

**IN THE HIGH COURT AT CALCUTTA**  
**CRIMINAL APPELLATE JURISDICTION**  
**APPELLATE SIDE**

**Present:-**

**HON'BLE JUSTICE CHITTA RANJAN DASH**  
**AND**  
**HON'BLE JUSTICE PARTHA SARATHI SEN**

**CRA 366 of 2021**

**Hariram Paswaan@ Hari & Anr.**  
**Versus.**  
**The State of West Bengal**

**For the Appellant :**      **Mr. Sekhar Kumar Basu, Adv.,**  
                                 **Mr. Debashish Roy, Adv.,**  
                                 **Mr. Avik Ghatak, Adv.,**  
                                 **Ms. Afreen Begum, Adv.**

**For the State :**              **Mr.Neguive Admed, Adv.,**  
                                 **Ms. Amita Gaur, Adv.**

**For the de-facto**              **Ms. Minoti Gomes, Adv.**  
**Compalinant:**

**Last Heard on**              **: 13.09.2023**  
**Judgment on**              **: 18.10.2023**

**PARTHA SARATHI SEN, J. : –**

1. In this appeal, the judgement of conviction dated 05.10.2021 and the order of sentence dated 08.10.2021 as passed by the learned Additional Sessions Judge, 4<sup>th</sup> Court, Asansol, Paschim Burdwan in S.T case no. 04 of

2013 arising out of Sessions Case no. 72 of 2012 has been impugned. By the impugned judgement learned trial court found both the appellants guilty under Section 302 IPC and under Sections 25 and 27 of the Arms Act and thus convicted and sentenced them to undergo R.I for life each and to pay a fine of Rs. 5000/- each i.d. to suffer further SI for 2 months each and R.I for three years each and to pay fine of Rs. 1000/- each i.d to suffer S.I for one month each respectively for the commission of the aforesaid two offences with which they faced the trial.

2. For effective disposal of the instant appeal the facts leading to initiation of the aforesaid sessions case is required to be discussed in a nutshell.

3. One Sirji Yadav (hereinafter referred to as the informant) of R.K Dangal, Asansole lodged a written complaint dated 18.04.2012 with the officer-in-charge of the jurisdictional police station stating, inter alia, that on the self same day at about 10 a.m his son Sushil Yadav @ Dhandu (deceased) while proceeding to his place of employment by riding a two wheeler was intercepted by two miscreants on Kalna Domohoni Road near Parira Primary School and thereafter the said two miscreants fired bullets on his son. The victim of the alleged incident was taken to Sub-divisional Hospital, Asansol where he was declared '*brought dead*'. In his written complaint the informant had apprehended that one Hari Paswaan, the appellant no.1 and others might be involved in murdering his son on account of previous grudge.

4. On the basis of the aforesaid written complaint the jurisdictional police station started P.S case under Sections 302/34 IPC and Sections 25

and 27 of the Arms Act. Investigation was taken up and on completion of the same charge sheet was submitted under Sections 302/34 IPC and Sections 25 and 27 of the Arms Act against the accused persons who were appellants before this Court. The trial court record reveals that the present two appellants were explained of the charge under Sections 302/34 IPC and Sections 25 and 27 of the Arms Act against them, which they denied and claimed to undergo trial. The prosecution before the learned trial court examined 18 witnesses in all and exhibited various documents and materials. Before the learned trial court though the defence has adduced no evidence but from the trend of cross examination of the prosecution witnesses and the answers as given by the accused persons in their respective examinations under Section 313 Cr.P.C, it appears that the defence case is based on clear denial and false implications.

