

Form No. J(1)

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

Present :

**The Hon'ble Justice Rajasekhar Mantha
And
The Hon'ble Justice Rai Chattopadhyay**

**C.R.A. 407 of 2017
Mongala Sardar & Ors
v.
The State of West Bengal**

For the Appellant: Mr. Saswata Gopal Mukherji, Ld. Sr. Adv.
 Ms. Debadrita Mondal, Ld. Advocate

For the State : Mr. Saryati Datta, Ld. Amicus Curiae :

Hearing concluded on : June 9th, 2026.

Judgment pronounced on : June 11th, 2026.

Rajasekhar Mantha, J:

1. The subject appeal is directed against the judgment of conviction dated May 16th, 2017, and order of sentence dated May 17th, 2017, passed by the Additional Sessions Judge, Fast Track Court, Katwa, in Session Trial No. 01/2013, arising out of the Session Case No. 73/2012.

2. The 6 appellants were convicted under Section 302 IPC read with Section 34 of the IPC. They were sentenced to suffer life imprisonment and to pay a fine of Rs. 5,000 each. They were directed to further undergo a rigorous imprisonment for a term of one year. The appellant Karna Ghosh died during the pendency of the subject appeal. The appeal stands abated in so far as Karna Ghosh, since none of his legal heirs or immediate family members has expressed a wish to pursue this subject appeal on his behalf.
3. The appellant Mongala Sardar was further convicted for the offence punishable under Section 25(1-B) (a) of the Arms Act, 1959. He was sentenced to suffer rigorous imprisonment for 1(one) year and to pay a fine of Rs. 2,000. In default thereof, he was directed to undergo rigorous imprisonment of six months. The said Mongala Sardar was also convicted for the offence punishable under Section 27(2) of the Arms Act. He was sentenced to suffer rigorous imprisonment for seven years and to pay a fine of Rs. 2,000. In default thereof, he was directed to undergo a rigorous imprisonment of six months.
4. The appellant, Bapan Sardar, was convicted for the offence punishable under Section 27(1) of the Arms Act, 1959. He was sentenced to suffer rigorous imprisonment for three years and to pay a fine of Rs. 2,000. In default thereof, he was directed to undergo a rigorous imprisonment for six months.
5. The said sentences were directed to run concurrently. The pre-trial detention and detention during the trial were directed to be set off in terms of Section 428 of the CrPC. The appellants were allowed to claim the

benefit of remission or commutation of sentence, if eligible, in terms of Section 433A of the CrPC.

THE PROSECUTION CASE AND EVIDENCE ON RECORD

6. The appellants killed the victim out of political rivalry. They were workers of a particular political party. On January 22nd, 2010, the deceased victim Prasanta, accompanied by his son, PW 1, were travelling to Modak Para (local neighbourhood) to the house of one Jagai Ghosh for installing an asbestos sheet on his rooftop. The appellants intercepted the victim and PW 1. Appellant, Mongala Sardar, fired gun shots at the head of the deceased victim. Appellant Bapan Sardar armed with *Ram da* (vegetable cutter found in every local household) inflicted injuries on the throat of the victim. The other appellants restrained PW 1, the son of the victim, from saving his father. On hearing the hue and cry of PW 1, locals arrived at the PO, the appellants fled away.
7. PW 1 filed the written complaint against the said appellants with the Katwa PS on January 22nd, 2010. Accordingly, the Katwa PS case cum FIR no. 30 of 2010 dated January 22nd, 2010 was registered under Section 302 read with Section 34 of the IPC, and Sections 25(1-B)/(a) and 27 of the Arms Act, 1959, against the appellants herein.
8. An inquest thereafter was conducted on the same day from 11 A.M., which ended at 11:35 A.M. The inquest report noted that the victim had suffered gunshot and sharp cutting injuries. The entry point of the bullets was found at the right-side neck of the victim. The exit point thereof was at jaw of the victim. The inquest report recorded that the appellant

Mongala Sardar along with other accused persons fired bullet shots at the victim and cut the victim's throat, due to an old rivalry.

