

Form No. J(1)

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

Present :

**The Hon'ble Justice RajasekharMantha
And
The Hon'ble Justice Ajay Kumar Gupta**

**C.R.A. No. 437 of 2015
WITH
CRAN 5 of 2023
SANJAY KR SINGH @ PANDIT & ANR
VS
STATE OF WEST BENGAL
WITH
C.R.A. No. 435 of 2015
TINKU NASKAR @ POKA & ORS
VS
STATE OF WEST BENGAL
WITH
C.R.A. No. 438 of 2015
PINTU PATRA & ORS.
VS
STATE OF WEST BENGAL
WITH
C.R.A. No. 462 of 2015
RATAN HALDER
VS
STATE OF WEST BENGAL**

For the Appellants in CRA 437 of 2015, CRA 438 of 2015& CRA 462 of 2015

: Mr. Sudipto Moitra, Ld. Sr. Adv.
Mr. Angshuman Chakraborty, Adv.
Mr. S.S. Saha, Adv.
Mr. Saikat Ghosh, Adv.
Mr. Abhisekh Chakraborty, Adv.

For the Appellant Nos. 1 & 2 in CRA 435 of 2015

: Mr. Navanil De, Adv.
Ms. Monami Mukherjee, Adv.

For the Appellant No. 3 in CRA 435 of 2015

: Mr. Fazlur Rahman, Adv.
Mr. Md. Babul Hussain, Adv.
Mr. Mihinur Hossain, Adv.

For the State : Ms. Anasuya Sinha, Ld. A.P.P.
Mr. Ranadip Sengupta, Adv.

Heard on : 22nd April, 2025

Judgment on : 28th April, 2025

RajasekharMantha, J

1. The present appeals are directed against the judgment and order of conviction dated 29th June 2015 and 30th June 2015 passed by the Learned Additional District and Sessions Judge, 1st Court at Barasat, North 24 Parganas in Sessions Trial no. 1(4) of 2014 arising out of Sessions Case No. 29(9) of 2013.
2. By the said judgment the appellants were convicted under Sections 302/34 of the Indian Penal Code and sentenced to rigorous imprisonment for life and a fine of Rs.10,000/-, I/D to suffer simple imprisonment for 5 years. The appellants were also convicted for commission of offences punishable under Section 201/34 of the IPC and sentenced to simple imprisonment for 5 years and to pay a fine of Rs.5,000/-, I/D to suffer simple imprisonment for 2 years. The sentences were directed to run concurrently.

A. The Prosecution Case

3. The prosecution case is that on 2nd November, 2011 an unidentified dead body was found somewhere around Raigachi Chotopole, within the jurisdiction of Rajarhat PS, Kolkata. The body was photographed by PW-24 a photographer and PW-26, the IO of Rajarhat PS. It was removed with the help of PW 4, Abu Taleb, a rickshaw van puller and brought to the PS and was later stated to have been delivered to the R.G. Kar Hospital at Kolkata for

post-mortem.

4. Despite circulation of the photograph of the dead body to several police stations in and around Kolkata and enquiries being launched to that effect, nobody came forward to identify the same.
5. After about 4 months, the Rajarhat PS, which had initially registered a U/D Case and subsequently FIR No. 158/2011 dated 3rd November, 2011 was registered, filed a final report of mistake of fact on 14th March, 2012, before the ACJM at Barasat.
6. The prosecution case thereafter goes on to indicate that PW 26, Investigating Officer, attached to the Rajarhat Police Station on 20th May, 2013 received a phone call from an unknown person that the deceased was one Dinu Ali Baidya alias Sambhu. PW-26 stated that he went to the house of the family of the deceased with a photograph of the deceased and was identified by his mother PW-11. He made further investigation and also ascertained the identities of the alleged killers of the victim. The Rajarhat PS thereafter realizing that the deceased was residing under Baguihati PS transferred the case to Baguihati PS for investigation.
7. A second FIR came to be registered by PW-21, OC of the Baguihati PS, being No. 335 of 2013 dated 9th July, 2013. The said 2nd FIR, however, made reference to the first FIR being No. 158 of 2011, informant whereof was PW 1, Moijuddin Naskar. PW 27 was the IO who claims to have investigated the case thereafter.
8. The investigation was re-opened and charge sheet was filed against 11 accused persons. The named accused were (i) Debojyoti Ghosh alias Babai

(killed while on parole) substituted by his sister (for realisation of fine after conviction), (ii) TinkuNaskar alias Poka, (iii) Surojit Das alias Narkel, (iv) Sanjay Kr. Singh alias Pandit, (v) Pintu Patra, (vi) RatanHalder, (vii) Anarul Islam alias Sk Khoka and a few others. The Ld. PP in course of hearing of this appeal stated that Pintu Patra was in fact TinkuPatra which was not informed to the Trial Court.

9. There is procedural impropriety in the registration of the 2nd FIR since a Magistrate under the provisions of Section 173(8) of the Cr.P.C., can at best order further investigation on the already existing first FIR being No. 158 of 2011. The Magistrate in turn appears to have ordered the reopening of the first investigation. It is therefore assumed that the Magistrate in fact ordered further investigation on the first FIR.
10. All 11 persons were named accused in the charge-sheet filed by the Baguihati PS and were placed on trial. Charges were framed under Section 302 read with Section 34 of the IPC and Section 201 read with Section 34 of the IPC against the appellants. 9 out of 11 of the accused persons were convicted as stated above.

B. The Trial and the Evidence on record

11. Moijuddin Naskar (PW 1) was a local resident who discovered the body along with many others. He was the informant of the first FIR.
12. Hannan Ali Mistri (PW 2) was a local resident and onlooker and was present when the body was found on 3rd November, 2011.
13. Gobindalal Sikdar (PW 3) was a Constable who was a seizure witness of the

wearing apparel of the deceased.

14. Abu Taleb(PW 4) was a rickshaw van puller, who brought the dead body to the Rajarhat PS.
15. Safikul Baidya (PW 5) was the younger brother of the victim. He deposed that he did not know whether the deceased was alive or not. He stated that the photograph shown to him was not his brother's. He could not identify the accused persons. He put his signature on a blank paper on being threatened by the police. He also stated that his mother and father were threatened with consequences if they did not lodge a formal complaint.PW 5 was an unwilling witness. He was not however declared hostile.
16. Abdul Khalek (PW 6) was a local labourer and Sahjahan Ali Molla (PW 7) was a Rickshaw Van puller who could not identify the body he saw two years before despite being shown a photograph.
17. SujataKundu(PW 8) was the wife of Sanjay Kundu(PW 18), an alleged eyewitness. She was the owner of the vehicle being a Maruti Wagon R bearing Registration No. WB 02 S2321, in which the body of the deceased was carried from the PO to be dumped away. She however disposed that the vehicle was sold by her prior to Durga Puja (October -November) of the year 2011.
18. Sumitra Pal(PW 9) was the second owner of the Maruti Wagon R. She deposed that she purchased the same from a car showroom at Kamarhati on 8th December, 2012, a year after the incident.
19. Khairun Bibi (PW 11) was the alleged mother of the victim. She deposed that she had no contact with the victim from 17 months. She identified the

photograph of her son. She did not know who murdered the victim. She deposed that about 6 months ago the wife of the deceased came to look for him asking for his whereabouts.

20. Mithun Das (PW 12) was an alleged eye-witness to the murder of the victim. He deposed that he was a supplier of building materials to the accused no. 1 Babai. He knew the victim Dinu Ali Baidya who was killed on 2nd November, 2011. He deposed that the victim worked with the Accused No.1 initially and later started to supply building materials to the former.
21. A large sum of money was due and payable by accused Babai to the victim. On 2nd November, 2011 Babai is stated to have called PW 12 around 5:30 PM to come to collect dues, at the alleged place of occurrence being a building under construction. He stated that he saw all the accused persons there including the victim. There was a hot altercation between accused Babai on one side and the victim on the other in connection with the payment of building materials supplied. Thereafter Babai, Ratan, Poka and Subrata are stated to have tied the victim's neck with a nylon rope and pulled it from either side whereupon the body of the victim became motionless. He deposed that he did not tell any of his family friends or the police of the incident. His statement under Section 164 of Cr.P.C. was recorded about 2 years after the incident.
22. PW 12 admitted that he was arrested in connection with Baguihati PS Case dated 7th October, 2011 under Section 427, 379, 506, 325 and 34 of the IPC and also deposed as witness in a pending NDPS case before the Barrackpore Court on behalf of the prosecution.

