

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:

The Hon'ble Justice Rajasekhar Mantha

&

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 9 of 2004

Biswaranjan Das @ Santu Das & Ors.

Vs.

State of West Bengal

With

C.R.A. 37 of 2004

Mrityunjay Biswas

Vs.

State of West Bengal

For the Appellant

: Mr. Y.J. Dastoor, Learned Senior Advocate
Mr. Prabir Majumder
Mr. Snehanu Majumder
Mr. Debraj Shil
Ms. Sangeeta Chakraborty

For the State

: Mr. Debasish Roy, Ld.P.P.
Ms. Zareen N. Khan

Heard on

: 4th March, 2025

Judgment on

: 7th March, 2025

RajasekharMantha, J.

1. The instant appeals are against the judgment and order of conviction dated 19th November, 2003 and 20th November, 2003 passed by the Additional Sessions Judge, 3rd Court, Nadia in Sessions Trial No. 1 of November, 1999 arising out of Sessions Case No. 6 of December, 1996. The appellants were convicted and sentenced to suffer imprisonment for life under Section 302/34, 302 of the Indian Penal Code.

FACTS OF THE CASE

2. The prosecution case in brief is that on the early hours of 28th July, 1993 between 12:45 AM to 01:00 AM, the victim Sachin Mondal, a resident of Saheb Nagar village under Dhubulia Police Station, district – Nadia, returned home after fishing at Chari Ganga River. He was tired and fell asleep, on a cot, next to his wife, in the veranda of his pukka house immediately thereafter. The son and daughter of the deceased aged about 22 and 25 years old, were sleeping in the room of their house.
3. At about 1:30 AM, 5 to 6 persons of whom the appellant no. 1 and one Mritunjoy Biswas along with others came into the house of the victim. The appellant no. 1 shot the victim with a fire arm. The bullet went through from the right axillary region side below the armpit, at nipple level and exited through the left axillary region. According to the complaint, the exiting bullet from the body of the victim injured the wife of the deceased (PW 1), on her arm.

4. The said assailants including the appellant no. 1 ran away from the house of the deceased into a nearby bamboo grove. Upon hearing the sound of the firearm, SrishtidharMondal (PW 7), BadalMondal (PW 4), NemaiMondal (PW 5), SadhanMondal (PW 6), neighbours of the complainant, woke up and came out of their house. They saw the accused assailants fleeing away from the house of the deceased with the help of torch lights flashed by PW-7. The deceased was a member of the CPI(M) party and the President of a local body of farmers (Krisak Sabha) at Sadhan Para Anchal. The complainant further stated that the appellant no. 4, belonging to the rival Congress party had threatened the deceased many times. No complaints against the appellants have ever been filed by the victim or the PW-1 before the police in that regard. No other prosecution witness has corroborated any such threats.
5. The next morning at 8 AM, the complainant reached the Dhubulia Police Station on a bicycle along with SrishtidharMondal (PW 7) and others and submitted the complaint. The Dhubulia PS registered FIR No. 63 of 1993 dated 28th July, 1993. The Police arrived at the village and conducted inquest on the body. The Police seized blood-stained pillow, blanket, the cot, a mosquito net and an empty cartridge from the place of occurrence.
6. After conducting the inquest, on which NemaiMondal (PW 5) signed as a witness, the body was sent for post-mortem. The post-mortem doctor found the following injuries on the body of the victim.

- 1) *One perforated wound on chest wall at right infra axillary region at the level of nipple about 1"x1/2" with multiple puncted burn injuries around the wound covering a 5"radius suggesting wound of entry of gunshot injury.*
- 2) *Another perforating wound on posterior end of left axillary shout 1"x1" with no surrounding burn suggesting the wound of exit.*
- 3) *Stomach contents blackish colouredhalf digested rice about 4 ounce with no smell.*
- 4) *Death in my opinion was due to perforating wound of the heart caused by gunshot injury which was homicidal in nature.*

7. The appellants were arrested and charge sheet was filed against them after investigation by the Dhubulia PS.

THE EVIDENCE IN THE TRIAL

8. In course of the examination in chief, PW 1 gave details not mentioned in the complaint. She deposed that after coming home the deceased washed his hands and face, and lit up a hurricane lantern. PW 1 thereafter prepared a bed on a cot in the verandah in front of the room with the help of the light from the hurricane lantern. They fell asleep thereafter keeping the lantern burning. While her husband fell asleep she remained awake for some time. Suddenly she heard footsteps and found 5 to 6 persons standing in the verandah of the house. Two of them, who she stated were the appellant no. 1 and Mrityunjoy Biswas, approached the cot, and the appellant no. 1 fired a

weapon at her husband and then everybody fled away. She stated to have seen the appellants with the help of the lantern light. There is no mention of any lantern in the complaint filed by her.