9. Post mortem was conducted on the same date. It found that the victim has died out of gunshot and sharp cutting injuries. Investigation was completed and chargesheet was filed by the Katwa PS.
10. On April 10th, 2013, charges were framed under Section 302 read with Section 34 of the IPC against all the appellants. The appellants were further charged under Section 3 and Section 25(1-B)/(a) of the Arms Act, 1959, read with Section 34 of the IPC. The appellants were also charged under Section 5 and Section 27 of the Arms Act, 1959 read with Section 34 of the IPC.
11. **PW 1 was the complainant and son of the victim.** He has deposed that he and the victim were on the way to install asbestos at the rooftop at the house of one Jogai Ghosh. The victim and PW 1 were at Modak Para, when the appellants intercepted them in front of the cow-shed of Arun Dutta. The appellant no. 1 Mongala Sardar fired bullets on the head of the victim. The appellant no. 6 Bapan Sardar cut the throat of the victim by a *Ram da*. The other appellants encircled and obstructed the free movement of PW1, and threatened his life, if he tried to save his father.
12. PW 1 has deposed that the appellants thereafter washed the said sharp cutting weapon in the nearby pond, owned by one Kashinath Modal, Saheb Sain and others. The appellants fled the PO before arrival of the locals. The local were alerted by the hue and cry of PW-1. He has deposed

that Gopinath Das, a CPI (M) worker, informed the police about the said incident.

13. PW1 witnessed the inquest report. He has deposed that the police collected blood-stained earth from the P.O. During trial, he identified his signature on the said seizure list. The victim was wearing a lungi and a sweater. The wearing apparels were, however, not produced before the Court.

14. PW 1 has deposed that on January 28th, 2010, the police seized a pipe gun and a *Da* from the house of the deceased appellant Karna Ghosh based on the disclosure by the appellants. The same were seized under the seizure list dated January 28th, 2012. In his examination-in-chief, PW 1 has identified his signature on the said seizure list.

15. During cross-examination, PW 1 admitted to 5 criminal cases pending against him. PW 1 was confronted, that the victim had suffered injuries and died in the riot that took place the day before the incident, which he denied. The defence further suggested that PW 1 has compelled the wife of the appellant no 3, Sujata Sain, to leave her village, which was denied by PW 1.

16. **PW 2 was the scribe of the complaint and accused in the murder of one Netai Saha.** He has deposed that he had written the said complaint on the instructions of PW1, based on which the said FIR no. 30 of 2010 was registered against the appellants. He had explained and read over the contents of the said complaint to PW-1. He has identified his signature in the said complaint.

17. PW 2 has deposed that on the fateful day, he saw that the appellants came out from the house of Arun Dutta. The appellant no. 1 Mongala Sardar fired bullets at the head of the victim. The victim fell into a ditch. The appellant no. 6 Bapan Sardar inflicted injuries on the throat of the victim with a Da. He was witnessing the said incident from a distance. Upon his arrival at the P.O., he found the victim lying in a restless condition near a drain. He found PW 1 was senselessly lying at some distance from the victim. He has deposed that the wearing apparels of the victim were stained with blood.
18. In cross-examination, PW 2 has confirmed that he was one of the accused persons in the murder of Netai Saha in the GR case no. 564 of 2011. PW 1 also happens to be the accused in the said case of the murder of Netai Saha. In cross-examination, PW2 has confirmed that the victim and PW1 did not get injured during any riot. PW 2 has denied being a worker of the CPI (M) political party. He has, however, deposed that he is a supervisor of the MNREGA scheme, appointed by the CPI(M).
19. **PW 3 was an inquest witness.** He has signed the inquest report. He was a witness to the seizure of blood-stained earth. He has deposed that on the fateful day, he was going to his field for planting paddy. His house is 5 minutes from the cowshed of Arun Dutta. He saw the appellants come out from the said cow shed and encircling the victim and PW 1. The appellant No. 1, Mangal Sardar, fired bullets at the victim. The appellant no. 6 Bapan Sardar inflicted injuries on the throat of the victim with a sharp cutting weapon, Da.

20. PW 3 has deposed that police came to their village on January 28th, 2010, at about 6:30 p.m. The police recovered one pipe gun and a daw (vegetable cutting-dagger) from the manual ditch of the deceased appellant Karna Ghosh. The same were recovered and seized in the presence of the appellants Mongala Sardar and Bapan Sardar and based on their leading statements. He has identified his signature on the seized pipe gun and da. He has admitted to 3 criminal cases pending against him.