23. PW 13 was another alleged eyewitness, Manas Naskar. He was a supplier of building materials to accused Babai. He deposed that on 2nd November, 2011, he received a telephone call from Babai in connection with payments to be made by Babai to him. He reached the place of occurrence, being an under-construction building, at about 6:00 PM where he found the victim sitting on a cot. All the accused persons were present there and a hot altercation ensued between the victim and Babai. Thereafter Babai, Ratan, Poka, Subrata and Pintu tied the neck of the victim with a nylon rope and pulled it from either side till the victim became motionless. He deposed that he did not inform his family or friends of the incident. He did not go to the police out of fear. The accused persons thereafter poured bleaching powder on the body of the victim and wrapped the body in a black plastic sheet. Then accused Subrata, Poka, Khoka, Narkel and Ratan brought the dead body from the first floor to the ground floor and placed it in a Maruti Wagon R No. WB02 S2321 and Babai asked PW 13 Mithun Das to drive the car to dispose of the body. The aforesaid 6 persons then drove the car away and returned after 45 minutes. Mithun told on his return that he dropped the body at Raigachi Chotopole. They all went back to their houses later. He did not discuss the matter with anyone or his family thereafter. He had known Mithun Das since childhood and were close friends.
24. PW 13 was himself an accused in connection with Baguihati PS Case No. 193 of 2012. The alleged eye witness on account of PW 13 was recorded under Section 164 of the Cr.P.C. about two years after the date of occurrence.

25. PW 17 was Amit Ali Baidya. He identified the photograph of his brother. He did not know who killed the victim. None of the family members of the victim had strangely lodged any missing person's diary with the police when the victim went missing. The wife of the victim was never examined or cited as witness.
26. PW 18 was Sanjay Kundu, husband of PW 8 Sujata Kundu, another alleged eye witness, who also supplied building materials to accused no. 1 Babai. He knew the accused persons in connection with his business. He deposed that Babai called him along with PW 25 on 2nd November, 2011 at about 6:00 PM to the place of occurrence. There was a hot altercation between Babai and the victim and thereafter Babai, Ratan, Poka, Subrata and Pintu tied the neck of the victim with a nylon rope and strangled him by pulling it from either side. The dead body was thereafter dealt with and disposed of in the manner indicated by PW 12.
27. PW 18 contradicted the evidence of his wife PW 8 when he deposed that he sold away the vehicle on the day after the date of the incident on 4th November, 2011.
28. PW 19 was Dr. Swaraj Halder, who held the post-mortem of the victim. He deposed that he found the following injuries on the body of the victim.

"The dead body was brought and identified by constable no. 2370, Mr. A.Sk. On examination, I found rigormortis was present all over the body, P.M staining on the back, the body smeared with white powder, smelt like that of bleaching powder covered by black polythene sheet, wearing one pair of ash coloured shocks, one black trousers, one black belt on the waist of the trouser, one white sandowganjee on right wrist, there is a band of Moti, one black thread on the waist, scalp hairs 2 inches black, moustache .5 inches black, beared shaved, one tattoo mark written in English mark as "Sambhu " on the front of fore arm was seen. Eyes closed, corneas hazy, pupils dilated and fixed equal on both sides. One transversely circular and continuous ligature

mark measuring 18" X .8" was placed on middle of neck at the level of the thyroid cartilage. The ligature mark was placed below 2" from right mastoid process, 1.5" from right angle of mandible, 2.5" from mid point of chin, 1.5" from left angle of mandible, 2" from left mastoid process. The ligature mark was placed 57" above right heel, externally the ligature mark was found brownish, deeply grooved, parchmented and abarded at places. On dissection subcutaneous tissue underneath the ligature mark evidence of protuse extravasation and fracture of thyroid cartilage, one transverse circular and continue ligature mark measuring 18" X .8" was placed lowdown on the neck, 55" above right heel and the ligature mark was placed below 2.5" from right mastoid process, 2" from right angle of mandible, 4" from mid point of chin, 2" from left angle of mandible, 2.5" from its mastoid process, externally the ligature mark was found brownish, grooved, parchmented and abraded at places and on dissection subcutaneous tissue underneath the ligature mark evidence of protuse extravasation and multiple abrasions of varying sizes were found at places all over the forehead, face, shoulder regions, left arm and right arm, front of chest and back of chest and one deep bruise measuring 11" X 10" involved whole of front of chest wall and evidence of fracture of 2nd piece of sternum and fracture of ribs from 3rd to 7th on the right side and 2nd to 8th on the left side with extensive bruise and laceration of underlying pleura and lungs occurred correspondingly by the fractured ribs ends with accumulation of about 300 grams fluid and clotted blood within the pleural space, evidence of bruises all over both kidneys, one hematoma 6" X 4" involving right fronto-parieto-temporo and occipital area of sculp, one hematoma 6" X 4" was involving left fronto-parieto-temporo and occipital area of sculp. All the injuries showed evidence of vital reaction. No other injuries except those stated above could be detected even on careful dissection and observation under hand lense.

Preserve

(1) Wearing as noted above (2) scalp hair, (3) nail cutting and nail scrapings, (4) blood soaked with blotting paper with control, (5) blood without any preservative, (6) (a) stomach with its contents, (b) loop of intestine, (c) portion of liver, (d) half of each kidney, preserved in S.S. Nacl with control. All duly packed, labeled, sealed and signed, send to C.E through escorting constable. In my opinion, death was due to effects of asphyxia as a result of strangulation by ligature as noted above-ante-mortem and homicidal in nature. Evidence of injury at places all over the body were also ante-mortem and homicidal in nature.

It is the said post mortem which was written prepared and signed by me. The post mortem report is marked as Ext-14."

29. PW 24 was Indranil Chatterjee, a photographer. He claimed that he took pictures of the victim who was found lying at the Raigachi Chotopole on 3rd November, 2011. He identified the photographs that were shown to him but

stated that the original memory card of the digital camera on which the photograph was taken up, was erased with the passage of one and half years thereafter. The photographs of the deceased were therefore never exhibited nor could there have been any certification of the said purported photograph.

30. PW 17 and 5 had admitted that they saw the alleged photograph of the victim at the police station and put their signatures behind that on the dictates and instructions of the police.
31. PW 25 was SankarKundu another businessman and a creditor of Babai. He went to the place of occurrence on receiving a phone call from accused no. 1 Babai on 2nd November, 2011. He went to the place of occurrence along with PW 18 Sanjay Kundu in a vehicle belonging to the latter. PW 25 had admitted that he deposed on behalf of the State in Hare Street PS Case No. 626 of 2012 and in connection with Sithi PS Case No. 7 of 2007. He further deposed that when the police came to investigate the murder of one "Rintu" on 16th July, 2012 he had informed them about the identity and death of the victim. Each of the aforesaid alleged eyewitnesses clearly stated that they had not informed their family members and went on with their lives, as if nothing had happened after the incident had occurred.
32. PW 12, 13, 18 and 25 could surprisingly remember and identify the exact vehicle registration number of the vehicle in which the deceased was carried out from the place of occurrence, even after 2 years of the incident.
33. The evidence of PW 25 was a carbon copy of the evidence of PW 12, 13 and 18 about the altercation, the killing of the victim and wrapping of the body in a black plastic sheet after pouring bleaching powder on the same and driving

away to dispose of the victim's body in the car on the instructions of Babai.

34. PW 26 was the first IO Atikai Samajdar then attached to the Rajarhat PS. While he claimed that he had gone to the house of the victim's murder and shown the photographs when the victim was identified, the same evidence is given by PW 27 who took over the investigation from PW 26. He admitted that the statements under Section 164 of the Cr.P.C. of the alleged eye witness were recorded in 2013, nearly 2 years after the date of occurrence. He also admitted that there was no T.I. Parade conducted on the accused persons. He admitted that the wife of the deceased was never examined by the police. The accused were thereafter examined under Section 313 of the Cr.P.C. by the issues court passed on the alleged evidence on record.
35. 9 out of 11 accused, namely Babai, Pandit, Pintu, Narkel, Poka also called Rintu Naskar by the prosecution, Subrata Roy, Md. Rehan, Ratan Halder and Sk Anarul Islam alias Khoka were convicted and sentenced by the Trial Court as stated hereinabove.
36. This Court has heard arguments on behalf of the accused and the State at length. Several discussions have been cited by Mr. Sudipto Moitra, Sr. Adv., Mr. Fazlur Rahman and Mr. Navanil De, learned Counsels for the appellants and Ms. Anasuya Sinha for the State at length over four days.
37. Having carefully gone through the evidence on record, this Court finds several infirmities in the investigation and prosecution, as also the evidence of the witnesses in course of trial.

C. Procedural Impropriety in reopening the investigation

38. The second FIR registered by the Baguihati PS suffers from procedural impropriety. It gave rise to two FIRs in respect of the same incident. Upon filing of a closure report, the police do not lose their statutory right to carry out further investigation. Further investigation is continuation of the original investigation. The Magistrate accepting the closure report need not recall its order for enabling the police to do further investigation. The police need not apply before the Magistrate to carry out further investigation even after the filing and acceptance of the closure report. The Supreme Court in ***State of T.N. v. Hemendhra Reddy & Anr.***, reported in(**2023**) **16 SCC 779** has held as follows:

“69.However, the question before this Court is whether sub-section (8) of Section 173CrPC permits further investigation after the Magistrate has accepted a final report (closure report) under sub-section (2) of Section 173CrPC. The contention raised on behalf of the accused persons is that acceptance of a closure report would terminate the proceedings finally so as to bar the investigating agency from carrying out any further investigation in connection with the offence.

