

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

APPELLATE SIDE

CRA 277 of 2018

Nuruddin Molla alias Gula alias Gole Molla

Vs.

The State of West Bengal

With

CRA 278 of 2018

Gaffar Molla alias Goffar Molla

Vs.

The State of West Bengal

With

CRA 279 of 2018

Nur Alam Molla alias Noor

Vs.

The State of West Bengal

With

CRA 280 of 2018

With

CRAN 1 of 2025

Khokan Molla alias Pora Khokan

Vs.

The State of West Bengal

With

CRA 281 of 2018

Appon Molla alias Appan Molla

Vs.

The State of West Bengal

With

CRA 282 of 2018

**Gagge alias Tenia Molla alias Imam Ali Gayen alias Gughge &
Ors.**

Vs.

The State of West Bengal

With

CRA 283 of 2018

Khokan Molla

Vs.

The State of West Bengal

**Before: The Hon'ble Justice Rajarshi Bharadwaj
&
The Hon'ble Justice Apurba Sinha Ray**

For the Appellants : Mr. Sudipta Moitra, Sr. Adv.
Mr. Angshuman Chakraborty, Adv.
Mr. Dwaipayan Biswas, Adv.
Mr. Vijay Verma, Adv.
Mr. S. S. Saha, Adv.
Mr. Azam Khan, Adv.

For the State : Mr. Debashish Roy, Ld. P.P.
Ms. Amita Gaur, Adv.
Mr. Karan Bapuli, Adv.

CAV On : 17.07.2025
Judgment On : 10.11.2025

Apurba Sinha Ray, J. :-

1. As the above appeals arise out of the impugned judgment and conviction dated 18.04.2018 & 19.04.2018 passed by Sri Debasish Bandyopadhyay, Additional Sessions Judge, 1st Court, Alipore, South 24 Parganas in Sessions Trial No. 01(03)2012 arising out of the Sessions Case No. 10(09)2010 convicting the appellant(s) under Sections 302/34 of the Indian Penal Code and also under Section 25/27 of Arms Act, we propose to pass a single common judgment today which will dispose of all the appeals mentioned above, and accordingly, we pass the following judgment which will govern all the appeals, mentioned above.

2. Shorn of unnecessary details the crux of prosecution case, as is revealed, is that the defacto complainant, the sister of the lady victim, was informed by the victim's son that on the previous night the accused persons attacked their house and assaulted her mother with weapons and thereafter they took their mother to the nearby road. All the accused persons assaulted her with sharp cutting weapons. The victim's son and daughter, being afraid, took shelter in a nearby school and in the morning came to her house and informed them of the matter. The defacto complainant visited the place of occurrence and enquired from the local people and thereafter went to the concerned hospital where the victim was taken and thereafter lodged the complaint. Charge sheet was submitted and after compliance of necessary formalities, charges were framed against 10 accused persons

under sections 302/34 Indian Penal Code ('IPC' in short henceforth) and also under section 25/27 Arms Act to which all the accused pleaded not guilty and claimed to be tried. The learned Trial Court being Learned Additional District & Sessions Judge, 1st Court, Alipore South 24 Paraganas convicted 9 accused (*one being dead during pendency of the trial namely, Gufar Molla*) and sentenced them with rigorous imprisonment for life. This is the backdrop of the present appeal.

3. Appearing for the appellants, learned Senior Advocate, Mr. Sudipto Moitra challenged the conviction and sentence on several grounds, inter alia, that the investigation is perfunctory since it did not answer several questions raised by the defence, that though there is no whisper in the four corners of the FIR that the victim suffered gunshot injury, the prosecution case was developed by the witnesses subsequently in this regard, that the medical report shows that alleged bullet entered in the body of the victim, but there was no mark of exit of the said bullet, no attempt was made to recover the said bullet, if any, from the body of the victim, that the prosecution's star witnesses were children and although there are several pre-conditions to accept the testimony of such witnesses in view of the law settled by the Hon'ble Apex Court in that regard but the same was not taken into consideration by the learned trial court at the time of passing the impugned judgment of conviction, that though neither any arms nor ammunition were recovered in connection with the case in hand, the trial court convicted the accused under the Arms Act most illegally, that the

arms recovered in connection with another case were produced during the trial most astonishingly, that there was unreasonable and unexplained delay in lodging the FIR and therefore, the chances of manipulation of essential facts in the FIR were most likely, that there was also an unexplained delay in forwarding the FIR dated 02/12/2009 to the concerned ACJM Court for at least 3 days (05/12/2009), that the dead body was despatched for Post Mortem after 2 days of the incident (03/12/2009), that there were material discrepancies between ocular and medical evidence, that there were serious contradiction in the statements of the prosecution's star witnesses being PW2 and Pw3 (son and daughter of the victim) recorded under section 161, 164 of Cr.P.C and their deposition before the trial court.

