penal Code was framed against the appellants to which they pleaded not guilty and claimed to be tried.

The prosecution cited 12 witnesses and exhibited certain documents in order to establish its case.

The Ld. Advocate for the appellants stated the conviction of the appellants was erroneous and the evidence on record was misconstrued and improperly appreciated. It was further submitted that PW 1 had claimed himself to be an eyewitness in the complaint treated as First Information Report, however, the deposition of PW 1 before the Court revealed he was not present at the place of incident. He did not notice any blood on ground near the

place of occurrence and during his cross examination he had admitted that he did not witness the occurrence. Relying upon the evidence of PW 1, the Ld. Trial Court has erroneously convicted the appellants. Moreover, PW 1 in his evidence had stated the blood stained garments of the victims were collected on 12.11.2015, however, the seizure list dated 18.11.2015 was contrary to the statement of PW 1. Wavering its reliability PW 2 Dipak Mondal, one of the surviving victims deposed the appellants assaulted them with two to three feet long bamboo stick from behind. However, during his cross-examination he stated the appellants did not assault them from behind and they were inebriated at the time of the incident. Moreover, the injury report stated the weapon used was blunt in nature, contrary to the evidence of PW 2 who mentioned the offending weapon to be divided from its middle which was neither seized nor exhibited in Court. The Ld. Advocate for the appellants pointed out severe discrepancies with regard to exact time of the writing of the complaint by PW 1, handwriting of which did not tally with of the endorsement, seizure of the garments of the victim as well as the preparation of the seizure list, the non-recovery of offending weapon, inconsistencies in the evidence of PW 1 and PW 2. The statement of PW 2 was not earlier recorded under Section 161 of the Cr.P.C. Inconsistencies of the evidence of PW 3, the wife of the deceased victim was stressed upon. In fact, PW 3 did not witness the incident involving the appellants. Having heard "*Bachao, Bachao*" rescue calls, she rushed to the alleged place of incident. She further stated the Police had come after 3 to 4 minutes of the incident which did not corroborate with the other

evidence in this regard. She also stated she gained the knowledge of the details of the incident on the next morning when her husband narrated the same.

The Ld. Advocate for the appellant also pointed out severe contradictions in the evidence of PW 5. The injury reports of the victims revealed the time and the place of incident to be 4 am on 12.11.2015 near the pond of Bishnuramchak which is in total contradiction to the time and place of occurrence mentioned in the complaint and also the evidence of other prosecution witnesses. PW 8, Dr. Tapan Kanti Maity who examined the victim at Haldia SD Hospital on 12.11.2015 mentioned the name of one wrongdoer which did not match with the name of the present appellant. Moreover, injury report mentioned the nature of injury to be simple and the offending weapon to be a blunt object like "*lathi*". PW 8 had clearly opined in his deposition that injury caused by a "*lathi*" and split bamboo could be different. The victim Samiran Mondal died over a month of the alleged incident being under medical treatment in different hospitals. Therefore, it can be assumed the deceased to be a victim of maltreatment. The opinion of PW 9 the post mortem Doctor was inconclusive as to whether the injuries were suicidal, homicidal or accidental. PW 10 who was posted at Institute of Neuro Science, Kolkata attended the deceased and found him to be senseless since the time of injury till his admission at the Institute. No common intention was there on the part of the appellants in the commission of the alleged offence. The examination under Section 313 of the Code of Criminal Procedure was confusing and contrary to law. Principles of natural justice demands that the person must be heard and

opportunity must be extended to them to explain each and every circumstances which may be relied upon by the prosecution in order to convict a person. In the present case the circumstances were not properly addressed, creating confusion to the appellants without any opportunity to them to offer plausible explanation. There was no independent local witness to justify the prosecution case. There was no justification by the Trial Court to frame charge under Section 323 of the Indian Penal Code inconsistent to the allegations made by the prosecution. The apparels of the deceased victim and the injured victim were not sent for FSL examination. The cause of death is not conclusive as admitted by PW 9, the doctor who conducted the post mortem. It was further submitted that the judgment of the Trial Court did not mention whether the sentence would run concurrently or not and whether there will be any punishment in case of default to pay a fine and the Ld. Trial court has failed to apply in his judicial mind while pronouncing the sentence of conviction and therefore the appeal shall be allowed.

The Ld. Advocate for the State submits that the appellants were seen to commit the offence by PW 5 and PW 6. The injured witnesses PW 2 narrated the entire course of injury sustained by him and the deceased victim Samiran being assaulted by appellants. The sole testimony of PW 2 the injured victim is sufficient to prove the guilt of the appellants and the same has been corroborated by PW 5 and PW 6. The injury reports as well as the post-mortem report evinced credence to the evidence of prosecution witness PW 2, PW 5 and

PW 6. The prosecution has been able to prove its case beyond reasonable doubts and the appeal shall be dismissed.

