

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

CRA 704 of 2016

Mekail Mondal & Ors.
Versus
The State of West Bengal

For the Appellant	: Mr. Fazlur Rahman, Advocate Mr. Babul Hussain, Advocate Mr. Mihinur Hussain, Advocate Ms. Dona Sanyal, Advocate
For the State	: Mr. Debasish Roy Ld. P.P Mr. Rudradipta Nanady , Ld, A.P.P. Ms. Sanjana Saha, Ld. Advocate
Hearing concluded on	: September 25, 2025
Judgment on	: September 26, 2025.

Rajasekhar Mantha, J.

1. The subject appeal is directed against the judgment and order of conviction dated 3rd November, 2016 and 4th November, 2016 passed by Additional Sessions Judge, Fastrack 4th Court, Barrackpore in Sessions Trial No.

01(12)2009 arising out of Sessions Case No. 402 of 2009. The appellants were convicted under Section 302 read with Section 34 of the IPC.

THE PROSECUTION CASE

2. On May 25, 2009, Golam Mostafa Mondal, the victim, and his wife, being PW 2, went to their mango garden/orchard to unclog the water accumulated thereat, and collect the mangoes fallen thereon as a result of the cyclonic storm named 'Aila'.
3. The appellants were found to have been stealing the fallen mangoes from the said garden. The victim is stated to have shouted at them and asked them not to steal the mangoes. They fled the scene. They came back later with arms, or picked them up from the PO , namely Shabol, Kodol, spade and other sharp cutting weapons and grievously assaulted the victim thereat. The victim died on the spot.
4. PW 1, brother of the victim lodged the written complaint on the same date. He is stated to have arrived at the spot upon hearing the hue and cry of the wife of the victim, PW 2
5. The PW 2 and PW 3 are stated to be the eyewitnesses to the assault on the victim by the appellants. The victim is stated to have shouted out 'Maa' (mother) before his death. Most of the prosecution witnesses are stated to have arrived at the spot upon hearing the hue and cry of PW2.
6. An inquest was conducted at the PO late in the afternoon. The inquest officer found several injuries on the middle of the head and neck of the victim, caused by sharp cutting weapons. The inquest report recorded the preliminary versions of the witnesses that that the appellant Sahajan Mondal

had hit the victim with an axe on his head. As a result of this, the victim died on the spot. The inquest report also records that the appellants were stealing the mangoes from the PO.

7. Post-mortem was conducted. The cause of death is found to be homicidal. As many as eighth injuries were found on the deceased.
8. The SI Rajesh Kumar Chawhan conducted the investigation. The appellants were charge-sheeted and tried for the offence under Section 302, IPC read with Section 34 of the IPC. The accused Israfil Mondal was absconding.

THE EVIDENCE AND CHARGE ON RECORD

9. **PW 1 is Latib Mondal.** He is the brother of the victim. He is the complainant in the FIR. He has deposed that he has arrived at the PO upon hearing the hue and cry of the wife of the victim and another woman of the village. He found the victim in a pool of blood. He saw the wife of the victim hugging him and crying.
10. He came to learn from the wife of the victim that the appellants came to steal mangoes and upon being confronted by the victim, they picked up a fight with him. The appellant Mekail Mondol thereafter took a spade from the PO and attacked the victim. The other appellants Sahajahan Mondol hit the victim with a Shabol and Fateh Ali Mondol hit the victim on his face, neck, and head. He deposed that the appellant Ismail Modal exhorted the other appellants to beat the victim.
11. PW 1 was a witness to the recovery of the spade from the bush in front of the house of the appellant namely Mikail Mondol and the recovery of the Shabol in front of the house of the Shahjahan, the other appellant.