4. The learned Counsel for the State has, on the other hand, submitted that apart from some minor discrepancies, the prosecution has been able to prove the case beyond reasonable doubts. The deposition of the children of the victim was consistent, reliable since they remained unshaken during cross examination. Their deposition proved that the ghastly murder was done by the accused due to previous grudge, and their depiction of incidents as eye witnesses raised confidence in the mind of the court and after considering the other materials on record along with the said deposition of PW2 and PW3, the learned trial court rightly convicted and sentenced the appellants. Sufficient explanation was given for the alleged delayed FIR. There is no scope for the present appellate forum to interfere with the judgment of the trial court, in view of the fact that any lacuna on the part of

the investigation authority or any state machinery should not cost either the prosecution or the victim's relatives.

Court's View :

5. Undoubtedly, the son and the daughter (pw2 & pw3) of the victim are the most important witnesses and the FIR maker lodged the FIR on the basis of the version of the son of the victim. Summary of the FIR has already been mentioned above. The PW2 was one of the eye witnesses and his statements regarding the incident were recorded judicially under section 164 Cr. P.C. Let us examine what he had stated before the learned Judicial Magistrate.

5.1. On 05/12/2009 the PW2 stated before the Magistrate *that around 8:45 p.m. on 1st December he was lying in the bed. At that time Pora Kokhan (whose original name was Khokan Molla but he was called as Pora Khokan as he suffered burn injury during making of a bomb) and his companions were coming from Keya tola hut (market) after hurling bombs. Thereafter they hurled bombs in Boropukur and thereafter opened fire. Thereafter Pora Khokan and his team came to their house and encircled their house. They uttered filthy language against his mother. Thereafter, they broke their shop and also broke open the door of their house. They also broke their windows. Thereafter, Pora Khokan and the persons accompanying him pulled the hands of his mother and thereafter took her out of the house after beating her. Then his mother screamed as she was not willing to go outside. As they were forcibly taking his mother the PW-2 and his sister started crying so that they*

could leave their mother. But they assaulted him as well as his sister. Thereafter they took his mother outside and thereafter they killed their mother by firing after keeping her standing in front of a lamp post. The persons who fired her mother were Nur Alam, Gaffar, Tenia, Bakker, Gule (brother of Nur Alam), Nasir (another brother of Nur Alam), Appan, (cousin of Pora Khokan), Appan (brother of Goffar), Khokan (another brother of Goffar), Gaffar and Ors., Pora Khokan asked them to shot her mother and accordingly they killed their mother. The reasons for killing her mother was that his mother got a contract for construction of a house and for which Pora Khokan and his group demanded money from his mother but as his mother refused to pay them any money they killed his mother.”

6. From the above statement under section 164 CrPC, it appears that though he narrated the incidents of assault on her mother, he mentioned that her mother was shot by all the ten accused along with others and he never narrated that her mother was assaulted by any sharp cutting weapon. He also narrated before the Magistrate that Pora Khokan asked the other accused to shoot her mother that is why others shot her. This is a serious departure from the Case of the FIR. There is no whisper in 164 Cr.P.C statements regarding sharp cutting weapons. Now let us see what he deposed before the trial court in this regard.

The relevant excerpts of his deposition in this regard are quoted herein below:

‘Then Pora Khokan, Appan, Nur Alam, Bakker, Gaffar, Gofur, Gule, Nasir and brother of Gofur viz, Khokan pushed our door and entered inside our house and damaged our household articles. Then, they caught hold of hair and hands of my mother and thereafter, my mother was taken outside of our home. We had been to save my mother. We were assaulted then. We i.e, myself and my sister were assaulted then. My mother was taken thereafter, near a lamp post where one light of burning condition. In the light of bulb myself and my sister saw that Pora Khokan, Appen, Gule, Nasir, Gofur, Bakker, Gaffar, Nur Allam, Tenia and many others started to inflict by sharp cutting weapon blows on the person of my mother.

Thereafter, my mother was taken to the Mansatala pole in front of my house. Then, the dead body of my mother was thrown in the pond. I myself and my sister flee away and took shelter in a school. In the early morning, I myself and my sister had been to the house of my aunty viz. Jahanara Bibi and informed the incident to my aunty and her husband. Thereafter, I myself and my sister accompanied by my aunty and her husband came to our house.

In the meantime, dead body of my mother was taken by police at Amtala hospital. I myself, my sister and my aunty and her husband had been to Amtala Hospital. We found the dead body of my mother at Amala Hospital and then we had been to Bishnupur P.S. We found police personnel present at Amtala Hospital.....