Assailing the evidence of the prosecution witnesses it appears that PW 1 Samaresh Mondal, the brother of victim Samiran Mondal stated on 12.11.2015 at about 1.30/2.00 am he attended immersion celebration of Kali puja of Swadhin Sngha Club. On his way back home along with his brother's wife he saw "*the mike man and generator man*" was dismantling the connection assisted by both the victims. Suddenly they heard a shout "*Bachao Bachao*" at the "*Pandle*." He went to the "*Pandle*" along with his sister-in-law and found both the victims lying on the ground with injury on the head of Samiran with his broken left hand in a pool of blood. He found the victim Dipak with "*bleeding injury on his head and from the toe of left leg*". They tried to give them first aid, thereafter, police arrived and took away the victims. PW 1 along with his sister-in-law went to the Police Station and found both the injured victims to be unconscious lying on the bench at the Police Station. The victims were admitted at Durgachak SD Hospital with the assistance of the Police. PW 1 further stated he found both the victims in their senses on enquiry they revealed while dismantling the mike and generator the appellants Bhuna and Kalu came from behind with "*half of bamboo sticks*" and assaulted them. "*Bhuna assaulted on the head of Dipak and Kalu assaulted on the head of Samiran and both of them assaulted both the victims together.*" Dipak too narrated the same thing. Thereafter, he went to the police Station and wrote the complaint himself and signed the same which was marked as Ext. 1. Police

recorded his statement and they reached the “*Pandle*”. The offending bamboo sticks could not be searched. Thereafter, the police prepared a rough sketch map. At 4.30 pm, the police had spoken to his brother Samiran, Dipak and Subhra Mondal and had written something. On 18.11.2015, he met the police at his home at about 1 pm. The police had taken blood stained garments of his brother from him and he signed on a paper. He accompanied the police to the house of Dipak where the police seized the blood stained garments of Dipak and he signed on that paper. The seizure list dated 12.11.2015 was marked as Ext. 2 series. On 09.12.2015, he had given the medical certificate of his brother to the police. On 11.12.2015 he informed the death of his brother to the police with an application to receive the dead-body of his brother. The signature thereon was marked as Ext. 3. He identified the garment of his brother and Dipak marked as MAT Ext. I collectively. The victim Samiran was taken from Durgachak Hospital to the Hospital at Joka, Kolkata by his father-in-law for better treatment and he collected the injury report from the said hospital and gave it to the police and signed the same and identified his signature on the injury report marked as Ext. 4.

PW 2 the victim Dipak Mondal stated the incident took place on 12.11.2015 at about 1.30 am. After they returned from immersion of Kali image to the “*Pandle*” of Swadhin Sangha Club. PW 2 and the other victim Samiran Mondal along with the light man and mike man got engaged in dismantling the mikes and other equipments in the “*Pandle*”. Thereafter, he felt somebody coming from behind and both PW 2 and victim Samiran saw the

appellants Kalu and Bhuna approaching with 2/3 ft. long bamboo divided from middle portion in their hands. The appellant Kalu assaulted Samiran and Bhuna assaulted him on their head with the said piece of bamboo. They fell on the ground with bleeding injury on their head being constantly assaulted by the appellants and thereafter became senseless. He regained his sense at Haldia S.D. Hospital with bandage on his head and leg and narrated the entire incident to Samaresh, the wife of Samiran and his mother at about 8 am. At 4.00/4.30 pm he narrated the incident to the police on interrogation. Samiran concurred with his statement to the police and the same was written by the police. After 3 days of stay Samiran was shifted to some other place from the hospital and PW 2 returned home after being discharged. He identified the injury report with his signature thereat marked as Ext. 5. On 18.11.2015, police collected his blood stained garments along with the injury report and he identified his signature on the blood stained "Genji" marked as Mat Ext. I. He further identified his signatures on the papers marked as Ext. 2/2 and 2/3 respectively. During his cross-examination he stated that "*Kalu and Bhuna did not assault me from our backside.*" He further stated both of them had been inebriated at the time of the incident. He further stated to have told the police. The accused persons assaulted Samiran after he fell on the ground. He also stated they had not dispute with Kalu.

PW 3 the wife of victim Samiran confirmed the date and the time of the incident as stated by PW 1 and PW 2. She further stated after the immersion ceremony there were local people along with her husband and his brother and

PW 2 at the “*Pandle*”. The appellant namely Kalu and Bhuna were also present there. Her husband asked her to go home with his brother assuring his return after 10 minutes attending to the errands at the “*Pandle*”. When she reached near her house she heard a sound “*Bachao, Bachao*” and rushed to the “*Pandle*” and saw the victims lying in bleeding condition on the ground. The public gathered at the place and the police came within 3 to 4 minutes and took her husband and Dipak to the local PS and asked PW 1 and PW 3 to come to the police station. PW 1 went to the PS and she went home. In the morning at about 7.10 a.m. she met her husband along with PW 1 at the hospital. She saw her husband and PW 2 with bandage on their body and head. Her husband narrated on hearing a sound he saw the appellants Kalu and Bhuna approaching with bamboo in their hands and thereafter assaulted Dipak. Both of appellants assaulted both the victims. She heard the entire episode from her husband. Police recorded her statement at the hospital at about 4 pm. Her father PW 4 had shifted her husband to Joka Hospital wherefrom he was referred to BMRC hospital at Barrackpore where he was admitted for 3 to 4 days. Considering his critical condition he was further admitted at Neuro Science where he stayed for 23 to 24 days. She further stated that “there were two persons of the decorators at that time in the “*Pandle*” when my husband and Dipak were dismantling the lights and microphones. At the time of incident the decorators were also at the “*Pandle*”.” Her husband died on 11.12.2015.

