

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:-

The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 283 of 2015

Maynul Bere @ Sk. Maynul & Ors.
-Versus-
The State of West Bengal

With
C.R.A. 266 of 2015

Aftab Sk. @ Atab Sk. & Ors.
-Versus-
The State of West Bengal

With
C.R.A. 320 of 2015

Waser Sk. @ Wacher Mayra
-Versus-
The State of West Bengal

For the Appellants
(Maynul Bere and Sk. Maijuddin)
in CRA 283 of 2015.

: Mr. Sudipto Moitra, Senior Advocate
Mr. Angshuman Chakraborty
Mr. S.S. Saha

For the Appellants
in CRA 266 of 2015.

: Mr. Sabir Ahmed
Mr. Dhiman Banerjee
Mr. T. Ahmed

For the Appellant
(Latib Sk.) in CRA 283 of 2015
and
for the Appellant (Waser Sk.)

in CRA 320 of 2015	: Mr. Y.Z. Dastoor, Senior Advocate Mr. Prabir Majumdar
For the State	: Mr. Debasish Roy, Ld. Public Prosecutor Mr. Soumik Ganguly Ms. Madhumita Basak
Hearing concluded on	: 12 th August, 2025
Judgment on	: 18 th August, 2025

Rajasekhar Mantha, J.

1. The present appeals are directed against the judgment and order of conviction dated 22nd April 2015 and 23rd April 2015 passed by the learned Additional District and Sessions Judge (FTC-1), Krishnanagar, Nadia, in Sessions Trial No. 2 July (2008) arising out of Sessions Case No. 132(5) of 2007. The appellants, Maynul Bere, Latif Shaikh, Maisuddin Shaikh, Waser Sk @ Wacher Mayra, were sentenced to rigorous imprisonment and a fine of Rs. 5,000/- under Section 302 read with Section 34 of the IPC.
2. The appellants Mosaref Sk @ Musa, Maisuddin Sk, Faisuddin Bere, Jahangir Sk, Mainul Bere, WasirSk @ Wacher Mayra, Latif Sk, Ismail Mallick, AtabSk, Tayeb Ali Sk and Nur Islam @ Icchu were sentenced to suffer rigorous imprisonment for 7 years with fine, for offence punishable under Section 326 read with Section 34 of the IPC.

THE PROSECUTION CASE

3. The prosecution case is that on the 9th November, 2005 at about 09:00 AM in a plot of agricultural land located at a place called "Banskata" Math (field), Haphijuddin Mallick (PW 4) (resident of Dingel Village, under Kaliaganj PS) saw that accused Tayeb Ali Sk was ploughing into the former's land after breaking an 'aile' (a partition between two tracts of land made of mud in the

form of a raised platform also used for walking). Upon being confronted by PW 4 and one Moijuddin, Tayeb Ali Sk. attacked PW 4 and hit him with a stick on his head. Tayeb thereafter left the place along with Faizuddin Bere, to Borobighe village (1 km away) under Nakashipara PS, and brought the accused persons, Maynul Bere, Latif Sk., Maijuddin Sk., Waser Sk, Mosaref, Faijuddin Bere, Jahangir Sk., Mainul Bere, Ismail Mallick, Atab Sk. and Nur Islam and several other persons altogether about 20-30 persons.

4. At the relevant point in time, Lalchand Mallick, Sabdullah Mallick and Burhan Ali, all sons of PW 4, were present in the field reaping paddy along with workers. The accused persons and their associates are stated to have come from Borobighe village along with a Ram Dao (a long, curved, sharp cutting instrument used in agriculture), Sticks, Tangi (another sharp cutting instrument used in agriculture) and other sharp cutting instruments and attacked Haphijuddin, his sons, Lalchand Mallick, Burhan Mullick and Sabdullah. Lalchand was stated to have been restrained by two persons, Moijuddin and Faijuddin (stated by PW 9) or Latif (stated by PW 2) or Latif and Moijuddin (stated by PW 10).
5. Maijuddin, Momin and Faijuddin, Maynul and Latif are stated to have inflicted injuries on Haphijuddin, Burhan and Sabdullah with a Ramdao and sticks. Maynul is stated to have struck Lalchand in the nape of the neck with a Ramdao, as deposed by PWs 2, 3, 4, 8, and 9.
6. Lalchand is stated to have died on the spot or on the way to the Saktinagar hospital and was declared dead on arrival at the hospital. Burhan Mallick suffered grievous injuries in the right infra-scapular region on the back with diaphragm injury of 10" x 2" in the chest cavity and abdomen, and was

hospitalised for eleven days. Haphijuddin suffered an incised injury on the left scapula region, muscle deep and bone deep, 5" x ½". The bed head ticket was exhibited. Haphijuddin Mallick suffered a fresh incised injury on the scalp, 1" x ¼" x ¼", and another injury on the scalp of ½" x ¼" x ¼". He was in the hospital for three days. Sabdullah Mallick suffered incised injuries on the scalp, 1" x ¼" and with severe low back pain. He was in the hospital for 2 days.