Pora Khokan fired on my mother after inflicting weapon blows”

7. At the fag end of his examination in chief, he deposed that Pora Khokan fired on his mother after inflicting weapon blows. Such deposition again contradicts the statement recorded under section 164 Cr.P.C. However, as his deposition before the trial court is a substantive piece of evidence we have to consider such deposition in the light of other materials on record. According to him, the accused persons inflicted sharp cutting weapon blows on her mother. If that be so, then there must have been marks of some incised wound on the body of the victim. The PW 14, being the doctor conducting post mortem examination on the deceased, has stated in his cross-examination that there was no sharp cutting injury on the dead body. He opined that if somebody is assaulted with a sharp cutting weapon, the victim can sustain sharp cutting injuries on his persons. Therefore, such findings in the post mortem report, proved by the doctor, do not support the relevant deposition of the son of the victim. Moreover, in his cross examination, he has stated that he does not know whether Pora Khokan or anybody else assaulted his mother by means of a sharp cutting instrument or not. The Investigation Officer, PW16, has stated in his cross-examination that the PW2, during his interrogation, did not mention the specific name of the assailant /accused who fired his mother specifying the name.

8. Another eye witness was the PW3, being the daughter of the victim. Her relevant evidence in this regard is as hereunder:

“Pora khokhan, Appan, Nur Ali, Gule, Nasir, Bakkar, Gaffar, Gofur, Gule @ Tenia and brother of Gofur, Khokan pushed the door and entered inside our

house and then damaged our household articles and thereafter, my mother was taken out by them from our house. We raised objection but they caught hold of the hairs of my mother and took my mother outside of our house. On protest we were assaulted. Then my mother was taken near a lamp post in front of our house and where one bulb was lightening and then I myself and elder brother, Raju Sk found that the accused persons were inflicting sharp cutting weapon blows on my mother. They also fired on my was taken behind a hotel of Gofur and they thrown my mother in a ditch. We saw the incident from our house in the light of bulb and then I myself and my elder brother flee away due to fear and then took shelter in a school and in the early morning we had been to the house of aunty Jahanara bibi. We narrated the incident to my masi and her husband and also disclosed the name of the persons who assaulted my mother. Then, I myself and my brother came to our house accompanied by my masi and her husband. But the body of my mother was not found and as such, we had been to Amtala hospital. Then I myself and my elder brother and my masi and her husband had been to Bishnupur P.S. then we informed the incident to the Police and Barobabu told us to lodge complaint.”

9. Her statement was not recorded under section 164 Cr.P.C. From the record, it is found that her such deposition was contradicted by the defence during cross examination of the I.O who stated that she did not state to him that her mother was taken near a light post and thereafter, she was assaulted by sharp cutting weapon blows and fired which she witnessed in the light of bulb, nor that her mother was taken behind a hotel of ‘Gofur’

and thereafter she was thrown in a ditch. Therefore, the initial statement of PW3 recorded under section 161 Cr.P.C varies with her deposition in court. Again, I say at the cost of repetition that the medical evidence reveals that there was no sharp cutting injury on the persons of her mother. There are discrepancies in the deposition of PWs 2 and 3. While PW2 said that “Then, they caught hold of hair and hands of my mother and thereafter, my mother was taken outside of our home. We had been to save my mother.....”, the PW3 deposed that “.....We saw the incident from our house in the light of the bulb and then I myself and my elder brother flee away due to fear and then took shelter in a school....” The post mortem report and deposition of PW14 proved that the death of the victim was due to gunshot injury and anti-mortem in nature. Though the FIR did not disclose any gunshot injury, the medical evidence and ocular evidence of PWs 2 and 3 confirmed a bullet was shot upon the victim prior to her death. However, there is no clinching evidence regarding the person who actually opened the fire upon the victim. The learned trial court did not deal with this aspect elaborately. There is no evidence whether the shot was fired from any of the guns recovered from the two accused or not. No opinion was sought for from the Arms Experts in this regard in accordance with the relevant law. The objection of the defence that arms seized in connection with another case were produced, did not impress us since the arms recovered in connection with the incident of this case after a few days back should have been shown to be recovered in relation to this case, but without doing so, what the I.O wrongly did was that he started a new case under Arms Act against the two accused from whom such arms

were recovered. Although this fault of the I.O. cannot give a fatal blow to the prosecution case, the omission to obtain arms expert's report for ascertaining whether the fatal blow was shot from any of the seized guns, is undoubtedly a vital and serious mistake and cannot be viewed lightly. This aspect was also not properly considered by the learned trial court in its judgment.

10. The learned counsel Mr. Moitra has relied upon a judicial decision of **Jagdish & Another Vs. State of Haryana reported in 2019 Cri. LJ 4169 (SC)** in support of his contention that the evidence of the eye witness must be cogent and convincing. Paragraph 8 of the said judgment is quoted herein below:-

“Can the evidence of a solitary doubtful eyewitness be sufficient for conviction? We may have a word of caution here. Conviction on basis of a solitary eye witness is undoubtedly sustainable if there is reliable evidence cogent and convincing in nature along with surrounding circumstances. The evidence of a solitary witness will therefore call for heightened scrutiny.”

