

(2002) 05 CAL CK 0003

Calcutta High Court

Case No: Criminal Appeal No. 331 of 1997

Debabrata Mondal and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: May 8, 2002

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 154, 162, 174, 294, 294(3)
- Evidence Act, 1872 - Section 137, 138, 145, 3, 58
- Penal Code, 1860 (IPC) - Section 148, 149, 302, 304, 326

Citation: (2003) 1 CALLT 16

Hon'ble Judges: Sujit Barman Roy, J; Malay Kumar Basu, J

Bench: Division Bench

Advocate: Sekhar Kr. Basu, Debabrata Banerjee, Satyabrata Chakraborty and Sandip Ganguly, Nos. 1 to 5 and 8 to 10 and Dilip Dutt and Arup Chatterjee, Nos. 6 to 7, for the Appellant; Sudipto Moitra, Additional P.P. and Ramkrishno Ghosh, for the Respondent

Final Decision: Allowed

Judgement

S. Barman Roy, J.

This appeal is directed against the judgment dated 25.9.1997 passed by the learned Additional Sessions Judge, 13th Court, Alipore, South 24-parganas convicting eleven appellants, namely, Debabrata Mondol, Manabendra Mondol, Khakan Naskar, Kamal Naskar, Santosh Naskar, Bibhuti Naiya, Prasad Naiya, Birupaksha Mondal, Hrishikesh Mondol, Tarun Naskar and Swapan Naiya under Sections 302/149, 148 and 448/149 IPC and they were sentenced to suffer imprisonment for life and to pay a fine of Rs. 3,000/- each and in default to suffer R.I. for further one year each in respect of their conviction u/s 302/149 IPC. They were also sentenced to lesser terms of imprisonment/fine in respect of their convictions for lesser offences.

2. Prosecution case in brief is that P.W. 1 Smt. Kajal Naiya being the mother of two deceased persons, Kartick Naiya and Ganesh Naiya lodged a written complaint

before a police officer of Joynagar P. S. when she came to village Maldari. Complaint was addressed to the officer-in-charge of the said police station. It was lodged with the police officer on 5.4.87 at about 11.45 a.m. Said written complaint was then forwarded to the said police station for doing the needful. It was stated to have been forwarded to the police station through C/1988 Santosh Chowdhury (P.W. 7). Said complaint was received at the police station on that very day at about 4.45 p.m. and accordingly, a case/FIR under Sections 149/148/448/326/304 IPC was registered.

3. It was, inter alto, alleged in the said complaint that on the previous day (4.4.87) at 10 p.m. some 25/30 persons being armed with deadly weapons assembled and trespassed into the Courtyard of the complainant (P.W. 1) and called out the names of two deceased persons, namely, Kartik and Ganesh to come out. They were two sons of the complainant. Then Kartik was in the western-side room and Ganesh was in the verandah. Kartik tried to flee away by making a hole in the thatched roof of his room. However, Kartik could not escape and miscreants caught hold of him and dragged him out of his room and assaulted him. Later on, both were dragged to road in front of their house and were mercilessly assaulted with sticks, spears, choppers, spades and other deadly weapons. Complainant claimed to have recognized sixteen assailants by the moonlight and the light of lantern. She gave a list of 16 assailants appended at the end of her complaint. She further claimed that there were 13/14 other assailants whom she would be able to identify if she could see them again. Except appellant No. 7 Prosad Nalya, other appellants are named in the said list appended at the end of the complaint. All these assailants are stated to be residents of village Maldari. Deceased persons were assaulted due to some misunderstanding arising out of property dispute between them since long.

4. During the occurrences, assailants falsely, shouted saying "dacoit", "dacoit". It has further been alleged in the complaint that some villagers, Nirmal and P.W. 1 herself were seriously injured in the Incident and were lying beside the deceased persons. They also shouted for medical help but none came forward for medical help. Deceased Kartik succumbed to his injuries in the following morning at 5 p.m. Meanwhile police came and deceased Ganesh and Injured Nirmal were sent to hospital. However, on way to hospital, Ganesh expired. Complaint was written by scribe Subol Ch. Naskar (P.W. 11) as per statement of P.W. 1.

5. On the basis of the said written complaint, a case/FIR was registered at the police station, as already stated. After usual investigation police submitted chargesheet against 35 accused persons including the appellants under Sections 148/149/326/302 IPC showing 19 accused persons as absconders. In course of time case was committed to the Court of Sessions Judge, 24 Parganas (South), Alipore. Case was ultimately tried in the Court of the Additional Sessions Judge of the said District.

6. On perusal of the materials on record learned trial Court framed charges under Sections 148, 149/448, 149/326 and 149/302 IPC against as many as 33 accused

persons including the appellants to which they pleaded not guilty. In course of the trial, prosecution examined in all 13 P.Ws. out of 16 chargesheet witnesses. Chargesheet witness Nos. 10 and 5, namely, Kartik Ch. Mondol and Nirmal Naiya (injured) could not be examined due to their death. Likewise chargesheet witness No. 14 M.C. Roy (Sub-Inspector of Police) could not be examined during trial due to his death.

7. Defence version of some of the appellants/accused is that the case against them is totally false and they are Innocent. Their further case is that in the night of occurrence as the two deceased persons along with injured Nirmal Naiya were on a mission for committing decoity, they were chased by R. G. Party of villages Aruninagar, Chhatra and Maldari and other villagers and were assaulted by them. Defence of other accused/ appellants was of simple denial of prosecution case as alleged. No evidence was adduced on behalf of the defence.