7. PW 8 Ajila Bibi, mother of the deceased; PW 9 Hawatan Bibi, sister of the deceased and PW 10 Abdul Samad Mallick, husband of PW 9, are stated to have reached the place of occurrence from their house after hearing about the incident. The house is located at a distance of 1 km from the PO. While PWs 8 and 9 claimed that they sustained injuries in the scuffle trying to save Haphijuddin, no injury reports or bed head tickets of their treatment were produced in the trial.
8. After the incident and death of Lalchand at the spot, a written complaint was stated to have been filed on 9th November, 2005, by PW 1 Rejabul Mallick with the Debogram Outpost of Kaliaganj Police Station. The complaint was written by Azizul Mallick, PW 21, who was the nephew of PW 1.
9. The records, however, indicate that a complaint was lodged with the Nakashipara P.S., which is at a distance of 30 km from the Debogram Outpost. FIR was registered being No. 265 of 2005 at about 12:05 pm against GD Entry No. 388 under Sections 147, 148, and 326 of the IPC.
10. The inquest was conducted by PW 20, Sk. Jiaul Islam, ASI of Kotwali PS, having jurisdiction over Shaktinagar Hospital, against UD Case No. 562 of 05 dated 9th November, 2005. The inquest was witnessed by Obaidullah Mallick,

another brother of the deceased, one Bilal Mallick, a cousin brother of the deceased, and Md. Abdul Rashid Mallick. The inquest report indicated that the witnesses stated that the victim was assaulted and killed by the son of one "Tajer Bere", with a sharp cutting weapon, by chopping behind his head. The inquest report found only one injury mark, and no other injuries were found by the Inquest Officer even after turning and rolling over the body. The inquest was conducted at the Saktinagar District Hospital Morgue at 11:15 am, and it was sent for post-mortem immediately thereafter.

11. Post-mortem was conducted by PW 14, Dr. Ajit Kumar Biswas. He found many injuries, one on the back of the head of the deceased, on the right scapular region, on the back of his chest in the upper part measuring 4" x 2" bone deep, with cutting of the scapula. Another injury was a sharp, deep cut injury on the nape of the neck transversely/obliquely on the upper part 8" x 3", cutting into the cervical vertebrae no. 2 and 4. The vertebra was cut open. Injuries were found to have been inflicted with sharp cutting weapons, ante mortem and homicidal in nature.
12. The investigation was initially conducted by Arup Kumar Pal, I.O. of Nakashipara P.S. It was continued after the transfer of PW 18, by Anindya Basu, PW 19, the second I.O., who recorded the statements of 5 persons, 9 months after the incident.

THE CHARGE AND THE EVIDENCE ON RECORD

13. Investigation was completed, and a charge sheet was filed. The Trial Court framed charges against the accused under sections 326, 302, and 34 of the IPC.

14. **PW 1 was Rejabul Mallick**; he was a cousin brother of the deceased Lalchand Mallick. He was present at the place of occurrence along with PWs 2, 3, 4, 9 and 10. They were stated to have been working in the field at the relevant point in time. An altercation ensued between Haphijuddin, PW 4 and Tayeb concerning the disturbance of a boundary wall. Accused Tayeb Ali, after the altercation, is stated to have gone back to Borobighe village and came back with accused Jahangir Sk., Mosaraf @ Mosa and many others, with Chasda, Ramdao, Tangi and Sticks. They assaulted deceased Lalchand, Burhan, Haphijuddin, Sabdullah and Hawatan Bibi and Azila Bibi with the said weapons. Lalchand is stated to have died on the spot. The injured persons and the deceased were taken first to the house of Haphijuddin and thereafter to Saktinagar Hospital.
15. The said hospital was at a distance of 3 hours from the place of occurrence. On the way, there were three medical facilities available, which the victims were not taken to. The said three facilities are Debogram PSC, Nakasipara PHC and Dhubulia PHC. The victims were transported on a cart from the PO.
16. **PW 2 was Burhan Mallick**, brother of the deceased. He stated that on 9th November, 2005, the incident took place at 9 am, where the deceased himself, his father Haphijuddin (PW 4), brother Sahajahan (PW 5) and sister Hawatan Bibi (PW 9) were present. He stated that the accused Tayeb Ali assaulted his father on the head with a stick. The accused Atab was inciting and exhorting the other accused persons, shouting in Bengali, “cut their heads and let’s take it home”. Latif held the hand of the deceased, and Waser is stated to have held a pistol to the back of the neck of the deceased. Accused Maynul struck a blow on the neck of the deceased Lalchand. Maynul

also hit PW 2 on the back with the Ramdao, and he fell on the ground. The deceased Lalchand is stated to have died on the way to the hospital. PW2 fell to the ground and became senseless. He identified the accused in the dock. The victim's family was threshing grain to reap paddy after harvest in the fields.

17. PW 3 was Sabdullah Mallick. He reiterated the incident as stated by PW-2.

He stated that Maijuddin and Latif caught hold of the hands of Lalchand, and Waser held a pistol to his chest. Accused Maynul inflicted a blow with a Ramdao on the nape of the neck of the deceased Lalchand, who fell on the ground. He rushed towards Lalchand when Ismail and Momin assaulted PW3 with a Ramdao on the head and back. He also stated that PWs 2 and 9 sustained injuries in the incident and were admitted to Shaktinagar hospital. He further deposed that his youngest brother, Sahajahan, also sustained injuries and identified the accused on the dock.

18. PW 4 was Haphijuddin Mallick, the father of the deceased. He stated that on the date and time of the occurrence, he was guarding the field to prevent buffaloes from entering. He stated that he found the accused Tayeb Ali ploughing land and breaking the "aile" demarcating the land belonging to PW 4. When he protested, Tayeb Ali hit him on the head with a stick. Thereafter, accused Tayeb Ali and Faizuddin left the place and returned sometime later with accused Moijuddin, Mosa, Jahangir, Atab, Iccho, Latif and Maynul, all accused persons. Faijuddin and Moijuddin caught hold of the hands of Lalchand, and Waser is stated to have placed a pistol on the chest of the deceased Lalchand. Some accused persons were stated to be inciting and exhorting the others, shouting "hit them, hit them, cut their heads and take it

home". Faijuddin and Moijuddin are stated to have assaulted PW 4 with a bamboo stick, and he fell. He further deposed that upon regaining consciousness, he saw that the two had caught hold of his son's hands, and Maynul struck a blow with a Ramdao on the nape of his neck. Lalchand died instantly. PW 4 identified the accused in Court.