71. We are at one with the aforesaid submission canvassed on behalf of the accused persons. However, this is not going to make any difference. What is necessary to be examined is as to whether an order passed under Section 190(1)CrPC accepting a final report being a judicial order would bar further investigation by the police or CBI as in the present case, in exercise of the statutory powers under Chapter XII CrPC?

85.1. Even after the final report is laid before the Magistrate and is accepted, it is permissible for the investigating agency to carry out further investigation in the case. In other words, there is no bar against conducting further investigation under Section 173(8)CrPC after the final report submitted under Section 173(2)CrPC has been accepted.

85.2. Prior to carrying out further investigation under Section 173(8)CrPC it is not necessary that the order accepting the final report should be reviewed, recalled or quashed.

85.3. Further investigation is merely a continuation of the earlier investigation, hence it cannot be said that the accused are being subjected to investigation twice over. Moreover, investigation cannot be put on a par with prosecution and punishment so as to fall within the ambit of clause (2) of Article 20 of the Constitution. The principle of double jeopardy would, therefore, not be applicable to further investigation.

Emphasis Applied”

39. When the Rajarhat PS discovered that it lacked jurisdiction to investigate the unnatural death and/or alleged murder of the victim after carrying out further investigation upon receipt of the anonymous call after registration of the first FIR No. 158 of 2011 and filing of the closure report, ought have forwarded the first FIR to the Baguihati PS with a request to treat the First FIR as a Zero FIR. The number assigned to the First FIR would have stood erased, enabling the Baguihati PS to continue the investigation under the FIR number assigned by it to the Second FIR. There would have only one FIR if the procedure of Zero FIR had been followed.
40. However, one cannot lose sight of the fact that in the present case investigation was first carried out under the first FIR and accordingly a final report was filed. Hence it is not a case where the first police station was aware from the inception that it lacks jurisdiction to investigate the alleged crime. Therefore, as a matter of abundant caution, the FIR number assigned to the first FIR is required to be retained as a matter of record (though need not be used) for a complete and transparent reference in the future.
41. The Magistrate was required to guide the police and oversee the transformation of the First FIR to Zero FIR. However, it appears that the Magistrate has ordered the reopening of the first investigation, which is

impermissible under Sec 173(8) of CRPC. Hence the order for reopening of the investigation is required to be treated as a direction for further investigation. The Supreme Court in ***Ramachandran v. R. Udhaya Kumar*** reported in **(2008) 5 SCC 413** said as follows:-

“7. At this juncture it would be necessary to take note of Section 173 of the Code. From a plain reading of the above section it is evident that even after completion of investigation under sub-section (2) of Section 173 of the Code, the police has right to further investigate under sub-section (8), but not fresh investigation or reinvestigation. This was highlighted by this Court in *K. Chandrasekhar v. State of Kerala* [*K. Chandrasekhar v. State of Kerala*, (1998) 5 SCC 223 : 1998 SCC (Cri) 1291] . It was, inter alia, observed as follows : (SCC p. 237, para 24)

‘24. ... The dictionary meaning of “further” (when used as an adjective) is “additional; more; supplemental”. “Further” investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether. In drawing this conclusion we have also drawn inspiration from the fact that sub-section (8) clearly envisages that on completion of further investigation the investigating agency has to forward to the Magistrate a “further” report or reports—and not fresh report or reports—regarding the “further” evidence obtained during such investigation.’

8. In view of the position of law as indicated above, the directions of the High Court for reinvestigation or fresh investigation are clearly indefensible. We, therefore, direct that instead of fresh investigation there can be further investigation if required under Section 173(8) of the Code. The same can be done by CB CID as directed by the High Court.”

D. The Identification of the Body.

42. The first and moot issue is with regard to the identification of the body. PW 11 mother of the victim Khairun Bibi identified the photograph shown to her as that of the victim. The said photograph was never exhibited in course of trial. PW 5, brother of the victim has clearly stated that no photograph was shown to him by the IO in course of evidence. He has wholly denied that the photograph seen by him at the PS was that of his brother Dinu Ali Baidya. He deposed that he saw the photograph for the first time in the police station

and put his signature behind the same upon being pressurized by the police. His evidence is that certain blank documents were signed by him at the instance of the police cannot be ignored. There is no evidence whatsoever as to whose photograph was identified by the family. No such photograph has been exhibited in course of the trial.

43. In cross-examination, PW 5 after being declared hostile has denied having told the IO that Babai murdered his brother or that his brother used to work for Babai. He also denied having told the IO that his brother left the work after being assaulted by Babai and lives with his in-laws at Sandeshkhali. He further denied that Babai and his associates had come to his house one night to assault the victim or that Babai had told him in filthy language that the victim grabbed money from him. He also denied that Babai and his associates came to their house on 1st November, 2011. He also denied that Pintu came to their house looking for the victim on 2nd November, 2011 and asked him to go to Baguihati on the said day to settle the dispute with Babai.
44. The entire story of the prosecution therefore is without any evidence whatsoever of the manner in which the deceased at all went to Baguihati and the alleged place of occurrence on the said day.
45. What is more curious is that if Babai went to the house of the victim to threaten him on the 1st and 2nd November, 2011, the other family members including PW 11 and PW 17 would have also come to know of the said incident. They don't seem to know anything as regards the as was confronted to PW 5. The entire story of the prosecution as regardsthe

commencement of the case, the alleged murder of the victim and identification of the body is seriously questionable.

46. The wife of the victim is the best person to identify the body. She was not examined by the police nor cited as a witness. The Inquest Officer found no tattoo on the body of the victim even after thoroughly cleaning the same in course of the inquest. The PM doctor however found a tattoo on the hand of the victim. Curiously the dead body challan under which the body was handed over to R.G. Kar Hospital does not bear the signature of either the PM doctor or the hospital authorities. It is not known whose body was delivered to the hospital and on which body the post-mortem was conducted.
47. PW 4, Abu Taleb transported the dead body of the victim to the Rajarhat PS meaning he has physically seen the dead body. His testimony therefore would have been the best piece of evidence identifying whether the dead body of the victim originally seen by him is the same that is captured in the photograph. No such testimony has come from PW 4.
48. On the question of identification of the dead body, Para 23 of the decision of the Supreme Court in the case of ***Kalinga @ Kushal v. State of Karnataka*** reported in **(2024) 4 SCC 735** would be relevant.

“23. Furthermore, we deem it appropriate to note that the identity of the dead body recovered from the well is also not beyond question. The trial court had also noted the doubts regarding the identity of the dead body, however, the identity of the deceased was held to be established in light of the fact that the identification was done by PW 1, father of the deceased. The trial court also relied upon the fact that the identification was not challenged by either side. Be that as it may, we consider it important to note that there exist serious doubts regarding the identity of the dead body recovered from the well. The description of the deceased given by PW 1 in his complaint Ext. P-1 did not match with the description of the dead body. The clothes found on the dead body were substantially different from the clothes mentioned by PW 1 in his complaint. The presence of ornaments was not mentioned in the

complaint. Furthermore, identification of the dead body by face was not possible as the body had started decomposing due to lapse of time. Admittedly, the dead body was recovered after 12 days of the incident from a well. Sensitive body parts were found bitten by aquatic animals inside the well. The theory of ornaments has already been held to be a figment of imagination by the trial court and the High Court in an unequivocal manner. Therefore, the prosecution case regarding the identity of the dead body is not free from doubts.”

49. When the identification of the body is in doubt the prosecution case must fall flat on this ground alone.
50. The heart of this matter is the identity of the victim. The criminal investigation started with the want of the identity of the victim and was closed for that reason. Therefore when the identity of the victim was divulged by an anonymous call to the police giving impetus for further investigation, the police were duty bound to trace out and prove the source of the anonymous call i.e. the name of the caller, and what is his/her connection with the victim. The rule for further investigation is the receipt of new facts and evidence. In the present case, by not disclosing the name of the anonymous caller or at the least by not proving the link of the caller with the victim, the police have nipped the bud of the prosecution's case. In terms of section 114(g) of the Indian Evidence Act, the court therefore will draw adverse inference against the non-revelation of the name of the caller.

E. The Suspicious Medical Evidence and procedure adopted to obtain the same.

51. The matter becomes more curious when the PM doctor found severe injuries in the nature of three broken ribs and a broken chest/rib cage on the body of the victim. Such injuries can only be caused by a heavy instrument/weapon like a stick or rod. There were abrasions found on the

head of the victim. The PM doctor has stated that the injuries were anti-mortem in nature but had not indicated how such injuries were or could have been caused.