12. He further deposed that the police arrived at 7 pm. During his cross-examination, he stated that he could not mention that above facts in his written complaint given that he was in grief over losing his brother. He deposed that appellants had enmity with the family of the victim and victim himself on the latter being more financially sound than the former.
13. **PW 2 is Sahana Bibi.** She is the wife of the victim. She is stated to be an eyewitness to the crime. She has stated to have accompanied her husband to the mango orchard, the PO. She has deposed that the appellants were stealing mangoes from the PO. The victim having shouted at them, the appellants fled the scene. They however came back. Mekail was armed with spade, Shahjahan with a Sabol, and Fateh Ali Mondol with a sword like weapon. The absconding accused Israfil was armed with an iron part of a vehicle. They attacked the victim.
14. She has deposed that she attempted to save the victim; however, upon being the beaten by the appellants, the victim fell down at once giving a shout out of 'Maa'. The appellants however have not attacked her. She has suffered no injuries despite being present when the appellants were beating the victim. She has stated that her sister in law, being PW 3 and father-in-law, being PW 4 arrived at the spot hearing her hue and cry.
15. **PW 3 is Firoja Bibi.** She is the sister of the victim. She has deposed that she was on her way to the pond to have a bath, when she saw that the appellants were beating the victim. The rough sketch prepared indicates that the pond is close to the PO. She has deposed that the absconding accused Ishrafil Mondal and the appellant Ismail Mondal were instigating the other appellants to beat the victim. She has corroborated the version of PW 2 on the appellants

carrying sharp weapons. She has also heard the victim shouting out 'Maa' before he fell down on the ground at once. She has deposed that the appellants may have derived motivation to kill the victim out of a long-standing enmity with the family of the victim. The protest and resistance of the victim against the appellants stealing mangoes from the former's garden was therefore the trigger for the crime.

16. **PW 4 was Kalu Mondal.** He is the father of the victim. He has deposed that he heard the hue and cry of the victim and his wife, whereupon he rushed to the said mango garden. He supports the version of PW 1 in that he found PW 1 running towards the PO. He is stated to have seen PW 3, the daughter of PW 4, going to the nearby pond to take a bath.

17. He has deposed that he has seen the appellants along with the absconding accused with weapons as stated by PW 2. He has further stated that he has in fact seen the appellants beating the victim. However, he is stated to have arrived at the said garden upon hearing the commotion, and cries of PW 2. The victim is stated to have fallen and died on the spot after shouting out Maa.

18. **PW 5 is Fazer Ali Gazi.** He is the brother-in-law of the victim. He is a hearsay witness to the appellants having beaten the victim to death. He has deposed that he found the body of the victim in the PO. He found the father of the victim crying near the body of the victim. He is a witness to the seizure of Sabol in front of the house of the appellant Shahjahan. He has put his signature on the said seizure list. He has deposed that the police arrived at the place of occurrence between 2:30 PM to 3 PM on the fateful day of May 25, 2009.

19. **PW 6 is Majeda Bibi.** She is the mother of the victim. She has deposed that she has seen the victim going to the said garden. She has further seen the appellants stealing mangoes from the said garden. She has deposed to have seen the victim being beaten by the appellants upon the former's protest against the appellants on stealing the mangoes. She heard the hue and cry of PW 2, whereupon she rushed to the said garden. However, upon her arrival she saw the victim lying dead. She became unconscious upon seeing the same. The rough sketch indicates that the garden is at front of the house of the victim. Thus, PW 6 being sitting on the verandah of the said house could have seen the victim being beaten up by the appellants. She has seen the appellants running away from the PO.

20. **PW 7 is Niranjan Sarkar.** He claimed to know the victim. He has heard the news of the death of the victim. He has seen the victim lying dead in the mango garden. He has confirmed the presence of the father of the victim, i.e. PW 4 and brother, PW 1 at the PO. He has deposed that the police recovered Kodal as per the statement of the appellant Mekail Mondal. The said statement has been made in the presence of PW 7. It however appears that he has not been shown the Kodal in the Trial Court as he said in his deposition that he could identify the same, if shown to him.

21. **PW 8 is Khurshed Ali Mondal.** He came across some of the appellants Mekail Mondol and Fateh Ali Mondol on his way to home. The said appellants told him that the victim had assaulted them. He heard a noise and came to the mango garden, whereupon he heard that the appellants have killed the victim. He has deposed that the police have arrived between 2:30-2:45 PM. He

has confirmed that the mother of the victim was unconscious when he arrived thereat. He further deposed that he worked in the house of the victim 2 years before the victim's death. The likelihood of the appellant receiving injuries from the retaliation or attack from the victim thus could not be ruled out.

