

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 728 OF 2004

Noor Ali Gazi & Ors.

Vs.

The State of West Bengal

For the Appellants	:	Mr. Angshuman Chakraborty, Adv. Mr. S.S. Saha, Adv.
For the State	:	Mr. Swapan Banerjee, Adv. Ms. Purnima Ghosh, Adv.
Heard on	:	29.03.2023
Judgment on	:	29.03.2023

1. Heard Mr. Angshuman Chakraborty, learned Counsel for the appellants and Ms. Purnima Ghosh, led by Mr. Swapan Banerjee, learned Counsels for the State.

2. This appeal arises out of judgment of conviction and order of sentence dated 29.07.2004 and 30.07.2004 respectively passed by learned Additional Sessions Judge, Fast Track 1st Court, North 24 Parganas, Barasat in Sessions Trial No. 10(6) of 2003 arising out of Sessions Case No. 49(5) of

2003 convicting the appellants for offence under Section 323/34 IPC and 302/34 IPC and sentencing them thereunder.

3. The occurrence happened at about 5.00 to 5.30 p.m. on 08.02.2003. Golam Rahaman Gazi (P.W. 1), father of the deceased Wasim Murad @ Bablu Gazi is the informant. Prior to the occurrence, dispute cropped up between one Sudhannya Sarkar (not examined) and Jagadish Sarkar (P.W. 9) over erection of a wall in between their homestead properties. Sudhannya Sarkar and Jagadish Sarkar are the father and son. Over such dispute, Jagadish Sarkar (P.W. 9) called Abdur Rahaman Gazi (P.W. 2) who is the elder brother of P.W. 1 to his house for a settlement. When Abdur Rahaman Gazi (P.W. 2) reached the house of Sudhannya Sarkar, he was assaulted by accused persons including the appellants namely Kasem Gazi, Adam Gazi, Jamshed Gazi, Wahab Ali Gazi, Noor Ali Gazi, Moktar Ali Gazi, Iman Ali Gazi, Jamat Ali Gazi, Abu Bakkar Gazi, Julu Gazi, Bakir Gazi, Sahajahan Gazi, Rashid Gazi and Bahauddin Gazi with fists and blows.

3.1. One of the villagers reported Golam Rahaman Gazi (P.W.1) about such incident. P.W. 1 then proceeded towards the house of Sudhannya Sarkar with Habibur Rahaman (P.W. 4), Atiar Rahaman (P.W. 3) and his son Wasim Murad @ Bablu (deceased). On their way to the house of Sudhannya Sarkar, the occurrence happened in front of Raghavpur Primary School. P.W.s. 1, 3 and 4 found that Kasem Gazi, Adam Gazi, Jamshed Gazi, Wahab Ali Gazi, Noor Ali Gazi, Moktar Ali Gazi, Iman Ali Gazi, Jamat Ali Gazi, Abu Bakkar Gazi, Julu Gazi, Bakir Gazi, Sahajahan Gazi, Rashid Gazi and

Bahauddin Gazi were coming towards them being armed with sickle, lathis etc.

3.2. Adam Gazi assaulted Golam Rahaman Gazi (P.W. 1) with a sickle on his head and Kasem Ali Gazi gave a blow of shabal on his right leg. He (P.W. 1) fell down on the ground. Adam Gazi then assaulted Atiar Rahaman (P.W. 3) with sickle and the other accused persons assaulted him (P.W.3) with lathis, Shabal, etc. All the aforementioned accused persons also assaulted Habibur Rahaman (P.W. 4). Thereafter, all the accused persons assaulted Wasim Murad @ Bablu (deceased) at random with sickle, shabal, lathi, etc.

3.3. At that point of time Maskura Bibi (P.W. 5) wife of P.W. 1 rushed to the sport but she was also assaulted by Kasem Gazi, Jamshed Gazi and Iman Ali Gazi by lathi, shabal, etc. When the villagers came over the spot hearing hue and cry, the accused persons fled away. P.Ws. 1, 3, 4 and 5 who were injured in the assault including Wasim Murad @ Bablu (deceased) were taken to hospital. P.W.s. 1, 3, and 4 were discharged after primary treatment but P.W. 5, wife of P.W.1 and Wasim Murad @ Bablu (deceased) were referred for better treatment. In the night of occurrence Wasim Murad @ Bablu succumbed to injury.