21. PW 3 has deposed that he and his mother are full-time workers of the CPI (M) party. He has deposed that the victim and PW 1 were not injured during any riot. He also admitted that he was an accused in the murder of Netai Saha.

22. **PW 4 was another inquest witness.** He has deposed that the PO is seven minutes away from his house. On the fateful day, he was going to his land to plant paddy. He is a cultivator by profession. On his way, he saw the appellants had encircling the victim and PW 1. The appellant No. 1, Mongala Sardar, fired bullets at the victim. The appellant no. 6 Bapan Sardar attacked the victim with a sharp cutting weapon on his throat. He has denied that he is a thief or a dacoit.

23. PW 4 has deposed that the police have not interrogated him during the investigation. He deposed for the first time in the court. He has admitted to 5 criminal cases pending against him.

24. **PW 5 was the post-mortem doctor.** He conducted autopsy on the dead body of the victim. He found gunshot injuries fired from a short distance, and sharp cutting injuries, inflicted by a very sharp weapon on the person of the victim. He did not find any bullet in the body of the victim. He, however, found an exit hole in the person of the victim. He did not find any blood clot at the site of the injury caused by a sharp cutting weapon. The brain and skull of the deceased victim was found to be intact but pale.
25. **PW 6 was a police constable.** On the fateful day, he was posted at the Katwa PS. He brought the dead body of the victim from Gushumba (the village where the victim was murdered) to the Katwa Hospital for post-mortem examination.
26. PW 6 has deposed that after the conclusion of the post-mortem, he handed over the wearing apparels of the victim and the PM blood to SI Sukumar Sen. He has deposed that SI Sukumar Sen seized the articles under a proper seizure list. He has deposed that no one was called at the time of the preparation of the seizure list. He has deposed that he has not been shown the PM blood during course of the trial.
27. **PW 7 was the senior adjutant, Home Guard, and an Arms expert.** He deposed that he received one sealed packet containing an improvised pipe gun. In his examination in chief, he has deposed that the said pipe gun was in working condition when the same was examined by him. In cross examination, he has deposed that the pipe gun gathered rust. He could not state as to whether the said pipe gun was in a working condition at the time of trial.

28. **PW 8 was a retired additional sub-inspector of police at Katwa PS.** He has deposed that SI Sukumar Sen has prepared the seizure list. He has deposed that he cannot say as to whether SI Sukumar Sen made any attempt to call on any local witness to sign on to the said seizure list. He has deposed that the IO properly packed, sealed, and levelled the seized materials.
29. **PW 9 was the UD assistant.** He took the seized pipe gun for a ballistic examination.
30. **PW10 was the SI of the police at Katwa PS.** He sent a written requisition for FSL examination of the materials seized. He has deposed that the FSL, however, did not give any report. He has deposed that he submitted the charge sheet against the appellant.
31. **PW 11 was the investigating officer of the case.** He has indicated the steps taken by him during the course of the investigation. He has deposed that the said appellants, Mongala Sardar and Bapan Sardar, have made a statement before him as to the place where the said pipe gun and *Da* were kept. The same were eventually recovered from the house of the deceased appellant Karna Ghosh. The said two appellants pointed out the cow dung/manure ditch from where the said weapons were recovered. A seizure list of the said weapons was prepared in the presence of the available eyewitnesses.

32. In cross-examination, PW 11 has deposed that he has not examined Nilmoni Modak and Arun Dutta, whose houses are situated close to the PO. He has deposed that the place of occurrence is actually the inlet of a drain. He has deposed that he has not made any prayer before the learned magistrate for recording the statements of the appellants, Mongala Sardar and Bapan Sardar, under Sec. 164, CRPC.

33. Based on the evidence as above, the trial court convicted the appellants as stated above.

ANALYSIS OF THIS COURT

34. Learned Counsel for the appellants has pointed out that the prosecution witnesses have criminal antecedents. The eyewitnesses of the prosecution, namely PW 1-4 have been arrayed as accused persons in the criminal cases, lodged by the appellants and family. They all are co-accused in the murder of one Netai Saha, supporter of a rival political party the Indian National Congress which the appellants supported. The victim and PW 1-4 supported the CPI (M) party. The said PWs, therefore, have a motive to falsely implicate the appellants.