11. In **Ram Singh Vs. State of U.P. reported in 2024 Cri LJ 1297** the Hon'ble Court has dealt with the law regarding absence of ballistic report

and inconsistencies in the testimony of eye witness. Paragraphs 24 to 26 is quoted herein below:-

“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 v. State of Punjab, AIR 1963 SC 340. This Court observed that there is no inflexible rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. 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. This Court held as under:

41. ...These observations do not purport to lay down an inflexible Rule that in every case where an accused person is charged with a murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they prima facie appear 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. 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 v. State of Punjab, (1995) 3 SCC 367 (AIR 1995 SC 1601). 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. It was thereafter that this Court declared as follows:

21.... It hardly needs to be emphasised that in cases where injuries are caused by firearms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent

25.1. Thus, in the aforesaid case, this Court emphasized that in cases where injuries are caused by firearms, the opinion of the ballistic expert becomes very important to connect the crime cartridge recovered during the investigation to the firearm used by the accused with the crime. Failure to produce expert opinion in such cases affects the creditworthiness of the prosecution case to a great extent.

26. However, in State of Punjab v. Jugraj Singh, (2002) 3 SCC 234 (AIR 2002 SC 1083), this Court opined that when there are convincing evidence of eye-witnesses, non-examination of

the expert would not affect the creditworthiness of the version put forth by the eyewitnesses.”

12. In Siba Nial @ Trilochan Vs. State of Odisha reported in 2025 (1) Crimes 283 (SC) Hon’ble Court has also dealt with the law when ballistic report is absent. In that case law it has been held that when post mortem report, deposition, as well as ballistic report are ambiguous and do not support prosecution’s version and further it was not possible to compare firing pin marks on cartridge cases found at spot with test fired cartridge cases, the guilt of accused does not stand proved and established beyond reasonable doubt.

13. In Darshan Singh Vs. State of Punjab reported in (2024) 3 SCC 164 the issue of omission and contradiction in the statement of the eye witness recorded under Section 161 of Cr.P.C. has been dealt with. In this regard the paragraph 31 of the said judgment is quoted herein below:-

“If the PWs had failed to mention in their statements under Section 161 Cr.P.C. about the involvement of an accused, their subsequent statement before court during trial regarding involvement of that particular accused cannot be relied upon. Prosecution cannot seek to prove a fact during trial through a witness which such

witness had not stated to police during investigation. The evidence of that witness regarding the said improved fact is of no significance”

14. In **Pankaj Vs. State of Rajasthan reported in JT 2016 (9) SC 93** the Hon’ble Apex Court has specifically held that it is a well settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted. Paragraph 13 of the said judgment is quoted herein below:-

“It is a well-settled principle of law that when the genesis and the manner of the incident is doubtful, the accused cannot be convicted. Inasmuch as the prosecution has failed to establish the circumstances in which the appellant was alleged to have fired at the deceased, the entire story deserves to be rejected. When the evidence produced by the prosecution has neither quality nor credibility, it would be unsafe to rest conviction upon such evidence. After having considered the matter thoughtfully, we find that the evidence on record in the case is not sufficient to bring home the

guilt of the appellant. In such circumstances, the appellant is entitled to the benefit of doubt.”

15. In Amar Singh Vs. State of NCT of Delhi reported in (2021) 3 SCC (Cri.) 784 the Hon’ble Supreme Court has dealt with the conduct of the eye witnesses before the trial court. In this regard the paragraph 21 is very much relevant:-

“The other unnatural conduct of two brothers PW1 and PW11 just after the Incident again makes their presence on the spot extremely doubtful. There was a medical clinic of Doctor Bhardwaj just nearby the place of incident and the first endeavour of the two brothers would have been to take injured brother to the clinic for immediate medical aid or try and get some medical aid from the clinic of Doctor Bhardwaj. Admittedly, according to the statement of Parminder Singh PW1 PCR van arrived after about 15 minutes. During this period no effort was made to either take the injured brother to the clinic or to call Doctor Bhardwaj for some first aid. This is totally against normal human behaviour.”

16. The case law of **Mahendra Singh and Ors. Vs. State of M.P. reported in 2022 (2) Crimes 319 (SC)** has laid down that there are three types of witness. The paragraphs 12 and 13 are quoted herein below for the purpose of understanding the relevant observation:-

“12. It will be apposite to refer to the following observations of this Court in its celebrated judgment in the case of Vadivelu Thevar (supra):

“...Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely:

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness,

incompetence or subornation. In the second category, the court equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.”