3.4. P.W. 1 lodged FIR in the jurisdictional P.S on the same day by the evening and the I.O. (P.W. 16) also took immediate step for investigation, registering a case against all the accused persons.

3.5. In course of investigation, the I.O. (P.W. 16) examined the witnesses in the same night, made relevant seizures from the spot, issued requisition for medical examination of the injured persons, received information about

the fact that Wasim Murad @ Bablu succumbed to injury in the night of occurrence itself, made arrangement for inquest over the dead body of the deceased, challaned the dead body for post mortem and collected injury report in respect of injured persons, inquest report and post mortem report in respect of the deceased. During his spot visit he also prepared the spot map, arrested nine accused persons, who are appellants before us and submitted charge-sheet against nine accused persons (appellants before us) under Sections 324/325/326/302 IPC showing remaining five accused persons, namely, Moktar Ali Gazi, Abu Bakkar Gazi, Sahajahan Gazi, Rashid Gazi and Bahauddin Gazi as absconders.

4. Prosecution has examined 16 witnesses to bring to home the charges against the accused persons (appellants before us). As introduced (Supra), P.W. 1 is the informant and injured in the occurrence. P.W. 2 is the elder brother of P.W. 1 who also received injury in a transaction just preceding the instant transaction and also eyewitness to the occurrence. P.W.s. 3, 4 and 5 are the injured persons and are eyewitnesses to the occurrence. Besides the aforesaid witnesses, P.W.s. 6, 7, 8 and 9 are also eyewitnesses to the occurrence. P.W. 10 is the medical officer who examined P.W.s. 1, 2, 3 and 4. P.W. 11 is the medical officer who examined P.W. 5, wife of P.W. 1. P.W. 12 is the medical officer who conducted post mortem over the dead body of the deceased. P.W. 13 is the Constable of police who took the dead body for post mortem and identified the dead body of Wasim Murad @ Bablu before P.W. 12. P.W. 14 is the ASI of Police who held inquest over the dead body

and prepared the inquest report. P.W. 15 is the ASI of Police who drew the formal FIR on the basis of written report of P.W. 1. P.W. 16 is the I.O.

4.1. The defence plea is one of complete denial and false implication.

4.2. Further it is found from the cross-examination of the prosecution witnesses by the defence that there was free fight between two groups, i.e., prosecution party and the defence party and some of the accused persons also sustained injury in the event and a counter FIR was lodged by the accused persons against P.W. 1 and others.

5. Learned Trial Court on the basis of the materials on record, framed charge against the nine accused persons (appellants before us) under Sections 325/341/307/34 IPC and 302/34 IPC.

5.1. On scrutiny of the evidence obtained on record, learned Trial Court found the appellants guilty of offence under Sections 323/34 IPC and Sections 302/34 IPC. The appellants were acquitted of the charge under Sections 325/341/307/34 IPC. On the basis of the impugned judgment, each of them were sentenced to suffer R.I. for one year each for the offence under Sections 323/34 IPC. Similarly each of them were sentenced to suffer imprisonment for life and to pay fine of Rs. 2,000/- each in default to suffer S.I. for one month more for the offence under Sections 302/34 IPC.

5.2. In reaching the finding, learned Trial Court relied mainly on the evidence of P.W.s 1, 2, 3, 4 and 5 and evidence of P.W.s 6, 7, 8 and 9 who were examined as independent eyewitnesses, and also the corroborative medical evidence on record including the evidence of P.W. 12 who conducted the post mortem over the dead body of the deceased Wasim Murad @ Bablu.

6. Mr. Chakraborty, learned Counsel for the appellants submits that while appreciating the evidence on record, learned Trial Court has not taken into consideration the relevant contradictions that have surfaced on joint reading of the depositions of the injured witnesses and eyewitnesses along with the deposition of the I.O., P.W. 16.

6.1. Secondly, it is submitted by him that the evidence is to the effect that all the appellants including the absconding accused persons assaulted the deceased with sickle, shabal, lathi but such an evidence of severe assault on the deceased is not corroborated by the medical evidence of P.W. 12.