35. Sections 146, 153, and 155 of the Evidence Act, 1872, specify the mechanism by which the credibility of a witness can be impeached with reference to his or her character and past criminal records. The said sections are set out below:-

Sec. 146. Questions lawful in cross-examination. — When a witness is cross-examined, he may, in addition to the questions hereinbefore referred to, be asked any questions which tend—

- (1) to test his veracity,
- (2) to discover who he is and what is his position in life, or
- (3) ***to shake his credit, by injuring his character***, although the answer to such questions might tend directly or indirectly to criminate him, or might expose or tend directly or indirectly to expose him to a penalty or forfeiture

[Provided that in a prosecution for an offence under section 376, 3 [section 376A, section 376AB section 376B, section 376C, section 376D, section 376DA, section 376DB] or section 376E of the Indian Penal Code (45 of 1860) or for attempt to commit any such offence, where the question of consent is an issue, it shall not be permissible to adduce evidence or to put questions in the cross-examination of the victim as to the general immoral character, or previous sexual experience, of such victim with any person for proving such consent or the quality of consent.]

Sec. 153. Exclusion of evidence to contradict answers to questions testing veracity. —When a witness has been asked and has answered any question ***which is relevant to the inquiry only in so far as it tends to shake his credit by injuring his character, no evidence shall be given to contradict him;*** but, if he answers falsely, he may after wards be charged with giving false evidence.

Exception 1.— *If a witness is asked whether he has been previously convicted of any crime and denies it, evidence may be given of his previous conviction.*

Exception 2.— ***If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested,*** he may be contradicted. Illustrations

Sec. 155. Impeaching credit of witness.—The credit of a witness may be impeached in the following ways by the adverse party, or, with the consent of the Court, by the party who calls him:—

- (1) **By the evidence of persons who testify that they, from their knowledge of the witness, believe him to be unworthy of credit**

(2)*****

(3)*****

Explanation. — ***A witness declaring another witness to be unworthy of credit may not, upon his examination-in-chief, give reasons for his belief, but he may be asked his reasons in cross-examination, and the answers which he gives***

cannot be contradicted, though, if they are false, he may afterwards be charged with giving false evidence.

Emphasis Applied

36. In a criminal trial, the accused is under the trial not the witness. Evidence, therefore, is adduced qua an accused person. The nature of such evidence may include evidence relating to the good or bad character of an accused. This is evident from a conjoint reading of Sections 53 and 54 of the Evidence Act, 1872. The character of a witness is, however, never a principal issue in a criminal trial.

37. Explanations 1 and 2 are exceptions to the rule of Sec. 153 i.e. evidence impeaching the character of a witness cannot be adduced. The said two explanations kick in when a witness denies any suggestions that impeach his character or impartiality. In ***State of Karnataka v. K. Yarappa Reddy, (1999) 8 SCC 715***, it was held as follows-

28. The general rule of evidence is that **no witness shall be cited to contradict another witness if the evidence is intended only to shake the credit of another witness....**

29. The said rule has only two exceptions. ***One is that if the witness denies having been previously convicted then evidence can be adduced to prove that he was so convicted. The other exception is the following:***

“Exception 2.—If a witness is asked any question tending to impeach his impartiality, and answers it by denying the facts suggested, he may be contradicted.”

30. Illustration (d) cited in Section 153 is to amplify the aforesaid Exception 2. That illustration is extracted below:

“(d) A is asked whether his family has not had a blood feud with the family of B against whom he gives evidence. ***He denies it.*** He may be contradicted on the ground that the question tends to impeach his impartiality.”

31. **The basic requirement for adducing such contradictory evidence is that the witness whose impartiality is sought to be contradicted with the help of such evidence, should have been asked about it and he should have denied it.** Without adopting such a preliminary recourse it would be meaningless, if not unfair, to bring in a new witness to speak something fresh about a witness already examined.

32. **As the general rule of evidence is one of prohibiting evidence on collateral issues and since it is only by way of exception that such evidence can be permitted, the court must guard that the defence evidence falls strictly within the exception.**

Emphasis applied

38. In the present case, the appellants have not suggested that the PWs have been **CONVICTED**. Thus, the explanation no. 1 is not attracted. Explanation no. 2 is equally not applicable since during cross-examination by the appellants, the PWs have admitted that criminal cases have been lodged against them by some of the appellants. The PWs, therefore, have not denied any suggestions put to them by the defence, which had the tendency to impeach their character.