22. **PW 9 is the post-mortem doctor.** He has deposed that the nature of the injuries indicates that the injuries are caused by human intervention. He has deposed that the brain of the victim was severely injured. The list of injuries is set out herein below:-

- “(1) One lacerated wound 2 inch X 1½ inch X Bone vertically over the frontal area immediately to the right from interior midline and immediately above the hair line having depressed fracture of the underlying frontal bone,
- (2) One lacerated wound 1 inch 1½ inch X bone, 1 inch below the injury No. 1 & 3/4 inch from the anterior midline and 1 inch above the right eye brow having fracture of the underlying frontal bone,
- (3) One lacerated wound 1 & 1/2 inch X1Xbone on the root of nose having fracture of the underlying nasal and frontal bones associated with extrusion of brain matter through wounds,
- (4) One lacerated wound 2 inch X1/2 inch Xbone transversely immediately below right eye brow having fracture on the underlying bone,
- (5) One fractured wound 1inchX1/2inchXbone on the right temporal region vertically having dislocation of the underlying temporal bone,
- (6) One lacerated wound 2 inch X 1/2 inch X bone on the right zygoma associated with abrasion tailing of about 1 inch above the staring point and below the end of the wound on the screen having fracture on the maxillary bone,
- (7) One lacerated wound 1 inch X 1/2 inch X muscle on the right upper lip,
- (8) One lacerated wound 1 inch X 1½ inch X muscle on the back of the left little finger.

23. **PW 10 is Rajesh Kumar Chawhan.** He is the IO of the case. He deposed that he conducted the inquest on the victim. He has deposed that he recovered Kodai from Mekail Mondal and Sabol from the Sahajan, the appellants. He deposed no trees were found to have fallen on the said ground i.e. at the PO. He however stated that the details in the evidence of PW 1- 6 were not related to him during examination of the said PW(s).

24. The accused were examined under Section 313. They have denied all the evidence and the circumstances appearing against them.

THE FINDINGS OF THE TRIAL COURT:-

25. The victim was found in the mango garden, the PO. The appellants were also present there. The PW 2 and PW 3 have seen the appellants beating the victim to death. The other prosecution witness found the victim in said garden. All the PWs have heard that the appellants have killed the victim. The weapons recovered from a place close to PO and the same have been seen in the hands of the appellants connect the appellants with the crime. The appellants are therefore guilty of the offences charged.

ANALYSIS OF THIS COURT:-

26. Learned counsel for the appellant argues that the evidence of PW 1 cannot be relied on. He has made material additions to the contents of his Written Complaint while deposing before the Trial Court. The contents of the FIR and the writing complaint may be used to contradict a deposition given before the Court. Section 11 of the Evidence Act is referred to in this regard.

27. This Court notes that Sec. 11 is attracted when a set of facts, which are otherwise irrelevant to the case, become relevant as they appear to contradict the facts at issue. The written complaint of PW 1 does not contradict his deposition before the Court. He has added the name of Israfil Mondal in his deposition. PW 10, the IO, was examined in this regard. He has confirmed that the names of the said persons were not mentioned in the FIR. The IO, however, has not said that such names were not taken before him during interrogation of PW 1. The accused must have been named before the IO since the police arrested the appellants Mekail, Shahjahan, Ismail Mondal, and others. The other accused Ishrafil continues to be absconding.

28. A written complaint resulting in an FIR need not contain all the details. An FIR is not an encyclopedia. The appellants attempted to build a case in the Trial Court that the victim died as a result of trees falling on him during the cyclone Aila. The evidence of the PW(s) as regards the time of the arrival of the police at the PO varies. The appellants argued before the Trial Court that the police were initially reluctant to lodge an FIR. The said reluctance of the police authorities may have been based on the impression that the victim had not been killed rather met with an accident of a tree falling, as a result of Cyclone. Thus, the police may have arrived at the PO on several occasions to verify the claim of killing.