PW 4, Amar Saha's evidence before the Court is primarily based on hearsay. On 13.11.2015 he went to the Durgachak State General Hospital and shifted the victim Samiran Mondal to ESI Thakurpukur, Calcutta wherefrom the said victim was referred to BMRC, Barrackpore. On deterioration of his health he got admitted in Neuro Science Hospital where he stayed for 22 to 23 days. On interrogation he had stated the fact to the police.

PW 5 Mrinmoy Maity stated to deal in business in the name and style of "Ma Basanti Light Service". He further stated on that night, accompanied by Jaydeb Mondal, the victims Samiran and Dipak, they were dismantling the light and mike. Samiran and Dipak were arranging the dismantled lights inside a box. At the relevant point they heard sound of footsteps and saw the appellants approaching with a piece of bamboo and assaulted both the victims. "Kalu assaulted Samiran on his forehead and Bhuna assaulted Dipak." Victims fell on the ground screaming. Initially they were puzzled but shouted later on and the appellants fled. Thereafter PW 1 and PW 3 came to the spot along with 5 to 6 villagers. They tried to give them first aid. The police arrived and took away the victims by their van. PW 5 and PW 6 left for their home and after 1-1/2 months of the incident learnt about the death of Samiran.

During his cross-examination PW 5 stated quarrel did not take place between the victims and the appellants. They did not try to resist the appellants out of fear.

PW 6 Jaydeb Mondal during his deposition articulated the substance of the evidence of PW 5 which was paraphrased. During his cross-examination he conformed that the appellants were not resisted out of fear.

PW 7 S.I. Mihir Biswas held the inquest of the deadbody of victim Samiran Mondal on 12.12.2015 identified by PW1 and PW 4. The inquest report was marked as Ext. 6 bearing the signatures of the witnesses.

PW 8 Dr.Tapan Kanti Maity had examined the victim Samiran at the “Emergency” of Haldia Hospital at 4.40 a.m. where he was posted as a pathologist. He found,

“one injury on scalp on frontal region 3 X 2 X ½ inch with active bleeding and local pain on that region, tenderness present on left arm and elbow joint. Patient was conscious with normal pulse and blood pressure. He had pain all over the body. The injury was simple in nature. It may be cause with blunt weapon like ‘lathi’. This report is written by me and signed by me marked as Ext. 7.”

On that date he had also examined the victim Dipak Mondal at 5.15 a.m. and found,

“a penetrating wound with ragged edge margin measuring ½ X ½ X 1/4th inch of the scalp (volt) with abrasion wound on left great toe. Patient had normal pressure and pulse rate. The injury caused by blunt weapon. Both patient stated that they were assaulted by Kalu and Dhana. This report is written by me and signed by me marked as Ext. 8.”

He further opined such injury can happen if any person is assaulted with bamboo or half piece of bamboo.

PW 9 Dr.Anindya Kr. Goswami conducted the post-mortem on the deadbody of Samiran Mondal on 12.12.2015 while he was posted at NRS Medical College as Assistant Professor, Department of Forensic and State Medicine and on examination he found,

“Injury No. 1) one stitched up (six) wound 2” present over left side of vault of skull, present vertically 3” above from eye brow and 1” from midline. On removal of stitches it was lacerated injury in nature and scalp deep.

2) One stitched up (5) wound 1.5” present over left side of vault of scalp present vertically 2.5 above from eye brow and 0.5” from midline. On removal stitches it () lacerated injury in nature and scalp deep.

3) One evidence of recently healed scar 2.5”X 0.1” present over left side of vault of scalp present vertically 1.5” above from eyebrow 0.5” from midline.

On desection (sic)-4) Extravassater of blood 6”X 4” defused all over frontal both parietal region of scalp.

5) Evidence of the surgically made bar hole 0.5”X 0.5” each present over left side of scalp.

6) Subdural haemorrhage with blood clought present all over both cerebral Hemesphere including u/surface of brain. All the injured shows evidence of vital reaction. Extravassated blood is red in colour. ”

PW 10, Dr. Mukul Kumar Mondol was posted at Institute of Neuro Science, Kolkata on 18.11.2015 stated the victim Samiran Mondal was admitted at 2.45 pm on 18.11.2015 under Dr. D. Kripasankar and PW 10. Both the doctors treated the victim and a report was prepared by Dr. D. Kripasankar, PW 10 and other Medical Officers marked as Exhibit 10 collectively. PW 10 identified the handwriting of the Medical Officer. During his cross-examination PW 10 stated that the victim became conscious after his treatment on 20.12.2015. From 26.12.2015 to 28.12.2015 *“he had good sense. We did not note any history of assault form him at that time. The patient was recovered mostly. He was on general bed up to 07.12.2015 morning he was conscious. He had fever and breathing problem. He deteriorated subsequently because of hydrocephalus. We again operated him as water was accumulated in his brain. After that he died.”*

PW 10 further stated during his cross examination that *“his death is the consequence of head injury.”*

PW 11 A.S.I. Sujit Samanta identified his handwriting and signature on the complaint marked as Ext 1/1. He identified his handwriting and signature on the formal FIR marked as Ext. 11.