8. On conclusion of the trial, appellants were convicted and sentenced as already stated. Rest of the accused were acquitted.

9. Evidence of P.W. 1 complainant in brief is that the occurrence took place at midnight at about 12/11 o'clock. At that time she was sleeping on her Verandah. Deceased Kartik was sleeping inside his room and the other deceased was sleeping on the Verandah. At that time appellants Debabrata, Manabendra, Kamal, Khokan and Santosh trespassed into her house and while abusing her son Kartik (since deceased) started to strike the doors and windows of her house with tangi. Out of fear deceased Kartik hid himself in the ceiling of the room. However, the assailants broke open the door and also cut open thatched roof of her room and struck Kartik with a tangi and brought him down on the floor. Soon after that appellants Debabrata, Manabendra, Khokan, Kamal and Santosh brought her son Kartik out in the Courtyard and struck him at random with tangi, dao and shovel. Kartik then jumped into a tank to save himself and yet the assailants brought him out of the tank and again assaulted him with tangi, dao and shovel and tied him with a rope. After that the appellants, namely, Santosh Naiya, Bibhuti, Prosad, Hrishikesh and Birupaksha encircled her house and the assailants who had assaulted deceased Kartik also assaulted Ganesh. Kartik died in the night of occurrence. Ganesh died on the next day on his way to hospital in a police van. In her examination-in-chief itself she stated that in the next morning she herself went to the Joynagar police station in order to lodge complaint but the police officer on duty there refused to take her complaint. Three days thereafter, when she again went to the police station along with P.W. 11 Subal (scribe), she lodged her case naming her assailants. P.W. 11 wrote the complaint, which was read out to her and then only she put her LTI on the complaint.

10. From her evidence it appears that P.W. 1 did not name Appellant Nos. 10 & 11, namely, Tarun Dutta and Swapan Naiya.

11. During cross-examination she stated that she could not say if some 500/600 persons had assembled there at the time of occurrence as she was "lying down" on a Verandah quite at a distance. When she woke up from sleep after hearing hue & cry, "night was fairly advanced and it was quite dark". P.W. 8 Sandhya, Kumud and his wife were also sleeping in the house. It took about half an hour time to break open the door and thatched roof made of straw. During the occurrence about 200/250 villagers assembled there. Seeing the assault on Kartick, she fainted and regained her consciousness when she found her daughter nursing her. She also found Kartik dead and Ganesh was fluttering in pain on the Courtyard. Following morning after sunrise she along with her daughter Sandhya P.W. 8 came to the police station and narrated the entire occurrence to the "daragababu". Her son Ganesh (since deceased) was accused in a dacoity case. But she denied that her other son Kartik was an accused in a dacoity case.

12. She further stated during cross-examination that the police officer seized blood stained earth from the floor of her room. She is stated to be an old lady aged about 60/70 years. Appellant Bhibuti Naiya is older than her in age. She also gave topography of the area and names of other neighbours whose houses were situated nearby. She also admitted that when she woke up from her sleep, she heard cries "dacoit" "dacoit". At that time many people rushed to her house. She also claimed that she came to the police station at 7 in the morning and returned back to her village by bus at 11-30 a.m. About 3/4 hours after her return to the village, police arrived. When she went to the police station, Kumud and his wife did not accompany her. On return to the village from the police station she did not find Kumud and his wife in their house. About two days after the incident Kumud and his wife returned home. She repeated in her cross-examination that police refused to take up any case when she went to the police station. Three days thereafter she went to the police station alongwith P.W. 11 Subol Ch. Naskar. Apart from the aforesaid, she did not meet police personnel after the incident. After return from the police station she found the dead body of her son Kartick was lying in her house and also she found injured Ganesh in the house. She further denied the suggestion that in the night of occurrence deceased Kartick and Ganesh went out to commit the dacoity and they were chased by members of the R.G. Party of village Arunnagar, Chatra and Maldari. P.W. 2 Dr. Basudeb Mukherjee said nothing in connection with this case. It is not understood as to why he was examined on behalf of the prosecution. For obvious reason the accused also declined to cross-examine him.

13. P.W. 3 Dr. Pulin Behari Das held post mortem examination over the dead body of Ganesh Naiya on 7.4.87. On post Mortem examination of his dead body, he found the following injuries :-

i) abrasions - Over the front of right leg measuring 6" x 3", over medial side of left-ankle joint measuring 3" x 2", over back of right arm measuring 2" x 2", over right elbow, lateral part, measuring 2" x 1", over right chest wall, on the lateral part

measuring 3" x 2", over the right petala 2 1/2" x 1 1/2", over right thigh from in its lower part measuring 3" x 2", over left elbow measuring 1" x 1 1/2", over medial side right ankle joint 2" x 2", over the left shoulder on its upper part measuring 1 1/2" x 1 1/2" and over the left flank measuring 2" x 2".

ii) Scattered bruises over whole of the scalp, bruises over back of right arm measuring 3" x 1/2".

iii) One incised would over mastoid region on the left side measuring 1" x 1/2" x muscle deep, one incised would over left side of back on the lower part, close to iliac crest 1 1/2" left of midline obliquely placed measuring 3" x 1" x bone deep having cut mark over the upper border of iliac crest. One penetrating incised would over the right scapula region at the middle portion measuring 3" x 1" x bone deep. Having cut mark over the right scapula.

iv) One lacerated wound over partial region on the back portion measuring 2" x 1/2" x bone deep, one lacerated wound over the vault of the scalp measuring 2 1/2" x 1" x muscle deep.

v) One crack-fracture over the left temporal and parietal bone measuring 4" in length.