13. It could thus be seen that this Court has found that witnesses are of three types, viz. (a) wholly reliable; (b) wholly unreliable and (c) neither wholly reliable nor wholly unreliable. When the witness is "wholly reliable" the Court should not have any difficulty inasmuch as conviction or acquittal could be based on the testimony of such single witness. Equally, if the Court finds that the witness is "wholly unreliable" there would be no difficulty inasmuch as neither conviction nor acquittal can be based on the testimony of such witness. It is only in the third category of witnesses that the Court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial.”

17. In K. Venkateshwarlu Vs. State of Andhra Pradesh reported in (2012) 3 SCC (Cri) 795 the Hon'ble Court has dealt with the point regarding when conviction can be based on the evidence of a child. The relevant paragraphs nos. 9 and 11 are quoted herein below:-

"9. Several child witnesses have been relied upon in this case. The evidence of a child witness has to be subjected to closest scrutiny and can be accepted only if the court comes to the conclusion that the child understands the question put to him and he is capable of giving rational answers (see Section 118 of the Evidence Act). A child witness, by reason of his tender age, is a pilable witness. He can be tutored easily either by threat, coercion or inducement. Therefore, the court must be satisfied that the attendant circumstances do not show that the child was acting under the influence of someone or was under a threat or coercion. Evidence of a child witness can be relied upon if the court, with its expertise and ability to evaluate the evidence, comes to the conclusion that the child is not tutored and his evidence has a ring of truth. It is safe and prudent to look for corroboration for the evidence

of a child witness from the other evidence on record, because while giving evidence a child may give scope to his imagination and exaggerate his version or may develop cold feet and not tell the truth or may repeat what he has been asked to say not knowing the consequences of his deposition in the court.

Careful evaluation of the evidence of a child witness in the background and context of other evidence on record is a must before the court decides to rely upon it.

.....

11. Having perused the evidence of all the witnesses, we find it difficult to rely on them. We feel that the trial court had rightly discarded their evidence as unworthy of reliance and the High Court erred in taking it into consideration. This, in our opinion, is a case where neither the evidence of the parents of the victim PW2 Aruna nor the evidence of PW2 Aruna, nor the evidence of the child witnesses, who claim to have witnessed the incident, nor the medical evidence supports the prosecution case. Besides, all the pancha witnesses have turned hostile, a fact

which we have noted with some anguish. A needle of suspicion does point out to the appellate because he is a police constable and in a small village where the incident took place witnesses may be scared to depose against him because of his clout. There are certain circumstances which do raise suspicion about the appellant's involvement in the crime. The children were playing on the terrace of the appellant. The appellant was not arrested by the police till 4-9-1998. The demeanour of PW2 Aruna, the tears in her eyes, her walking out of the court after looking at the appellant, pricks the judicial conscience. But convictions cannot be based on suspicion, conjectures and surmises. We are unable to come to a conclusion that the trial court's judgment is perverse. For want of legal evidence we will have to set aside the appellant's conviction and sentence. But we make it clear that we are doing so only by giving him benefit of doubt."

18. In *Piyarul Sk. Vs. State of West Bengal* reported in 2022 Cri L.J. 4277 the Hon'ble Court has also dealt with the issue when evidence of child

evidence is unreliable due to extreme tender age and tutoring by relatives. In this regard paragraph 17 is quoted herein below:-

“17. Trial Court relied on the aforesaid witness and came to a finding of guilt against the appellant. When the prosecution primarily rests on the evidence of a child witness, it is the duty of the Court to examine the evidence of the said witness with utmost care and circumspection. A child of tender years is prone to prompting and tutoring. Hence, an onerous duty is cast on the Court to examine the deposition of a child witness not only on his capacity and ability to understand circumstances but also on the possibility of the witness being tutored by persons who have control and custody over him.”

19. In Gurdeep Singh Vs. State of Punjab & Ors. reported in (2011) 12 SCC 408 it has been held that the statement of the witness recorded under Section 161 Cr.P.C. should conform to the substratum of prosecution story. The relevant paragraph 15 of the said judgment is herein below:-

“In the alternative, even assuming that no statements of PWs 2 and 3 had been recorded under Section 161 Cr.P.C., this factor destroys

the substratum of the prosecution story in a far greater measure as it must then be taken that their statements were being recorded for the first time in court which would rob them of much of their evidentiary value. In this case, we find that the two witnesses are none other than the brother and the father of the deceased.”

20. In Naresh Aneja @ Naresh Kumar Aneja Vs. State of Uttar Pradesh & Anr. reported in (2025) 1 SCC (Cri) 766 the Hon’ble Court has dealt with the situation when direct allegation or evidence attributing intent to the appellant is absent. However, the case was initiated under Section 482 of Cr.P.C. for quashing of the relevant proceedings.