PW 12 S.I. Buddhadeb Mal stated that on 12.11.2015, he was posted at Haldia PS as SI and identified the handwriting and signature of PW 11 Sujit Samanta who had filled up the formal FIR which was marked as Ext. 1/1. He further identified the handwriting and signature of I.C, Haldia, Swarup Basak who had endorsed him for investigation marked as Exhibit 1/2. PW 12 examined the complainant, recorded his statement along with the statement of Gopal Mondal. At the place of occurrence, he prepared a rough sketch map with index marked as Ext. 12. He did not find the bamboo stick. No one agreed to adduce evidence on search. He raided and arrested two accused persons on 12.11.2015 at 11.35 a.m. and forwarded them to Court. He met the victims Dipak Mondal and Samiran Mondal at Haldia Sub-Divisional Hospital and recorded their statements. The statement of Samiran Mondal was recorded at the hospital in the presence of his wife Subhra Mondal was marked as “X” for identification. He collected the injury report of the victims from Haldia SD hospital and recorded the statement of the complainant from his house. He seized the wearing apparels of Samiran Mondal from Samaresh Mondal and that of Dipak Mondal from him. He collected the injury reports of Samiran

Mondal from Samaresh Mondal which revealed the victim was admitted on 13.11.2015 at E.S.I., Joka. On 14.11.2015 he was admitted at Barrackpore Medicare till his discharge on 18.11.2015. Thereafter, he was admitted at Institute of Neurosciences, Kolkata where he died. On 13.11.2015, he interrogated the father-in-law of Samiran Mondal and collected the medical documents from him. He received the death intimation of Samiran Mondal from OC Beniapukur and thereafter he added Section 302 of IPC on 12.12.2015. He examined Jaydeb Mondal and Mrinmay Maity on 27.12.2015. He collected the medical report from Neuroscience Hospital, the Post Mortem report from Beniapukur PS and also the inquest report. He submitted the chargesheet being No. 06/16 dated 04.02.2016 under sections 323/307/302/34 IPC against the accused persons and identified them in the Court.

The Ld. Advocate for the appellants argued that the examination of the appellants under Section 313 Cr.P.C. was confusing and contrary to law. The appellants did not take the plea to demonstrate, failure to attract their attention to the prosecution evidence resulted in failure of justice whereby they were precluded to explain any incriminating circumstance. Charges were framed and evidence was recorded in the presence of the appellants and the trial concluded in a fair manner. At this stage the appellants are debarred from claiming any benefit stating that the process under Section 313 Cr.P.C. was confounding and contrary to law.

The circumspection of the evidence of PW 1 in the Court veneers from his statement in the complaint dated 12.11.2015. In his complaint PW 1 has stated that the appellants attacked them with sticks agitated with the affect of Kali Puja being organised near Muslim locality. The complaint further stated as they reached the place of occurrence of assault, the appellants fled otherwise the victims would have been killed and their dead bodies would be hidden. In their presence the appellants left the spot. The appellants told given a chance, they would kill the victims and hide their dead bodies. They also uttered filthy language. From his deposition it transpired that PW 1 was not present at the time of the assault contrary to his statement in the complaint. He reached the place of occurrence after the assailants had left and found the victims lying on the ground being injured. He further stated to have found injury on the head and lip on Samiran, his left hand was broken and he was in a pool of blood. PW 3, wife of the victim Samiran Mondal during her cross-examination stated that she did not see whether any blood oozed towards the ground. PW 5 Mrinmoy Maity and eyewitness during his cross-examination stated that blood was not oozing upto the ground but the garments of the victims were blood stained. He further stated that the wife of Samiran and his brother came within one and half minute on hearing the news. PW 1 during his cross-examination on 24.03.2017 stated that the place of occurrence had been a mud made road and he did not see any blood on the ground, however, blood oozed from the body of both the victims. The FIR is not the encyclopaedia of the crime as observed in (2018) 8 SCC 127 and (1990) 3 SCC Cri 161.