14. P.W. 3 further stated that all these injuries had corresponding abrasions and clotted blood in and around the wounds and they were all antemortem and resistant to washing. Membrane of the brain was also found to be injured with defused clotted blood. As regards brain, P.W. 3 further stated that cranial cavity had extra-dural clotted blood. He further opined that the death was due to the effect of the injuries stated above and they were all antemortem and homicidal in nature. As regards contents of the stomach, he found that same were partially digested rice and curry about 4 oz.

15. On the very same day P. W. 3 held post mortem examination over the dead body of deceased Kartick Naiya with reference to the very same case, On such examination he found the following injuries over the dead body of deceased Kartick Naiya : -

"Abrasion over back of right arm measuring 4" x 3", over right elbow measuring 2" x 1", over dorsam of right hand measuring 2" x 2", over the front of left leg measuring 3" x 1", over the medial side Of left arm to down fore-arm measuring 6" x 3", over front of right leg measuring 5" x 3", over right shoulder on upper part measuring 2" x 2", over scapula to scapula measuring 8" x 4", over the right cheek measuring 3" x 2", over left cheek measuring 2" x 1"."

16. He Iso noticed the following bruises :-

"Over occipital region measuring 3" x 2", over chest wall middle portion measuring 4" x 4", over left chest wall anteriorly in the middle portion measuring 3" x 2", over

the right chest wall in its upper part measuring 3" x 3" and over back of right thigh measuring 4" x 2"."

17. He also noticed one lacerated wound over the front of left leg measuring 1 1/2" x 1" x bone deep. As regards fractures, he found compound closed fracture of shaft of both bones of left leg, compound closed fracture of all the bones of the left ankle joint. He further noticed compound fractures of the small bones of the lateral fore-fingers of the right hand and similar fracture of both bones of the right leg. All the injuries had corresponding abrasions and clotted blood. Injuries were found to have been antemortem and resistant to washing. As regards stomach contents, he found partly digested rice and curry about 2 oz. He also opined that death of deceased Kartick Naiya was due to shock and haemorrhage due the aforesaid injuries and all these were found to have been antemortem and homicidal in nature. As regards the injuries found on the dead body of Ganesh Naiya, P.W. 3 stated that it was not possible for him to say whether all the said injuries were inflicted simultaneously or not. He further opined that wounds found on dead body of deceased Ganesh could be caused by one or several weapons. He further opined that the injuries found on the dead body of Kartick Naiya could have been inflicted by hard and blunt substance.

18. P.W. 4 Bonomali Sardar did not see the occurrence. However, in the next morning he came to the house of informant and found deceased Kartick lying dead and deceased Ganesh gasping for life. Except this there is nothing important in his evidence.

19. P. W. 5 is witness of the inquest proceeding and he signed the inquest report. The inquest report was prepared on 5.4.87. It appears that the inquest report was prepared by Mahadeb Ch. Roy, Sub-Inspector of police. He could not be examined in this case on behalf of the prosecution due to his death. Except what is stated above, there is nothing important in the evidence of P.W. 5. Likewise P.W. 6 is also a signatory to the inquest report prepared on the following day after the occurrence. Except this there is nothing important in his evidence.

20. P.W. 7 Santosh Kr. Chowdhury was a police constable. On 4.4.87 he went to the place of occurrence in connection with the murder and he took the dead bodies from the village to Mominpur morgue. He carried the dead bodies of deceased Kartick and Ganesh. He took the dead bodies to the morgue on being instructed to do so by the officer-in-charge of Joynagar police station. However, one important aspect emerges from his evidence that on the date of occurrence itself this police arrived at the place of occurrence and shifted the dead body to Mominpur Morgue. This shifting of dead body took place on 4.4.87. It is, therefore, evident that long before the registration of the FIR, the police arrived at the scene of occurrence on the date of incident itself. As per his evidence being instructed by the Officer-in-charge of Joyanagar P,S. he carried the dead bodies of the two deceased persons with dead body challans and command certificate. It that be so, it is not

understood as to how the inquest report could be prepared at the place of occurrence itself on 5.4.87. It is needs to be mentioned here further that the written complaint by P.W. 1 was received by a police officer of the said police station at the scene of occurrence itself at 11.45 a.m. on 5.4.87. And thereafter the said written complaint was forwarded to the P.S. through constable Santosh Chowdhury. The complaint was received at the police station on 5.4.87 at 4.45 p.m. P.W. Santosh Chowdhury Is totally silent about this fact that he carried the complaint to the police station on 5.4.87. These are some of the prominent circumstances that the complaint was received by the police officer on 5.4.87 at 11.45 a.m. at place of occurrence itself or as to why no complaint could not be recorded on 4.4.87 itself when as per the version of P.W. 7 he with police officer came to the place of occurrence on 4.4.87 itself and carried the dead bodies to the hospital. , Another prominent feature of the case needs to be noted here is that the inquest report was prepared at 9.05 a.m. on 5.4.87. This inquest report was prepared with reference to Joynagar P. S. case No. 6 dated 5.4.87. But FIR was registered at the police station at 4.45 p.m. on 5.4.87. If that be so, it is not understood how the police officer who prepared the inquest report at 9.05 a.m. on 5.4.89 could note down this case number in the inquest report itself. That apart P.W. 7 Santosh Kr. Chowdhury remained totally silent as to the fact that he carried the written complaint of P.W. 1 to the police station. These prominent features acquired great importance in view of the fact that P.W. 1 in clear and unambiguous terms stated in her evidence that in the morning after the occurrence itself she had been to the Police Station and narrated the entire incident to the Officer-in-charge of the police station and yet no case was taken from her at the P.S. Three days thereafter when she again went to the police station, she lodged her written complaint and on that basis the case was registered at the police station. It nobody went to the police station on the date of occurrence itself, it is not understood as to what had brought the P. W. 7 Santosh Kr. Chowdhury (constable of police) and the officer-in-charge of the police station to the place of occurrence on the date of incident itself? These prominent features are required to be evaluated when appreciating the evidence of eye-witnesses particularly when the incident occurred at mid-night as per the version of P. W. 1 and it was quite dark and mid-night.