52. If one looks at the evidence of the 4 alleged witnesses namely PW 12,13,18 and 25, none of them saw the victim being assaulted by any stick or rod or heavy weapon so as to break his rib cage and thirteen ribs. On the contrary, the said eyewitnesses deposed that the victim was sitting on the cot when they reached the place of occurrence.
53. The medical evidence is unclear about the cause of death. While on one end it is stated by the PM doctor that the death occurred due to Asphyxia by strangulation and was homicidal in nature. It is also opined that the physical injuries in the body were anti-mortem and homicidal in nature. There is no opinion given as to how the physical injuries could have been sustained. There are two causes of death indicated by the PM doctor.
54. In ***Nankaunoo v. State of Uttar Pradesh*** reported in **(2016) 3 SCC 317** at Para 13, it was held as follows:

“13. Keeping in view the above principles, when we examine the facts of the present case, the deceased sustained gunshot wound of entry 1½" × 1½" on the back and inner part of left thigh, six gunshot wounds of exit each ⅓"×⅓" in size in front and middle left thigh. Due to the occurrence in the morning at the barber shop of the deceased, the appellant emerged from the northern side of the grove carrying pistol in his hand and fired at the deceased. The weapon used and the manner in which attack was made and the injury was inflicted due to premeditation clearly establish that the appellant intended to cause the injury. Once it is established that the accused intentionally inflicted the injury, then the offence would be murder, if it is sufficient in the ordinary course of nature to cause death. We find substance in the contention of the learned counsel for the appellant that the injury was on the inner part of left thigh, which is a non-vital organ. Having regard to the facts and circumstances of the case that the gunshot injury was caused in the inner part of left thigh, the sufficiency of injury to cause

death must be proved and cannot be inferred from the fact that death has taken place. But the prosecution has not elicited from the doctors that the gunshot injury on the inner part of left thigh caused rupture of any important blood vessel and that it was sufficient in the ordinary course of nature to cause death. Keeping in view the situs and nature of injury and in the absence of evidence elicited from the doctor that the said injury was sufficient in the ordinary course of nature to cause death, we are of the view that it is a fit case where the conviction of the appellant under Section 302 IPC should be under Section 304 Part I IPC.”

55. The prosecution has miserably failed to elicit from the PM doctor the actual cause of death. In such a circumstance, the conviction of the appellants on based on the medical opinion on record is grossly improper. It was wholly inappropriate for the trial court to arrive at any conclusion or to course of death. The defense has therefore lost the opportunity to cross-examine the PM doctor on the same.
56. In the case of ***Torab Sk. &Ors. v. State of West Bengal &Ors.*** reported in ***2014 SCC Online Cal 15691*** at Para 23, it was held as follows:

“23. Taking a conspectus of the aforesaid decisions, in our opinion, it would not be proper for us to decide for ourselves considering the nature of injuries sustained by the victim, whether they could have caused death in the normal course of nature. It would be dangerous for us to guess as to whether this was possible as we are not medical experts. Moreover, by doing so and applying our own assessment, as rightly argued by Mr. Basu, the appellants would have no right of cross-examination of any Doctor on this point. When the prosecution has failed to ascertain the opinion of the Doctor, who proved the post mortem report, as to whether the injuries sustained by the victim could cause death in the normal course, it would be unsafe for us to infer that the death was indeed caused by these injuries. Moreover all the injuries sustained by the victim are on the non-vital parts of his body. The injuries on the left ankle, left knee and on the thigh appeared to be muscle deep; the vessels, Tibia and Fibula have been cut. The testimony of the eye-witnesses proves that the victim was bleeding profusely due to the injuries. The ocular evidence also establishes the fact that appellants attacked the victim by injuring him on the non-vital parts of his body.”

F. Inconsistency between the deposition of eyewitnesses and the Medical Evidence.

57. The evidence of the PM doctor does not match with the evidence of the 4 alleged eyewitnesses. The eyewitnesses whose evidence is parrot-like cannot, therefore, be believed. There is yet another factor in the post-mortem report that goes contrary to the other evidence on record, the PM doctor stated that PM was conducted around 3:15 PM on 3rd November, 2011, and the victim was stated to have been strangled around 6:00 PM the previous day. The evidence of the PM doctor that the victim died about 12 hours before the post-mortem was conducted, is therefore inconsistent with the prosecution case and the evidence of the eyewitnesses.
58. None of the eyewitnesses mentioned any assault on the victim by any of the accused persons on the chest and head. The medical evidence clearly shows that the chest of the victim was broken, three ribs on one side and eight ribs on the other were broken. The post-mortem doctor has stated that the injuries are anti-mortem in nature.
59. Each of the 4 eyewitnesses stated that the victim was in a sitting position when they arrived at the place of occurrence. It is impossible for the victim to be in a sitting position after receiving the injuries on his chest, ribs and head. There is therefore clear contradiction between the evidence of the alleged eyewitnesses and the medical evidence on record. Reference in this regard is made to Para 22 of the decision of the Supreme Court in the case of ***Mahavir Singh v. State of Madhya Pradesh*** reported in ***AIR 2016 SC 5231***, it was held as follows:

“22. The position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant

factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. (See *Abdul Sayeed v. State of M.P.* [*Abdul Sayeed v. State of M.P.*, (2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262] , SCC p. 274, para 39.”

60. In the case of ***Ganesh Datt v. State of Uttarkhand*** reported in **(2014) 12 SCC 389** at Para 16 it was held follows:-

“16. The eyewitnesses, namely, PWs 1 to 3 and CW 1 Smt Raj Kumari, widow of deceased Prabhunath have testified that accused Sudarshan and accused Deep Narain fired shots with pistol and gun respectively at Prabhunath during the occurrence resulting in injuries but as per the medical evidence there was no gunshot injury found on any part of the body of Prabhunath. Thus in short, as far as deceased Prabhunath is concerned, the ocular evidence is totally inconsistent with the medical evidence with respect to the assault by accused Sudarshan and Deep Narain. If this matter is false, there is no guarantee that the other assault deposed to by the eyewitnesses was also not false.”

61. In ***Amar Singh & Ors. v. State of Punjab*** reported in **(1987) 1 SCC 679** at Para 10, it was held as follows:

“10. It is next contended on behalf of the appellants that the learned Additional Sessions Judge and the High Court were not justified in placing any reliance upon the evidence of PW 5 Smt Veero, which is totally inconsistent with the medical evidence. It has been already noticed that all the accused persons were armed with sharp weapons. It is the evidence of PW 5 that Amar Singh, son of Bachan Singh, and Rattan Singh were each armed with a *sua*, Lakha Singh was armed with a *barchi*, Harbhajan Singh was armed with a *kulhari* and Amar Singh, son of Isher Das, was armed with a *kirpan*. She said: “Then all the accused except Bachan Singh accused surrounded my son Piara Singh (deceased). Then Lakha Singh accused gave a *barchi*-blow on the left knee of my son. Then Piara Singh (deceased) fell down and all the accused then gave injuries to him with their respective weapons.” In her cross-examination she said that the accused persons gave quite a number of blows with their respective weapons after they had overpowered him, and that many of the blows fell on the ribs and abdomen of deceased Piara Singh. But, not a single incised wound was found on the body of the deceased by PW 2 Dr Verma. Moreover, the medical report shows that there was no injury on the ribs and abdomen of the deceased. We are unable to accept the evidence of PW 5 that although a number of blows were given by the accused with their weapons on the ribs and abdomen of deceased, yet such blows did not produce any mark of injury. The medical report submitted by PW 2 shows that there were only contusions, abrasions and fractures, but there was no incised wound on the left knee of the deceased as

alleged by PW 5. If her evidence that all the accused inflicted injuries on the deceased with their respective weapons has to be accepted, then there would be incised wounds all over the body of the deceased, but the medical report shows that not a single incised wound was found on the body of the deceased. Thus the evidence of PW 5 is totally inconsistent with the medical evidence. This Court in *Ram Narain Singh v. State of Punjab* [(1975) 4 SCC 497 : 1975 SCC (Cri) 571 : AIR 1975 SC 1727] has laid down that if the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence, this is a most fundamental defect in the prosecution case and unless reasonably explained, it is sufficient to discredit the entire case. There is no explanation for the apparent total inconsistency between the evidence of PW 5 and the medical evidence.”

62. In ***Viram alias Virma v. State of Madhya Pradesh*** reported in **(2022) 1 SCC 341** at Para 13, it was held as follows:

“**13.** The oral evidence discloses that there was an indiscriminate attack by the accused on the deceased and the other injured eyewitnesses. As found by the courts below, there is a contradiction between the oral testimony of the witnesses and the medical evidence. In *Amar Singh v. State of Punjab* [*Amar Singh v. State of Punjab*, (1987) 1 SCC 679 : 1987 SCC (Cri) 232] , this Court examined the point relating to inconsistencies between the oral evidence and the medical opinion. The medical report submitted therein established that there were only contusions, abrasions and fractures, but there was no incised wound on the left knee of the deceased as alleged by a witness. Therefore, the evidence of the witness was found to be totally inconsistent with the medical evidence and that would be sufficient to discredit the entire prosecution case.”