6.2. Thirdly, it is submitted that the witnesses have testified that the deceased fell down when he was assaulted by the accused persons and injury no. 1 in the deposition of P.W. 12 which is fatal in nature on the parietal region of scalp might have been caused by such fall and such injury cannot be held to have been intentioned by the appellants along with the absconding accused persons.

6.3. Fourthly, it is submitted by him that the learned Trial Court has applied the concept of Section 34 IPC in a misconceived manner.

6.4. Fifthly, it is fairly submitted by him that so far as conviction of the appellants under Sections 323/34 IPC is concerned, he has no quarrel with the finding of the learned Trial Court in view of the fact that the appellants were in custody for more than eleven years, and there is also evidence on record to that effect.

6.5. Per contra Ms. Purnima Ghosh, learned Counsel for the State submits that taking into consideration the probative effect of the evidence of injured witnesses which is labelled as best evidence in criminal jurisprudence and sufficient corroboration from independent sources, i.e., P.W.s 6, 7, 8, 9 and the Medical Officer (P.W. 12), the Trial Court is justified in reaching the finding of guilt so far as the appellants are concerned and the judgment of conviction and order of sentence needs no interference.

7. Having heard the submissions of learned Counsel for the parties, we propose to find out which is the spot of occurrence.

The I.O. (P.W. 16) has prepared the spot map vide Ext. 13 showing the Raghavpur Primary School ground as the spot of occurrence. Such spot map has been prepared on the basis of statements made by the witnesses before him. But no bloodstained earth, etc., has been seized from the spot by the I.O. P.W. 3, Atiar Rahaman Gazi, who was examined on 09.02.2003 (next day of the occurrence) did not state before the I.O. that the occurrence took place in the field of the aforesaid school. P.W. 4, Habibur Rahaman, who is youngest brother of P.W.s 1 and 2 and had accompanied P.W. 1 and 3 when P.W. 1 set towards the house of Sudhnniya Sarkar has also not stated before the I.O. that the occurrence took place near Raghavpur Primary School. P.W. 8, Saiful Islam who has been examined as an independent witness, did not state before the I.O. that P.W. 1 and others were assaulted on the school ground. P.W. 9, Jagadish Sarkar who has also been examined as an independent witness, also did not state before the I.O. about the spot of occurrence to be the ground of Raghavpur Primary School.

7.1. Such omission by the material witnesses i.e. P.W.s 3, 4, 8 and 9 in their statements recorded by the I.O. (P.W.-16) under Section 161 Cr.P.C. on a vital aspect like the spot of occurrence amounts to material contradiction under Section 145 Evidence Act read with explanation to Section 162 Cr.P.C. The I.O. has also failed to collect any blood-stained earth etc. from the spot.

7.2. In view of the above material contradiction in the evidence of the witnesses (Supra), we have a genuine doubt regarding the spot of occurrence as projected by the prosecution and as such a grave doubt arises about the very genesis of the prosecution case.

8. Coming to the next question, we find from the cross-examination of P.W. 1 that he was earlier elected as member of Gram Panchayat from CPI(M) Party. At the time of occurrence, one Sansur Nahar of Trino Mul Congress was the Pradhan of Gram Panchayat. P.W. 8 is the son-in-law of his brother-in-law and he is somewhat related to P.W.1. There is suggestion by the defence to prosecution witnesses that there was faction in the spot village in party line between CPI(M) and TMC. From the aforesaid suggestion, though denied by the prosecution witnesses and evidence of P.W. 1 to the effect that he was a member of CPI(M) and also especially the situation in West Bengal since decades creating division in different villages on party line, we are constrained to hold that the spot village was a faction ridden village. When any untoward incident happens in a faction ridden village and witnesses are examined by the prosecution, it is seen that witnesses belonging to a particular faction tends to exaggerate the allegations against the opposite faction. In view of such fact, evidence of witnesses in a faction

ridden village is to be scrutinised, closely with greater circumspection so far as the probative value of evidence of such witnesses are concerned and the Court should always be careful to separate the grain from the chaffs.

9. It is contended by Mr. Chakraborty, learned Counsel for the appellants that all injured persons including the deceased Wasim Murad @ Bablu received injuries in course of free-fight between the prosecution party and the defence party.