5. The prosecution witnesses before the learned trial court can be categorized in the following manner:-

| <b><i>Private witnesses</i></b>                                                                                                                 | <b><i>Govt. officials</i></b>                        | <b><i>Police Officials</i></b>                                                 |
|-------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------|--------------------------------------------------------------------------------|
| 1. PW2- A law clerk and a seizure witness.                                                                                                      | 1. PW14- An autopsy surgeon                          | 1. PW1- A constable of police and a seizure witness.                           |
| 2. PW5- A teacher of Parira FT Primary School.                                                                                                  | 2. PW16- Assistant Director, FSL Kolkata.            | 2. PW3- A S.I of police and inquest report maker.                              |
| 3. PW6- The informant and father of the deceased.                                                                                               | 3. PW17- Assistant Director (Ballistic) FSL, Kolkata | 3. PW4- A police constable who took the dead body for post mortem examination. |
| 4. PW7- A person of the locality where the informant and the deceased resided and claimed to be an eye witness of the incident of murder as per |                                                      | 4. PW11- S.I of police and a seizure witness.                                  |

|                                                                                                                                                                     |  |                                                      |
|---------------------------------------------------------------------------------------------------------------------------------------------------------------------|--|------------------------------------------------------|
| <i>prosecution.</i>                                                                                                                                                 |  |                                                      |
| <i>5.-PW9- A person of the locality where the informant and the deceased resided and claimed to be an eye witness of the incident of murder as per prosecution.</i> |  | <i>5. PW12- S.I of police and a seizure witness.</i> |
| <i>6. PW8- A seizure witness.</i>                                                                                                                                   |  | <i>6.PW15- First I.O</i>                             |
| <i>7.PW13- A seizure witness.</i>                                                                                                                                   |  | <i>7.PW18- Recording Officer and second I.O.</i>     |
| <i>8. An inhabitant near the P.O.</i>                                                                                                                               |  |                                                      |

6. In course of his argument Mr. Basu, learned senior advocate appearing for the appellants at the very outset draws attention of the court to the evidence of PW5, PW7 and PW9. It is contended by Mr. Basu, learned senior advocate for the appellants that the learned trial court committed serious error of fact as well as of law in holding that the evidence of PW5, PW7 and PW9 are consistent. It is argued by Mr. Basu that learned trial court while passing the impugned judgement has failed to visualize that those three prosecution witnesses are mere chance witnesses and therefore their alleged presence in the P.O on the relevant day and hour are really doubtful in view of the inconsistencies in their respective evidence. Mr. Basu, further submits that learned trial court has also miserably failed to visualize that in absence of recording of statements under Section 161 Cr.P.C of P.W7 and P.W 9, no credence could be placed upon their evidence in view of the sole fact that their statements have been recorded under Section 164 Cr.P.C by a competent Magistrate. Mr. Basu, learned senior advocate for the appellant further contends that while passing the impugned judgement learned trial court has miserably failed to consider that both the

PW7 and PW9 have not been sponsored by the I.O and such fact is explicit from the cross examination of the aforesaid two witnesses. Mr. Basu, further contended that inordinate delay has been caused in recording the statement of the aforesaid two witnesses namely; PW7 and PW9 under Section 164 Cr.P.C and such delay has not been explained properly which raises a serious suspicion with regard to the genuineness of the investigation which the learned trial court failed to visualize. Mr. Basu, learned senior advocate thus contends that it is a fit case for allowing the instant appeal by setting aside the impugned judgement.

7. Mr. Basu, in course of his submissions places reliance upon the following reported decisions namely:-

- i. Jogendra Nahak and Ors. Vs. State of Orissa & Ors.* reported in **(2000) 1 SCC 272**;
- ii. Nafeesa vs. State of U.P thru Secy., Home Lucknow & Ors.* reported in **2015 SCC Online ALL 8731**;
- iii. Ismail Ahmed Peepadi vs. Momin Bibi & Ors.* reported in **AIR 1941 Privy Council 11**;
- iv. Jarnail Singh & Ors. vs. State of Punjab* reported in **(2009) 9 SCC 719**.