63. Reference in this regard is made to the decision of the Supreme Court in ***Viswanatha v. State of Karnataka*** reported in **2024 SCC Online SC 1658** particularly at Para 12& 13.

“**12.** PW-1 and PW-2 are the star witnesses of the prosecution. They had deposed during the trial that the two accused had strangulated the deceased to death. PW-1 had said that on the day of the incident, she left home at around 9 : 30 in the morning and when she returned at 12 : 30 in the afternoon she found that her room was bolted from inside and then she heard her mother screaming. It was then that she called PW-2 for help. PW-1 further states that she saw through the window both the accused strangulating her mother by pulling the rope at the two ends. She further states, that when PW-1 called one of the accused Ravikumar by name, who she immediately recognised being their relative, Ravikumar called the name of the other accused i.e., the present appellant and the two escaped.....’

13. The above evidence of PW-1 and PW-2, all the same, does not corroborate with the post mortem report, which shows that the ligature marks, though round the neck, but are missing on the back of the neck. If the testimony of PW-1 and PW-2 is to be believed then the ligature marks should have been all round the neck, including the back.....The report does suggest that the deceased was indeed strangled to death. But it could not be in the manner as seen by PW-1 and PW-2 (who had seen the two accused strangulating the 86 years old woman by pulling both ends of the rope) as the ligature mark extended only from one angle of the mandible to the other and no such mark was seen at the back of the neck. Had the strangulation been in the manner as described by PW-1 and PW-2, the ligature marks would have been different.”

64. It is not the case of the prosecution that the police have come to learn about the identity of the victim based on an intelligence tip, revealing the source whereof will jeopardize the security of the state and/or country.

G. The story and factual basis for reopening of the investigation.

65. The turning point in the case is the reopening of the investigation and further investigation being conducted, which resulted in the second FIR being 336 of 2013 dated 9th July, 2013 by the Baguihati PS. The informant of the first FIR being No. 158 of 2011 and the FIR itself is referred to in the second FIR. After about nearly 17 months from the date of receipt of information about the dead body of the victim, on 20th May, 2013, the IO of the Rajarhat PS is stated to have received an anonymous phone call that the deceased was found on 2rd November, 2011 was Dinu Ali Baidya @ Sambhu.
66. The police did not bother to ascertain the identity of the caller although they had all means to do so. A GD entry has been made on receipt of this call. However, no such GD entry was produced in the trial. The commencement of further investigation and registration of the second FIR was produced, and the charge sheet appeared to be without any lawful basis.

67. The police admittedly came to know of the identity of the victim, on 16th July, 2012 in connection with the murder of one Rintu as deposed by PW-25. There is no explanation whatsoever from the prosecution as to why they waited until 9th July, 2013 under the story of an anonymous informant to reopen the investigation into FIR No. 158 of 2011.
68. Admittedly, the incident occurred on 2nd November 2011. The Police came to know the name and/or murderer of the victim in July 2012. The application for reopening of the investigation was made in June 2013. There is no explanation whatsoever for the delay by the prosecution. The prosecution case must fail on this ground alone.
69. Why the police did not pursue the name of the anonymous caller when the identity of the victim was revealed 1 year and 5 months ago by the caller? As to what kept the anonymous caller silent about the identity of the victim for one odd year was required to be investigated and brought on record. The absence of investigation or explanation by the prosecution creates serious substantial doubts about the story of the anonymous caller.
70. As to how the police zeroed down the house of the victim by knowing his name only has also not come on record. What was the distance between the house of the victim and the Rajarhat PS has not come on record. Therefore, the circumstances under which PW 27 went to meet the mother of the victim are suspect. As already discussed the facts confronted to PW 5 were not confronted to PW 11 and PW 17.
71. Even if one could explain the delay of 2 months from the date of the receipt of the anonymous call and the consequent lodging of the 2nd FIR, it remains

unexplained as to why the police have not pursued the anonymous caller given the fact that the caller is informing about the identity of the victim more than year after the incident.

72. It would be appropriate to refer to the observations of the Supreme Court in ***Balaji v. State of Maharashtra*** reported in **2019 (2) Crimes 54 (SC)**:

“Having regard to the aforementioned discussion and other material on record, we find that the origin and genesis of the prosecution is shrouded in mystery; the prosecution has tried to improve its case from stage to stage. In our considered opinion the prosecution has not proved its case beyond reasonable doubt against the accused. Hence benefit of doubt must be given to the accused.”

H. The Silence of the 4 alleged eyewitnesses with regard to the incident since November 2011

73. The fact that the four eyewitnesses did not inform the police or their families or friends of the incident for 2 years and went about their daily lives, is difficult for this Court to believe. The conduct of the 4 alleged eyewitnesses is unusual and hence not believable.
74. Reference in this regard is made to the decision of ***Maruti Ram Naik v. State of Maharashtra*** reported in **(2003) 10 SCC 670** at Paragraph 7 thereof.

“7. We will now consider whether the evidence of PW 4 in any manner corroborates the evidence of PW 3 or for that matter the said evidence of PW 4 is acceptable at all. PW 4 has admitted that he is a close relative of deceased Krishna MahadaNaik. While he had noticed the incident of the attack on the deceased Krishna MahadaNaik, he has not spoken in any manner about the subsequent attack which includes the attack on PW 3. According to this witness, at the relevant time, he was going to the bus-stand to board a bus to reach his factory where he was working when he saw the assault on the deceased Krishna MahadaNaik by the assailants including the appellants. Having noticed the incident, he did not go to any one of his relatives' house to inform about the attack in question. He knew at that point of time that Krishna MahadaNaik was injured and still alive, still he did not make any effort whatsoever to get any help to shift the injured to a

hospital. According to this witness, even after seeing Krishna MahadaNaik lying injured in a critical condition, he without informing anybody about the incident, went to the bus-stand, took a bus and went to his factory and even at that point of time, he had sufficient opportunity to inform the other people about the incident or for that matter, even the police which he did not do. It is interesting to note from the evidence of this witness that even though he had an opportunity of approaching the police, he did not go to them because he did not know whom he had to inform about the incident in the police station. The witness further states that he went to the factory, worked for a while, took leave from the factory and went back home. Even after reaching home, he did not bother to find out from anybody there about the fate of the victims nor did he inform anybody about he having witnessed the incident. It is only at about 6 p.m. when PW 21 recorded the statement for the first time, he came out with the fact of having witnessed the incident. It is rather surprising as to how and in what manner, PW 21 came to know that PW 4 was a witness to the incident. The prosecution has also failed to explain the delay in recording the statement of this witness, therefore, bearing in mind the conduct of PW 4 in not informing anybody about his having witnessed the incident and the delay in recording his statement makes us hesitant to place any reliance on his evidence. The only other piece of evidence relied on by the prosecution to support its case against these two appellants is that of recovery which even according to the prosecution, was made from a place which was not in the exclusive possession of the appellants and the said place was easily accessible by other people and also the fact that recovery was made almost 9 days after the incident in question, in our opinion, this piece of evidence also would not at all be sufficient to base a conviction of these appellants without further acceptable corroboration. Therefore, we are of the opinion that these appeals must succeed. The conviction and sentence imposed on the appellants are set aside and the appeals are allowed.”

75. In ***Mangesh P. Bitode & Ors. v. State of Maharashtra*** reported in **2006 SCC Online Bom 1595**, a similar question cropped up at Para 7 and 8, the Bombay High Court has stated as follows:

7. The second witness is RW. 8 Bhagwat. He states that he was going to his village Mohaja by bicycle around 12 noon from Washim. He also states about the assault on KisanTupsande by the accused/appellants with knife, sword stick and stone. He too states that out of fear he did not disclose the incident to anybody. It is in the evidence of P.W. 9 Rarhesh the Investigating Officer that he had been to village Mohaja and he made enquiry with some villagers about the dead body. This witness P.W. 8 Bhagwat is a native of village Mohaja and yet when police voluntarily came to his village to make enquiry he did not disclose this fact to the police. We fail to understand what then prompted both these witnesses to be bold all of a sudden after 6 days.