The cross-examination of PW 2 Dipak Mondal i.e. the injured witness revealed they had no dispute with the appellant Kalu and the appellants' house could be reached in 5 minutes from their house. It has been further stated during cross-examination that when the assault took place the victims were inebriated. The injury reports marked as exhibit 7 and 8 with regard to Samiran and Dipak respectively mentioned the history of assault with lathi by the appellants "*Kalu and Dhana*" and the nature of injury appeared to be simple in both the cases. There was active bleeding and tenderness on both arms and elbow joint of Samiran. PW 2 in his deposition stated the appellants came with 2/3 feet long bamboo which was divided from middle portion in their hands. "*Kalu assaulted Samiran with that piece of bamboo and Bhuna assaulted me with that piece of bamboo on our head.*" Thereafter, both the victim fell on the ground being injured and were assaulted by the appellants with the offending weapon subsequently they became senseless. According to him, he regained his consciousness at Haldia SD Hospital. The injury report marked as Ext. 8 revealed that the victim Dipak Mondal was not admitted in the hospital but was "*discharged after first aid*". PW 3 the wife of victim Samiran met both the victims at the Haldia SD Hospital in the morning and found them to be conscious. Her husband narrated the course of incident to her that after PW 1 and PW 3 left the "*Pandle*" they were engaged in dismantling the lights and suddenly the appellants approached towards them with bamboo in their hands and assaulted her husband. Kalu assaulted her husband first on his head and thereafter Bhuna assaulted Dipak Mondal.

Thereafter both of them assaulted her husband and Dipak. She stated that “*I heard all these things from my husband.*” Her husband was shifted to BMRC Hospital at Barrackpore at the insistence of her father (PW 4). From the evidence of PW 1 and PW 3 their absence at the time of occurrence is conspicuous. During her cross-examination, PW 3 further stated she heard at the noise after 2 to 3 minutes of her leaving from the “*Pandle*”. Thereafter she saw her husband and Dipak lying on the ground in bleeding condition. PW 5 and PW 6 in unison stated that on the night of 12.11.2015 at about 1:30 am after the immersion of Kali idol they were dismantling the lights and mikes along with victims when the appellants came to the spot with bamboo sticks. Kalu assaulted the victim Samiran on his forehead and Bhuna assaulted Dipak as they shouted the appellants fled. Thereafter, the wife of Samiran and his brother came. During their cross-examination PW 5 stated that blood was not oozing upto the ground but their garments were blood stained. Both PW 5 and PW 6 denied any quarrel to take place at that time between the victims and the appellants. The evidence of PW 5 and PW 6 corroborated with that of the evidence of PW 2. The entire period of assault might have lasted for less than 5 minutes. The initial status of the victims revealed the nature of injury to be simple as detected and estimated by PW 8 Dr. Tapan Kanti Maity who enumerated the nature and the extent of injury in the document marked as Ext. 7 and 8. The motive of the offence cannot be established by the prosecution including sudden quarrel or provocation. There was no enmity between the victims and the appellants as they resided in proximity to each

other. The distance between their house covered in 5 minutes. PW 2, the injured witness as well as PW 5 and PW 6 the eye-witnesses did not state that the appellants were instigated or there was any history of past enmity or any proximate incitation to have enraged the appellants to commit the offence. The version of PW 1 in the complaint dated 12.11.2015 that the appellants threatened to assault the victims severely and thereafter hide their dead bodies cannot be relied upon as his absence at the place of occurrence at the time of the incident evident from the deposition of PW5 and PW 6. PW 1 reached the spot of occurrence after the appellants fled. PW 5 and PW 6 as eyewitnesses did not state the appellants threatened to kill the victims and hide their bodies which was a fabrication on the part of PW 1. PW 5 and PW 6 stated on their scream the appellants fled. Though the victim Dipak Mondal was discharged from the Haldia SD Hospital with simple injury, however, the victim Samiran was affected critically. The victim was even operated in the intermittent period of the hospitalization. His condition improved and thereafter worsened leading to his death. The presence and the active role of the appellants to have assaulted victims are aptly proved through the evidence of PW 2, PW 5 and PW 6. The defence could not prove the ocular evidence of PW 5 and PW 6 to be of reproach, subordination or interestedness. Minor contradictions are negligible owing to passage of time fade of memory in normal course of life. Such trivial human errors are natural and insignificant.

PW 2 being the injured witness devoid of any acrimonious relationship with the appellants suddenly being injured by them shall not falsely inculcate

the appellants if they were innocent. His presence at the place of occurrence is incontrovertible, the injury sustained by him is irrefutable, therefore, his testimony is unassailable. The evidence of PW 2 is creditworthy to be relied upon disregarding the minor contradictions which do not affect the foundation and essence of the prosecution case.

In **Abdul Sayeed vs. State of Madhya Pradesh** ¹the Hon'ble Supreme Court observed that,

Injured Witness

26. The question of the weight to be attached to the evidence of a witness that was himself injured in the course of the occurrence has been extensively discussed by this Court. Where a witness to the occurrence has himself been injured in the incident, the testimony of such a witness is generally considered to be very reliable, as he is a witness that comes with a built-in guarantee of his presence at the scene of the crime and is unlikely to spare his actual assailant(s) in order to falsely implicate someone. "Convincing evidence is required to discredit an injured witness". (Vide *Ramlagan Singh & Ors. v. State of Bihar*, AIR 1972 SC 2593; *Malkhan Singh & Anr. v. State of Uttar Pradesh*, AIR 1975 SC 12; *Machhi Singh & Ors. v. State of Punjab*, AIR 1983 SC 957; *Appabhai & Anr. v. State of Gujarat*, AIR 1988 SC 696; *Bonkya alias Bharat Shivaji Mane & Ors. v. State of Maharashtra*, (1995) 6 SCC 447; *Bhag Singh & Ors. (supra)*; *Mohar & Anr. v. State of Uttar Pradesh*, (2002) 7 SCC 606; *Dinesh Kumar v. State of Rajasthan*, (2008) 8 SCC 270; *Vishnu & Ors. v. State of Rajasthan*, (2009) 10 SCC 477; *Annareddy Sambasiva Reddy & Ors. v. State of Andhra Pradesh*, AIR 2009 SC 2261; *Balraje alias Trimbak v. State of Maharashtra*, (2010) 6 SCC 673).