39. Illustration no. (d) to Section 153 negates the argument of the appellants. The impartiality of the said PWs could have been impeached, if they had denied the criminal cases lodged against them by some of the appellants. In the present case, the PWs have not denied the criminal cases lodged against them. In ***Vijayan @ Vijaya Kumar V. State Rep. By Inspector Of Police, reported in 1999 INSC 125***, it was held as follows:-

Section 153 is based on the decision rendered by Pollock CB in Attorney General v. Hitchcock, (1847) 1 Ex.91 in which the learned Judge observed that B "a witness may be contradicted as to anything he denies having said provided it be connected with the issue as a matter capable of being distinctly given in evidence, or it must be so far connected with it as to be a matter which, if answered in a

particular way, would contradict a part of the witness's testimony, and if it is neither the one nor the other of these, it is collateral to though in some sense it may be considered as connected with, the subject of enquiry." ***The rule limiting the right to call evidence to contradict a witness on collateral issues excludes all evidence of facts which are incapable of affording any reasonable presumption or inference as to the principal matter in dispute***

Emphasis applied

40. Therefore, it follows that the credibility of a witness is not to be assessed in a straitjacket formula, namely that the witness in question is accused in criminal cases. The credibility of a witness falls in the subjective satisfaction of the Court to be formed based on objective criteria.
41. The character/criminal antecedents of a witness cannot and does not impact the events witnessed by him or her. This is regardless of whether the witness has enmity against the person involved in the said events. The same is based on the principle of presumption of innocence that runs in favour of a person turned witness who is accused of any crime.
42. However, when a witness is an accused in other criminal cases initiated by the accused facing the trial, the Court must carefully scrutinise the evidence tendered by such a witness, in terms of Section 146(3) read with Section 153 of the Evidence Act, 1872.
43. The status of the said PWs vis-a-vis the appellants should also be examined from the following legal perspective. It is argued that PW 1- 4 are interested witnesses since they may derive benefit from seeing some of the appellants being convicted.

44. The evidence of the interested witnesses cannot automatically be discarded. The criminal antecedents of a witness do not operate as a disqualification for them to truthfully depose before the Court. The Court is tasked to assess the evidence of an interested witness with caution, but not suspicion. In **Jayabalan v. State (UT of Pondicherry)**, reported in **(2010) 1 SCC 199**, it was held as follows:-

23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. ***The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence.***
The primary endeavour of the court must be to look for consistency.

Emphasis Applied

45. In **Sarwan Singh v. State of Punjab**, reported in **(1976 (4) SCC 369)**, it was held that the evidence of an interested witness needs no corroboration as a rule of law, provided the evidence is reliable and unimpeachable. Para no. 10 of **Sarwan Singh (supra)** is set out below:-

“..... The evidence of an interested witness does not suffer from any infirmity as such, ***but the Courts require as a rule of prudence, not as a rule of law, that the evidence of such witnesses should be scrutinised with a little care. Once that approach is made and the Court is satisfied that the evidence of interested witnesses have a ring of truth such evidence could be relied upon even without corroboration***

Emphasis Applied

46. On the fateful day, PW 1 was accompanying the victim to work in the house of one Jagai Ghosh. His presence at the PO, therefore, is obvious. PW 1 was the son of the deceased victim. PW 1 is, therefore, a related witness. In ***Dalip Singh v. State of Punjab, reported in (1953) 2 SCC 36***, it was held that a relative of the victim would want the actual culprit to be punished. Paragraph no. 26 of ***Dalip Singh (supra)*** is set out below:-

26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. **Ordinarily a close relative would be the last to screen the real culprit and falsely implicate an innocent person.**

Emphasis applied

47. The evidence of PW 2 indicates that PW 1 was also injured. No injury report to that effect is, however, available on record. It can, however, be reasonably inferred that PW 1 may have received injuries since he was with the victim when the latter was attacked by appellants. In fact, PW 1 was encircled by the appellants to ensure that the victim is not attended to.

48. The appellants Mongala Sardar and Bapan Sardar killed the deceased in front of the eyes of PW 1. This piece of evidence deposed by PW1 has withstood and passed the test of cross-examination. The prosecution has thus proved the guilt of the said two appellants beyond any shadow of doubt.