19. In cross-examination, however, PW 4 said that except for Tayeb, Moijuddin, and Homai, there was no other person in the field at the point of time, and no work was in progress on the land of others in the neighbouring fields. He stated that he has 15 to 16 bighas of land in the said 'Banskata' field. He could not recollect how long he remained senseless.

20. **PW 5 was Sahajahan Mallick**, the youngest son of PW 4. He stated that he has five brothers and 6 sisters. The eldest brother was Obaidulla Mallick, the inquest witness, who was not examined. He was 17 years old at the time of the incident. He stated that the accused, Maynul, assaulted his brother Lalchand with a sharp cutting weapon. He heard one of the accused, Atab, shouting and inciting others, "cut their heads and take them home". He identified all 13 accused in the dock. He also stated that he was examined by the I.O.

21. **PW 6 was Jabbar Mallick**. He stated that he went to work in the field of PW 4 on the date, place and time of occurrence to reap paddy. He deposed that a dispute arose between Tayeb Ali and PW 4 in connection with the former ploughing and breaking the "aile" bordering the field of PW 4. He deposed that PW 4, his deceased son, and PW 2 were assaulted, but did not know who assaulted them. He stated that people of Borobighe village came to the place

after some time. He left the field to save his life after being threatened. He was declared hostile by the prosecution.

22. In cross-examination, however, he deposed that it was PW 4 who assaulted Faizuddin first on the head, and thereafter Tayeb and Faizuddin went to their village, Borobighe and brought 30 to 40 people, including Maynul and several others, with lathis and sharp cutting instruments like dao. He requested the people there not to fight with each other, despite whereof the victims were attacked.

23. **PW 8 was Ajila Bibi**, wife of PW 4. She deposed that she came to the place of occurrence after hearing about the incident and the consequential hue and cry. She found Moijuddin, Faijuddin and Momin assaulting her son Lalchand with a Ramdao. Her husband was assaulted by Ismail and Momin. She also stated that her son Sahajahan, Burhan and Sabdullah and her husband were admitted to the hospital for treatment. She deposed that Maynul and Latif chopped behind her son's head, as a result of which he died. She claimed that her daughter, Hawatan Bibi, was assaulted by the accused, and she sustained bleeding injuries and had 12 stitches administered by the doctor. She stated that Aftab ordered the assault. In cross-examination, she stated that the Darogababu told her what to depose in court. She could not produce any injury reports or BHTs of herself, PW 5, or PW 9.

24. **PW 9 was Hawatan Bibi**. She was the daughter of PW 4 and PW 8. She deposed that she was in her house on the date and time of the incident and arrived at the PO after hearing about the incident and disputes which cropped up between her father and Tayeb Ali. She found at the PO that Waser held a pistol to the chest of the deceased Lalchand, and accused Latif

and Moijuddin of restricting his hands. Maynul is stated to have chopped on the nape of the neck of Lalchand, and he fell to the ground. Accused Momin and Ismail chopped PW 2 Burhan Mallick on the left side of his chest and the right side of his back with a Ramdao. Burhan fell to the ground bleeding. Accused Faijuddin and others assaulted her father on the head and her on the body with a lathi when she went to save the injured. She, along with her family members, took the injured to Shaktinagar Hospital, and she was also admitted thereat. She further deposed that the accused persons assaulted her brother Sabdullah on the back of his head with a Ramdao.

25. In cross-examination, she deposed that she was not examined by the I.O. and deposed for the first time in Court.

26. **PW 10 was Abdul Samad Mallick**, husband of PW 9. He stated that he accompanied his wife to the place and time of occurrence on the date, and he saw his PW 4 in a bleeding condition on his head. Accused Tayeb Ali left for his village to come back with several persons who gheraoed PW 4, PW 2, PW 3, and the deceased. PW 9 was also gheraoed and attacked. He stated that his father-in-law, PW 4, did not leave the field despite being injured, as several labourers were working under him. He deposed that Moijuddin and Latif held the hands of Lalchand, and Waser held a pistol to the chest of Lalchand and accused Moynul of chopping the deceased on the back of his neck. He also deposed that the accused Momin and Ismail assaulted PW 2 Burhan Mallick on his left chest and right side of his back with a Ramdao. Accused Atab and Yusuf were inciting the other accused persons.

27. Thereafter, accused Faijuddin and Reayajuddin assaulted his wife and brother-in-law Sabdullah on their heads and back with a Ramdao. He was examined by the I.O., where he stated the same.
28. **PW 13 was Madan Mondal**, a local villager and resident of Barabighe village. He saw the incident and deposed that it was Haphijuddin (PW 4) and his sons who were damaging the 'aile' of Faijuddin when the latter protested. He stated that PW 4 and his sons assaulted Faijuddin. The other villagers came thereat to restrain PW 4. Though this witness deposed contrary to the prosecution case, he was not declared hostile.
29. **PW 14 was Dr. Ajit Kumar Biswas**, who conducted the post-mortem. The PM report indicates that the time of dispatch of the body from the morgue to the PM room was 12:35 PM, and the body reached the PM room at about 02:25 PM. There is no explanation of the undue delay in the dispatch and receipt of the body. He deposed as already stated hereinabove. He also stated that the stomach of the deceased was empty except for a yellow liquid.
30. **PW 15 was Dr. Samir Chowdhury**, who treated PWs 2, 3, and 4. Their bed head tickets were exhibited. They did not tell the doctor how they sustained the injuries. PWs 2, 3, and 4 did not name any of the accused to PW 15. He deposed about the injuries of PWs 2, 3 and 4 as described hereinabove.
31. **PW 16 was Abdul Hosaain Sk**, a local villager, who deposed that people in the village engaged in cultivation took a rice meal in the morning before going to work and took another meal after returning.
32. **PW 17** was an inquest witness. **PW 18 was SI Arup Kumar Paul**, the first I.O. He deposed that, considering the critical nature of the injuries of PW 2 Burhan Mallick, he made a request for recording his dying declaration. The

said declaration was not recorded or collected. The records, however, indicate that the said dying declaration was duly recorded but never saw the light of day.