9. She stated that she cried out aloud when BadalMondal (PW 4), NemaiMondal (PW 5), SadhanMondal (PW 6), andSrishtidhar Mondal (PW 7), her neighbours came out of their houses into the house of the victim. They are stated to have informed PW-1, of having seen the appellants coming out of the house of the victim. She further deposed that the next morning she went to the Dhubulia PS, along with PW 7 and other people from the village, and lodged a complaint. In course of cross-examination by the appellants PW 1 was confronted with an illicit affair she was having with PW 7. She denied that her husband was in any way connected with any political party.
10. She admitted in cross-examination that she stayed every night in the house of the PW-7 her nephew, to allegedly take care of his ailing father. She admitted that she was living in the house ofSrishtidharMondal (PW 7) after the death of her husband. She denied that there was any conflict between PW 7 and his wife due to the illicit relations between PW 7 and herself. Admittedly SrishtidharMondal, BadalMondal, NemaiMondal, BimalMondal, Kartick, Sadhan are all members of the same political party. She further deposed that the appellant Mohan KansiMondal had won the local Panchayat Election by defeating one Ramani Nandi a leader of the CPI(M) party. PW -1 has not explained why she stayed in her house that particular

night when she admittedly stayed at the house of PW 7 every night which was the natural course of events under Sec. 114 of the Evidence Act, 1872.

11. JoysankarSaha (PW 2) was the ASI of Police earlier attached to Dhubulia PS who received the written complaint submitted by PW 1 and endorsed the same with signature.
12. TaraknathMondal (PW 3) was the scribe of the FIR who admitted in cross-examination that the complainant/ PW 1 contested the elections for the post of Managing Committee of the local Moragachi High School.
13. BadalMondal (PW 4) stated that he woke up on the date and time of occurrence at about 01:00 AM to 01:30 AM after hearing the sound of footsteps outside his house. He stated that he found the appellant MohanbanshiMondal standing with a "Ramda" (a sharp-cutting farm implement) in front of the entrance of the house of the deceased. He thereafter heard the sound of gunfire from the house of the deceased and saw the appellants with the help of a torchlight in his hand fleeing away from the house of the victim. The police did not seize his torchlight. He thereupon entered the house of PW 1 and found the victim lying dead on the verandah of his house with bullet injuries on his chest. It is not known how PW 4 could not identify that there was a bullet injury sustained by the victim at the relevant point of time. PW 4, having heard the sound of footsteps flowing from outside his house, would have required the prosecution to

indicate the distance between the house of the victim and PW 4, which has not been done.

14. NemaiMondal (PW 5) was another neighbour of the victim. He woke up on the said night after hearing the sound of gunfire and crying. He was informed by the others as regards the alleged shooting of the victim by appellant no. 1 by the complainant. He saw the deceased lying on the cot. In cross-examination, he stated that he informed the Investigating Officer of all that happened and all that he saw outside and inside the house of the victim on the said night. In course of examination in chief, he said that he was holding a torchlight himself, in cross-examination, he stated that he told the Investigating Officer that he saw the victim under the torchlight of BadalMondal and PW 7. Several statements in cross-examination of PW 4 are inconsistent with the evidence of PW 4. The Investigating Officer (IO) PW 11 denied 80% of what PW 5 claimed to have stated to him, in course of investigation.
15. SadhanMondal (PW 6) was the cousin of the deceased. He was also a neighbour. He woke up in the middle of the night to the sound of gunfire emanating from the house of the deceased. He claimed to have seen the appellants fleeing from the house of the deceased, with the help of the torchlight flashed by PW 7. Upon reaching inside the house of the victim he found him bleeding on the chowki. PW 1 informed him that appellant no. 1 fired a weapon at her husband with the accused no. 1 Mrintunjoy Biswas

standing next to him. He was also a witness to the seizure list, a mosquito net, blood-stained pillow, a cot and the chowki, blood-stained bed cover and an empty bullet cartridge.