49. The evidence of PW 2 to PW 4, however, requires our careful consideration. It is argued that the presence of PW 2-4 at the PO is most unnatural. The said PWs cannot simultaneously be out of their houses for work and seen the commission of the crime. It is argued that the said PW 2-4 and PW 1 and the victim were 'partners in crime'. PW 2-4 have been argued to be set up against the appellants.

50. The houses of PW 3 & 4 were just 5 and 7 minutes away from the PO. The presence of the said PWs at the PO therefore is not unusual. The appellants did face resistance from PW 1 while attacking the victim. The appellants, thus, took some time to end the life of the victim. Consequently, the said PWs got the time to walk to the PO and witness the crime, which was just few minutes from their respective homes. PW 1 also raised hue and cry from the PO. PW 3 and 4, therefore got alerted by the hue and cry of the PW 1, and arrived at PO.

51. PW 2 has deposed that when he arrived at the PO, he saw that the victim was lying moribund and PW 1 was lying unconscious thereat. PW 3 whereas has deposed that he did not see the PW 1 and victim lying at the PO in the said condition. The PW 2 and 3, therefore, did not arrive at the PO at the same time. The difference in their time of arrival at the PO follows from the difference in the distance of their respective homes from the PO.

52. What however has withstood the test of cross-examination is that PW 2, 3, and 4 have deposed in unison that they have seen the appellants Mongala Sardar and Bapan Sardar firing bullets and attacking the throat of the victim with a sharp cutting weapon respectively.

53. During trial, PW 2-4 have *not* mentioned the presence of one another at the PO. PW 1 has deposed that he raised hue and cry to which the locals arrived at the PO. He has not mentioned the presence of PW 2-4 at the PO. It is most probable that the PW 1 may not have specifically recollected their presence, overcome by the events. The defence has also not cross-examined the said PWs in that regard.

54. Therefore, the said PWs did not have the occasion to mention the presence of one another at the PO. The presence of the said PWs at the PO at the same time is secondary to main incident, i.e. the attack on the victim by the appellant nos. 1 and 6, which is established from the evidence of the PWs.

55. The PW 1-4 have deposed that the appellants Mongala Sardar and Bapan Sardar assaulted the deceased. The said PWs were consistent in the naming the appellants Mongala Sardar and Bapan Sardar. The other appellants were stated to have encircled the victim and PW 1. No specific role is assigned to the other appellants in the offence. The names of the other appellants are only mentioned in the written complaint dated January 22nd, 2010, lodged by PW 1.

56. It is next argued that the specific mention of the names of the said two appellants during the Trial may have been done with a motive. The appellant Bapan Sardar lodged a case of 'attempt to murder' under Sec. 307, IPC, against PW 1 and victim. The appellant Mongala Sardar has lodged the case of arson and loot under Sec. 390, IPC against the victim and PW 1. The nature of the said cases is thus serious. Therefore, it is argued that it cannot be ruled out that the said PWs have a greater motive to implicate the said two appellant nos. 1 and 6 than the other appellants. The aforesaid argument, however, cuts both ways. The appellants also had motive to kill the victim.

57. Appellant no. 3 Swapan Sain was the complainant in a case of arson and loot against PW 1 and PW 3. The defence has suggested that PW 1 has even compelled the wife of the appellant no.3, Sujata Sain, to leave her village. Swapan Sain, appellant no.3, has not been assigned any specific role by the said PWs in the trial.

58. Learned Sr. Counsel for the appellants has next argued that the defence, during the course of the trial, has suggested that the victim and PWs are habitual offenders. The victim may have been injured in a riot that took place the day before the incident. Ld. Sr. Counsel for the appellants seek to develop the aforesaid argument by adding that the victim and the prosecution witnesses areco-accused in the criminal cases, lodged by some of the appellants, against them. This

argument cannot be accepted since there is no evidence to suggest that any riot took place on the day before the incident.

59. Learned Sr. Counsel for the appellants next argued that the investigating agency has withheld independent witnesses, who may have seen the crime. He has pointed out that the prosecution witnesses have deposed in unison that the appellants came out from the cow shed of Arun Datta and attacked the victim. The appellants, therefore, were hiding in the said cow shed. It is argued that thus the said Arun Datta would be aware of the presence of the appellants at the material point in time. The rough sketch prepared during investigation indicates that the house of Arun Dutta is near the PO. He, however, has not been cited as a witness by the prosecution.