21. P.W. 8 Sandhya Mondal is the sister of two deceased persons. She stated in her evidence before the trial Court that in the night of occurrence she was sleeping on the verandah of their house with her mother. Deceased Kartick was sleeping inside the room. Deceased Ganesh was sleeping in the Courtyard. When she was sleeping, suddenly she heard sounds of bomb bursting and police whistle was also heard by her. Some five persons entered into their house and they were Santosh Naiya (not an accused in this case), Appellant No. 6 Bhibuti Naiya, Appellant No. 7 Prosad Naiya, Appellant No. 8 Birupaksha Mondal and Appellant No. 9 Hrishikesh Mondal. After entering their house, these five persons started abusing in filthy language. After that another group of five persons being armed with weapons came to the

verandah of their room. Among these 5 persons she could recognize Appellant No. 1 Debabrata Mondal, Appellant No. 2 Manabendra Mondal, one Kamal Naskar(since acquitted), Santosh Naskar (since acquitted) and Appellant Khokan. These five persons broke open the window of their house and pushed her mother (P.W. 1) into the room by holding her neck. They told her mother that there was dacoit in the room and P.W. 1 should find him out and then her mother being P.W. 1 opened the door and all the aforesaid 10 persons at that time were present in the Courtyard. Her brother Kartick (since acquitted) was sleeping inside the room. He took shelter in the ceiling . The assailants climbed to the ceiling and struck the deceased Kartick on his head. Kartick somehow tried to flee away but he fell down in a tank. Then these assailants again brought out Kartick from this tank by striking him repeatedly with a weapon. After lifting Kartick from the tank, he was tied up with a rope again and they threw Kartick into the tank where he dies. Ganesh woke up from sleep and went up to the assailants and asked them as to why they were assaulting Kartick. Then Ganesh was taken out of the house to the road situated nearby and he was assaulted. His legs were broken. One of his eyes was uprooted. In the nest morning this witness along with her mother went to the police station but the officers of the police station drove them out. On return from the police station, she found her brother Kartick lying dead and Ganesh was lying by his side though till then he was alive. One Nirmal was also found lying there with injuries. Thereafter police came and took away the deceased Kartick and injured persons, namely Ganesh and Nirmal in two separate vans. But Ganesh died on the way to hospital. Subsequently police again come to the place of occurrence and asked various persons about the incident and took LTI of this witness and all other persons. She further stated in her evidence except Santosh Naiya were present in the Court. This is in brief the evidence she gave during her examination-in-chief before the trial Court.

22. During her cross-examination before the trial Court she stated that about two months prior thereto she gave her evidence before the trial Court and she could not remember at that time as to what exactly she had stated before the trial Court. Her husband is alive. She did not keep good relations with her husband. She did not raise any alarm to attract police attention though she heard police whistle. Yet she continued to watch the incident while standing on the verandah and the incident continued till the dawn. When she first heard sound of bomb bursting, it was midnight. When she first saw her brothers, they were lying dead on the road. She also stated in her cross-examination that her husband was alive and he lived in village Gaberia. But no explanation was given by her in her evidence as to why she was in the village of occurrence in the night of incident instead of staying in the village Gaberia with her husband. She further claims to have seen the right eye of deceased being uprooted. But this story of uprooting any eye of either of the two deceased persons is not supported by the medical evidence on record. This witness stated in her evidence that name of her husband is Nabinanda Mondal. But I.O. (PW 13) of the case stated in his evidence that he did not record the statement of the PW

Sandhya Mondal, wife of Nabinanda Mondal of village Gaberia. First Investigating Officer of the case could not be examined in this case as he died before the trial. However it has been noted by the learned trial Court in the deposition of PW Sandhya that Public Prosecutor conducting the case admitted that Investigating Officer did not record any such statement. This is in short the gist of the evidence given by PW 8 Sandhya Mondal.

23. PW 9 Smt. Sabitri Naiya is another eyewitness of this case. Her evidence before the trial Court in short is that on the night of occurrence she was sleeping on her bed. On hearing some hue and cry, she woke up and saw accused Kamal Naskar, Santosh Naskar, Khokan Naskar, appellant No. 1 Debabrata Mondol, appellant No. 2 Manabendra Mondol, accused Tarun Naskar and appellant No. 11 Swapan Naiya were assaulting deceased Kartick. After that they tied up Kartick with a rope and laid him on the road. Noticing this, deceased Ganesh went up and asked them as to why they were assaulting her elder brother Kartick. Soon after that appellant No. 9 Hrishikesh Mondol, appellant No. 7 Prosad Naiya, appellant No. 8 Birupaksha Mondol and accused Santosh Naiya exhorted other assailants to finish off Ganesh also. Being so exhorted, these assailants of Kartick started repeated blows on Ganesh with a crossbar (shovel) while focussing torch light repeatedly. Kartick succumbed to his injuries. She alone begged the assailants to spare Kartick and Ganesh.