8. Mr. Nuguive Ahmed, learned advocate for the State however contends that there cannot be any justification to disbelieve the consistent ocular testimonies of PW 7 and PW9. It is further argued on behalf of the State that even for the sake of argument if it is held that PW7 and PW9 are mere chance witnesses to the alleged incident of murder but in absence of any cogent material in their respective cross examination it cannot be held that the said PW7 and PW9 had a oblique motive to rope the present appellants with the alleged crime.

9. Mr. Ahmed, further argued that from the evidence of the prosecution private witnesses it would reveal that the victim, the informant, PW7 and PW9 as well as the present appellants belonged to the same locality and thus the ocular testimony of PW7 and PW9 with regard to the identification of the present appellants while committing the alleged crime have been duly established before the trial court.

10. Mr. Ahmed thus submits that it is a fit case for dismissal of the instant appeal.

11. The factual matrix in which the appellants came to be prosecuted and convicted has been set out in details by the learned trial court in the impugned judgement. Therefore, we need not recapitulate the same once again except to the extent it is necessary to do so for the disposal of the instant appeal.

12. At the very outset we propose to peruse the evidence of PW14 who at that material time was posted as medical officer (Medico legal) at Asansol District Hospital and in that capacity he had performed the post mortem examination over the dead body of the deceased. The relevant portion of the testimony of PW14 is as under:-

*“On examination I found:*

- 1. Wound of entry of bullet right side of chin with wound of exit on left side.*
- 2. Wound of entry of bullet 2 cm diameter on left side just behind left ear. Bullet has entered skull and brain and lodged right side of neck recovered.*
- 3. Wound of entry of bullet 3 CM X 2 Cm just in front of left mastoid. Bullet has passed through skull and lodged in brain, recovered.*
- 4. Wound of entry of bullet behind left ear below number two bullets has passed through skull and brain and existed through wound of exit in front of right ear 4 C.M X 3 C.M.*

*5. Wound of bullet on ultra outer aspect of right arm no penetration.*

*6. Wound of entry of bullet on right side of posterior chest wall 6 C.M medial to post axillary line bullet has passed through chest wall right lung mediastinum and lodged in left lung recovered.*

*Death in my opinion is due to gunshot (bullet injuries described) antemortem and homicidal in nature."*

Though PW14 was cross examined on behalf of the defence but nothing could be elicited from his mouth to substantiate that reason of death of the victim is otherwise as observed by PW 14 in his post mortem report (Exhibit 10) and as discussed supra.

In view of such clinching evidence as adduced by PW14 we have no hesitation to hold that the learned trial court is absolutely justified in holding that the death of the deceased was homicidal in nature.

13. On perusal of the evidence of PW5 who according to the prosecution is one of the ocular witnesses of the alleged incident of murder it appears to us that though PW5 in his examination-in-chief gave a vivid description as to how the deceased was shot on the relevant day at the P.O by two miscreants but in view of his testimony that the assailants were not known to him, the evidence of PW5 had become useless in order to prove the charges against the accused persons who are appellants before us.

14. From the impugned judgement it reveals that the learned trial court placed his reliance upon the evidence of PW7 and PW9 and came to a finding that though the said two witnesses are chance witnesses to the alleged scene of murder but their evidence are trustworthy and credible and thus practically accepted the testimony of PW7 and PW9 as gospel truth

with regard to the guilt of the accused persons with which they were charged in the trial court.

15. On comparative study of the evidence of PW 7 and PW9 it appears to us that it is their common versions that on the relevant day and hour when the deceased was proceeding towards his working place by riding a scooter the present two appellants who were also riding a black coloured motorcycle intercepted him and started firing bullets to the deceased. PW7 testified that one of the accused persons shot bullet beneath the ear of the deceased 3-4 times and when the deceased fell down on the earth the accused persons fled away by riding their motorcycle. It was his further version that PW9 was present at that material time at the P.O. He further testified that he was examined by the I.O and after 15 days of the incident his statement was recorded under Section 164 Cr.P.C.