27. While deciding this issue, a similar view was taken in, *Jarnail Singh v. State of Punjab*, (2009) 9 SCC 719, where this Court reiterated the special evidentiary status accorded to the testimony of an injured accused and relying on its earlier judgments held as under:-

¹ (2010)10 SCC 259

"Darshan Singh (PW 4) was an injured witness. He had been examined by the doctor. His testimony could not be brushed aside lightly. He had given full details of the incident as he was present at the time when the assailants reached the tubewell. *In Shivalingappa Kallayanappa v. State of Karnataka*, 1994 Supp (3) SCC 235, this Court has held that the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies, for the reason that his presence on the scene stands established in case it is proved that he suffered the injury during the said incident.

In State of U.P. v. Kishan Chand, (2004) 7 SCC 629, a similar view has been reiterated observing that the testimony of a stamped witness has its own relevance and efficacy. The fact that the witness sustained injuries at the time and place of occurrence, lends support to his testimony that he was present during the occurrence. In case the injured witness is subjected to lengthy cross-examination and nothing can be elicited to discard his testimony, it should be relied upon (vide *Krishan v. State of Haryana*, (2006) 12 SCC 459). Thus, we are of the considered opinion that evidence of Darshan Singh (PW

4) has rightly been relied upon by the courts below."

28. The law on the point can be summarised to the effect that the testimony of the injured witness is accorded a special status in law. This is as a consequence of the fact that the injury to the witness is an in-built guarantee of his presence at the scene of the crime and because the witness will not want to let his actual assailant go unpunished merely to falsely implicate a third party for the commission of the offence. Thus, the deposition of the injured witness should be relied upon unless there are strong grounds for rejection of his evidence on the basis of major contradictions and discrepancies therein.

29. Ashfaq (PW.2) had given graphic description of the entire incident. His presence on the spot cannot be doubted as he was injured in the incident. His deposition must be given due weightage. His deposition also stood fully corroborated by the evidence of Anees (PW.1) and Usmal Ali (PW.4). The depositions so made cannot be brushed aside merely because there have been some trivial contradictions or omissions.

In the case of **State of Uttar Pradesh vs. Naresh and others**², the Hon'ble Supreme Court observed that,

“The evidence of an injured witness must be given due weightage being a stamped witness, thus, his presence cannot be doubted. His statement is generally considered to be very reliable and it is unlikely that he has spared the actual assailant in order to falsely implicate someone else. The testimony of an injured witness has its own relevancy and efficacy as he has sustained injuries at the time and place of occurrence and this lends support to his testimony that he was present during the occurrence. Thus, the testimony of an injured witness is accorded a special status in law. The witness would not like or want to let his actual assailant go unpunished merely to implicate a third person falsely for the commission of the offence. Thus, the evidence of the injured witness should be relied upon unless there are grounds for the rejection of his evidence on the basis of major contradictions and discrepancies therein.

In the instant case:

- i) One victim was not even admitted in hospital
- ii) Other victim died after more than 1 ½ months of the injury undergoing medical complications
- iii) Single blow injuries inflicted on both the victims on the vital parts.
- iv) No sharp cutting weapon was used.

In **State of Andhra Pradesh vs. Rayavarapu Punnayya and another**³, the Hon'ble Supreme Court observed that,

11. The principal question that falls to be considered in this appeal is, whether the offence disclosed by the facts and circumstances established by the prosecution against the respondent, is 'murder' or 'culpable homicide not amounting to murder'.

12. In the scheme [of the Penal Code](#), 'culpable homicide' is genus and 'murder' its specie. All 'murder' is 'culpable homicide' but not viceversa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder', is 'culpable homicide not amounting to murder'. For the purpose of fixing punishment, proportionate to the gravity of this generic offence, [the Code](#) practically recognises three

² (2011) 4 SCC 324

³ (1976) 4 SCC 382

degrees of culpable homicide. The first is, what may be called, culpable homicide of the first degree. This is the gravest form of culpable homicide which is defined in [s. 300](#) as 'murder'. The second may be termed as 'culpable homicide of the second degree'. This is punishable under the 1st part of [s. 304](#). Then, there is 'culpable homicide of the third degree.' This is the lowest type of culpable homicide and the punishment provided for it is, also, the lowest among the punishments provided for the three grades. Culpable homicide of this degree is punishable under the second Part of [s. 304](#).