24. After that police came to the spot and took away Kartick and Ganesh in a "police van. Incident took place on 4.7.87. But PW 13 (I.O.) clearly stated during his cross-examination that on 3.7.89 he recorded statements of witness PW 9 Sabitri Naiya and Sandhya Mondol wife of Late Dharni Mondol. No explanation was offered by PW 13 as to why there was an inordinate delay of two long years since the occurrence to record statements of important eye-witnesses like PW 9 Sabitri Naiya and Sandhya Mondol. He further admitted during his cross-examination that none of the witness examined by him could say anything about the incident. This is in short the evidence of PW 9 Sabitri Naiya and the evidence given by PW 13 (I.O.) In that connection. There are may other infirmities in the evidence of PW 9 which will be referred to at appropriate stage of this judgment.

25. PW 10 Sadhan Ch. Naiya in his evidence stated that Debabrata Mondol and Kamal Naskar only killed the two deceased persons. Debabrata Mondol is appellant No. 1 and was identified by this witness. However, he failed to identify Kamal Naskar. During cross-examination this witness stated that the two deceased persons were killed in the evening. Police examined him on the next day after occurrence. However, PW 13 (I.O.) stated that he recorded statement of this witness long two years after the occurrence on 3.7.89. No explanation has been given as to this inordinate delay in recording the statement of PW 10. He further stated in his evidence that due to hue and cry raised at the time of occurrence and out of fear all the family members of two deceased persons fled away from their house. Even this

witness also fled away. PW 10 further admitted that he did not divulge names Debabrata Mondol and Kamal Naskar in his statement to the police.

26. PW 11 Subol Ch. Naskar is the scribe of the complaint. On the following day after the incident he visited the village of occurrence. Police recorded his statement. He also wrote out the complaint of PW 1 as per her statement and took the complaint to Jayanagar P.S. with the complaint and lodged it there after obtaining UTI of PW 1 thereon. But from the endorsement of P.N. Ghosh of Jaynagar P.S., Camp-Maldari at the bottom of the complaint itself it is seen that the complaint was received on 5.4.87 at 11.45 a.m. at Maldari camp and it was forwarded therefrom through C1988 Santosh Chowdhury (PW 7) to O/C. Joynagar P.S. for starting a case. Therefore, it is not understood as to where was the scope for PW 11 himself to take the complaint to the Police Station for registration of an FIR. There are some of the most prominent circumstances which must be evaluated before coming to the final conclusion. It may further be noted that Sri P.N. Ghosh (Police Officer) who received the complaint at the spot on 5.4.87 at 11.45 a.m. and forwarded the same to the Police Station has not been examined in this case as a PW and no explanation is forthcoming as to why this P.N. Ghosh could not be examined in this case as a P.W.

27. PW 12 Ranabir Mukherjee stated in his evidence that he was O/C. of Joynagar P.S. that time. On 5.4.87 at about 4.45 p.m. he received a written complaint which was forwarded to him by P.N. Ghosh through constable No. 1988 Santosh Chowdhury (PW 7) and registered the same as an FIR. Therefore, evidence of PW 12 coupled with endorsement of S.I., P.N. Ghosh at the bottom of the complaint substantially belies evidence of PW 1 and PW 11 in this regard.

28. This is in short the entire evidence on record in this case.

29. We heard Mr. D.K. Datta and Mr. S.K. Basu, learned counsel for the appellants. We also heard Mr. S.K. Moitra, learned Additional Public Prosecutor for the State.

30. From the aforesaid discussion of the evidence on record it appears that the impugned judgment is based on the testimony of alleged eye witnesses, namely, PW 1, PW 8, PW 9 and PW 10.

31. PW 8 Sandhya Mondal is sister of the two deceased persons. Her husband was alive at that time and lived in village Gaberia. She did not give any explanation in her evidence as to why she was in the house of her mother PW 1 in the night of occurrence instead of staying in the house of her husband situated in another village. Therefore, her evidence is that of a chance witness. Evidence of a chance witness is proverbially unsafe to rely upon unless corroborated in material particulars by other reliable independent evidence. At the time of occurrence she suddenly woke up from her sleep upon hearing sound of bomb bursting. This part of her evidence is not supported by other evidence on record. No bomb injury was found on any of the two deceased persons. No splinter of any bomb was seized by the police from anywhere at or about the place of occurrence. Her mother PW 1

never supported the version of this witness that five accused persons, namely, Debabrata Mondol, Manabendra Mondol, Kamal Naskar, Santosh Naskar and Khokon pushed her mother PW 1 into the room by holding her neck or that they told PW 1 that a dacoit was hiding there and PW 1 should find out the dacoit or that PW 1 opened the door. PW 1 or other alleged eye witnesses also did not support the version of PW 8 that after assaulting the deceased Kartick assailants tied him up with a rope and again they threw Kartick in a tank where he died. None of other eye witnesses supported her story that the assailants uprooted an eye of deceased Ganesh. This story of uprooting an eye of deceased Ganesh is also belied by medical evidence on record. Therefore, evidence of this witness differs materially from the evidence of other alleged eye witnesses. She also heard police whistle but nobody supported this part of her story also. According to her name of her husband is Nabinanda Mondol. PW 13 (I.O.) clearly stated in his evidence that during investigation about two years after the occurrence on 3.7.89 he recorded the statement of one Sandhya Mondol. w/o. Late Dharni Mondol, PW 13 further stated that he never recorded statement of witness Sandhya Mondol whose husband's name is Nabinanda Mondol. Therefore, it seems I.O. never recorded the statement of PW 8 Sandhya Mondol whose husband's name is Nabinanda Mondol. Even if we assume that statement of Sandhya Mondol, w/o. Late Dharni Mondol as recorded by the I.O. on 4.7.89 is the statement of PW 8, same cannot inspire our confidence due to belated recording of her. Statement apart from other infirmities in her evidence, as already pointed out above. Prosecution has not offered any explanation for this inordinate delay to record the statement of PW 8. PW 8 claimed that on the very next day after occurrence in the morning along with PW 1, she went to the Police Station and narrated the occurrence and yet her statement was not recorded by the police for about two years. It appears from the decision of the Apex Court in Bhagwan and Another Vs. State of Madhya Pradesh, that for similar reason, important eye witnesses were disbelieved. It may be seen from another decision of the Apex Court in Babuli alias Narayan Bahera Vs. The State of Orissa, that for about 20 hours delay in recording the statement of important eye witness, his version was rejected. Therefore, it appears that this witness is a chance witness. There was an inordinate delay of about two years on the part of the police to record her statement though according to her she along with her mother (PW 1) visited the Police Station in the very next morning after the occurrence and reported about the incident. This fact by itself renders her testimony highly untrustworthy. Apart from the aforesaid her testimony is at variance with testimony of other eye witnesses in material particulars. Her testimony is further belied by medical evidence with regard to the alleged uprooting of an eye of the deceased Ganesh and hence we are unable to place any reliance on her evidence.