The explanation offered is not worth being accepted. In a case reported in (*State of Orissa v. Mr. Brahmananda Nanda*) (1976) 4 SCC 288 : AIR 1976 SC 2488 following observations are made:

“The evidence suffers from serious infirmities which have been discussed in detail by the High Court. It is not necessary to reiterate them, but it will be sufficient if we refer only to one infirmity which, in our opinion, is of the most serious character. Though according to this witness, she saw the murderous assault on Hrudasnanda by the respondent and she also saw the respondent coming out of the adjoining house of Nityanandal where the rest of the murders were committed, she did not mention the name of the respondent as the assailant for a day and a half. The murders were committed in the night of 13th June, 1969 and yet she did not come out with the name of the respondent until the morning of 15th June, 1969. It is not possible to accept the explanation sought to be given on behalf of the prosecution that she did not disclose the name of the respondent as the assailant earlier than 15th June, 1969 on account of fear of the respondent. There could be no question of any fear from the respondent because in the first place, the respondent was not known to be a gangster or a confirmed criminal about whom people would be afraid, secondly, the police had already arrived at the scene and they were stationed in the Club House which was just opposite to the house of the witness and thirdly, A.S.I. Madan Das was her nephew and he had come to the village in connection with the case and had also visited her house on 14th June, 1969. It is indeed difficult to believe that this witness should not have disclosed the name of the respondent to the police or even to A.S.I. Madan Das and should have waited till the morning of 15th June, 1969 for giving out the name of the respondent. This is a very serious infirmity which destroys the credibility of the evidence of this witness.” and another case reported in (*State of Maharashtra v. Bhanudas Somanna Sangolkar*) 1997 Cri LJ 3205 this Court held:

“The first is that, for over 5 days from the date of incident, he did not disclose the incident to anyone. The prosecution sold out a reason, explaining such a conduct of this witness, namely the respondent had threatened him that in case he disclosed the incident to anyone, he would meet a fate similar to that of Jaywant. We are not impressed with the said reason. The evidence is that, on the next day of the incident, the police had come in village. In our view, if he mustered courage to disclose to the police the incident after 5 days, he could have very well mustered courage to disclose it on the following day. Further in our judgment, there remains no justification for his having not informed his wife or other family members about the incident. In his cross-examination, when he was specifically asked in paragraph 5, he stated that he stayed for 3 to 4 days at his house and did not disclose the incident even to his family members. This, we are not prepared to accept.”

76. In ***Narendrasinh Keshubhai Zala v. State of Gujarat*** reported in **2023 SCC Online SC 284** at Para 11, it was held as follows:

“11. PW 3 states that the incident left him shocked and stunned. He was so scared that he ran towards the society where he met his uncle HarshadVeljibhai (PW 9) and his friend Manish Natvarlal Trivedi (PW 8) whom he informed of the incident. Seeing his condition, he was asked by his uncle to go home and sleep. Next morning, he went to the house of Ram and narrated the incident to his mother and sister HeenabaPradipsinhZala (PW 2). Thereafter he went to the hospital and informed Ram's father (PW 1) of the incident.”

77. The versions of the eyewitnesses are therefore wholly suspicious and disbelieved by this Court.

I. The Credibility of the Statements and Evidence of the Eyewitnesses.

78. The evidence and credibility of an eyewitness account recorded more than 2 years after the incident and order after the prosecution came to know of the murder of the victim, is totally unexplained and therefore could not have been relied upon by the Trial Court. It further appears from the evidence on record that each of the eyewitnesses namely PW 12,13,18 and 25 have deposed identical and parrot-like and as tutored-like witnesses. Their evidence cannot be accepted without any manner of corroboration. The medical evidence itself is seriously doubtful as in the identification of the deceased. Reference in this regard is made at Para 5 of the decision of the Supreme Court in the case of ***Rambilas & Ors. v. State of MP*** reported in ***AIR 1997 SC 3954***.

“5. We have very carefully gone through the judgments of both the courts below and with respect we find that notwithstanding the concurrent judgments thereof we are unable to sustain the convictions of the appellants on any count. It is well settled that this Court would be slow to interfere with the findings of facts recorded by the courts

below which are based on appreciation of evidence but we are of the considered view that the Sessions Court as well as the High Court have mechanically read the evidence of the eyewitnesses and totally ignored the well-known principle of appreciation of evidence. We have very carefully gone through the evidence of PW 2, PW 3, PW 5 and PW 6 who claimed to be the eyewitnesses. If we compare the evidence of these eyewitnesses it is immediately noticed that their evidence is just like a parrot telling what is taught. Even the omissions, contradictions and improvements are identical. The claim of these eyewitnesses is totally unbelievable when they testified that they had gone to the place of occurrence. The distance between their houses and the place of the occurrence is said to be one furlong. It was night time and the only light available was that of the moon. A festival "Ganga Dashara" was being celebrated in the village and these witnesses claimed that they heard the noise of *marpeet* by sticks and, therefore, they woke up. During the cross-examination they tried to explain by saying that they were not fully asleep and, therefore, could hear the noise of *marpeet*. They claimed that they had not consumed any liquor. Their further claim was that when they went to the place of the occurrence they all had earlier met at a place which was in front of the house of Sukhnath (PW 5). The claim of Sukhnath was that he overheard the talk between other eyewitnesses and, therefore, he came out and went along with them to the place of the occurrence. The claim made by these eyewitnesses in their examination-in-chief was that they had actually seen the assault on Deosharan by the appellants but during cross-examination they admitted that they did not see the actual assault as they were prevented from going to the place of the occurrence by the appellants. The talk between the appellants and these four eyewitnesses was again absolutely identical without adding a word "less" or "more". In addition to the above, the salient feature of their evidence is that after some time they again went to the place of the occurrence but they could not see the appellants as well as the dead body. They searched for the appellants during the whole night. This claim of these eyewitnesses is difficult to accept because according to them, they had already been threatened by saying that if they made any noise they would meet the same fate like Deosharan. The assertion of these witnesses that they had gone to the place of the occurrence during that night appeared to us a cock and bull story. Another circumstance that weighed with us is that despite such a ghastly attack on Deosharan, none of them ever thought of going to the father of Deosharan to inform him about the incident. They also did not go to the police station during the same night to lodge the first information report. Furthermore, the story of these eyewitnesses as regards the assault on Deosharan is also not corroborated from the medical evidence. Dr S.S. Pankera (PW 4) had noticed three external injuries on the head and many small injuries on the whole chest, backside and both feet, knees and below the knees. Dr S.S. Pankera further opined that the dead body was mutilated and there was a fracture on occipital portion and blood clot was present inside the skull. One has only to test this evidence on the touchstone of probability that when the five appellants were simultaneously attacking Deosharan with the sticks in their hands, of which the noise was heard from a distance of one furlong, there ought to have been

many more injuries on the dead body of Deosharan. After going through the evidence of these four star witnesses who constituted the backbone of the prosecution story, we are of the considered view that in all probabilities it was a blind murder.”

J. Delay in recording Statements under Section 164 of the CrPC

79. On the inordinate delay by the police of nearly 2 and a half years particularly of the statement of the alleged eye witness PW 12,13,18 and 25, the prosecution has failed to explain the delay between July 2012 wherein PW 18 informed that the murder of the victim and the recording of the statements under Section 161 and 164 of the aforesaid eyewitnesses, in July 2013 an adverse inference may be warranted in terms of Section 114 of the Evidence Act. Reference in this regard is made to the case of **Natthu Singh Vs State Uttar Pradesh** reported in **2023 SCC Online SC 78** at Para 11 and 12, the Supreme Court held as follows:-

“**11.** The perusal of the evidence of IO/PW 6 (LalmaniGautam) would reveal that there is no explanation as to why the statement of the witnesses was recorded belatedly. The only explanation given by him is that he has recorded the statement of these witnesses after the investigation was given to him.

12. We find that the inordinate delay in recording the statement of the witnesses, coupled with no explanation to that effect from the IO and further the conduct of PW 3 would bring him in the category of witnesses who are not wholly reliable. In our considered view, conviction on the sole testimony of such a witness, without there being any corroboration to his evidence, would not be justified.”

80. The inordinate delay in recording the statements of the witnesses is also fatal to the prosecution case. It would seriously question the very foundation of the prosecution case. Reference is also made in this regard to Para 5,6,7 and 8 of the decision of the Supreme Court in the case of **Balakrushna Swain & Ors. v. State of Orissa** reported in **(1971) 3 SCC 192** and at Para 5 in the case of **Gayadin v. State of MP** reported in **(2005) 12 SCC 267**.

81. In ***Sahid Khan v. State of Rajasthan*** reported in ***AIR 2016 SC 1178*** at

Para 11, it was held as follows:

“11. Ashok Kumar died of homicidal violence is evident from the medical evidence adduced in the case. PW 17, Dr Arvind Kumar Bohra who conducted post-mortem found 4 stab incised wounds in the abdomen and 2 incised wounds on the forehead and left thigh. Ext. P-21 is the post-mortem report issued by him in which he has opined that the cause of death was haemorrhagic shock as a result of cutting of pedicle of spleen omental and mesenteric vessels. From the above it is clear that Ashok Kumar died of injuries sustained in the occurrence.”