16. Sristidhar Mondal (PW 7) was the nephew of the deceased, living closeby. He claims to have woken up upon hearing the sound of the gunfire while lying down on the verandah of his house. He got up on the verandah of his house and flashed a torch light. He claimed that he and Badal Mondal (PW 4) saw the appellants escaping from the house of the victim into a wooden bamboo gate. He thereupon entered the house of the deceased and found him dead. At the relevant point of time, PW 4 and PW 5 were also there in the house.
17. He admitted in cross-examination that during the day time, the wife of the victim stayed in her own house but during the night she used to stay in his house. He deposed that his father Kartick Chandra Mondal was suffering from eye trouble and had other old age issues. He is stated to have told a large number of facts to the IO PW-11, during investigation, which have been denied by the latter.
18. He was confronted with the illicit affair he was having with PW 1. He also denied that there is any disharmony between his wife and himself due to the illicit affair between PW 1 and himself.
19. Bimal Mondal (PW 8) was another neighbour of the deceased. On the said night he was also sleeping in his house and woke up to the sound of gunfire. He stated that he had seen the appellants escape from the house under a

torchlight. His torchlight was never seized by the police. He indicated that the sky was clear on the said date. In cross-examination he was questioned as regards the actual age of Kartick Chandra Mondal, father of PW 7 was 68 years old. He was also confronted on the illicit affair between PW 1 and PW 7.

20. Gurupada Biswas (PW 10) appears to be a chance witness. He claimed that the appellants were seen conspiring with each other in a clubhouse, the previous night, to kill the victim, near the house of appellant, Mohan Kansimondal. He admitted that he had not informed the IO of the same.
21. Md. Amanulla (PW 11) was the Investigating Officer. He admitted that he held inquest on the deceased. He sent the body for post-mortem. He also seized a Nylon mosquito net, blood-stained cotton pillow, blood-stained cover of toshok and a wooden chowki (cot). He seized torch light of SristidharMondal (PW 7) along with two batteries. In course of cross-examination, he denied that PW 4, 5 and 6 had stated anything at all in course of investigation, what was deposed by them in course of trial.
22. Dr. GoutamSanyal (PW 12) was the post mortem doctor.
23. On behalf of the defence, two witnesses were examined namely, Ajit Paul (DW 1) and Kishore Dey (DW 2), both residents of the said village. Both of them deposed that they were near the Chhari Ganga River on the night that the deceased went fishing around 9:30 to 10:00 PM. They saw the victim fishing at Chhari Ganga on the said day between 9:30 to 10:00 PM. DW 1

stated that he heard an explosion of either a bomb or a gunfire in the middle of the night, on the date of occurrence. DW 2 stated that he went fishing himself near the Chhari Ganga River on the date of occurrence when he found PW 7 and PW 5 carrying the body of the victim very near the Chhari Ganga River, his evidence could not be shaken in cross-examination.

24. Each of the appellants were examined under Section 313 of the Cr.P.C. The Court further went on to convict the appellants as noted hereinabove.

ANALYSIS OF THE EVIDENCE

25. Learned counsel for the appellants have made several arguments that are addressed as follows:
26. It appears that the FIR was endorsed and placed before the jurisdictional Magistrate 5 days after the incident i.e. on 2nd August, 1993. There is no explanation whatsoever from any of the prosecution witnesses or particularly from the IO as to why there was a delay of 7 days in placing the FIR before the Magistrate. The chinks in the armour of the prosecution, appear from the inception of the case. The post-mortem report indicates in normal handwriting that it is connected with Dhubulia PS Case No. 63 of 1993 under Section 302 read with Section 120B and 34 of the Indian Penal Code. It is only by a different smaller handwriting that the provisions of Section 25 and 27 of the Arms Act were added.
27. The delay in lodging of the FIR coupled with the fact that three vital witnesses namely the son and daughter of the victim and Kartick Chandra

Mondal, the father of SristidharMondal (PW 7) not having been examined by the prosecution throws up serious questions as regards the bona fides of the prosecution case.

28. Admittedly the son and daughter of the victim were sleeping in the room in front where the victim was allegedly killed by a gunshot from a firearm. If the neighbours could wake up hearing a gunshot fire it is difficult for this Court to believe that the children of the victim who were sleeping in a room next to the verandah, would not have woken up, either from the sound of the gunshot or the cries of PW 1. The evidence of the said two children is the best possible evidence to throw light on the illicit relationship between their mother and PW 7. They would also be the best persons to confirm the place of occurrence i.e. where the victim was killed after being fired at with a firearm.
29. The withholding of vital evidence, the delay of 5 days in the placing of the FIR before the Magistrate raises serious suspicions as regards the prosecution case. In addition thereto adverse inference can also be drawn against the prosecution for withholding vital evidence under Section 114 of the Evidence Act. The Supreme Court in ***Harvinder Singh @ Bachhu v. The State Of Himachal Pradesh*** reported in **2023 INSC 907** has held that non-citing of witness by the prosecution who could have presented a different story, could dent its case.