16. The version of PW9 is almost similar to PW 7. He testified that on the relevant day and hour he was at the P.O and he found that the deceased was intercepted by the present appellants and thereafter the appellant no.1 Hari fired near the ear of the deceased 3-4 times while the appellant no.2, Abhoy shot at his chest and thereafter they fled away by riding a black coloured motor cycle. It was his further version that in the crowd he noticed PW7 was there. It was his further version that he himself went to the Magistrate and gave his statement which was recorded.

17. At this juncture we propose to look to the evidence of PW6 who is the father of the deceased and the informant of this case. Admittedly PW6 is a post occurrence witness who reached at the P.O on the relevant day after getting information of the murder of his son. From his testimony it reveals

that when he reached the P.O., in the crowd he found PW7 and PW9 and both PW7 and PW9 narrated the entire incident as well as the involvement of the accused persons in the alleged crime to him. He further testified that on the next day of the incident i.e. on 19.04.2012 both PW7 and PW9 came to him and disclosed again the role of the appellant in the alleged crime. PW6 was extensively cross examined on behalf of the accused persons.

18. On the basis of the evidence of PW6 (informant), PW15, the first I.O was controverted since according to PW15, he recorded the statement of PW6, the informant. From the cross examination of PW15 it however appears that PW6 had not stated to him that on the relevant day and hour he met PW7 and PW9 at the P.O and PW7 and PW9 narrated the incident to him. On being controverted PW15 stated further that in his statement PW6 did not state before him that PW7 and PW9 were in the crowd at the P.O immediately after the alleged incident and stated to him about the names of the assailants and /or those two persons i.e. PW7 and PW9 on the next day of the alleged incident came to his house and again narrated the incident to him. In view of such contradiction and /or omission we are constrained to hold that evidence of PW6 with regard to the alleged involvement of the present appellants (though hearsay) lost its significance in view of the proviso Clause 162 (1) Cr.P.C and its Explanation read with Section 145 of the Evidence Act.

19. The next crucial question which we propose to answer is with regard to the evidenciary value of PW 7 and PW9 (the alleged ocular witnesses of the incident) especially in view of not recording of their statements under

Section 161 Cr.P.C though their statements have been recorded under Sections 164 Cr.P.C.

20. It is however not disputed that both PW7 and PW9 have not been examined by the I.O for the reason best known to him but the argument of Mr. Basu, learned senior advocate for the appellant that both PW7 and PW9 were not sponsored by the I.O is not correct in view of the order as passed by the learned ACJM, Asansol and JM, 6<sup>th</sup> Court, Asansol vide order dated 08.06.2012 which are reproduced hereinbelow in verbatim:-

*“Seen the prayer of I.O who prays for recording statement u/s 164 CrPC of witnesses*

1. *Rambali Yadav*
2. *Hareram Yadav*
3. *Mahendra Yadav*

*Prayer is allowed.*

*Ld. J.M 6<sup>th</sup> Court is requested to record the statement of witnesses u/s 164Cr.P.C*

*Sd/- ACJM,  
Asansol”.*

*“ Three witnesses namely Rambali Yadav, Hareram Yadav, Mahendra Yadav are produced and identified before me by Constable 2547 Debdas Goswami of Asansol (N) P.S. After identification the said constable left my chamber. Statements of the above named witnesses are recorded by me. These are kept in separate sealed envelopes. The three sealed envelopes are kept with the record. Let the witnesses and two recorded the produced before the Ld. ACJM, Asansol.*

*Sd/- Judicial Magistrate,  
1<sup>st</sup> Class,6<sup>th</sup> Court, Asansol”.*

21. In view of the aforesaid orders as passed in G.R Case record being T.R 153 of 2012 we have no hesitation to hold that PW7 and PW9 cannot be termed as unsponsored witnesses and therefore the reported decision of

**Jogendra Nahak (supra)** are quite distinguishable from the facts and circumstances as involved in the instant case.

22. Admittedly both PW7 and PW9 adduced clinching evidence with regard to the happenings of the alleged incident on the relevant day and hour at the P.O, the involvement and role of the present appellants in the alleged crime and as to how such crimes have been committed by them by firing bullets at the lower side of ear of the victim and on his chest which gets sufficient corroboration from the post mortem report of PW14 vis-à-vis their previous statements as recorded under Section 164 Cr.P.C.