32. Other eye witness PW 10 Sadhan Ch. Naiya should name only Debabrata Mondol and Kamal Naskar. However, he failed to identify Kamal Naskar. According to him, his statement was recorded by the police on the very next day after the occurrence.

However, PW 13 (I.O.) stated in his evidence that long two years after occurrence on 3.7.89 he recorded the statement of this witness. No explanation has been offered by the prosecution for this inordinate delay in recording his statement. He further stated in his evidence that due to hue and cry raised at the time of occurrence and out of fear, he along with other members of the family of PW 1 fled away from the scene. Other eye witnesses did not support him on this point. He also admitted during cross-examination that he did not divulge the names of accused Debabrata Mondol and Kamal Naskar to the police. After the aforesaid there is hardly any need for any further discussion of the evidence of this witness for holding the view that the trial Court should not have acted upon his evidence.

33. PW 9 Sabitri Naiya is another eye witness. PW 13 (I.O.) stated that her statement was also recorded by him long two years after the occurrence on 3.7.89. PW 9 herself claimed that her statement was recorded by the police on the next day after the occurrence. In this connection it needs to be mentioned here that prosecution case is that police came to the P.O. on the next day in the morning and prepared inquest report. Complaint from PW 1 was allegedly received by S.I., P.N. Ghosh at 11.45 a.m. on 5.4.87 and yet her statement was not recorded by police. It may be seen from a decision of the Apex Court in (1982)2 SCC 35, that as the alleged eye witness did not report the incident to the police when police came to the village, he was disbelieved. For such belated disclosure of the incident to the police, though police was available at least on the very next day after the occurrence, Supreme Court disbelieved eye witness version in large number of cases i.e Sonia Bahera Vs. State of Orissa, , Panda Nana Kare Vs. State of Maharashtra, etc. Therefore, it is totally unsafe to give any credence to the evidence of this witness.

34. Now, we are left with the evidence of the most important eye witness for the prosecution, namely, PW 1 Smt. Kajal Bala Naiya being the complaint. She is also the mother of two deceased persons.

35. On the basis of the written complaint lodged by the complaint, the FIR of this case was registered. Registration of the FIR in a criminal prosecution is the most important aspect and, therefore, circumstances under which such FIR was registered acquires great importance in the matter of appreciation of evidence. No doubt principal object of the FIR is only to make a complaint to the police to set criminal law into motion. Its use is for contradiction and corroboration of the substantive evidence of the complaint before the Court. But it is secondary though equally important object is to obtain earliest version of an alleged criminal activity before there is time for such circumstances to be forgotten or embellished. To avoid embellishment or introduction of connected story in the FIR it is expected that it should be lodged at the earliest opportunity. Because the story as given in the FIR checks and controls subsequent development.

36. From the endorsement at the bottom of the complaint it appears that the written complaint was allegedly received at the spot itself at 11.45 a.m. on 5.4.87

and thereafter it was forwarded to the Officer-in-charge of Joynagar Police Station through constable No. 1988 Santosh Chowdhury (PW 7). But from the inquest report it appears that the inquest report was drawn up by Manab Ch. Roy at the place of occurrence at 9.45 a.m. on 5.4.87. Sandhya Mondol who is an eye witness according to the prosecution put her LTI in the inquest report; yet no FIR was recorded at 9.45 a.m. This inquest report relates to deceased Kartick Naiya. The inquest report contains a recital that inquest was held on the dead body of deceased Ganesh Naiya also. This injured Ganesh Naiya was sent by him to hospital alongwith injured Nirmal Naiya and subsequently at 10.25 a.m. the inquest was held on deceased Ganesh Naiya when he was found to be dead. Despite this no FIR was taken either from injured Nirmal Naiya or from deceased Ganesh Naiya when he was alive. PW 1 being the complaint subsequently identified the dead body of the deceased Ganesh Naiya when inquest was held on him by the concerned police Officer. Yet no FIR was taken from either of them. The inquest report also does not contain the names of the assailants or anything about the incident as stated before the trial Court by PW 1 or other eye witnesses. It is true that primary object of inquest proceeding is to ascertain apparent cause of death as far as possible. Under normal circumstances absence of names of the assailants or about the occurrence in the inquest report is not of much consequence. But in these circumstances of the case as stated above apart from other circumstances of the case to be pointed out hereinafter such omission do acquire great importance in the matter of proper evaluation and appreciation of the evidence of alleged eye witnesses. It is stated in the inquest report itself that deceased Ganesh Naiya and Kartick Naiya as also injured Nirmal Naiya gathered at 12.30 a.m. at Arunnagar and at that time they were armed with gun and pipe guns. They were accompanied by others also. But security forces of Arunnagar chased them and in order to flee away they proceeded towards Maldari village, being chased by security forces and at Malderi village the security forces shouted "thieves, dacoits". Around 300/400 villagers along with security police of Gaberia, Chatra, Arunnagar and Malderi gathered and assaulted the deceased with sharp weapons and as a result of such assault the deceased Ganesh Naiya died at this spot at Belapukur junction. These facts as noted in the inquest report itself totally belies the prosecution version. Rather these matters as noted in the inquest report lends support to the version of the appellants and other accused persons.