“24. Failure on the part of the prosecution in not examining a witness, though material, by itself would not vitiate the trial. **However, when facts are so glaring and with the witnesses available, particularly when they are likely to give a different story, the Court shall take adequate note of it. When a**

circumstance has been brought to the notice of the Court by the defense and the Court is convinced that a prosecution witness has been deliberately withheld, as it in all probability would destroy its version, it has to take adverse notice. Anything contrary to such an approach would be an affront to the concept of fair play. In *TakhajiHiraji v. ThakoreKubersingChamansing*, (2001) 6 SCC 145,

“19. So is the case with the criticism levelled by the High Court on the prosecution case finding fault therewith for non-examination of independent witnesses. **It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise,** or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. **The court of facts must ask itself — whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court.** If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of nonexamination of other witnesses...”

(emphasis supplied)

30. The children of the victim, who were adults, are natural witnesses since they were present at the PO. They are also direct and best witnesses as regards the relationship between the victim and PW 1. It was the duty of the prosecution to elicit their evidence in the trial. Their statements have not even been recorded under Section 161 of the Cr.P.C. Such omission leaves substantial doubts in the mind of the court as regards the prosecution case and the serious likelihood of the truth having been suppressed.

31. On the delay of 5 days in placing the FIR before the magistrate coupled with the withholding of evidence, reference is made by Mr. Y.J. Dastoor to the case of ***Balaka Singh &Ors. v. The State of Punjab*** reported in **1975 SCC (Cri) 601**. Paragraph 7 thereof which is apt and appropriate and is set out herein below:

“7. Another finding which demolishes the entire edifice and fabric of the prosecution case is that the FIR itself was not written at 10 p.m. as alleged by the informant Banta Singh but it was written out after the inquest report was prepared by the ASI and after the names of the four accused acquitted by the High Court were inserted in the inquest report. If this is true then the entire case of the prosecution becomes extremely doubtful. The High Court has also derived support from another important circumstance to come to the conclusion that the FIR was not written at 10 p.m. as alleged by the prosecution but after the preparation of the inquest report at about 2.30 a.m. The High Court points out that according to the prosecution the special report reached the Ilaqa Magistrate at 11 a.m. on September 2, 1966 i.e more than 12 hours after the FIR was lodged at the police station, whereas it should have been delivered to the Ilaqa Magistrate during the night or at least in the early morning. Counsel appearing for the appellants submitted that under the High Court Circulars and the Police Rules it was incumbent upon the Inspector who recorded the FIR to send a copy of the FIR to the Ilaqa Magistrate immediately without any loss of time and the delay in sending the FIR has not been properly explained by the prosecution as rightly held by the High Court. It is, therefore, clear that the FIR itself was a belated document and came into existence during the small hours of September 2, 1966. Indeed if this was so, then there was sufficient time for the prosecution party who are undoubtedly inimical to the accused to deliberate and prepare a false case not only against the four accused who have been acquitted, but against the other five appellants also. The High Court also found that the best person to explain the delay in sending the special report to the Ilaqa Magistrate was the police constable who had carried the FIR to the Ilaqa Magistrate but that constable has not been examined by the prosecution. On this point the High Court observed as follows:

“The delay with which the special report was made available to the Ilaqa Magistrate is indicative of the fact that the first information report did not come into existence probably till about sunrise by when the dead body had already been despatched for the purpose of post-mortem examination to Patiala along with the inquest report, so that the Investigating Officer was no longer in a position to make alterations in the body of that report and all that he could do was to add later on the names of the said four appellants to its heading.”

The finding of the High Court is based on cogent materials and convincing reasons, but unfortunately the High Court has not considered the effect of this finding on the truth of the prosecution case with regard to the participation of the appellants. In our opinion, in view of the finding given by the High Court it has been clearly established that the FIR was lodged not at 10 p.m. as alleged by the prosecution but sometime in the early morning of September 2, 1966. If this was so, then the FIR lost its authenticity. If the prosecution could go to the extent of implicating four innocent persons by inserting their names in the inquest report and in the FIR which was written subsequent to the inquest report they could very well have put in the names of the other five appellants also because they were equally inimical to the prosecution party, and there could be no difficulty in doing so because it is found by the High Court that all the prosecution witnesses belonged to one party who are on inimical terms with the accused.”