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

Section 299 person commits culpable homicide certain if the act by which the death caused is done.

Section 300 -- Subject to certain exceptions culpable homicide is murder if the act by which the death is caused is done.

INTENTION

(a) with the intention of causing death:

(1) with the intention of causing death;

or

or

(b) with the intention of causing such bodily injury

(2) with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused or,

(3) with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death; or

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(c) with the knowledge that

(4) with the knowledge that the act likely to cause

death. the act is so imminently dangerous that it must in all probability cause death or such bodily injury as is likely to cause death, and without any excuse for incurring the risk of using death or such injury as is mentioned above.

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

15. Clause (b) of [s. 299](#) does not postulate any such knowledge on the part of the offender. Instances of cases falling under cl. (2) of [s. 300](#) can be where the assailant causes death by a fist blow intentionally given knowing that the victim is suffering from an enlarged liver, or enlarged spleen or diseased heart and such blow is likely to cause death of that particular person as a result of the rupture of the liver, or spleen or the failure of the heart, as the case may be. If the assailant had no such knowledge about the disease or special frailty of the victim, nor an intention to cause death or bodily injury sufficient 'in the ordinary course of nature to cause death, the offence will not be murder, even if the injury which caused the death, was intentionally given.

16. In clause (3) of [s. 300](#), instead of the words 'likely to cause death' occurring in the corresponding el. (b) of [s. 299](#), the words "sufficient in the ordinary course of nature" have been used. Obviously, the distinction lies between a bodily injury likely to cause death and a bodily injury sufficient in the ordinary course of nature to cause death. The distinction is fine but real, and, if overlooked, may result 'in miscarriage of justice. The difference between cl. (b) of [s. 299](#) and cl. (3) of [s. 300](#) is one of the degree of probability of death resulting from the intended bodily injury. To put it more broadly, it is the degree of probability of death which determines whether a culpable homicide is of the gravest, medium or the lowest degree. The word "likely" in cl. (b) of [s. 299](#) conveys the sense of 'probable' as distinguished from a mere possibility. The words "bodily injury... sufficient in the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury having regard to the ordinary course of nature. For cases to fall within cl. (3), it is not necessary that the offender intended to cause death, So long as death ensues from the intentional. bodily injury or injuries sufficient to cause death in the ordinary course of nature. *Rajwant and anr. v. State of Kerala*(2) is an apt illustration of this point.

18. *In Virsa Singh v. The State of Punjab*, (2) Vivian Bose j. speaking for this Court, explained the meaning' and scope of Clause (3), thus (at p. 1500):

"The prosecution must prove the following facts before it can bring a case under s. 300, 3rdly'. First, it must establish, quite objective- ly, that a bodily injury is present;. secondly the nature of the injury must be proved. These are purely objective investigations. It must be proved that there was an intention to inflict that particular injury, that is to say,. that it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved to be present, the enquiry proceeds further, and, fourthly it must be ,proved that the injury of the type just described made up of the three elements set out above was suffi- cient to cause death in the ordinary course of nature. This part of the enquiry is purely objec- tive and inferential and has nothing to do with the intention of the offender."

19. Thus according to the rule laid down in *Virsa Singh's case* (supra) even if the intention of accused was limited to the infliction of a bodily injury sufficient to cause death in the ordinary course of nature and did not extend to the intention of causing death, the offence would be murder. Illustration (c) appended to s. 300 clearly brings out this point.

20. Clause (c) of s. 299 and cl. (4) of s. 300 both require knowledge of the probability of the causing death. It is not necessary for the purpose of this case to dilate much on the distinction between these corresponding clauses. It will be sufficient to say that cl. (4) of s. 300 would be applicable where the knowledge of the offender as to the probability of death of a person or persons in general--as distinguished from a particular person or persons---being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge on the part of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

In the case of **Malvia Thamban Nambiar vs. State of Kerala**⁴, the Hon'ble Supreme Court observed that,

" After giving our careful thought to the nature of offence, we are of the considered view that the offence of the appellant would more appropriately fall under Section 304 part II of the Indian Penal Code. The appellant had given one blow with a pair of scissors on the vital part of the body of Madhavan and, therefore, it would be reasonable to infer that he (appellant) had knowledge that any injury with the pair of scissors on the vital part would cause death though he may not have intended to commit the murder. We accordingly alter the

⁴ (2009)17 SCC 441

conviction of the appellant from 302 [IPC](#) to one under [Section 304](#) part II of the [IPC](#).

In the case of **Manoj Kumar vs. State of Himachal Pradesh**⁵ the Hon'ble Supreme Court observed that,

"30. In Camilo Vaz v. State of Goa, referring to the ambit of Section 304 of the Code, the Court in similar set of circumstances held thus:

14. This section is in two parts. If analysed, the section provides for two kinds of punishment to two different situations : (1) if the act by which death is caused is done with the intention of causing death or causing such bodily injury as is likely to cause death. Here the important ingredient is the "intention"; (2) if the act is done with the knowledge that it is likely to cause death but without any intention to cause death or such bodily injury as is likely to cause death. When a person hits another with a danda on a vital part of the body with such force that the person hit meets his death, knowledge has to be imputed to the accused. In that situation the case will in Part II of Section 304 IPC as in the present case.....