82. In ***Harjinder Singh alias Bhola v. State of Punjab*** reported in ***(2004) 11***

SCC 253 at Para 13, it was held as follows:

“13. The evidence of PW 6 is evidently meant to build up the “last seen” evidence. Her version that at the instance of the two accused the victim left the house is open to serious doubt. If her version is truthful, one would expect PW 3 contacting the two accused or their leader. It was nobody's case that PW 3 went to the houses of those persons and tried to make inquiries. It is seen from the deposition of PW 6 that her statement was recorded on 6-4-1994 i.e. about three months later, for which no explanation is forthcoming.”

83. In ***Ramesh and Anr. v. State of Karnataka*** reported in ***(2024) 9 SCC 169***

at Para 16, it was held as follows:

“16. More damaging is the fact that the statements of PW 2 and PW 3, the so-called eyewitnesses, were recorded under Section 161CrPC one month after the date of the incident. This delay on the part of the investigating officer in recording their statements weighed heavily against the prosecution. Reliance was placed by the trial court on the judgment of this Court in *Gayadin v. State of M.P.* [*Gayadin v. State of M.P.*, (2005) 12 SCC 267 : (2006) 1 SCC (Cri) 549] to infer the possibility of these witnesses being planted witnesses.”

84. Equally relevant is the decision of the Supreme Court in the case of

AlilMollah & Anr. v. State of West Bengal reported in ***(1996) 5 SCC 369***

at Para 7, it was held as follows:

“7. On his own showing PW 3 was an employee of the deceased. He was present, according to his testimony, when the deceased was assaulted by the appellants. He admits that after committing the crime the appellants and their associates fled away. The witness, however,

not only did not raise any alarm when his master was being assaulted, he did not go near his employer even after the assailants had fled away to see the condition in which the employer was after having suffered the assault. According to him he got frightened and fled away to his home. He also admitted in his cross-examination that neither at his home nor in the village did he disclose what he had seen in the evening of 4-2-1982 to anyone. Though in the morning of the following day, the witness went to the brick-fields of the deceased-employer and many of his co-employees were also present there, he admitted that he did not disclose the occurrence to anyone of them and went on to concede that even to the Manager of the brick-fields he gave the information about the occurrence only 2-3 days after the occurrence. His statement was recorded by the police on the next day in the afternoon. This conduct of the witness that he did not tell anyone about the occurrence till the next day appears to be rather unnatural and creates an impression that he had not witnessed the occurrence. The witness however tried to take shelter on the plea that he was 'frightened' and therefore till he appeared before the police, he did not pick up courage to inform anyone either in the village or in the brick-fields regarding the occurrence. This plea does not impress us. From the statement of the investigating officer, PW 12, we find that after having visited the scene of occurrence, he went to the village where the witness resides, on the night of 4-2-1982 and remained there till 5-2-1982. It is not understandable why the witness who was in the village did not appear before the investigating officer, when he was camping in the village throughout the night or even the next morning. No explanation whatsoever has been offered by him. PW 3, in view of his unexplained silence, delayed statement to the police and relationship with the deceased, therefore, does not appear to us to be a wholly reliable witness. There is no corroboration of his evidence from any other independent source either. In the absence of any corroboration of his testimony we find it rather unsafe to rely upon the evidence of PW 3 only to uphold the conviction and sentence of the appellants. Indeed both the courts below have relied upon the statement of PW 3 and found him to be a reliable witness but unfortunately neither the trial court nor the High Court have adverted to the admissions made by the witness in his cross-examination, which we have noticed above. Though this Court sitting in appeal by special leave does not normally reappraise the evidence, which has been appreciated by the two courts below unless there are compelling reasons but with a view to satisfy our judicial conscience we have examined the statement of PW 3 critically and are of the opinion that the appreciation of his evidence by both the courts below was not proper as admissions made by him in his cross-examination which materially detracted from his reliability were not at all noticed by the courts below thereby resulting in miscarriage of justice. To perpetuate an error is no virtue but to rectify it is a compulsion of judicial conscience. We find ourselves unable to agree with the findings recorded by the courts below with regard to the reliability of PW 3. There is no corroboration of his evidence to connect the appellants with the crime. In our considered view, on the basis of critical analysis of the evidence on the record, we are of the opinion that the case against the appellants has not been proved beyond a reasonable doubt. Consequently, this appeal succeeds and is allowed.

The conviction and sentence of the appellants is hereby set aside. The appellants are on bail. Their bail bonds shall stand discharged.”

85. Admittedly as already found hereinabove PW 12, 13, 18 and 25 criminal cases are either pending against them or they are prosecution witnesses in other cases for the State. Their evidence cannot be accepted by this Court without appropriate corroboration. No such corroboration has been brought on record. In the aforesaid circumstances, they must be deemed as fully unreliable by this Court. Reliance in this regard has been placed in the case of ***State of Orissa v. Brahmananda Nanda*** reported in **(1976) 4 SCC 288** in paragraph 2 thereof.

“2. The entire prosecution case against the respondent rests on the oral evidence of Chanchala (PW 6) who claimed to be an eyewitness to the murder of Hrudananda, one of the six persons alleged to have been killed by the respondent. The learned Additional Sessions Judge believed her evidence, but the High Court found it difficult to accept her testimony. The High Court has given cogent reasons for rejecting her evidence and we find ourselves completely in agreement with those reasons. We have carefully gone through the evidence of this witness, but we do not think we can place any reliance on it for the purpose of founding the conviction of the respondent. The evidence suffers from serious infirmities which have been discussed in detail by the High Court. It is not necessary to reiterate them, but it will be sufficient if we refer only to one infirmity which, in our opinion, is of the most serious character. Though according to this witness, she saw the murderous assault on Hrudananda by the respondent and she also saw the respondent coming out of the adjoining house of Nityananda where the rest of the murders were committed, she did not mention the name of the respondent as the assailant for a day and a half. The murders were committed in the night of June 13, 1969 and yet she did not come out with the name of the respondent until the morning of June 15, 1969. It is not possible to accept the explanation sought to be given on behalf of the prosecution that she did not disclose the name of the respondent as the assailant earlier than June 15, 1969 on account of fear of the respondent. There could be no question of any fear from the respondent because in the first place, the respondent was not known to be a gangster or a confirmed criminal about whom people would be afraid, secondly, the police had already arrived at the scene and they were stationed in the clubhouse which was just opposite to the house of the witness and thirdly, A.S.I. Madan Das was her nephew and he had come to the village in connection with the case and had also visited her house on June 14, 1969. It is indeed difficult to believe that this witness should not have disclosed the name of the

respondent to the police or even to ASI Madan Das and should have waited till the morning of June 15, 1969 for giving out the name of the respondent. This is a very serious infirmity which destroys the credibility of the evidence of this witness. The High Court has also given various other reasons for rejecting her testimony and most of these reasons are, in our opinion, valid and cogent. If the evidence of this witness is rejected as untrustworthy, nothing survives of the prosecution case.”

86. Reference in this regard is also made to the decision of the Supreme Court in the case of ***Mahendra Singh & Ors. v. State of MP*** reported in **(2022) 7 SCC 157**. Applying the test laid down under Para Nos. 12 and 13 thereof, this Court is of the clear view that the alleged eyewitnesses PW12, PW13, PW 18 and PW 25 come under the category of wholly unreliable witnesses.
87. The eyewitness PW 12, 13 and 18 allegedly carried the body of the victim into the Maruti WagonR. PW 13 helped in tying up the body. PW 18 was the owner of the vehicle. PW 12 and 25 did not disclose to the police of the murder of the victim by Babai and, therefore, shielded him. The said PW 12, 13, 18 and 25 could therefore also be deemed as accomplices to the crime.
88. The evidence of an accomplice cannot be accepted without any corroboration. Reference in this regard is made to the decision of ***State of Kerala v. Thomas alias Bobby*** reported in **1986 SCC (Cri) 176** at Para 5 thereof is held as follows:

“5. Turning to the evidence of PW 14, the taxi driver, it cannot be disputed that on his own showing he would be an accomplice and, therefore, his evidence cannot be accepted unless it receives independent corroboration. True, when the taxi driver took the respondent-accused in his taxi to the locality where the tea shop of deceased Joy was situated it would be an innocent trip but when the respondent-accused returned back to his taxi with all his body and clothes stained with blood there was every reason for him to suspect that there was something amiss and particularly when the respondent-accused on the return journey tried to change his clothes and later on disposed of those articles by going to the house of PW 15, he surely became an accomplice in the offences committed by the respondent-accused. Actually, the prosecution

has relied upon the extra-judicial confession said to have been made by the respondent-accused to this witness when he entered the taxi after committing the crime. In helping the respondent-accused to escape after the commission of the crime PW 14 could be said to have become *particepscriminis* after the event and as such his evidence would require some independent corroboration before it can be accepted and the important corroborative evidence that was sought to be relied upon by the prosecution was the trip-sheets (which we are informed are in the nature of log-books) produced on record showing the movement of the taxi from place to place, distance travelled and the consumption of petrol, etc. But unfortunately, the trip-sheets themselves are not free from doubt because they are in loose sheets and not in any bound book which ordinarily an owner of the taxi is supposed to maintain. The High Court was unable to rely upon these trip-sheets as corroborative evidence. The witness's subsequent conduct in keeping mum about the incident and about his carrying the accused-respondent to the tea shop of the deceased and carrying him back to the house of PW 15 and not disclosing anything to anyone for quite a few days till he was contacted by the police also assumes significance. In the circumstances we cannot say that the High Court was wrong in not accepting the evidence of PW 14 for want of independent corroboration."