32. Reference in this regard is also made to the case of ***Thulia Kali v. State of Tamil Nadu*** reported in **(1972) 3 SCC 393**, particularly paragraph 12 thereof is set out herein below:

“**12.** It is in the evidence of Valanjiaraju that the house of Muthuswami is at a distance of three furlongs from the village of Valanjiaraju. Police Station Valavanthi is also at a distance of three furlongs from the house of Muthuswami. Assuming that Muthuswami PW was not found at his house till 10.30 p.m. on March 12, 1970, by Valanjiaraju, it is not clear as to why no report was lodged by Valanjiaraju at the police station. It is, in our opinion, most difficult to believe that even though the accused had been seen at 2 p.m. committing the murder of Madhandi deceased and a large number of villagers had been told about it soon thereafter, no report about the occurrence could be lodged till the following day. The police station was less than two miles from the village of Valanjiaraju and Kopia and their failure to make a report to the police till the following day would tend to show that none of them had witnessed the occurrence. It seems likely, as has been stated on behalf of the accused, that the villagers came to know of the death of Madhandi deceased on the evening of March 12, 1970. They did not then know about the actual assailant of the deceased, and on the following day, their suspicion fell on the accused and accordingly they involved him in this case. First information report in a criminal case is an extremely vital and valuable piece of evidence for the purpose of corroborating the oral evidence adduced at the trial. The importance of the above report can hardly be overestimated from the standpoint of the accused. The object of insisting upon prompt lodging of the report to the police in respect of commission of an offence is to obtain early information regarding the circumstances in which the crime was committed, the names of the actual culprits and the part played by them as well as the names of eyewitnesses present at the scene of occurrence. Delay in lodging the first information report quite often results in embellishment which is a

creature of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. It is, therefore, essential that the delay in the lodging of the first information report should be satisfactorily explained. In the present case, Kopia, daughter-in-law of Madhandi deceased, according to the prosecution case, was present when the accused made murderous assault on the deceased. Valanjiaraju, step-son of the deceased, is also alleged to have arrived near the scene of occurrence on being told by Kopia. Neither of them, nor any other villager, who is stated to have been told about the occurrence by Valanjiaraju and Kopia, made any report at the police station for more than 20 hours after the occurrence, even though the police station is only two miles from the place of occurrence. The said circumstance, in our opinion, would raise considerable doubt regarding the veracity of the evidence of those two witnesses and point to an infirmity in that evidence as would render it unsafe to base the conviction of the accused-appellant upon it.

33. The decision of the Supreme Court in the case of ***Ishwar Singh v. State of U.P.*** reported in **1976 SCC (Cri) 629**, cited by Mr. Dastoor, particularly paragraph 5 thereof is equally relevant and is set out herein below:

“5. Mr Frank Anthony appearing for appellant Ishwar Singh submitted that in affirming the judgment of the trial court, the High Court also overlooked certain important aspects of the case that the Sessions Judge had failed to consider. He pointed out that the FIR which is stated to have been lodged at 9.05 a.m. on February 14, 1973 was sent out from the police station the next day, February 15; the time when it was despatched is not stated, but it appears from the record that the Magistrate received it on the morning of February 16. The court of the Magistrate was nearby, which makes it difficult to understand why the report was sent to him about two days after its stated hour of receipt at the police station. Section 157 of the Code of Criminal Procedure, 1898 as well as of 1973 both require the first information report to be sent “forthwith” to the Magistrate competent to take cognizance of the offence. No explanation is offered for this extraordinary delay in sending the report to the magistrate. This is a circumstance which provides a legitimate basis for suspecting, as Mr Anthony suggested, that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case the suspicion hardens into a definite possibility when one finds that the case made in court differs at least in two very important particulars from that narrated in the FIR Mahabir Singh, who lodged the first information report, stated in court that he had invited some people to his house to effect a settlement between him and Ishwar Singh, and that he had also sent Ghanshyam to call Ishwar Singh there. The FIR does not mention anything