29. In the above backdrop, PW 1 distressed by the death of his brother cannot be expected to articulate every detail of the incident in his written complaint to the police. The PW(s) are villagers. Their evidence has to be appreciated in light of the decision in **Shivaji Sahebrao Bobade v. State of Maharashtra**, reported in **(1973) 2 SCC 793**, followed in **Goverdhan & Anr. State Of Chhattisgarh** reported in **2025 INSC 47 (See Para No. 54)**. Para no. 8 of **Shivaji case (supra)** is set out below:-

“8. Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. **When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered.....**

Emphasis applied

30. The decision of **Ram Kumar Pandey v. State of M.P.** reported in **AIR 1975 SC 1026** has been relied by the Counsel for the appellant to argue that PW 1 ought to have stated all the names of the accused and further should have specified which appellants carried which weapon, in his written complaint. PW 1 ought to have further stated to who gave the death blow to the victim.
31. In **Ram Kumar Pandey case (Supra)** the sister of the victim has seen the accused giving death blows to the victim, her brother. Their father lodged the written complaint based on the eye witness account of her daughter, the sister of the victim. The absence of name of the sole accused in the FIR, whose name ought to have been informed by his daughter, an eye witness, was held inconceivable, and hence the complaint was found unreliable. Section 11 thus was invoked to discredit the prosecution case.
32. In the case at hand, PW 1 did not see the appellants inflicting blows on the victim. He has heard from the wife of the victim about the actions of the appellants towards the victim. He therefore cannot be expected to gather all the details at that tragic time from the wife of the victim. He however has seen the appellants with the weapons. In the complaint filed by PW 1, he has mentioned the appellants as assailants. The omission to mention the absconding Ishrafil and all other details as deposed therefore cannot attract Section 11 of the Indian Evidence Act, 1872. The deposition of the PW 1 has withstood cross examination. The defense has not put any suggestion to him as regards the said minor omission. The decision in **Ram Kumar (Supra)** thus is inapplicable to the facts of the present case.

33. The other PWs have clearly supported the deposition of PW 1. The FIR is not a substantive piece of evidence. The same may, however, be used to contradict the deposition of a witnesses provided the evidence of other witnesses lends credence to such contradictions. The decision in **Goverdhan (Supra)** may be referred to in this regard:-

30. Though the FIR is not a piece of substantive evidence, especially, when the Complainant, i.e., PW-6 did not fully support the contents of the FIR, yet, it cannot be totally ignored and **is to be treated as a relevant circumstance if the same is proved by other prosecution witness**, in this case by PW-14, the SHO who recorded the report in the form of FIR as stated to him by the complainant.

Emphasis applied

34. The appellants have next argued that PW 2 is not an eyewitness to the murder of the victim. PW 3, the sister of the victim, has deposed that she saw PW 2 rushing to the PO upon commotion and shouts of the victim. The PW 2 has withstood the test of cross-examination. She was unequivocal in stating that she accompanied the victim in the garden. All the PWs were equally unequivocal in stating that they saw the PW 2 hugging the victim and crying. PW 3, however, saw the crime from a distance. She was on her way to the pond.

35. The appellants did not kill the victim by a single blow. The post-mortem report has found eight injuries on the head, neck and body of the victim. The victim first had a verbal spat with the appellants. The appellants left the spot and then again came back. PW 2 was present all along with the victim.

36. The victim and PW 2 may have been collecting mangoes and cleaning the ground at a distance from each other. The victim was given the death blow and thereupon, PW 2 ran towards the victim. The PO is a mango garden. Thus, PW 2 and the victim, working on different parts of the ground, may not

have followed each other like sheep. In that backdrop, the PW 3 may have seen the PW 2 rushing towards the victim. PW 2 thus gave an eye account of murder. The pond being at a level lower than the PO is really of no significance. PW 3 could have been standing on the edge of the pond and looking at P.O. after hearing the commotion. Reference in this regard is once again made to the decision in **Goverdhan (supra):-**

55. This Court also reminded that while dealing with the evidence of witnesses who are rustic, because of minor inconsistencies, the evidence should not be ignored....

Emphasis applied

37. The prosecution case is not that the victim was killed when PW 2 was standing beside him. PW 2 could have been standing at a slight distance to the victim. It is natural for a person to be scared of approaching the victim when he is being attacked by four persons with weapons. PW 2 could have sustained injuries in the process.
38. Learned Counsel for the appellants next argued that PW 3 admitted in her deposition that she presumed the motive of the appellants to kill the victim namely the long-standing enmity. Hence, her evidence on the motive for the crime is unreliable.
39. The motive of a person is preeminently peculiar to him. An outsider can only draw presumptions based on the conduct of the person concerned. The appellants did not argue that the presumption is baseless. No evidence has been adduced to rebut the presumption. The informed presumption of PW 3 therefore cannot be ignored.