33. He arrested the accused Mosaraf and Jahangir Sk, and later arrested Tayeb Ali and Faijuddin Sk. on 10th December, 2005. He applied before the CJM Nadia for the inclusion of Section 302 of the IPC in the FIR after the death of Lalchand. He arrested Yeazuddin Sk. And Momin Sk. He arrested Moijuddin Sk. later. He examined several witnesses, seized blood-stained earth and sent it for FSL examination. He did not investigate prior to the initiation of the case by Nakashipara PS but after the victims were admitted into Saktinagar Hospital. He confirmed some of the statements of some witnesses who deposed in the trial.

34. **PW 19** was **ASI Anindya Basu**, the third I.O.

35. **PW 20** was **ASI Jiaul Islam**, who also performed the inquest.

36. **PW 21** was the scribe of the complaint. He denied that he had any personal knowledge of the incident, although PW 1 stated in his evidence that PW 21 was present throughout the incident on the date and time of the occurrence and wrote the written complaint on the former's instructions.

37. The accused did not lead any evidence on their side. They were examined under Section 313 of the Cr.P.C.

38. All victims and prosecution witnesses were from Dingel village in Nadia District under Kaliaganj PS and were related to each other.

39. Based on the above, the learned Trial Judge, after analysing the records, found the majority of the accused guilty of the offence as indicated above. Momin Sk., Yeazuddin Sk., have been acquitted by the Trial Court.

THE ARGUMENTS IN THIS APPEAL AND THE COURT'S ANALYSIS

40. Learned Senior Counsel Mr. Dastoor, appearing for Waser Sk @ Waser Mayra in CRA 320 of 2015, and Mr. Sudipta Moitra, appearing for Maynul Bere and others in CRA 283 of 2015 and Mr. Sabir Ahmed for the appellants in CRA 266 of 2015, have pointed out several discrepancies in the prosecution case in the investigation and the findings of the Trial Court. The complaint was lodged at the Debogram outpost of Kaliaganj PS. The FIR reached Nakashipara PS by 12:05 pm. It is also argued that it takes 3 hours to reach Saktinagar Hospital from the place of occurrence, which should be around noon. There was no way that the inquest of the deceased could be conducted at 11:15 am at the Saktinagar Hospital.

41. This Court is of the view that with the passage of time of 5 years between the incident and the Trial, it is likely that the exact timings of the movement of the injured and deceased from the PO may vary amongst the villagers. The inquest was conducted at 11:15 PM, as recorded by PW 20, against a UD case registered by the police attached to the Hospital upon being notified. The registration of the formal FIR by Nakashipara PS may have occurred independently of the UD case registered in the hospital. The complaint, left with the Debogram outpost of Kaliaganj P.S., was most likely transferred to the Nakashipara PS for jurisdictional purposes. The UD case must have been connected later with the formal FIR No. 269 dated 09.11.2005. Reference in this regard may be made to the decision in ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*** reported in **(1983) 3 SCC 217**, wherein it was held as follows:-

: “5. ... We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by the learned counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

42. It is next argued that the inquest report recorded that the witnesses thereto stated that the murder of the victim was committed by the son of one Tajer Bere. No investigation was conducted by the police in this regard. This Court however notes that the Inquest Officer (PW 20), the first I.O. (PW 18) and the second I.O. (PW 19) were confronted with the overwhelming evidence of the statement of witnesses, pointing out the involvement of the accused persons in the murder of the deceased Lalchand and assault on PW 2, 3, 4, 8, and 9. He therefore may not have felt the need to conduct any investigation against Tajer Bere and his son. The inquest witnesses were not present at the date, time and place of occurrence. This court, therefore, does not find any infirmity in the investigation on this score.

43. An Inquest report captures the circumstances prevalent at that moment, many of which may or may not be worth pursuing in the course of investigation. While the inquest report may propose a line of investigation to be adopted, it is based on preliminary and tentative observations. It may supply a lead. It, however, does not and can never dictate to an investigating officer to follow a particular line of investigation, unless it is shown that the same was manifestly relevant to the case. Reference in this regard may be

made to the decision in ***Pedda Narayana v. State of Andhra Pradesh***, reported in **(1975) 4 SCC 153**, it was held as follows:-

“11. A perusal of this provision would clearly show that the object of the proceedings under Section 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. **The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings under Section 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report. [...]**”

Emphasis applied

44. It is next argued that PW 14, the PM doctor, has confirmed that the victim died 5 hours after he had his last meal, and no food was found in the stomach of the victim except a yellow liquid. It is submitted that the death of the victim may not have occurred after 9:15 am on 9th November 2005, as stated by the prosecution witnesses in view of the evidence of PW 16. He had deposed that cultivators usually take a rice meal before going to work in the fields.

45. Mr. Dastoor would argue that if the stomach of the deceased was empty and the death occurred 5 to 6 hours after the last meal, this should lead to the conclusion that the last meal of the deceased was the dinner of the previous night and the death of the victim occurred sometime early in the morning and not after 9 am as deposed by the witnesses and concocted by the prosecution.

46. This Court has carefully considered the argument and the evidence on record. It is quite possible that the victim may not have eaten in the morning on that particular day, for which reason his stomach was empty. In view of the aforesaid, the argument of Mr. Dastoor, drawing inference from the PM

report and evidence of the PM doctor, cannot be accepted as the only possible conclusion.