like this. From the FIR it appears as if the accused persons came uninvited to his house, demanded why he had demolished the drain, and started assaulting him and the other persons who were present there. It is also difficult to understand why Mahabir should invite anyone to his house for a settlement, if really Ishwar Singh had permitted him to demolish the drain as he claimed. Further, the FIR does not mention that Mahabir and Satyapal wielded lathis in their defence when attacked and that this resulted in some of the accused getting injured; but that is what both Mahabir (PW 1) and Satyapal (PW 2) stated in their evidence in court. These variations relate to vital parts of the prosecution case, and cannot be dismissed as minor discrepancies. In such a case, the evidence of the eyewitnesses “cannot be accepted at its face value”, as observed by this Court in *Mitter Sen v. State of U.P.* [(1976) 1 SCC 723 : 1976 SCC (Cri) 190] The next argument by Mr. Dastoor is the variance in the complaint of PW 1 as stated that the victim came home late in the night at about 01:30 PM and fell asleep on a cot laid down by PW 5. As opposed to this in course of evidence in chief she has stated that after coming home the victim washed his hands and face and lit up hurricane lantern. In addition thereto it is reiterated that the lantern was left burning by her husband next to the cot. In the third time in the evidence of PW 1 shows she has allegedly identified two of the appellants with the light coming from the burning hurricane lantern.”

34. While it is true that the FIR is not an encyclopedia, the complaint and the FIR must contain the basic and essential facts that form the backbone of the prosecution case. PW 1 can't omit the basic and vital facts in her written complaint. Given the fact that the PM report did not initially mention the charges under Section 25 Arms Act, and the FIR is placed before the Magistrate 5 days after it was registered by the police, the inconsistencies between the complaint and the evidence of PW-1, it could be inferred that the FIR and Complaint were prepared after the post mortem report to cook up a story of murder by the appellants. The Trial Judge failed to notice the above.
35. In ***Rama Devi v. The State Of Bihar and Others*** reported in **2024 INSC 755**, it was pointed out that the need for an early dispatch of the FIR is to

prevent any chance of its interpolation. It was held that when the witnesses are creditworthy, the delay in the forwarding of the FIR will not discard the prosecution case, meaning thereby when the witnesses are not creditworthy, the delay in the dispatch of the FIR will be one more circumstance which will accrue a benefit of the doubt in favor of the accused. Paragraph 30 of the said case is set out below:-

“30.....The requirement to dispatch and serve a copy of the FIR to the jurisdictional magistrate is an extrnal check against ante dating or ante timing of the FIR to ensure that there is no manipulation or interpolation in the FIR. If the court finds the witnesses to be truthful and credible, the lack of a cogent explanation for the delay may not be regarded as detrimental.”

36. Yet another fact that has not been stated by PW 1 in her complaint is that she received information from Monoranjan and Santu as regards the role and presence of Mohan Kansimondal, Madan Pal, Mrityunjoy Biswas, Biswanarayan Das and Rantu Das.
37. Reference in this regard is made by Mr. Dastoor to the decision of Supreme Court in the case of ***Ram Kumar Pandey v. State of Madhya Pradesh*** reported in **(1975) 3 SCC 815** particularly paragraph 9 thereof is set out herein below:

“9. No doubt, an FIR is a previous statement which can, strictly speaking, be only used to corroborate or contradict the maker of it. But, in this case, it had been made by the father of the murdered boy to whom all the important facts of the occurrence, so far as they were known up to 9-15 p.m. on March 23, 1970, were bound to have been communicated. If his daughters had seen the appellant inflicting a blow on Harbinder Singh, the father would certainly have mentioned it in the FIR We think that omissions of such important facts, affecting the probabilities of the case, are relevant under Section 11 of the Evidence Act in judging the veracity of the prosecution case.”

38. Applying the aforesaid test, the evidence of PW 1, therefore, cannot be believed because the very basis of the FIR being the complainant appears to be clearly concocted. The complaint and FIR were therefore manufactured to cater to a concocted prosecution case hence the delay in placing the same before the Magistrate concerned.
39. In course of examination-in-chief PW 1 clearly stated that her husband was a member of the CPI(M) party. In cross-examination however, she had stated that her husband was completely apolitical. PW 3 has admitted that appellant Mohan Kansimondal a member of the Congress party had contested Panchayat Elections against PW 1 and had defeated a CPI(M) candidate and there was admittedly a political rivalry between the appellants and the witnesses for the prosecution. The deliberate and willful contradiction in the evidence of PW 1, as regards her husband's political inclinations, is therefore a matter of concern and questions the credibility of her deposition in the trial.
40. While PW 1 has stated in the complaint that she sustained an injury on her arm from the bullet exiting the body of the deceased, there is no mention of the same in her deposition. No injury report was produced in course of evidence either. The third serious omission on the part of the Trial judge is the trajectory of the bullet based on the post mortem report. The entry of the gunshot wound was at the Right Capillary area at the nipple level. The exit