60. This Court notes that the defence has not established the presence of Arun Datta in the cow shed. Therefore, it cannot be held that Arun Datta was a witness to the presence of the appellants in the cow shed. Secondly, the defence has not run the case that Arun Datta has seen the commission of the crime by the appellants. The defence has not established that Arun Dutta was present in his house at the place and time of occurrence. Section 114 of the Evidence Act cannot be invoked in the facts of the case.

61. In so far as the non-examination of Satinath, Khelaram and Nilmoni, concerned, the argument of Ld. Amicus that it was about 6:30 am in a January morning when light was poor, cannot be ignored. It is possible that people were asleep in the village and may not have heard the gun shot. In any event the prosecution case having

been established by the other evidence on record, the absence of the the aforesaid persons has not diluted the prosecution case. The defence has not led evidence that the said persons were available in their houses.

62. Learned counsel for the appellants has argued that the evidence of the arms expert, namely PW 7 has not established that the recovered pipe gun was used in the commission of the crime. Therefore, no direct link has been proven between the pipe gun and the commission of the crime in question.

63. This Court however notes that the bullets that hit the victim were not recovered. The post-mortem doctor has found a bullet exit hole in the victim's body. The bullet thus got dispersed after piercing through the body. Therefore, the investigating agency could not trace the bullets and send them to PW 7. Hence the bullets fired at the victim could not be correlated with the recovered pipe gun. Therefore, sufficient explanation is available on record for the absence of the said correlation between the recovered pipe gun and the commission of the crime in question.

64. Secondly, the requirement of a ballistic report linking the murder weapon with the accused is not a mandate. The evidence of PW 1-4 has established that the appellant nos. 1 and 6 used the weapon to kill the victim. The medical evidence has further established the victim succumbed to gun shot and sharp cutting injuries. In ***Ram Singh V. The State Of U.P., reported in 2024 INSC 128*** it was held as follows.

29. Thus, what can be deduced from the above is that by itself non-recovery of the weapon of crime would not be fatal to the prosecution case. When there is such non-recovery, there would be no question of linking the empty cartridges and pellets seized during investigation with the weapon allegedly used in the crime. **Obtaining of ballistic report and examination of the ballistic expert is again not an inflexible rule. It is not that in each and every case where the death of the victim is due to gunshot injury that opinion of the ballistic expert should be obtained and the expert be examined. When there is direct eye witness account which is found to be credible, omission to obtain ballistic report and nonexamination of ballistic expert may not be fatal to the prosecution case but if the evidence tendered including that of eyewitnesses do not inspire confidence or suffer from glaring inconsistencies coupled with omission to examine material witnesses the omission to seek ballistic opinion and examination of the ballistic expert may be fatal to the prosecution case.**

65. Ld. Sr. counsel for the appellants has argued that the inquest and post-mortem report have established that the bullet entered through the back of the neck of the victim and exited from his jaw. The post-mortem doctor, however, has deposed that the brain and skull of the victim were intact but pale. It is, therefore, argued that despite the alleged trajectory of the bullet, the skull of the victim has remained intact. It could not have, given the area of the bullet injury.

66. The human anatomy tells us that the jaw (mandible) is *anatomically distinct* from the skull vault and cranial cavity. A bullet entering the neck and exiting through the jaw does not, therefore, necessarily have to fracture the skull.

67. Therefore, the skull being intact does not, by itself, be inconsistent with a bullet travelling from the neck and exiting at the jaw. Further, the pipe gun in question was an improvised gun. Its capability to catapult a bullet in specific trajectory and damage the skull may not be possible.

68. The medical evidence indicates that the deceased suffered haemorrhagic and neurogenic shock as a result of the gunshot injury and the sharp cutting injury. A hemorrhagic shock results in substantial blood loss. A neurogenic shock results in injuries to vital organs, namely on the neck and throat region, which the victim in fact suffered and finally succumbed to. The prosecution case that the victim has received murderous injuries on his neck and throat is, therefore, consistent with the said medical evidence.

69. Learned Senior Counsel for the appellants has next argued that the Da, the alleged second murder weapon, has been sent for FSL examination. However, no report was prepared and sent by the FSL to the investigating agency. The recovered Daw, therefore, cannot be linked to the commission of the crime and the appellants.