47. A PM report provides an estimation of the time of the last meal. It does not have the purpose and potential to die the cast on time. The time indicated is an opinion, not a fact, unlike the type and nature of the injuries recorded. Over-emphasis, therefore, on the conclusions drawn in the PM report will lead to elevating conjecture over facts.

48. It is next argued that the prosecution witnesses, namely PW 1, 2, 3 and 4, gave different versions as to who held Lalchand by his hands while Moynul inflicted the blow with a Ramdao on the neck of the victim.

49. This Court, however, finds that since there were 20 to 30 people who were attacking the victims, it is not impossible for different versions between several witnesses in the huge scuffle and in the melee that took place between the accused persons and their associates on the victim. In fact, if each of the prosecution witnesses had given the same evidence, it could have been suspected as parrot-like evidence. It is equally possible that different persons tried to restrain the accused by holding his hands to enable Maynul to have inflicted the fatal blow with the Ramdao on the neck of the deceased Lalchand. Reference in this regard may be made to the ***Pedda Narayana decision (supra)*** wherein it was held as follows:-

(7) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by the counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The subconscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him—perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.”

50. It is next pointed out that PW 6 had, in his cross-examination, after being declared hostile, given a completely different version of the genesis of the incident. He stated that PW 4 first attacked Tayeb Ali and Faijuddin, which resulted in the latter running away to their village and bringing with them 30 to 40 co-villagers. This, coupled with the evidence of PW 13, who was not declared hostile by the prosecution, should throw out the prosecution case.

51. Even if it is assumed that the genesis of the incident, as related by PW 1, 2, 3 and 4, is incorrect, and it is PW 4 who first committed the assault on Tayeb Ali which prompted the latter and Faijuddin to rush to their village Borobighe and bring 30 to 40 people, the actual incident of murder of Lalchand by Maynul and the grievous injuries inflicted on PW 2, 3 and 4 by the accused persons are undeniable. Reference in this regard is made to the decision in ***Balu Sudam Khalde and Anr. v. State of Maharashtra*** reported in **2023 SCC OnLine SC 35**, wherein it was held as follows:-

“26. When the evidence of an injured eye-witness is to be appreciated, the under-noted legal principles enunciated by the Courts are required to be kept in mind:

b) Unless, it is otherwise established by the evidence, it must be believed that an injured witness would not allow the real culprits to escape and falsely implicate the accused.

(c) The evidence of injured witness has greater evidentiary value and unless compelling reasons exist, their statements are not to be discarded lightly.

(d) The evidence of injured witness cannot be doubted on account of some embellishment in natural conduct or minor contradictions.”

52. The other arguments that the dying declaration of Burhan could form a statement, and the contradictions in the statements of PWs 8, 9, and 10 are not so serious as to upset the overwhelming evidence of the injured witnesses in the incident, namely, PWs 2, 3, and 4.

53. It is next argued by Mr. Moitra and Mr. Dastoor that the victims may have contributed to the death of the victim, given their delayed medical attention to the victims. Admittedly, the victims were taken to their house first and later to Saktinagar Hospital. The deceased was, however, taken directly to Saktinagar Hospital.
54. This Court, however, notices that ignoring three other medical facilities available on the way to Saktinagar may be irrelevant insofar as the death of Lalchand is concerned, as a majority of the witnesses have stated that he may have died on the spot. The injuries in the PM report are so grievous that the vertebrae were severed. The victim, Lalchand, most likely must have died on the spot if not on the way to the hospital.
55. The injured victims, namely PWs 2, 3, and 4, recovered after a long treatment at the hospital in a matter of 2 to 3 days. The evidence of these injured witnesses cannot be brushed aside by this Court. The other omissions in the investigation are, however, minor and irrelevant, given the overwhelming evidence of the injured witnesses, the PM report and the report of PW 15, the doctor who treated the injured. The discrepancies on the part of the injured witnesses in specifying the role of each of the accused persons are irrelevant in the facts of the case. Even the non-recovery of the sharp cutting weapons used in the crime is not fatal to the prosecution case, given the PM report and injury reports of PW 2, 3 and 4. The non-recovery of the pistol is, however, a material omission which shall be discussed later hereunder.
56. While it is true that PW 19 has deposed that the statement of 5 persons has been recorded 9 months after the incident, the prosecution has been able to prove its case with the evidence recorded in time.

57. There is sufficient explanation as to why there was a delay in recording the statement of some of the witnesses, i.e. the transfer of some of the I.O.s from the Nakashipara PS.
58. The evidence that has come on record insofar as the charge under Section 302 read with Section 34 of the IPC is concerned is as follows:
59. PWs 2, 3 and 4 are witnesses who were injured in the incident. PWs 5 and 11 have also confirmed the incident. PWs 8, 9 and 10 have duly confirmed having seen the incident of assault of PWs 2, 3 and 4 and the fatal blow on Lalchand inflicted by Moynul Bere. Each of the aforesaid witnesses, PW 11, have deposed that the hands of the deceased Lalchand were caught hold of by Moijuddin, Faijuddin and/or Latif. PW 8 deposed that Moijuddin and Faijuddin held the hands of Lalchand. PW 9 and 10 deposed that Latif and Moijuddin held the hands of Lalchand. Each of the aforesaid witnesses, namely PWs 2, 3, 4, 8, 9, and 10, have clearly deposed that Maynul Bere inflicted one fatal blow on the nape of the neck of Lalchand.
60. The evidence of PWs 4, 8 and 9 is found to be partly reliable and partly unreliable. The evidence of PW 4 is partly unreliable because it is contradicted by the evidence of PW 13. While PW 4 stated that he was assaulted by Tayeb Ali Sk., which was the genesis of the incident, PW 13, who was not declared hostile, has deposed that the genesis of the incident began with the assault of Faijuddin/Baijuddin by PW 4. Even if it is accepted that Tayeb Ali and Faijuddin were first assaulted by PW 4 and then ran away to Borobighe village, and 30 to 40 persons came with them, it is the ensuing attack on the victims, who were outnumbered thereafter, that resulted in the death of Lalchand and grievous injuries to PWs 2, 3 and 4.