wound recorded was at the left capillary moving in a slightly upward direction,

41. It is not possible for such a wound to occur from a gunshot fired on the victim who was sleeping on a cot, by a person standing in front of the cot. The only way such a wound can be inflicted is if the victim was with his arms raised over his head. The victim could have been shot while he was fishing with a rod with his arm raised. The shooter must be in very close proximity to the victim given the burnt residue on the entry wound found by the post-mortem doctor. The other possibility is that the victim was shot by someone very close to him in his bed while he was sleeping. The exiting bullet would have been recovered either from the cot or in the verandah. Since no such bullet was recovered, the prosecution case of the victim being shot by the appellants in his house is completely ruled out.
42. Insofar as the collection of evidence, the investigation by the police leaves much to be desired. Although the Nylon mosquito net was seized along with the cot, an empty cartridge, blood-stained pillow, bed sheet and clothes of the deceased, the same were not sent for FSL report.
43. The most vital evidence i.e. the Hurricane Lantern was never seized by the police in all likelihood there was no Hurricane Lantern at the place of occurrence. The prosecution story and the evidence of PW 1 that she saw the assailants under the light of a hurricane lantern is therefore doubtful and cannot be accepted.

44. In the present case, the torchlight appears as the only guiding light for all the prosecution witnesses in seeing the appellants, apart from PW 1, who has seen the appellant with the aid of a lantern. The uniform deposition of the other prosecution witnesses has been that they have seen the appellants under the torchlight of PW-7. It was incumbent upon the investigating agency to examine the trajectory of the torchlight to ascertain whether the torch had the potential to provide clear visibility to a person when applied to another. It is also doubtful as to how PW7 at once indicated the torchlight on the assailants and every prosecution witness, in unison, saw them and also at the same time identified them. It is not the case of the prosecution that PW 1 shouted after the gunshot being fired at the victim meaning thereby that PW 7 did not get any clue from the shouting of PW 1 as to the direction the assailants were proceeding after the murder. In fact a woman seeing strangers in her house in the middle of the night would have immediately raised a hue and cry at least to alert her children. The torchlight theory, therefore appears to be an afterthought to implicate the appellants.
45. The next issue of importance is the absence of any FSL reports on any of the seized articles. The importance of an FSL report in cases of murder, has been appropriately dealt with by paragraph 14 of the decision of the Supreme Court in the case of **Laxmi Singh &Anr. v. State of Bihar** reported in **(1976) 4 SCC 394** thereof is set out herein below:

14. To add to this another important circumstance is the omission on the part of the prosecution to send the bloodstained earth found at the place of

occurrence for chemical examination which could have fixed the situs of the assault. In almost all criminal cases, the bloodstained earth found from the place of occurrence is invariably sent to the Chemical Examiner and his report along with the earth is produced in the court, and yet this is one exceptional case where this procedure was departed from for reasons best known to the prosecution. This also, therefore, shows that the defence version may be true. It is well settled that it is not necessary for the defence to prove its case with the same rigour as the prosecution is required to prove its case, and it is sufficient if the defence succeeds in throwing a reasonable doubt on the prosecution case which is sufficient to enable the court to reject the prosecution version.

46. The failure of the prosecution to send the seized articles and obtain FSL report thereof is therefore fatal to the prosecution case. Curiously the cartridge allegedly seized by the police at the place of occurrence was also not sent for ballistic report. No FSL or ballistic report was placed before the Trial Court. The prosecution case, therefore, cannot be established in the absence of the aforesaid evidence.
47. The Supreme Court in ***Ram Singh v. The State Of U.P.*** Reported in **2024 INSC 128** has explained the cases where the absence of ballistic report would be fatal to the prosecution case. It was held therein that the absence of ballistic report coupled with the non-examination of material witnesses, as is in the present case, confers a benefit of the doubt in favour of the accused. The want of credibility of the eyewitnesses will make the production of ballistic report mandatory. Paragraphs 23-25, 28 and 29 of the said case are set out below:-

23. In *Munna Lal Vs. State of U.P.*, (2023) SCC Online SC 80, this Court opined that since no weapon of offence was seized in that case, no ballistic report was called for and obtained. This Court took the view that failure to seize the weapon of offence on the facts and in the circumstances of the case, had the effect of denting the prosecution story so much so that the same

together with non-examination of material witnesses constituted a vital circumstance amongst others for granting the appellants the benefit of doubt.