40. Learned Counsel for the appellants has referred to the decision in **State of Haryana v. Mohd. Yunus & Ors.** reported in **2024 3 SCC 180** to argue that when the accused persons had previous enmity with the victim and his family, there may be every reason for the latter to falsely implicate the accused. The Court under **Para no. 23** of the **Mohd. Yunus (Supra)** doubted the credibility of the prosecution witnesses. In the present case, however, all the prosecution witnesses in one voice have deposed that the appellants were present at the PO; they were carrying weapons. The appellants have further pointed out the place from where the incriminating weapons have been recovered. In the case at hand, the evidence of the PW(s) thus is unimpeachable.

41. Learned Counsel for the appellants has referred to the decision in **Sunil Kumar Sambhu Dayal Gupta (Dr.) vs. State of Maharashtra** reported in **2010 13 SCC 657** to argue that the facts stated for the first time before the Court must be seen with suspicion. The Court under para no. 33 of **Sunil Kumar (supra)** observed that that the complainant therein has stated new facts for the first time before the Court. Such facts however were never stated even during his examination under Section 161 Cr.P.C. In the present case, PW 1 has lodged the written complaint under tragic circumstances. The IO has not stated that PW 1 did not inform him about the facts deposed in the Court during his Section 161, Cr.P.C. examination.

42. The appellants have argued that the recovery of Shabol from Shahjahan and Kodal from Mekail is not as per Section 27 of the Evidence Act. PW 5 has been a witness to the seizure of Shabol whereas PW 7 was a witness to the fact that the police having seized Kodal as per the instruction of the Mekail.
43. **The decisions in Nikhil Chanadr Manadal v. State of WB** reported in **2023 6 SCC 605 (Ref Para no. 20)**, **Manju Nath and Ors. v. State of Karnataka**, reported in **2023 SCC Online SC 1421 (Ref Para no. 27)** and **Abdul Wahid & Anr. v. State of Rajasthan** reported in **2025 SCC Online SC 453 (Ref para no. 21)** have dealt with Section 27 of the Indian Evidence Act. The Court deprecated the manner of recovery of weapons in the facts of the aforesaid decisions.
44. This Court however takes note of Section 8 of the Indian Evidence Act, which deals with the conduct of the accused person after the commission of the crime. The recovery was made on the date of the alleged crime. The same have been recovered in the presence of independent witnesses in front of the house of the appellants. They are not related to the appellants and victim and his family. The conduct of the two appellants namely Mekail and Shahajahan in pointing out the incriminating weapons to the IO thus is relevant to the crime committed. The decision in **Perumal Raja v. State**, reported in **2024 SCC OnLine SC 12** is referred to in this regard:-

35. Apart from Section 27 of the Evidence Act, **Section 8 of the said Act would be also attracted insofar as the prosecution witnesses, namely, the investigating officers, ChintaKodanda Rao (PW-30), Inspector of Police, PS Grand Bazaar and T. Bairavasamy (PW-32), Circle Inspector, PS Odiansalai, have referred to the conduct of the appellant** - Perumal Raja @ Perumal with regard to any fact in issue or a relevant fact when the appellant - Perumal Raja @ Perumal was confronted and questioned. Reference in this regard may also be made to the judgment of this Court in Sandeep v. State of U.P.²⁸ which held that:

“52. (...) It is quite common that based on admissible portion of the statement of the accused whenever and wherever recoveries are made, the same are admissible in evidence and it is for the accused in those situations to explain to the satisfaction of the court as to the nature of recoveries and as to how they came into possession or for planting the same at the places from where they were recovered.”

Emphasis applied

45. The PW(s) have unequivocally stated that the appellants were seen by former with Shabol, Kodal, and other sharp cutting weapons at the PO just after the commission of the crime. The appellants were seen with the said weapons when the victim was lying dead at the PO. The appellants therefore are duty bound to explain their aforesaid conduct under Section 106 of the Indian Evidence Act, 1872, after the prosecution has proved the aforesaid circumstances connecting the appellants with the recovery of the said weapons.