This fact is proved by the unimpeachable portions of the evidence of PWs 2, 3, 4, 5, 8 and 9. The minor contradictions between the evidence of the PWs, as regards which of the accused held the hands of the deceased Lalchand and which of them assaulted PWs 2, 3, and 4, are natural.

61. In a free fight and attack by 20 to 30 persons on the victims, some minor differences in the versions of the PWs are expected, as they saw and fell unconscious from the assault. The dicta of ***Md. Jabbar Ali v. State of Assam*** reported in **(2023) 19 SCC 672**, cited by Mr. Moitra, may not be applicable in the facts of the case.
62. What is, however, relevant is that, in the ***Md. Jabbar Ali case (supra)***, the Court relied on its earlier decision in ***State of Rajasthan v. Kalki***, reported in **(1981) 2 SCC 752**, to apply a distinction between material and normal discrepancy, explained in ***Kalki (supra)***. Referring to ***Kalki (supra)***, it was held in ***Md. Jabbar Ali (supra)***, that not normal but material discrepancies have crept into the evidence adduced by the prosecution witnesses. We may refer to paragraph 8 of ***Kalki (supra)***, which would indicate that the discrepancies, as pointed out by the appellants in this case, have been held to be normal discrepancies.

“8. The second ground on which the High Court refused to place reliance on the evidence of PW 1 was that there were “material discrepancies”. As indicated above we have perused the evidence of PW 1. We have not found any “material discrepancies” in her evidence. The discrepancies referred to by the High Court are, in our opinion, minor, insignificant, natural and not “material”. **The discrepancies are with regard to as to which accused “pressed the deceased and at which part of the body to the ground and sat on which part of the body; with regard to whether the respondent, Kalki, gave the axe blow to the deceased while the latter was standing or lying on the ground, and whether the blow was given from the side of**

the head or from the side of the legs. In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person. As indicated above we have not found any material discrepancies in the evidence of PW 1."

Emphasis Applied

63. Mr. Moitra next relied on the case of ***Balaka Singh v. State of Punjab*** reported in **(1995) 4 SCC 511**, paragraph 5 thereof. He argued that the Inquest witnesses stated that Lalchand was killed by the son of one Tajer Bere. None of the Inquest witnesses were cited as a witness in the chargesheet, and no attempt was made by the prosecution to investigate this angle. He therefore submits that evidence of the PWs should be discarded. This Court, however, notes that none of the inquest witnesses were present at the place and time of occurrence. In view of the overwhelming evidence of the PWs and duly corroborated by the medical evidence on record, the version of the inquest witnesses can be given no credence.
64. Paragraph 5 of ***Balaka (supra)*** dealt with a situation where the informant took and included the 9 accused persons in the FIR; however, he left 4 of them in the inquest report. The distinguishing feature of the said case is that the FIR was lodged before the inquest report was prepared. The informant took 9 names in the FIR but only 5 in the inquest report. This created a doubt in the mind of the Court. An officer of the State, in order to make the inquest report consistent with the FIR, on the number of the

accused persons, overwrote and included the left out 4 names in the inquest report. The decision in ***Balaka (supra)*** cannot be applied in these facts.

65. The next argument of Mr. Moitra is that none of the injured witnesses named any of the accused before PW 15, the medical officer who treated them. It is quite possible that the doctors were busy treating PWs 2, 3, and 4. PW 2 was on the verge of death and recovered miraculously with the fine treatment given by the doctor, PW-15. Not recording the names of the assailants, in such circumstances, would not ipso facto lead to the innocence of the accused. Reference in this regard is made to the case of ***State of Bihar v. Ramnath Prasad*** reported in ***(1998) 9 SCC 49*** at paragraph 8 thereof.
66. Mr. Moitra next relied upon the case of ***Jagat Singh v. State of Himachal Pradesh*** reported in ***(2011) 2 SCC 234***, to argue in the alternative that in a case where the injuries were sustained by the victims in a free fight between 2 groups, the offence under Section 302 must be scaled down to Section 323 of the IPC. This Court, however, finds that none of the accused or their associates sustained any injuries. The assailants were 20-30 in number and grossly outnumbered the family of the victims. This is therefore not a case for scaling down of the offence committed by the accused.
67. Paragraph 14 of the ***Jagat Singh case (supra)*** is of relevance in this context. The Court was considering whether there was the presence of mens rea to kill the accused, or was it a case of the accused having overstepped the limits of his right of private defense at the spur of the moment, or the death of the victim was the result of a free fight. The argument of the appellants herein is not that the fight occurred in the spur of the moment,

and private defense was employed by the appellants against the victims. The fact that the appellants Tayeb and Faijuddin Bere went to call the other accused persons/appellants from their village, and the exhorting of some of them to kill and behead the victim. They had sufficient time to cool off before leaving their village to come to the place of occurrence.