37. As regards inquest report, Sub-section (2) of Section 174 Cr.PC provides that the inquest report shall be signed by the police Officer conducting the inquest inquiry and other persons or by so many of them as concur therein. Therefore, witnesses who signed the inquest report must have concurred with the contents of the inquest report as otherwise they could not have signed the same. For this reason contents of the inquest report amount to statements/admissions of not only the Police Officer who conducted the inquest inquiry but also of the inquest witnesses who signed the inquest report.

38. Contents of the inquest report in this case amount to prosecution's admission of a part of the defence version. This inquest report was produced by the prosecution along with charge sheet. Now Section 58 of the Evidence Act provides that "No fact need be proved in any proceeding which parties thereto or their agents agree to admit at the hearing or which, before the hearing, they agree to admit by any writing under their hands or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings. Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

39. Contents of the inquest report are not denied or disputed by the appellants. Rather, these contents stood admitted by the appellants as evident from the suggestions given on their behalf to some of the prosecution witnesses apart from what the appellants stated in course of their examination u/s 313 Cr.PC.

40. Proof of such admitted facts would ordinarily be futile as the Court has to try only such issues on which parties are at variance and not those on which they are agreed. Judicial admissions are formal admissions by a party during the proceedings of the case. Extra-judicial admissions are informal admissions not appearing on the record of the case. Such admissions constitute a waiver of proof. They can be made foundation of the rights of the parties. Admissions which have been deliberately made for the purpose of a case will act as an estoppel to the admission of any evidence contradicting them. See [Nagindas Ramdas Vs. Dalpatram Ichharam alias Brijram and Others.](#)

41. Furthermore Section 294 Cr.PC provides as follows:--

"294. No formal proof of certain documents.--(1) Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each such document.

(2) The list of documents shall be in such form as may be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in any inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed. Provided that the Court may, in its discretion, require such signature to be proved."

42. This Inquest report was surely included in the list of documents as set out in the chargesheet. Genuineness of the inquest report has not been denied or disputed by either of the parties. The trial Court also in its discretion has not called upon either of the parties to prove the document or all the signatures appearing therein, though signatures of two witnesses were proved. It is now settled principle of law that if the

genuineness of a document filed by a party is not disputed by the opposite party, it can be read as substantive evidence under Sub-section (3) of Section 294 Cr.PC. Accordingly a post-mortem report, if its genuineness is not disputed by the opposite party, can be read as substantive evidence without doctor concerned being examined. See 1983 Cr.iLJ 487 : [Saddiq and Others Vs. State,](#). In fact object of Section 58 Evidence Act and Section 294 Cr.PC is to accelerate the pace of trial by avoiding the time being wasted in examining the author of the document filed by either of the parties to prove his signature and correctness of its contents if its genuineness is not disputed.

43. In fact in a case reported in [Balaka Singh and Others Vs. The State of Punjab,](#) the Apex Court relied upon the contents of the inquest report for giving benefit of doubt to the accused. In that case out of nine accused, names of four accused were omitted to be mentioned in the inquest report. For failure to explain this omission, complicity of four accused persons was held to be doubtful and benefit of that doubt was given to four accused.

44. It is true if contents of the inquest report is based on the statements of witnesses made to police in course of investigation of an offence, same may be hit by Section 162 Cr.PC and hence same can be used only for the purpose of contradiction in accordance with provision of Section 145 Evidence Act. But in this case inquest was held long before any FIR was registered. Rather the FIR itself was recorded in course of investigation as police had already received all necessary information of commission of cognizable offence at the time of inquest. As the inquest report contains the earliest information of commission of cognizable offence, same has to be treated in this case as FIR. Complaint of PW1 which was treated in this case as the FIR is hit by Section 162. Therefore, inquest report should be treated in this case as FIR and the same can be used in this case for the purpose of contradiction as well as corroboration. Section 162 provides for use of statements of witnesses made to police in course of investigation into an offence. Inquest inquiry as contemplated u/s 174 is merely inquiry into the apparent cause of death and not an Investigation into an offence. Such Inquiry preceded the commencement of investigation into the offence. Hence, inquest report cannot be said to be hit by Section 162. Such report which preceded commencement of investigation into an offence can be used not only for the purpose of contradiction but also for corroboration. Inquest report also contains materials observed at the spot by the Police Officer himself who conducted inquest and, therefore, same is not hit by Section 162.