46. Section 27 of the Evidence Act is an aid to the police authority to prove the mental awareness of the accused person as regards the incriminating materials. Sec. 27 calls for a cautious but not rigid application. While Shabol was recovered from the bush near the house of the Shahjahan without him giving any instructions to the police, the recovery of Kodal was made as per the instructions of the Mekail. PW 7 is an independent witness to the recovery of Shabol, who has seen Shahajan to have given such an instruction to the Police. The court thus cannot ignore the evidence of PW 7 as regards his witnessing the said recovery of Kodal. Reference in this regard may be made to the **Perumal decision (supra):-**

22. However, we must clarify that Section 27 of the Evidence Act, as held in these judgments, does not lay down the principle that discovery of a fact **is to be equated to the object produced or found**. The discovery of the fact resulting in recovery of a physical object exhibits knowledge or mental awareness of the person accused of the offence as to the existence of the physical object at the

particular place. Accordingly, discovery of a fact includes the object found, the place from which it was produced and the knowledge of the accused as to its existence. To this extent, therefore, factum of discovery combines both the physical object as well as the mental consciousness of the informant accused in relation thereto.

24. Section 27 of the Evidence Act is frequently used by the police, and the courts must be vigilant about its application to ensure credibility of evidence, as the provision is vulnerable to abuse. **However, this does not mean that in every case invocation of Section 27 of the Evidence Act must be seen with suspicion and is to be discarded as perfunctory and unworthy of credence.**

30. However, evidentiary value to be attached on evidence produced before the court in terms of Section 27 of the Evidence Act cannot be codified or put in a straightjacket formula. **It depends upon the facts and circumstances of the case. A holistic and inferential appreciation of evidence is required to be adopted in a case of circumstantial evidence.**

Emphasis applied

47. Learned counsel for the appellant has argued that the absence of a memorandum under Section 27 of the Evidence Act will render the discovery of the said weapons inadmissible.

48. A memorandum under Section 27 is essentially a confession of an accused. Therefore, such a memorandum is extrajudicial and is eschewed. However, the portion of the said confession which provides the information about the place where the incriminating weapons are kept is admissible before the Court. Consequently, the mental awareness of the accused about the place and the weapons kept thereat also becomes relevant before the Court. The police are required to call on two independent witnesses who would be witnesses to the statement of the accused under Section. 27. Further, they must also accompany the police party to the place, stated by the accused. The decision in **Babu Sahebgouda Rudragoudar v. State of Karnataka reported in (2024) 8 SCC 149** may be referred to in this regard:-

61. The statement of an accused recorded by a police officer under Section 27 of the Evidence Act is basically a memorandum of confession of the accused recorded by the investigating officer during interrogation which has been taken down in writing. The confessional part of such statement is inadmissible and only the part which distinctly leads to discovery of fact is admissible in evidence as laid down by this Court in *State of U.P. v. Deoman Upadhyaya* [State of U.P. v. Deoman Upadhyaya, 1960 SCC OnLine SC 8 : AIR 1960 SC 1125] .

49. The existence of the said memorandum lends credence to the statement made under section 27. However, when the Prosecution witnesses who have signed such a memorandum and therefore have been witnesses to the events thereof do not depose to that effect before the Court, the validity of the memorandum gets diluted. Therefore, what is important to note is whether the prosecution witnesses, who have been witnesses to the statement and recovery under Section 27 regardless of the existence of a memorandum, have deposed to that effect, which would indicate the compliance with Section 27. The decision in **Subramanya v. State of Karnataka** [Subramanya v. State of Karnataka, reported in (2023) 11 SCC 255 may be referred to in this regard:-

77. The first and the basic infirmity in the evidence of all the aforesaid prosecution witnesses is that none of them have deposed the exact statement said to have been made by the appellant herein which ultimately led to the 21 discovery of a fact relevant under Section 27 of the Evidence Act.