9.1. Admittedly, there are case and counter-case between the parties and in the counter-case filed by the appellants all accused persons have been acquitted by the Trial Court. On our query, the concerned department of the High Court has reported that no appeal has been preferred either by the State or by the appellants against such order of acquittal recorded by the Trial Court in the alleged counter-case. Further it is found from the defence plea that it is one of denial and false implication. No appellant in their statement recorded under Section 313 Cr.P.C. has whispered a word to the effect that any of them received injury in course of free-fight. The defence has also taken no step to adduce evidence to prove the fact that any appellant has received injury in course of free-fight. A feeble attempt has been made by the defence in giving suggestion to this effect to some of the prosecution witnesses but such suggestion having been denied, it has no probative effect. In view of such fact we do not accept the contention of the appellants that P.W.s 1, 3, 4, 5 and the deceased received injury in course of free-fight between the parties.

10. In view of the aforesaid discussion, we have to proceed to examine the evidence on record very carefully, especially when the spot of occurrence as deposed by the witnesses is itself doubtful and the spot village is a faction ridden village.

11. Mr. Chakraborty, learned Counsel for the appellants has fairly conceded that he has nothing to submit so far as conviction of the appellants under Sections 323/34 IPC is concerned. In view of such fact, we do not propose to examine the evidence of the witnesses so far as the assault on P.W.s. 1,2, 3, 4 and 5 is concerned and corresponding medical evidence of P.W.s. 10 and 11.

12. Coming to the question of murder of Wasim Murad @ Bablu, it is found from the evidence of P.W. 3 that Adam Ali Gazi (appellant no. 7) assaulted deceased Wasim Murad @ Bablu with a 'dao' on his head and Kaseem Ali Gazi (Appellant No. 9) assaulted deceased Wasim Murad @ Bablu with a shabal (the situs of the assault not specified by P.W. 3 so far as Kasem Ali Gazi is concerned). It is further testified by P.W. 3 that other accused persons assaulted deceased Wasim Murad @ Bablu with latih.

12.1. P.W. 2 (Abdur Rahaman) has testified that Adam Ali Gazi (appellant no. 7) assaulted deceased Wasim Murad @ Bablu with a 'dao' on his head. Then Noor Ali Gazi (Appellant No.1, since deceased) shouted and directed other accused persons to kill the son of P.W. 1. Adam Ali Gazi (appellant no. 7) again assaulted deceased Wasim Murad @ Bablu with a 'dao'.

12.2. P.W. 4 (Habibur Rahaman) has testified that Adam Ali Gazi (appellant no. 7) and Kasem Ali Gazi (appellant no. 9) assaulted deceased Wasim Murad

@ Bablu with a shabal. Noor Ali Gazi (deceased appellant No. 1) assaulted deceased Wasim Murad @ Bablu by lathi. Md. Jamshed Ali Gazi (appellant no. 6) assaulted deceased Wasim Murad @ Bablu with a lathi. Md. Bakibulla Gazi (appellant no. 8) assaulted deceased Wasim Murad @ Bablu with a lathi, fists and blows.

12.3. P.W. 1, father of the deceased has testified that all the accused persons assaulted deceased Wasim Murad @ Bablu at random with sickle, shabal, lathi, etc.

12.4. P.W. 5, mother of the deceased has testified that all the accused persons assaulted her son with dao (sickle), shabal, lathi, etc.. When she reached the spot to save her son, appellant no. 9 assaulted her with a shabol, appellant no. 6 assaulted her son on his head with a lathi and all the accused persons, thereafter, started assaulting her and her son at random.

12.5. P.W. 6 who is a co-villager has testified that all the accused persons assaulted deceased Wasim Murad @ Bablu with lathi, shabol, sickle etc. Deceased Wasim Murad @ Bablu was severely assaulted by them and he fell down.

12.6. P.W. 7 who is also a co-villager has testified that the accused persons including the appellants assaulted severely deceased Wasim Murad @ Bablu and his mother tried to save him (deceased), but she was also assaulted by them and Wasim Murad @ Bablu fell down on the ground.