21. In Chotkau Vs. State of Uttar Pradesh reported in 2022 Cri. L.J. 4579 the Hon’ble Court deals with the delay in lodgement of FIR. The paragraph 65 and 66 are quoted herein below:-

“65. Therefore, the learned Additional Advocate General for the State may be right, in theory, that a delay in transmission of the FIR to the court, may not, per se, be fatal, without anything more. But in the case on hand, the delay was not small. The FIR said to have been registered on 08.03.2012 was received by the Court of the Chief Judicial Magistrate on

13.03.2012. It is true that no question was put in cross-examination to the Investigation Officer about this delay.

66. But we have found that the evidence of P.Ws. 1 to 3 is untrustworthy, particularly on the question of the origin and genesis of the first information report. Therefore the inordinate delay in the FIR reaching the jurisdictional court assumes significance. We agree that the word “forthwith” in Section 157(1) of the Code is to be understood in the context of the given facts and circumstances of each case and a straightjacket formula cannot be applied in all cases. But where ocular evidence is found to be unreliable and thus unacceptable, a long delay has to be taken note of by the Court. The mandate of Section 157(1) of the Code being clear, the prosecution is expected to place on record the basic foundational facts, such as, the Officer who took the first information report to the jurisdictional court, the authority which directed such a course of action and the mode by which it was compiled. Explaining the delay is a

different aspect than placing the material in compliance of the Code.”

22. In State of M.P. Vs. Ratan Singh & Ors. reported in 2018 (3) Crimes 319 (SC). Paragraph 4 of the judgment is quoted herein below:-

“4. To begin with, though the incident has taken place at about 9.00 am on 30.08.1991 and though the names of all the 18 persons were known to the complainant - Khilan Singh, absolutely no valid reason was forthcoming on record as to why there was a delay in lodging the FIR. The Courts generally will not disbelieve the version of the eye witnesses even if there is some delay in lodging the FIR, if the versions of the eye witnesses are reliable and trustworthy. However, the delay needs to be explained. This Court, in Apren Joseph. v. State of Kerala, (1973) 3 SCC 114, emphasised that since a promptly filed FIR reflects reduced chances of embellishment, fabrication or distortion in memory, in cases of delay in filing the FIR it is important to assess the explanation therefore, to look for possible ulterior motives, and to assess its effect.”

23. In Harilal Etc. Vs. State of Madhya Pradesh reported in AIR 2023 Supreme Court 4239 the similar question was discussed in paragraph 19 which is relevant for the purpose of the present discussion.

“19. Although there might not have been a specific question put to PW-9 as regards the delay in lodging the FIR but the fact that it was a delayed FIR cannot be ignored. When an FIR is delayed, in absence of proper explanation, the courts must be on guard and test the evidence meticulously to rule out possibility of embellishments in the prosecution story, inasmuch as delay gives opportunity for deliberation and guess work. More so, in a case where probability of no one witnessing the incident is high, such as in a case of night occurrence in an open place or a public street.”

24. In Thanedar Singh Vs. State of Madhya Pradesh reported in AIR 2002 SC 175 the Hon’ble Apex Court has also dealt with the question of delay in lodgement of the FIR. The question whether the FIR was ante-dated or not has been dealt with by the Hon’ble Apex Court. The excerpts from the paragraph 5.2 is quoted herein below:-

“5.2.... In this context it is apposite to refer to the decision of this Court In Meharaj Singh v. State of U.P. (1994 (5) SCC 188), there also the

question whether FIR was antetimed to rope in the accused after some deliberations or to suit the investigation came up for consideration. Dr. A.S. Anand, J. (as his Lordship then was) speaking for the Bench observed thus:-

"FIR in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon: prompt lodging of the FIR is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them, the weapons, if any, as also the names of the eye-witnesses, if any. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks.

One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf. The second external check equally important is the sending of the copy of the FIR along with the dead body and its reference in the inquest report. Even though the inquest report, prepared under Section 174 Cr.PC is aimed at serving a statutory function, to lend credence to the prosecution case, the details of the FIR and the gist of statements recorded during inquest proceedings get reflected in the report. The absence of those details is indicative of the fact that the prosecution story was still in an embryo state and had not been given any shape and that the FIR came to be recorded later on after due

deliberations and consultations and was then ante-timed to give it the colour of a promptly lodged FIR. In our opinion, on account of the infirmities as noticed above, the FIR has lost its value and authenticity and it appears to us that the same has been ante-timed and had not been recorded till the inquest proceedings were over at the spot by pw8.”

25. In State of Maharashtra Vs. Ahmed Shaikh Babajan & Ors. reported in 2009 (1) ECRN 637 SC the Hon’ble Court has dealt with the issue when there was vital omission in the FIR. Paragraph 21 deals with the specific issue.