36. In the case on hand, the death is not instantaneous, but the deceased died after sometime, due to haemorrhage. When several persons of the accused group wielding weapons attacked the deceased, it is surprising to see only two injuries, that too, two simple injuries alone are inflicted, of course, one such simple injury turns out to be fatal sometime later. This circumstance demonstrates that the appellant had no intention to cause death, though he has knowledge that the weapon used by him to inflict injury on the scalp of the deceased may cause death. But in the absence of intention to cause death or to cause such bodily injury as is likely to cause death, the offence does not fall within the scope of section 300 IPC but it will fall within Section 304 Part II IPC."

In **Thankachan vs. State of Kerala**⁶ the Hon'ble Supreme Court observed that,

"8. The next question is whether the infliction of injury was with the intention of causing such bodily injury as the appellant knew would likely cause the death of his son. Here again, the facts disclose that he did not have such an intention, nor can we find any intention on the part of the appellant of causing bodily injury sufficient in the ordinary course of nature to cause death. We are, therefore, of the view that the offence committed is not an offence punishable under Section 302 IPC. However, it cannot be denied that the offence would fall under Section 304 IPC because even though the appellant inflicted injury without the intention of causing death, he knew that the injury caused with a weapon

⁵ (2018) 7 SCC 327

⁶ (2005) 11 SCC 536

like a chopper may cause such injury as is likely to cause death. We, therefore, find that the offence committed by the appellant is one which is punishable under Section 304 Part II IPC.”

The appellants hit the victims on their vital parts as stated in the injury report marked Ext. 7 and Ext. 8 respectively. PW 8 Tapan Kanti Maity on preliminary evaluation of the injuries termed its nature, to be simple. The victim Dipak Mondal survived, however, the victim Samiran Mondal died after a span of nearly one and half months. In the intermittent period he was shifted to Durgachak State General Hospital, thereafter to ESI Thakurpukur, Calcutta further transferred to BMRC, Barrackpore and ultimately admitted in Institute of Neuroscience in Kolkata where he died after 22-23 days of hospitalization. PW 10 Dr. Mukul Kr. Mondal in his deposition stated Samiran Mondal to be in his proper senses from 26.12.2015 to 28.12.2015 and to have recovered at a considerable rate resulting in his transfer to the general bed where he continued to stay till 07.12.2015 in a conscious state. Subsequently, he developed fever and breathing problem and his physical health deteriorated due to Hydrocephalus and underwent operation due to accumulation of water in his brain. Thereafter, he died. It cannot, therefore, be said the injury sustained him by on 12.11.2015 was the proximate cause of his death. He was shifted from one hospital to the other. His health condition improved in the meantime and subsequently worsened at a later stage. Though there was no case of medical negligence pleaded or proved, but the prolonged hospitalization and surgery could be an exacerbated factor which instead of alleviating his health condition might have aggravated the same. The appellants were at the

spot for two to three minutes and left the same after PW 5 and PW 6 cried aloud. PW 3 stated to have reached the spot within two to three minutes of hearing PW 5 and PW 6 to scream. The appellants with intention to kill the victims could have neglected the gesture of PW 5 of PW 6 and continued with their act to achieve their objective of murdering the victims however, at the clamour of PW 5 and PW 6 they left the spot instantaneously. However, the appellants hit the victims on the vital parts of their body i.e. the forehead and scalp. Knowledge that such act may cause or likely to cause death or such bodily injury as to cause death can be attributed to the appellants. Accordingly, in my opinion, the offence committed by the appellants is one which is punishable under Section 304 part II IPC.

Lapses on the part of the prosecution with regard to non-recovery of the offending weapon and failure to send the wearing apparels of the victims for FSL examination will not affect the prosecution case in place of trustworthy ocular evidence fortified by medical evidence to otherwise substantiate the prosecution case.

Accordingly, the conviction of the appellants is altered from Section 302 IPC to one under Section 304 Part II of the IPC.

In view of the aforesaid discussion, conviction of the appellants are converted to culpable homicide not amounting to murder under [Section 304](#) Part II of the Indian Penal Code. Sentence imposed on the appellants are

also reduced and they are directed to suffer rigorous imprisonment for a period of 7 years and to pay fine of Rs.10,000/-, in default, to suffer further simple imprisonment for one year more each.

With the aforesaid modification, the appeal being no. C.R.A 319 of 2019 and C.R.A. 361 of 2019 are disposed of.

Connected applications, if any, also disposed of.

The period of detention, if any, undergone by the appellants during investigation, enquiry and trial shall be set off against the substantive sentence imposed upon them in terms of [Section 428](#) of the Code of Criminal Procedure.

The lower court records along with a copy of this judgement be sent down at once to the learned trial court for necessary action.

Photostat certified copy of this order, if applied for, be given to the parties on priority basis on compliance of all formalities.

I agree.

(Ananya Bandyopadhyay, J.)

(Joymalya Bagchi, J.)