P.W.s. 6 and 7 reached the spot at the same time and they are testified to have removed Wasim Murad @ Bablu and his mother (P.W. 5) from the spot.

12.7. P.W. 8 has testified that the appellants along with other accused persons assaulted severely deceased Wasim Murad @ Bablu and he fell down on the ground. This witness has not testified about the weapon of offence held by the accused persons.

12.8. P.W. 9, Jagadish Sarkar who is the person in dispute with Sudhannya Sarkar had called Abdur Rahaman (P.W. 2) regarding the dispute between him and his father Sudhannya Sarkar over a wall and the genesis of the prosecution case lies near the wall where P.W. 2 was assaulted first followed by the instant transaction resulting in injuries on the person of P.W.s 1, 3, 4 and 5 and murder of Wasim Murad @ Bablu. P.W. 9 has testified that the accused persons including the appellants assaulted P.W.s. 1, 3, 4 and 5 including deceased Wasim Murad @ Bablu by lathi, shabal, dao, etc. and Wasim Murad @ Bablu fell down on the ground receiving such assault and then mother of Bablu came to rescue him and she was also assaulted by the accused persons.

13. From the evidence of the witnesses, as discussed *supra* it is found that P.W.s. 2, 3 and 4 have taken the name of Adam Ali Gazi (appellant no. 7) so far as assault by dao on the head of the deceased is concerned. P.W.s. 3 and 4 have added further the name of Kasem Ali Gazi (appellant no. 9) to be an assailant so far as deceased Wasim Murad @ Bablu is concerned and he is alleged to have assaulted the deceased Wasim Murad @ Bablu with a shabal but situs of assault has not been mentioned by any of the witness. So far as other accused persons are concerned P.W.s 3 and 4 have specifically testified that all the accused persons including the appellants assaulted the deceased

by lathis. Evidence of P.W.s 5, 6, 8 and 9 is omnibus in nature. They have implicated all the accused persons including the appellants so far as the assault on deceased Wasim Murad @ Bablu is concerned. Some have testified about the weapon of offence and some have testified about only the assault. But all of them have testified that deceased Wasim Murad @ Bablu fell down on receiving the assault. P.W.s 1 and 9 have specifically testified that P.W. 5 though an injured reached the spot after assault on the deceased Wasim Murad @ Bablu and she was assaulted when she tried to save her son (deceased). But she has also tried to implicate all the accused persons so far as the entire transaction is concerned including the assault on P.W.s 1, 3 and 4.

14. When we read the evidence of the aforesaid witnesses in conjunction with the evidence of the I.O., P.W.-16, it is found that P.W.-2 had not stated before him (P.W.-16) that appellant no. 1 shouted and directed the other accused persons to kill the son of P.W. 1 and that Adam Ali Gazi again assaulted deceased Wasim Murad @ Bablu on his head with a dao. From such evidence of P.W. 16, it is clear that P.W. 2 who is testified to have seen Adam Ali Gazi (appellant no. 7) giving two blows on the head of deceased Wasim Murad @ Bablu by a dao, has been contradicted so far as second blow on the head of the deceased Wasim Murad @ Bablu with dao by appellant no. 7 is concerned. Further from the cross-examination of the I.O., P.W. 16, it is found that P.W. 2 had not stated before the I.O. that appellant no. 9 assaulted Wasim Murad @ Bablu (deceased) with shabal and Wasim Murad @ Bablu (deceased) was assaulted by other accused with lathi, etc.

14.1. P.W. 3 is contradicted to the extent that appellant no. 7 assaulted deceased Wasim Murad @ Bablu on his head with 'dao' and appellant no. 9 assaulted the deceased with a shabal on his leg and other accused persons assaulted him with a lathi.

14.2. P.W. 4, as found from the evidence of I.O., P.W. 16, had not stated before the I.O. that appellant no. 7 assaulted deceased Wasim Murad @ Bablu with a dao and appellant no. 9 assaulted deceased Wasim Murad @ Bablu with a shabal or that appellant no. 1 assaulted deceased Wasim Murad @ Bablu with a lathi or that appellant no. 6 assaulted deceased Wasim Murad @ Bablu with a lathi or that appellant no. 8 assaulted deceased Wasim Murad @ Bablu with lathi, fists and blows.