89. Admittedly there is no independent corroboration of the eyewitness accounts.

K. Witness involved in Criminal Cases in the past and Stock Witnesses of the prosecution.

90. Admittedly each of the four alleged eye witnesses of the prosecution were involved in Criminal cases and or were prosecution witnesses for the State in several cases. Each of the alleged eyewitness deposed parrot-like. There are other serious infirmities in the prosecution case pointed out hereinabove including the identification of the dead body. There is a contradiction in the evidence of the family witnesses and the prosecution witnesses. The evidence of the eyewitnesses cannot therefore be given any credence by this Court.

91. At Para 18 in the case of ***Abdul Wahid and Anr. v. State of Rajasthan*** reported in **2025 SCC Online SC 453** it was held as follows:-

"18. Let us now briefly analyse the evidence of the prosecution

witnesses as alluded to hereinabove. Coming first to the evidence of PW-1, his conduct appears to be highly unusual. When the police station was only 200 meters away from the place of crime, instead of rushing to the police station to save himself and also to inform the police about the assault on Ahsan, he goes into the lane of Gauri Hotel and hid himself there. He did not raise any alarm either. PW-1 contradicted himself by first saying that Ahsan was injured by the knife blows before he fell down from the motorcycle but in the same breath, he goes on to say that Ahsan was stabbed after he fell down. He also deposed that there were about 100 people in and around the crime scene but none came to the rescue of Ahsan which is also quite unusual. Besides being entangled in several criminal cases, it has also come on record that he is a stock witness of the police to depose in favour of the police in other cases including in a case where one of the present accused persons Aziz @ Patti was an accused. Evidence of such a witness without further corroboration cannot form the basis to convict an accused.”

92. A stock witness speaks in favour of the prosecution on the asking and compulsion of the police. A stock witness does not remain present in the PO nor does he or she come to acquire any hearsay knowledge from the prosecution witnesses by his or her natural interaction with them. He is tutored by the police to give evidence, thus he or she is an artificial and planted witness. The Supreme Court in ***Prem Chand v. Union of India*** reported in **(1981) 1 SCC 639** said:

“5. Certain facts emerge as fairly probable from the affidavits of both sides. Prem Chand made a living as a paniwala or vendor of soft drinks near Delite Cinema even as a teenager, which shows that he had very poor beginnings. **How did he fall into the thrall of the local police? He explains it in his affidavit:**

“He had a few mobile carts which were used for refrigerating water. These carts used to be parked by the petitioner on the roadside due to the indulgence of the police. He was in his teens when he started his avocation and continued for a very long time. Thus, he acquired an alias i.e. Prem Chand Paniwala.

Due to close association with police and their connivance and indulgence, the petitioner thrived. In this process, the petitioner became a prey and pawn in the hands of the police. He was persuaded to be their perpetual stooge and stock witness.

The petitioner in the year 1965, when he was 25 years old was involved in a gambling case by the police to mould him a permanent

stock witness and lest he should be militant to defy them. Despite his hesitation and unwillingness he was forced to become a permanent pawn of the police. This is how, the petitioner landed himself in the web of the police; he had no alternative than to be like that as his livelihood was dependent upon the mercy and indulgence of the police.”

The version of the petitioner is that once he yielded to the pressure of the police to give false testimony disclosing a rubberised conscience and un-veracious readiness to forswear himself, there was escalation of demands upon him and he became a regular pedlar of perjury “on police service”. Indeed, counsel for the petitioner argued that his client was a “stock witness” because he had to keep the police in good humour and obliged them with tailored testimony in around 3000 cases because the alternative was police wrath....Were he not omnipresent how could he testify in so many cases save by a versatile genius for loyal untruthfulness?..

6. The reason why the petitioner has divulged his role as professional perjurer for the police is simple and credible, at this price, the favours of the police who allowed him to carry on his soft drinks business on the public street near a cinema house, not otherwise permissible under the law. The police blinked at the breach, the petitioner made good profits and by this mutual benefit pact, the prosecution got readymade evidence and Paniwala joined the nouveau riche. He became respectable when he became rich and when he became respectable he became reluctant to play “stock witness”. For “the more things a man is ashamed of the more respectable he is” (Bernard Shaw). Whenever he resisted the demand for giving false evidence the police implicated him in some case or other and when he yielded, the case was allowed to lapse. Indeed, it is surprising that the petitioner himself admits that he was “dubbed as a stock witness and often disbelieved by the courts.....Various details are furnished by the petitioner about his deposing on prosecutions for the survival of his business.....”

93. In ***Sri Bhagwan v. State of U.P.*** reported in **(2013) 12 SCC 137** held as follows:-

“12.. At the very outset, it will have to be stated that except submitting that PWs 1 and 3 were stock witnesses, nothing more was pointed out by the learned counsel to support the said contention. Further, when we examine the depositions of the said witnesses they disclose that they were actually guarding the area as members of the residential colony. According to them, the place of occurrence, namely, the bus-stand of Dayalbagh is at a distance of about 250 yd from their colony. They also stated that when they heard the pathetic cries of the deceased, they could notice the accused assaulting the deceased which they were able to see from the street light brightness and that when they rushed towards the deceased, the accused who was throwing acid on the deceased started fleeing and that as they shouted

at him, the passers-by caught hold of the accused and that is how they were able to bring the deceased as well as the accused to the police station. Nothing was put in cross-examination to state that these witnesses had either tendered evidence at the instance of the police in any other criminal case or even a suggestion that they were stock witnesses of the police. There is nothing on record to show that these witnesses had earlier deposed in any other criminal case in order to even remotely suggest that they were being used as stock witnesses by the police authorities.

13.It can be stated that as per the version of PWs 1 and 3 while they were guarding the area as responsible residents of a nearby colony they heard the cries of the deceased and they rushed to the place of occurrence to help the deceased when they were able to witness the act of the appellant in sprinkling acid on the deceased and the attempt of the appellant to flee from the scene of occurrence which was successfully thwarted by the witnesses along with others standing nearby. Their statement in narrating the incident in such a sequence was really convincing and it was quite natural and acceptable in every respect without giving room for any doubt. Moreover, as rightly pointed out by the learned counsel for the respondent, they were not interested in any manner in the deceased. They were total strangers and their presence as claimed by them was justified in every respect and, therefore, there was no room to doubt their version in having stated that it was the appellant who was responsible for causing acid injury on the deceased. The said submission of the learned counsel for the appellant, therefore, does not merit acceptance. “

94. Apart from the fact that PW 12, 13, and 25 were known to the police either from the criminal cases being registered against them or on any of them having deposed in favour of the prosecution and thereby satisfies one of the criteria of being a stock witness, it must be noted that all 4 PW(s) have deposed that the accused Babai has given them phone calls for being present in the alleged PO. It is as if Babai invited them to see the execution of the victim so that in the future, they could depose as eyewitnesses. Accordingly, all of them went to the alleged PO and saw the victim being killed by the accused persons.

95. PW 26 in his application dated 20th May, 2013 before the Magistrate stated

that he examined the father and brother of the victim but not the mother or PW 17. In his deposition however PW 26 stated that he had examined the mother as well as the brother of the victim.

96. PW 27 deposed that he visited the house of the victim on 30th May, 2013 and obtained endorsement of the family of the victim on the photograph. The date of endorsement on the reverse of the photograph markings exhibited in the Court below indicates that it was done on 20th May, 2013. There is a clear contradiction between the first and third IO in their deposition in the Trial Court. PW 11 and 17 stated that they were not examined by the police, contrary to the deposition of PW 26 and 27.
97. Strangely the father and wife of the victim were neither cited as witnesses nor called for any evidence. Reference in this regard is made in the case of ***Stephen Seneviratne v. King*** reported in ***1936 SCC Online PC 57***, relevant portion of the said decision is quoted herein below:

“Witnesses essential to the unfolding of the narrative on which the prosecution is based must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against its case.”
98. For, inter alia, the reasons stated hereinabove, the impugned judgment and order of conviction cannot be sustained and are hereby quashed and set aside.
99. Each of the appellants shall be set at liberty, subject to them not being required to be in custody in connection with any other criminal proceeding and subject to their executing a bond to that effect.
100. There shall be no orders as to costs.

(RAJASEKHAR MANTHA, J.)

I agree.

(AJAY KUMAR GUPTA, J.)