23. At this juncture a serious question arises as to whether it would be fair on the part of the learned trial court to accept the evidence of PW7 and PW9 as gospel truth while passing the impugned judgement. In order to arrive at a logical conclusion of the question as referred to above we propose to look to Section 161 Cr.P.C and Section 162 Cr.P.C. The said two sections are reproduced herein in verbatim:-

**“Section 161 in The Code Of Criminal Procedure, 1973**

*161. Examination of witnesses by police.*

*(1) Any police officer making an investigation under this Chapter, or any police officer not below such rank as the State Government may, by general or special order, prescribe in this behalf, acting on the requisition of such officer, may examine orally any person supposed to be acquainted with the facts and circumstances of the case.*

*(2) Such person shall be bound to answer truly all questions relating to such case put to him by such officer, other than questions the answers to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.*

*(3) The police officer may reduce into writing any statement made to him in the course of an examination under this section; and if he does so, he shall make a separate and true record of the statement of each such person whose statement he records.”*

**“Section 162 in The Code Of Criminal Procedure, 1973**

*162. Statements to police not to be signed: Use of statements in evidence.*

*(1) No statement made by any person to a police officer in the course of an investigation under this Chapter, shall, if reduced to writing, be signed by the person making it; nor shall any such statement or any record thereof, whether in a police diary or otherwise, or any part of such statement or record, be used for any purpose, save as hereinafter*

*provided, at any inquiry or trial in respect of any offence under investigation at the time when such statement was made: Provided that when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of the Court, by the prosecution, to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872 (1 of 1872 ); and when any part of such statement is so used, any part thereof may also be used in the re- examination of such witness, but for the purpose only of explaining any matter referred to in his cross- examination.*

*(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of clause (1) of section 32 of the Indian Evidence Act, 1872 (1 of 1872 ), or to affect the provisions of section 27 of that Act. Explanation.- An omission to state a fact or circumstance in the statement referred to in sub- section (1) may amount to contradiction if the same appears to be significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction in the particular context shall be a question of fact.”*

24. On perusal of the aforesaid two sections it reveals that Section 161 of the Code of Criminal Procedure gives power to a police officer to examine the witnesses in course of investigation and under Section 161 (3) Cr.P.C the said police officer may reduce such statements in writing in course of examination. Section 162 Cr.P.C however provides that such statements of the witnesses, if reduced into writing, shall not be signed by the persons making such statements and that such statements and /or any portion thereof may be used by the accused in course of examination by the maker of the said statements to contradict such witness in the manner provided under Section 145 of the Evidence Act.

25. As discussed above admittedly PW7 and PW9 have not been examined by either of the I.Os under Section 161 Cr.P.C and on the contrary they have been examined under Section 164 Cr.P.C and thus in course of cross examination of PW7 and PW9 the accused persons before the learned trial court lost a valuable right to cross examine the said alleged ocular witnesses on the basis of their previous statements in order to contradict them under Section 145 of the Evidence Act which tantamounts to serious prejudice to the accused persons facing the trial. In the same way the accused persons have been deprived of taking the advantage of the omissions of PW7 and PW9, if there be any, for not recording their statements under Section 161 CR.P.C. In our considered view the prejudice as caused to the accused persons on account of non-examination of PW7 and PW9 under Section 161 Cr.P.C is irreparable and affects the very root of the trial in which the impugned judgement has been pronounced.