14.3. P.W. 4 has also been contradicted in material particular so far as assault by appellant nos. 7, 9, 6, 1 and 8 is concerned.

14.4. P.W. 5 did not state before the I.O. that all the accused persons started assaulting her and her son at random.

14.5. P.W. 6 as found from the cross-examination of the I.O., P.W. 16 had not stated before the I.O. that he (P.W.-6) suddenly heard hue and cry from in front of Raghavpur Primary School or that he came out from the chamber of Dr. Hamid and found that appellant nos. 1, 6 and 7 and other 10/12 persons (brothers of appellant no. 1) assaulted P.W.s 1, 3 and deceased Wasim Murad @ Bablu or that they were assaulted with lathi and they thereafter, removed Wasim Murad @ Bablu and his mother and took them to their house or that such occurrence took place near Raghavpur Primary School.

14.6. P.W. 8, Saiful Islam had not stated before the I.O. (P.W.16) as found from the cross-examination of P.W. 16 that he (P.W.-8) did not state before the I.O. that hearing the news of such assault on Abdur Rahaman, Golam Rahaman Gazi, Atiar Rahaman, Habibur Rahaman, Bablu and others while proceeding towards the house of Jagadish Sarkar, they were assaulted on the school ground by Jamshed, Kasem, Noor Ali, Sahajahan, Abu Bakkar and others being armed with dao, shabal, lathi, etc., or that Gobinda Mondal, Sudhannya Sarkar and others took Bablu and Maskura to their house.

15. If the aforesaid contradictions admissible under Section 145 of Evidence Act are taken into consideration, it is found that there has been assault on the deceased but it is not clear what is the severity of assault and as to whether any particular appellant (before us) had given any specific blow by any specific weapon.

16. In view of the aforesaid contradictions in the evidence of the prosecution witnesses, Mr. Chakraborty, learned Counsel for the appellants submits that the contradictions being very very material with potency to strike at the root of the prosecution case the appellants be given benefit of doubt so far as offence under Section 302/34 I.P.C. is concerned.

We cannot take a pedantic view of the matter. We have to be very pragmatic while appreciating evidence in such a transaction. When a group of persons are being attacked and assaulted by another group, it is very difficult on the part of a victim to give account of the assault on himself and others with exact precision. There is bound to be miss and addition. There is

bound to be exaggeration and sometimes embellishments, but the Court should be careful, in such a case to find out the gist of the prosecution case eschewing the contradictions obtained on record.

17. In such a case, when it is difficult to find as to who is the real assailant when allegation is made against a group of more than one assailant, aid of Section 34 I.P.C. is taken in some cases, where there is no allegation of unlawful assembly. Section 34 IPC is merely a Rule of evidence which provides that there should be a prior meeting of mind before concerted assault was mounted on the victim and such prior meeting of mind may also take place in the spur of the moment in course of the transaction itself. From the evidence on record, if it is clearly made out that a particular accused had assaulted the victim with a specific weapon, other persons who had not participated in the crime may be absolved of the responsibility or culpability saddled on them by aid of Section 34 IPC on the basis of facts and circumstances obtained on record. In the present case, there is, however, omnibus allegation against all the accused persons and as we have held earlier there is no clear evidence about the spot and the witnesses are of a faction ridden village. We, therefore, propose to take assistance from the evidence of the medical officer to find out the severity of the assault.

18. P.W. 12 is the medical officer who had conducted post mortem over the dead body of deceased Bablu. He found the following injury on the dead body of the deceased:

- “i) One stitched wound lacerated in nature 2” in length on the anterior part of left parietal region.
- ii) One abrasion 2” x 1” on the left cheek.
- iii) One abrasion 1” x 3/4” on the right side of the forehead.
- iv) One abrasion 2½” x 1” on the right temporal region.”