68. Mr. Moitra next argued that none of the weapons i.e. Ramdao, Dao and Tangi and sticks, were reserved by the I.O. The FSL report of the blood-stained earth was also not brought on record. The investigation was therefore faulty, and the benefit of the doubt must be given to the accused. He relied upon a decision of ***State of U.P. v. Wasif Haider*** reported in ***(2019) 2 SCC 203***. This Court is of the view that it may not have been possible for the I.O. to recover the weapons used in the crime since they were commonly used agricultural instruments. The accused may not have cooperated in giving any leading statements. However, the medical evidence and the evidence of the PWs have clearly established the offences. It is equally well settled that a faulty investigation would not automatically result in the acquittal of the accused if the evidence on record is unimpeachable.
69. It is next argued by Mr. Moitra that when the genesis of the incident is doubtful, the prosecution case must fall. Reliance is placed on the decision of ***Pankaj v. State of Rajasthan*** reported in ***(2016) 16 SCC 192***. The prosecution case therein was based on the evidence of PW 8, the sole eyewitness. There was no consistent corroboration of the evidence of PW 8, and the medical evidence contradicted it. Such is not the case in the facts of this case, as already discussed in detail hereinabove. The ***Pankaj decision (Supra)***, therefore, cannot come to the aid of the appellants.

70. The evidence of PWs 2, 3, 4, 5, 8, 9 and 10, as regards the assault on PWs 2, 3, and 4 and the deceased Lalchand, is unimpeachable. This Court is, therefore, inclined to accept the evidence of PWs 2, 3, 4, 5, 8, 9 and 10 to the extent that they have indicated about the role of Maynul Bere, Moijuddin, Faijuddin, Latif, Momin and Tayeb Ali.
71. More than one of the witnesses have stated and identified Atab as having exhorted the other accused persons to assault PWs 2, 3, and 4 and Lalchand i.e. “hit them, cut their heads off and take it home”.
72. The evidence of PW 8 and 9 is partly unreliable to the extent that they sustained injuries in the assault, since no injury report or evidence of their treatment is indicated by PW 15. There is, however, some proof in the evidence of PW 8, 9, and 10 that they may have naturally moved forward to step in and stop PW 4 from enduring further assault, as they may have sustained some injuries.
73. In ***Munna Lal v. State of U.P.***, reported in **(2023) 18 SCC 661**, it was reiterated that there cannot be a complete eschewing of witnesses, whose evidence is partly reliable and partly unreliable. The principles reiterated are as follows:-

28.2. Generally speaking, oral testimony may be classified into three categories viz.:

(i) Wholly reliable;

(ii) Wholly unreliable;

(iii) Neither wholly reliable nor wholly unreliable.

The first two category of cases may not pose serious difficulty for the court in arriving at its conclusion(s). However, in the third category of cases, the court has to be circumspect and look for corroboration of any material particulars by reliable testimony, direct or circumstantial, as a requirement of the **rule of prudence.**

Emphasis Applied

74. The argument of Mr. Dastoor, that each of the prosecution witnesses namely PWs 1, 2, 3, 4, 5, 8, 9, and 10 have mentioned only one injury on the neck

of the deceased whereas the PM report indicates too deep injuries on the neck and back of the deceased Lalchand, cannot be fatal to the prosecution case. It is quite likely that PWs 2, 3, and 4, having sustained injuries and having fallen down unconscious for some time, may have witnessed only one blow on the neck of Lalchand. The likelihood of Maynul, Ismail and Momin inflicting another blow on the neck of Lalchand, in these facts and circumstances, cannot be ruled out. One has to therefore go by the unimpeachable evidence of the PM doctor as regards the injuries suffered by the deceased Lalchand and the injury reports of PW 15 and the evidence of PWs 2, 3, and 4 on the role of Ismail, Momin and Tayeb Ali.

75. Mr. Moitra placed reliance upon the decision of ***Indira Devi v. State of Himachal Pradesh*** reported in **(2016) 12 SCC 76**, paragraphs 6 and 7 thereof. In the said decision, the 3 appellants were arrayed as accused along with the 2 principal accused persons. Appellant no. 1 was the wife of Brij Lal, and appellant no. 3 was the wife of the principal accused Dev Raj. They were not assigned any specific role by the Complainant in the FIR. There was a contradiction in the evidence of the injured witness and the subsequent events that occurred. The 3 PWs who were also ladies, were found to be falsely implicating the appellants. It is in that context that it was held that while the evidence of an injured witness was of more value, it could also be used to implicate innocent persons out of personal vendetta.
76. In the facts of the instant case, while it is true that the injured witnesses PWs 2, 3, 4, 8, 9, and 10, were all injured witnesses and belonged to the same family, the defense has not put forward any alternative case or alibi of not being present in the PO. It is almost an admitted position that Tayeb

Ali, after the altercation with Haphijuddin, ran to his village along with Baijuddin and fetched as many as 20 to 30 persons to attack the victims. The specific roles of Maynul, Moijuddin, Latif, Atab, Ismail and Momin in the assault of Haphijuddin, Burhan, Sabdullah are evident. Even if one holds that the evidence of PWs 8, 9 and 10 is partly not reliable as they could not produce their injury reports and BHTs, the evidence of the PWs 2, 3, and 4 are clear and consistent and sufficient to the prosecution case against the appellants, even after applying the caution sounded in the ***Indira Devi decision (Supra)***.

77. The decision of ***Abdul Razak v. State of Karnataka*** reported in **(2015) 6 SCC 282** particularly paragraphs 9 and 10 cited by Mr. Moitra is of some relevance. In the said case, it was held that the version of the prosecution witnesses did not inspire their confidence as they did not come to rescue the victim. The appellants in the said case tied the hands of the victim behind his back, poured chilli powder in his eyes and assaulted him with a club on his head and chest. Even after the incident, the PWs did not untie the victim's hands, and he died 4 hours later without any medical treatment. In the case at hand, the family of the victims took them to their house first and then skipped 3 medical facilities and then took the victims to Shaktinagar hospital at a distance of 3 hrs from the village Dingel. Indeed the conduct of the PWs 8, 9, & 10 is unusual.
78. This by itself is not sufficient to disbelieve the evidence of PWs 2, 3 and 4. They were the victims. They had no role to play in their being taken to their house. PWs 8, 9, and 10 deposed that they were also assaulted while trying to save PWs 2, 3 and 4. The persons who removed them and the victims

from the PO may have wanted to take them to safety first, and therefore removed them to their house and may have good reason to take the victims to the best of the Hospitals for treatment. As for the deceased Lalchand, several witnesses deposed that he died on the spot. He was declared “brought dead” by the Shaktinagar hospital. Given the fact that his vertebrae were severed by an 8-inch cut in the neck, he most likely died on the spot.