45. It is true the Apex Court In [Surjan and Others Vs. State of Rajasthan,](#) observed "But the statement in the inquest report is not evidence by itself and it cannot be pitted against the evidence of the medical Officer given in Court." However, in a later decision in [Rameshwar Dayal and Others Vs. State of Uttar Pradesh,](#) , Apex Court distinguished and explained its decision in Surjan's case and ultimately relied upon

materials furnished by the inquest report and observed in this connection that the inquest report furnished valuable materials for testing the veracity of witnesses. Again in Pandurang, Tukia and Bhillia Vs. The State of Hyderabad, Apex Court refused to place any reliance upon the inquest report as it did not tally with the post mortem report.

46. In this way large number of case laws can be referred wherefrom it would be evident that the Apex Court time and again relied upon materials furnished by the inquest report provided facts and circumstances of such case justified the same. Accordingly and in view of the legal position in this regard as discussed above, it appears that materials furnished by the inquest report in this case can be relied upon as legal evidence and the same lends corroboration to the version of the appellants.

47. Another important feature of the case is that P.N. Ghosh (S.I.) who received the complaint from PW 1 at or about the place of occurrence and forwarded the same to the Police Station through PW 7 Santosh Chowdhury had not been examined in this case. PW 7 Santosh Chowdhury has not uttered a single word in his evidence about the fact of carrying the complaint of PW 1 from the place of occurrence to the Police Station as directed by S.I., P.N. Ghosh. PW 1 in her evidence has given a completely different story as regards the FIR. According to police the FIR was registered at 4.45 p.m. on 5.4.87. However, PW 1 in her evidence stated that in the early morning following the occurrence PW 1 went to the Joynagar Police Station and narrated the incident to the police Officer present there. However, police Officer on duty at the Police Station refused to take her case. She thereafter returned to her village. However, three days thereafter she again went to the Police Station alongwith PW 11 Subol Chowdhury and then lodged the FIR. The important question that arises here is whether complaint was in fact received at the place of occurrence at 11.45 a.m. on 5.4.87? This story as given by PW 1 in her evidence belies the prosecution version that the complaint was received at the place of occurrence on 5.4.87 at 11.45 a.m. and that the complaint was received at the Police Station at 4.45 p.m. on 5.4.87 and then the FIR was registered. We also find from the dated initial and seal of the concerned Magistrate that the FIR was received by him on 9.4.87. If FIR was in fact registered on 5.4.87, why there was such inordinate delay in forwarding the original FIR to the Magistrate after four days? The law is that FIR must be sent to the Magistrate forthwith after its registration. This fact further belies the prosecution version that FIR was registered on 5.4.87 itself. This inordinate delay in forwarding the FIR to the concerned Magistrate renders the prosecution story regarding registration of the FIR on 5.4.87 highly doubtful and suspicious. These suspicious circumstances further make it highly probable that the version of the accused is true. Perhaps the eye witnesses did not see the occurrence at all or that failed to recognise the assailants. It is the evidence of PW 1 and some other witnesses that the occurrence took place at about mid-night and it was dark. Because either the alleged eye witnesses did no witness the occurrence or that they failed to recognise

the assailants and this is the reason for this inordinate delay in registering the FIR in this case or forwarding the same to the Magistrate on 9.4.87.

48. In view of the aforesaid suspicious circumstances we are unable to place any reliance whatsoever on the testimony of PW 1 and other eye witnesses examined in this case on behalf of the prosecution. In the aforesaid circumstances possibility of false implication of the appellants in this case cannot be ruled out. There is no explanation from the side of prosecution as to why there was such inordinate delay in forwarding the FIR to the Magistrate.

49. In the aforesaid circumstances we find that it is absolutely unsafe to place any reliance at all on the testimony of these eye witnesses and hence we further hold that prosecution has totally failed to establish its case against the appellants beyond reasonable doubt.

In the result we are constrained to allow this appeal and set aside the impugned judgment of conviction and sentence.

We further direct that the appellants shall be set at liberty forthwith.

M.K. Basu, J.

50. I am in agreement with the above findings of my learned brother. However, I feel constrained to differ from my learned brother in respect of only one of his reasoning (vide page-22 of the Judgment). It is observed there, "the facts as noted in the inquest report totally belies the prosecution version and rather such citation in the inquest report lends support to the defence version". The facts which appear to have been stated by the Police Officer on the inquest report are that Ganesh Naiya and Kartick Naiya as also the injured Nirmal Naiya gathered at 12.30 a.m. at Arun Nagar being armed with pipe guns or guns and accompanied by others also and being chased by the security forces tried to flee away through Malderi village and at this time about 300/400 villagers shouting "thieves, dacoits" assaulted them with sharp weapons and as a result of such assault Ganesh Naiya died at this spot at Bela Pukur junction. I am afraid, such contents of an inquest report cannot be relied upon or cannot be treated as a piece of evidence for the purpose of considering the question whether the guilt of the accused persons has or has not been established. Apart from the fact that the inquest report in the present case has not been admitted into evidence, (only the signatures of PW 5 & 6 which were put on the inquest report have been marked exhibits 1 & 2 respectively, but not the inquest report itself--vide order sheet dated 15.5.1996 at page 30 of the paper book). Such contents of an inquest report cannot be taken as substantive evidence touching the merit of the prosecution allegations. They may be relevant only for the purpose of corroboration or contradiction as provided u/s 145, Evidence Act. Indeed, it may be dangerous to rely upon such a story narrated by a Police Officer on the inquest report remaining unsubstantiated during the trial. In this connection, I would refer to a three-Judge Bench decision of the Supreme Court in [Pandurang, Tukia and](#)

Bhillia Vs. The State of Hyderabad, wherein Their Lordships came to the finding that it was questionable how far an inquest report was admissible except u/s 145 of the Evidence Act.

Barring this solitary part, I agree with the judgment and order proposed by my learned brother.