The medical officer has opined that the cause of death is shock and haemorrhage resulting from the above named ante mortem injuries and homicidal in nature. In cross-examination, he has testified that such type of injury may be caused in case of free fight between two groups. Medical Officer (P.W. 12) in his deposition has not specified the internal injury sustained by the deceased. We, therefore, take assistance from the post mortem report Ext. 7 to find out if there was any internal injury. From the post mortem report, we find that the deceased had sustained following internal injury i.e., subcutaneous extensive haematoma in the scalp over the left parietal, right parietal and posterior part of the vault of the scalp associated with extensive subdural haemorrhage with blood clot over both cerebral hemisphere and there under surfaces. If we take stock of the external injury, we find that the aforesaid internal injury is corresponding to external injury no. 1 (extracted *supra*). Injury no. 1 which is opined to be a lacerated injury may not be caused by any sharp cutting weapon like ‘dao’ (sickle) but may be caused by one blow, by a lathi or a shabal or any weapon with blunt surface or it may be caused by free fall on a hard surface. By some witnesses it is testified that on receiving the assault, deceased Bablu fell down on the ground but they have not testified as to whether he fell

down with his face upward or with his face downward and that the surface on which he fell down was hard surface. Defence has also not been able to bring out from record any material to show that the deceased on receiving the assault fell down on hard surface. The injury no. 1 being on the anterior part of the parietal region assault, be it by overt act of the accused persons including the appellants by hard and blunt object or by fall has been caused due to impact on the backside of the head of the deceased. Injury no.1 with its corresponding internal injury, as discussed *supra*, in our considered view is the fatal injury and other three injuries are superficial in nature. In view of such fact, we are of the view that assault on deceased Bablu was not so severe as exaggerated by the witnesses (P.Ws. 1 to 9).

19. We have found that in the instant transaction P.W.s. 1, 3, 4, 5 and deceased were assaulted. P.W.s. 1, 3 and 4 sustained simple injuries. P.W. 5 who came to the spot after assault on the aforesaid witnesses and the deceased as per version of P.W.s. 1 and 9 in their deposition also sustained simple injuries as per the medical opinion.

20. Taking into consideration the genesis of the case, nature of evidence, nature of injury sustained by the deceased and persons accompanying him i.e. P.W.s 1, 3 and 4 we are of the view that the accused persons including the appellants had no intention to kill anybody but they assaulted them i.e. P.W.s 1, 3, 4, 5 and deceased either to deter them from assaulting them i.e. accused persons including the appellants as there is case and counter case between the parties or with intention to just cause them injuries to save-guard their persons. In the transaction, weapons like shabal, sickle, lathi

were there in the hands of the assailants and from the surrounding circumstances and the injury sustained by the injured persons i.e. P.W.s 1, 3, 4 and 5, we are of the view that the appellants had knowledge to the effect that if they assault by such weapons there is likelihood of death of the victims. However, P.W.s 1, 3, 4 and 5 escaped with minor injuries but unfortunately Wasim Murad @ Bablu succumbed to the injury no. 1 (discussed *supra*) while other three injuries sustained by him (deceased) were superficial in nature.

21. In view of such fact, we are constrained to hold that the appellants are at best guilty of offence under Section 304 (Part-II) IPC read with Section 34 IPC and Section 323/34 IPC.

22. It is submitted by Mr. Chakraborty, learned Counsel for the appellant that the appellants were there in custody for about 11 years.

23. Taking into consideration the entire discussion (*supra*), we sentence each of the appellants to suffer R.I. for five years for offence under Section 304 (Part-II) IPC read with Section 34 IPC and to pay fine of Rs. 5000/- each in default to suffer R.I. for three months more. As the appellants have already suffered the sentence imposed as well as the default sentence, there is no necessity of sending them to jail again.

24. Accordingly, the finding of learned Trial Court in the impugned Judgement under Section 323/34 IPC is affirmed and finding of learned Trial Court for the offence under Section 302/34 I.P.C. is modified to the extent as aforesaid. The appellants who are stated to be on bail, be discharged of the bail bond in the present case.

25. Out of the nine appellants, the appellant no. 1, Noor Ali Gazi and appellant no. 4 Jamat Ali Gazi having died in the meantime, the appeal against them has already abated vide order dated 28.03.2023.

26. The appeal being **CRA 728 of 2004** is, accordingly, allowed in-part.

27. The Lower Court Record be sent down to the concerned Court along with a copy of this Judgement.

28. Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Partha Sarathi Sen, J.)

(Chitta Ranjan Dash, J.)