“21. It is also pertinent to note that in his cross-examination, he also stated that when his further statement was recorded on 29th April, 1989, i.e. two days after the occurrence, even then he did not disclose the fact that accused A-4 and A-5, viz., Asmabi and Rahimabi, had broken open their flat and had occupied it with a kid. He simply stated that "I cannot assign any reason to omit their names as persons taking unlawful occupation in the house immediately after the occurrence. This might be due to the shock and tragedy we had faced on that date,

which continues today. Before I met my father, I did not make report of the occurrence to the police, although police and police officers were present in the Cooper Hospital" It is, thus, manifest that the informant (PW-1) was not able to give any reasonable explanation for the significant omission on his part. We feel that the evidence of PW-1 is tainted with certain embellishments."

26. In Sujoy Sen @ Sujoy Kumar Sen Vs. State of West Bengal reported in (2007) 2 C Cr LR (SC) 669 the Hon'ble Court has dealt with the law point concerning when there was a major discrepancy in the FIR. Paragraph 11 and 13 are quoted herein below:-

"11. Learned Counsel for the respondent has relied upon a decision of this Court in Manoj v. State of Maharashtra, (1999) 4 SCC 268 where it has been stated that FIR need not be an encyclopaedia. That may be true, but an FIR is a very vital material as it is the first information about the incident and has less chances of altering the version and improvement.

.....

13. No doubt, a minor discrepancy in a FIR will not be fatal to the prosecution case. But the discrepancy in the FIR in the present case is not a minor discrepancy, but a major one. Had the first informant seen the accused entering into the house at the time of the incident he would have definitely mentioned the fact in the FIR.”

27. In **State of Uttar Pradesh Vs. Arvind Kumar reported in (2007) 3 SCC (Cri) 159** the Hon’ble Court has dealt with the case law when there was inconsistency between version given in the FIR and statement before court. Paragraphs 10 to 12 are quoted herein below for the purpose of proper understanding of the law on this point.

“10. Apart from that, there is inconsistency between the version given in the FIR and the statement of Anil Prakash (PW 1) before the trial court. In the FIR it is only stated that accused Arvind inflicted a knife-blow on Atul, but in his deposition before the trial court, PW1 stated that accused Arvind inflicted knife-blows on Atul while Anil @ Pappu also inflicted knife-blow on Atul. Thus the statement in court is an improvement on the version given in the FIR in which it was only stated that Arvind above

inflicted a knife-blow on Atul, but there was no mention in the FIR that Anil @ Pappu also inflicted knife-blows on Atul.

11. As rightly held by the High Court, it seems that after coming to know of the medical report for the first time at the trial court, the witnesses improved their version given in the FIR.

12. The High Court has given the benefit of doubt to accused Arvind Shukla and we see no reason to take a different view. The appeals are accordingly dismissed."

28. In **Nankaunoo Vs. State of Uttar Pradesh reported in (2016) 3 C Cr LR (SC) 34** deals with culpable homicide and murder and the case law of **Indira Devi and Ors. Vs. State of Himachal Pradesh reported in 2016 (3) AICLR 321 (SC)** deals with a situation when the evidence of injured and medical evidence did not corroborate.

29. The learned counsel for the State has also relied upon a case law of **Ramji Singh & Ors. Vs. The State of Uttar Pradesh reported in (2009) 3 SCC 444** and also a case law of **P. Ramesh Vs. State Rep by Inspector of Police reported in (2019) 3 SCLR 801**. In the case of **Ramji Singh & Ors. (supra)** has deal with the law when the ocular evidence is direct and

supportive of medical evidence, the negligence of the investigation team is immaterial. Paragraph 21 of the said case law is quoted herein below:-

“21. The appellants are right when they urge that when the report of the ballistic experts have not been proved and all the bullets recovered from the spot have not been sent to the ballistic expert, the guns seized cannot be connected with the offence. Even if that be true we cannot discredit the testimony of the eye-witnesses that two of the accused used guns. The guns seized may or may not be the guns used. However, when the ocular evidence is direct and clear in this regard, and this ocular evidence is fully supported by the medical evidence, the negligence of the investigation team cannot be used by the defence in support of their case.”

30. The other case law i.e. **P. Ramesh (supra)** the Hon’ble Apex Court has deal with the competence of a child witness. Paragraph 15 of the said judgment is quoted herein below for the sake of proper understanding of the law on the point.

“15. In order to determine the competency of a child witness, the judge has to form her or his opinion. The judge is at the liberty to test the

capacity of a child witness and no precise rule can be laid down regarding the degree of intelligence and knowledge which will render the child a competent witness. The competency of a child witness can be ascertained by questioning her/him to find out the capability to understand the occurrence witnessed and to speak the truth before the court. In criminal proceedings, a person of any age is competent to give evidence if she/he is able to (i) understand questions put as a witness; and (ii) give such answers to the questions that can be understood. A child of tender age can be allowed to testify if she/he has the intellectual capacity to understand questions and give rational answers thereto. A child becomes incompetent only in case the court considers that the child was unable to understand the questions and answer them in a coherent and comprehensible manner. If the child understands the questions put to her/him and gives rational answers to those questions, it can be taken that she/he is a competent witness to be examined."