24. On the aspect of non-examination of ballistic expert and its impact on the prosecution case, one of the earliest decisions of this Court was rendered in Gurucharan Singh Vs. State of Punjab, AIR 1963 SC 340.... **Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused by a gun and those prima facie appeared to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert.** However, in what cases the examination of a ballistic expert is essential for the proof of the prosecution case must naturally depend upon the circumstances of each case...

25. This issue was again examined by this Court in Sukhwant Singh Vs. State of Punjab, (1995) 3 SCC 367..... **In that case, this Court observed that though the police had recovered an empty cartridge from the spot and a pistol along with some cartridges were seized from the possession of the appellant at the time of his arrest, yet the prosecution did not send the recovered empty cartridges and the seized pistol to the ballistic expert for examination and expert opinion.** This Court was of the view that if such opinion would have been called for, comparison could have been made which in turn could have provided link evidence between the crime and the accused. **It was noted that this again was an omission on the part of the prosecution for which no explanation was furnished...**

28. In Pritinder Singh Vs. State of Punjab, (2023) 7 SCC 727,.... In that case which was based on circumstantial evidence, **it was held that when there was serious doubt as to credibility of the witnesses, the failure to examine ballistic expert would be a glaring defect in the prosecution case.**

29. Thus, what can be deduced from the above is that by itself non-recovery of the weapon of crime would not be fatal to the prosecution case... When there is direct eye witness account which is found to be credible, omission to obtain ballistic report and nonexamination of ballistic expert may not be fatal to the prosecution case **but if the evidence tendered including that of eyewitnesses do not inspire confidence or suffer from glaring inconsistencies coupled with omission to examine material witnesses, the omission to seek ballistic opinion and examination of the ballistic expert may be fatal to the prosecution case.**

Emphasis Applied

48. This Court's mind is not free from doubt that there was a deliberate attempt on the part of the prosecution to create evidence in the instant case. Two seizure lists with the same date and time were prepared, one in the house of the deceased and the other in the house of PW 7. A difference of at least 5 to

10 minutes is invariable between two seizures even if the houses are located next to each other. This Court is therefore unable to accept the bona fides of the seizure made by the police. Interestingly PW 7 signs as witness in the seizure lists, one is in English and one is in Bengali.

49. This Court further notes that there is an outpost of the Dhubulia PS near Murigacha village a distance of 10 minutes from the village of the deceased as to why PW 1 and the other prosecution witness went on the way bi-cycle to Dhubulia Police Station itself and in the outpost remains unexplained.
50. The last argument of the learned Senior Counsel on behalf of the appellants Mr. Dastoor is that the IO knew of an alternative theory as to where the death could have occurred i.e. near the Chari Ganga River. The same is evident from the deposition of the IO himself. There is absolutely no explanation whatsoever by the IO as to why he did not investigate and inspect the place of occurrence indicated by the DWs. The need for examining and exploring the area via which the victim came home on that fateful night after catching fish assumes significance given the curious fact that every prosecution witness was awake on that night as if they were awaiting some event to take place where they have to participate.

CONCLUSION

51. In the backdrop of the above this Court is of the view that the place of occurrence argued by the prosecution and sought to be proved by the witness cannot be accepted as true and correct. What is more likely to have

happened in the assessment of this court is that the victim was killed to enable PW 7 and PW 8 to prolong and continue with their illicit relationship. The implication of the appellants was out of political rivalry. The complainant and the prosecution have tried “to hit two birds with one stone”. The evidence of the two children and the victim was not brought on record since they would have revealed the truth. In this backdrop, the impugned judgment and order of conviction cannot be sustained in law and is liable to be quashed and set aside. The surviving appellants shall be set free forthwith if not wanted in any other case and subject to execution of bond to the satisfaction of the Trial Court. The said bail bond shall remain in force for a period of 6 months in view of Section 437A of Cr.P.C., 1973 corresponding to Section 481 of BNSS, 2023. The appeal is allowed and disposed of.

52. Trial Court Records be sent down to the Court below along with a copy of this judgment for information and necessary action.
53. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.

(RajasekharMantha, J.)

I agree.

(Ajay Kumar Gupta, J.)