79. The cross-examination of the PWs has revealed that the victims and their friends believed that Shaktinagar Hospital has better facilities. To take the benefit of that skip over, the defense was required to prove that the said three hospitals had proper infrastructure to redress the injuries suffered by the victims. The defense must also demonstrate that the surviving victims with a view to invite the death of the deceased victim, opted for the distant hospital. The call to take the deceased victim to the distant hospital was an on-the-spot decision, which cannot be questioned without the defense introducing evidence to the contrary.
80. It has therefore clearly been proved that Faijuddin, Moijuddin and Latif, as deposed by PWs 2, 3, 8, 9, and 10, caught hold of the hands of the deceased Lalchand and Maynul inflicted the death blow with a Ramdao on the victim Lalchand. The principal assailants were therefore Moijuddin, Faijuddin, and Latif, who actively participated in furtherance of the common intention to put an end to the life of Lalchand. They are therefore guilty of offence under Section 302 read with Section 34 of the IPC.
81. It is at this juncture that one must look at the role of Waser Sk. @ Wacher Mayra. While PWs 9 and 10 have deposed that Waser Sk. held a pistol to the chest of Lalchand, PWs 2 and 4 stated that Waser Sk. held a pistol to the

neck of Lalchand. No gunshot wound was found by any of the doctors, nor was any pistol recovered.

82. There is no clear evidence against Waser Sk. for having assisted Moijuddin, Faijuddin, Latif and Maynul in the killing of Lalchand. This Court is of the view that Waser Sk @ Wacher Mayra must therefore be given the benefit of doubt and hence acquitted.
83. Insofar as the charge under Section 326 read with Section 34 of the IPC is concerned, the evidence of PWs 2, 3 and 4 clearly indicate that Atab was inciting and exhorting all the assailants and accused persons to cut the head of the victims and take them home. PW 3 mentioned both the names of Atab and Yusuf, also as PW 10.
84. Insofar as the assault on PWs 2, 3 and 4 is concerned, PW 2 has deposed that Maynul also attacked him with a Ramdao. Ismail and Momin assaulted Sabdullah Mallick (PW 3) and Burhan Ali (PW 2). Tayeb Ali, assaulted Haphijuddin (PW 4) with a Ramdao on his head. PW 4 confirmed that, Maynul and Tayeb Ali, Faizuddin and Moizuddin also assaulted him with a bamboo stick. PW 8 confirmed that Ismail and Momin attacked PWs 2, 3, and 5. PW 9 clearly deposed that Momin and Ismail assaulted PW 2 on the left side of his chest and right side of his back with a Ramdao. PW 10 has also deposed that Ismail and Momin assaulted PW 2 on the left side of his chest and right side of his back with a Ramdao.
85. PW 2 was in hospital for 11 days in a very critical condition. He was not expected to survive, and hence, a dying declaration was recorded. The non-production of the dying declaration was therefore not fatal to the prosecution case. The value of the dying declaration is lost once the

deponent survives and deposes before the Trial Court. PW 2 was not even cross-examined by the defense as regards his alleged declaration recorded by the Doctor or the Magistrate. The decision of the SC in the case of ***Samadhan Bhulaka Koli Vs State of Maharashtra*** reported in **(2010) Vol 4 SCC Cri 67** cited by Mr. Moitra is therefore of no relevance to the facts of the case.

86. Haphijuddin (PW 4) and Sabdullah (PW 3) were in hospital for 3 days for the injuries sustained by them. The ingredients of Section 326 are clearly satisfied here in that the aforesaid accused persons caused grievous hurt on the victims, PWs 2, 3, and 4. They knew that it would most likely cause their death. In fact, PW 2 nearly died and PWs 3 and 4 sustained grave injuries. The injuries were inflicted with sharp cutting weapons and were caused voluntarily.
87. The sentence and conviction of Mosaref @ Mosa, Moijuddin Sk., Faijuddin Bere, Jahangir Sk., Maynul Sk., Latif Sk., Ismail Mallick, Atab Sk., Tayeb Ali Sk. and Noor Islam is therefore upheld. None of the prosecution witnesses has stated that Waser Sk. @ Wacher Mayra has been seen to have either incited the group or inflicted any blow himself. Waser Sk @ Wacher Mayra is, therefore, acquitted of the charge under Section 326 read with Section 34 of the IPC.
88. Hence, CRA 320 of 2015 is allowed, and the conviction of Waser Sk., either under Section 302 or under Section 326 read with Section 34 of the IPC, is set aside. Bail bonds of Waser Sk shall stand discharged.
89. CRA 283 of 2015 Maynul Bere and Ors. v. State of West Bengal and CRA 266 of 2015 Aftab Sk @ Atab Sk and Ors. are dismissed.

90. The above convicted persons on bail shall surrender forthwith and be taken into custody to complete their sentences. The accused who have already undergone sentences under Section 326 to the extent indicated by the Trial Court, shall be set free.
91. There shall be no order as to costs.
92. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon completion of all requisite formalities.
93. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

(Rajasekhar Mantha, J.)

I Agree

(Ajay Kumar Gupta, J.)