31. In our view, there is an explanation of delayed FIR since the defacto complainant had specifically mentioned in the FIR itself that after getting the information in the morning she went to the place of occurrence and enquired from the local people regarding the incident. Thereafter, she went to the hospital where the dead body of the victim was taken. Subsequently the FIR was lodged. It is neither expected that the minor children of the victim would lodge the FIR soon after the incident nor the defacto complainant would lodge the FIR on the oral version of the minor son of the victim without ascertaining the facts from local people and seeing the dead body of the victim. So, we find that the delay in lodging the FIR was sufficiently explained. However, the delay in sending the FIR to the jurisdictional court for about 3 days was there, and no explanation was forthcoming from the prosecution in this regard. Needless to mention, the evidence discloses the existence of previous enmity between the parties, and therefore, such fact cuts the ice both ways. There may be chances or no chances for anti-dating the FIR. But such a situation should be considered in favour of the accused.

32. The instant case is not based on circumstantial evidence rather there were eye witnesses to the alleged incident. However, the law clearly lays that the evidence of the child can be relied upon if such evidence is free from blemishes and is consistent and coherent. In this case, as already observed hereinbefore, that the evidence of the PWs 2 & 3 is not free from blemishes and therefore, there is a need for corroboration of such evidence from other

materials on record. No other local witnesses support the evidence of the PW 2 and PW3. Some of the relatives of the victim were also neighbours of the PWs 2 and 3, but the prosecution case did not get support from them in proving vital essential facts. The omission to mention gunshot injury in the FIR, failure to obtain ballistic report, failure to recover bullet or cartridge from the dead body or no exit point of fired bullet in the body of the victim, contradictory statements before the IO, Judicial Magistrate recording statement under section 164 Cr.P.C and learned trial court show that investigation was not done properly. Further, there was no clear evidence regarding the person who actually opened the firearms or who shot the victim. The evidence in this regard is not at all consistent and coherent. Even the evidence of the PW2 and PW3 in this aspect are not corroborating with each other.

33. The judicial decisions relied upon by the State also postulate that when the ocular evidence and medical evidence are supportive of each other, absence of ballistic report does not matter. But in this case what happened is that the ocular evidence and medical evidence are not supportive of each other on the scores as discussed above and further the testimony of eye witnesses are contradictory regarding use of guns and who actually opened the fire on the victim. As the depositions of two witnesses who are children are contradictory we need corroboration from other sources but unfortunately the same are lacking. Neither any other local witnesses

support the prosecution case nor the ballistic report along with medical evidence corroborate the deposition of PW2 and PW3.

34. The learned trial Court was unable to appreciate this gross lacuna on the part of the Prosecution evidence. Hence, we are unable to agree with the trial court's judgement of conviction, and are constrained to set aside the impugned judgment of conviction and sentence after finding that the appellants are entitled to benefit of doubts in view of the material evidence on record.

35. Accordingly, the impugned judgment and conviction passed on 18.04.2018 & 19.04.2018 passed by the learned Additional Sessions Judge, 1st Court, Alipore, South 24 Parganas in Sessions Trial No. 01(03)2012 arising out of the Sessions Case No. 10(09)2010 convicting the appellants under Sections 302/34 of the Indian Penal Code and also under Section 25/27 of Arms Act is hereby set aside. The 9 appellants **Nuruddin Molla Alias Gula alias Gole Molla, Gaffar Molla alias Goffar Molla, Nur Alam Molla alias Noor, Khokan Molla alias Pora Khokan, Appon Molla alias Appan Molla, Gagge alias Tenia Molla alias Imam Ali Gayen Alias Gughge, Nasir Molla alias Nasim Molla alias Nasir Uddin Molla, Bakkar Molla, Khokan Molla** be released at once, if they are not wanted in any other case.

36. The appeals being nos. **Criminal Appeal No. 277 of 2018, Criminal Appeal No. 278 of 2018, Criminal Appeal No. 279 of 2018, Criminal**

Appeal No. 280 of 2018, Criminal Appeal No. 281 of 2018, Criminal Appeal No. 282 of 2018, Criminal Appeal No. 283 of 2018, are hereby allowed. No Costs.

37. Accordingly, **Criminal Appeal No. 277 of 2018, Criminal Appeal No. 278 of 2018, Criminal Appeal No. 279 of 2018, Criminal Appeal No. 280 of 2018 along with CRAN no. 1 of 2025 , Criminal Appeal No. 281 of 2018, Criminal Appeal No. 282 of 2018, Criminal Appeal No. 283 of 2018** are disposed of. CRAN 1 of 2025 is also disposed of.

38. Urgent photostat certified copies of this Judgment, if applied for, be supplied to the parties on compliance of all necessary formalities.

I Agree.

(RAJARSHI BHARADWAJ, J.)

(APURBA SINHA RAY, J.)