78. If, it is say of the investigating officer that the appellant-accused while in custody on his own free will and volition made a statement that he would lead to the place where he had hidden the weapon of offence, the site of burial of the dead body, clothes, etc. then the first thing that the investigating officer should have done was to call for two independent witnesses at the police station itself. Once the two independent witnesses would arrive at the police station thereafter in their presence the accused should be asked to make an appropriate statement as he may desire in regard to pointing out the place where he is said to have hidden the weapon of offence, etc. When the accused while in custody makes such statement before the two independent witnesses (panch witnesses) the exact statement or rather the exact words uttered by the accused should be incorporated in the first part of the panchnama that the investigating officer may draw in accordance with law. This first

part of the panchnama for the purpose of Section 27 of the Evidence Act is always drawn at the police station in the presence of the independent witnesses so as to lend credence that a particular statement was made by the accused expressing his willingness on his own free will and volition to point out the place where the weapon of offence or any other article used in the commission of the offence had been hidden. Once the first part of the panchnama is completed thereafter the police party along with the accused and the two independent witnesses (panch witnesses) would proceed to the particular place as may be led by the accused. If from that particular place anything like the weapon of offence or bloodstained clothes or any other article is discovered then that part of the entire process would form the second part of the panchnama. This is how the law expects the investigating officer to draw the discovery panchnama as contemplated under Section 27 of the Evidence Act. **If we read the entire oral evidence of the investigating officer then it is clear that the same is deficient in all the aforesaid relevant aspects of the matter."**

Emphasis applied

50. The recovery of Shabol from a bush in front of the house of the appellant Mekail, as pointed out by him to the police and witnessed by the PW 7, has come in deposition before the Court. This evidence has withstood cross-examination. Thus, the said facts have become part of the substantive oral evidence. Such evidence becomes more reliable than a memorandum under Section 27 of the Evidence Act. The absence of a memorandum under Section 27 therefore is not fatal to the aforesaid recovery.

51. Learned counsel for the appellant points out that PM Doctor has opined that a lacerated injury may be caused by falling trees on a person. He argued that the cyclone Aila uprooted many trees and the victim was injured and died by the falling of trees on him. The victim was out in the garden during the cyclone and thus became a victim of one of the falling trees.

52. This Court notes that the PM Doctor in the same breadth has also opined that the injuries to the person of the victim could not been caused by falling trees. The same has been the definitive opinion of the PM Doctor to the suggestion put by the defense. Further, PW 10 being the IO of the case, has

deposed that no trees fell on the said ground at the PO. Based on the evidence on record, this Court is of the unequivocal view that the nature of injuries caused to the victim cannot be by the falling of trees.

53. The appellants have next argued that the previous enmity of the victim and his family against the appellants has led the family of the victim to falsely implicate the appellants. The said argument is a double-edged sword. It also supplies the appellants with a motive to cause harm to the victim. The appellant cannot take the benefit of previous enmity given the account of the PW(s) and the injuries recorded in post mortem which prove beyond a reasonable doubt that the victim was killed.

54. Learned Counsel for the appellant has lastly argued that the police have not sent the blood-stained clothing of the victim and his wife, being PW 2 and the incriminating weapons for FSL. Thus the investigation is defective and hence the appellants must be acquitted.

55. A defective investigation will not ipso facto result in an acquittal. The forensic examination and the matching exercise indeed provide some links to an investigation. They are, however, not a substantive and direct piece of evidence. In the backdrop of direct evidence in the instant case, the absence of scientific examination of wearing apparel and incriminating weapons is not fatal to the case of the prosecution. The decision in **State of UP vs. Wasif Haider & Ors. reported in 2019 2 SCC 303** is inapplicable to the facts of the present case given the investigation herein has been proper. Benefit of doubt therefore cannot accrue in favor of the appellants. Further, the oral evidence on record has proved the case of the prosecution beyond reasonable doubt.

56. In the present case, the victim did not enter into any physical fight with the appellants. The appellants have not denied that they went to the PO to steal mangoes. The appellants undoubtedly went to back from the PO, to bring weapons and have also taken the spade from the victim and then came back to attack the victim. Thus, they had an intention to cause severe harm to the victim. They knew that the injuries inflicted could to end the life of the victim since they attacked the vital organ namely the head and neck of the victim. Hence, they had the mens rea to kill the victim.

57. For the reasons stated herein above the conviction of the appellants by the Trial Court is affirmed. CRA 704 of 2016 fails and is hereby dismissed.

58. There shall be no order as to costs.

59. The trial Court records may be sent back along with a copy of this judgment.

60. Urgent certified photocopy of this judgment, if applied for, be supplied to the parties upon completion of all requisite formalities.

61. All parties are directed to act on a server copy of this order duly downloaded from the official website of this Court.

1.

(Rajasekhar Mantha, J.)

I agree.

(Ajay Kumar Gupta, J.)