26. We are conscious that Section 161(3) Cr.P.C does not say that police is bound to record the statements of the witnesses in which case there is admittedly no bar to the reception of testimony and it would reveal anomalous if we were to hold that their evidence is inadmissible as observed in the reported decision of ***Tilkeshwar Singh and ors. vs. State of Bihar*** reported in ***AIR 1956 Supreme Court 238***. However, as discussed above supra the question before us is not with regard to the admissibility of the evidence of PW7 and PW9 but the most crucial question which we are answering is the irreparable prejudice caused to the accused persons for losing their valuable right while cross-examining PW7 and PW9 in taking contradiction and/or omission in their previous statements vis-à-vis as

stated by them in course of their respective examination-in-chief. In our further considered view learned trial court while passing the impugned judgement has miserably failed to visualize the aforementioned serious prejudice as caused to the accused persons for which in our view the trial has been vitiated and thus the appellants are entitled to get benefit of the same since in a criminal trial presumption of innocence always lies with the accused persons until it has been proved beyond reasonable doubts.

27. Apart from the aforesaid legal aspect we have also noticed a factual aspect which has not been discussed in the impugned judgement. Admittedly the alleged incident of murder took place on 18.04.2012 while the statements of alleged ocular witness namely; PW7 and PW9 under Section 164 Cr.P.C were recorded on 08.06.2012 i.e. almost 2 months after the incident. In their respective testimonies, none of the I.Os i.e. PW15 and PW18 had explained as to why such delay occurred in recording the statement of PW7 and PW9 especially when PW6 being the informant in his examination-in-chief categorically stated that on the relevant day when he reached at the P.O he found the said two persons there and on the very next date of incident the said ocular witnesses being PW7 and PW9 came to him and stated about the involvement of the present two appellants in the alleged crime. If that be so, it remains unexplained as to why the said two ocular witnesses namely; PW7 and PW9 took so much time i.e. almost two months in reaching the police for getting their statements recorded under Section 164 Cr.P.C. As discussed earlier, we have also noticed from the cross-examination of PW15 (2<sup>nd</sup> I.O) that on being asked on behalf of the defence it has been testified by him that the informant (PW6) never stated to

him that the said eye witnesses were either found by him at the P.O on the relevant day and hour or they have come to him on the very next day and stated to him about the names and involvement of the present appellants in the alleged crime. In view of such material omission which tantamounts to contradiction we are of considered view that the presence of the said two ocular witnesses being PW7 and PW9 at the time of examination of the alleged murder becomes doubtful especially they being chance witnesses and delayed recording of their statements under Section 164 Cr.P.C without prompt recourse by the I.O for recording of their statements under Section 161 Cr.P.C . This aspect has however escaped the consideration of learned trial court.

28. Regard being had to the facts and circumstances as discussed supra we thus find sufficient merit in the instant appeal and accordingly the instant appeal is hereby allowed.

29. Consequently, the judgement of conviction as passed by learned Additional Sessions Judge, 4<sup>th</sup> Court, Asansol, Paschim Burdwan in S.T case no. 04 of 2013 arising out of Sessions Case no. 72 of 2012 is hereby set aside. The order of sentence dated 08.10.2021 is also set aside.

30. The present appellants be released from custody forthwith and be set as liberty at once, if not wanted in connection with any other case.

31. Department is hereby directed to forward a copy of this judgement along with LCR to the learned trial court forthwith.

32. Department is further directed to forward another copy of this judgement to the Superintendent of the Correctional Home where the present appellants are detained now forthwith.

33. Department is further directed to forward a copy of this judgment to Secretary, District Legal Service Authority, Asansol, Paschim Burdwan with a direction upon the Secretary, District Legal Service Authority to forward the said copy of this judgement to the Superintendent concerned correctional home where the present appellant are detained for their immediate release if they are not wanted in connection with any other cases.

34. Urgent Photostat Certified copy of this judgment, if applied for, be supplied to the parties expeditiously after complying with all necessary legal formalities.

**I agree.**

**(Chitta Ranjan Dash, J.)**

**(Partha Sarathi Sen, J.)**