70. The investigating agency did send the said da to the FSL. It was expected that the investigation would coordinate with the FSL and obtain the report of the FSL the Da. The absence of an FSL report however has not proved to be fatal for the reasons discussed hereinafter.

71. The recovery of the said Da and pipe gun runs contrary to the innocence of the appellants Mongala Sardar and Bapan Sardar in view of Section 27 of the Indian Evidence Act. The appellants Mongala Sardar and Bapan Sardar, during interrogation, have stated to the PW, the IO, that a pipe gun and da have been kept in the manure pit of the deceased appellant, Karna Ghosh.

72. Based on the said leading statement, the IO recovered and seized the said pipe gun and *Da* from the said manure ditch/cow-dung of the deceased appellant Karan Ghosh. The appellants Mongala Sardar and Bapan Sardar were present during the said recovery and seizure of the said weapons. The prosecution, therefore, has established the mental awareness of the said two appellants about the recovered pipe gun and the *Da*.

73. The disclosure of the place where the weapons were concealed links the said two appellants to the pipe gun and *Da* read with the medical evidence of PW 5, the PM Doctor, clearly links the appellants Mongala and Bapan to the offence. The PM Doctor has deposed that the victim received gunshot and sharp cutting injuries. The victim thus was attacked by a pipe gun and *Da*.

74. Learned Sr. Counsel has finally argued that the wearing apparels have been seized by the Police. The same have however not been produced before the Court. The same has been sent for FSL examination. No report therefrom however was submitted before the Court. The prosecution, therefore, has not linked the blood stained wearing apparels to the appellants. This omission is however a mere

defect in the process of investigation. It is now well settled that minor omissionson the part of the prosecution would not be fatal to the prosecution case.

75. The decision of **Kannaiya v. State of Madhya Pradesh** reported in **2025 SCC Online SC 2270** cannot come to the aid of the appellants. The said case has application when the substratum and or genesis of the offence is not established against the appellants. The foundation of the offence and much more are clearly established in the instant case.

76. In view of the aforesaid discussions, the following has been clearly established.

- I) The PW1 and the victim were present at the PO. The appellants, Mongala Sardar and Bapan Sardar, were also present at the PO.
- II) The victim suffered gunshot and sharp cutting injuries. The recovery of the pipe gun, read with the medical evidence, has established this.
- III) The absence of a label on the seizure list relating to the murder weapon and the non-production of the wearing apparel are investigative defects.
- IV) The evidence of PW 1-4 have established that they have seen the appellants Mangal Sardar and Bapan Sardar attacking the victim with a pipe gun and a vegetable dagger.
- V) Therefore, it is clearly established that Mongala Sardar and Bapan Sardar have killed the victim.

VI) There is however no clear evidence of the participation of the appellants nos. 2, 3, and 5 in the main offence. No specific role could be established by the prosecution against them. There is no evidence of any premeditation or evidence of their role in the offence, beyond reasonable doubt.

CONCLUSION

77. The subject appeal, CRA 417 of 2017 is hereby allowed in respect of the appellant nos. 2, 3, and 5. The appellant no. 5, Karna Ghosh has died after the passing of the said order of conviction and sentence and/or during the pendency of this appeal. The appeal qua him thus stands abated.

78. The order of conviction and sentence of the appellant nos. 2, 3, and 5 passed by the Ld. Trial Court, is hereby set aside. They shall be released forthwith, if in custody. They shall execute the Bond under **Section 437A** of the Code of Criminal Procedure, 1973 (CrPC) corresponding to **Section 485** of the Bharatiya Nagarik Suraksha Sanhita, 2023 (BNSS).

79. The order of conviction and sentence of the appellant no. 1 Mongala Sardar, and appellant no. 6, Bapan Sardar is hereby upheld. The appeal is therefore dismissed in respect of the said two appellants only.

80. Consequently all connected applications shall stand disposed of in terms of this order.

81. Learned Advocate on record for the appellants shall send and communicate this Order to the office of the Superintendent, Bardhaman Central Correctional Home, District Purba Bardhaman, Let the registry of this Court also send a copy of this Order to the said correctional home.

82. The Trial court records may be returned.

83. There shall be no orders as to costs.

84. All parties to act on the basis of a server copy of this order on their usual undertaking.

(Rajasekhar Mantha, J)

I Agree

(Rai Chattopadhyay, J)