(2002) 12 CAL CK 0006

Calcutta High Court

Case No: Criminal A. No. 34 of 1994

Chandan Chatterjee alias Fulu	APPELLANT
Vs	
State of West Bengal	RESPONDENT

Date of Decision: Dec. 18, 2002

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 313, 392
- Evidence Act, 1872 - Section 105, 4
- Penal Code, 1860 (IPC) - Section 100, 105, 299, 300, 302

Citation: 107 CWN 763

Hon'ble Judges: Sujit Barman Roy, J; Narayan Chandra Sil, J

Bench: Division Bench

Advocate: Sekhar Basu and S.G. Mukherjee, for the Appellant; Kazi Safiullah, Madhuri Das and P.K. Roy, for the Respondent

Judgement

Sujit Barman Roy, J.

This appeal at the instance of the appellant Chandan Chatterjee alias Fulu is directed against the judgment dated 6.1.1994 passed by the learned Sessions Judge, Howrah in Sessions Trial No. 14(4)/1993 convicting the appellant under Sections 302 and 448 I.P.C. and sentencing him to life imprisonment and to a fine of Rs. 10,000 and in default to undergo R.1. for further one year in respect of his conviction u/s 302 I.P.C. and also to suffer R.1. for six months in respect of his conviction u/s 448 I.P.C. with the direction that all the sentences would run concurrently. Prosecution case in brief is that on 27.1.1990 at or about 9.30 p.m. Ranjit Sarkar being Sub-Inspector of Police of Domjur P.S. received a telephonic information from an unknown person that some trouble was going on at "Panchananda Jewellers", situated at Dakshin Jhapardah. Immediately said information was entered in the G.D. of the said Police Station under G.D. entry No. 968 dated 27.1.90 being Ext. 7. Thereafter said P.W. 16 alongwith other police personnel left for the. said "Panchananda Jewellers". On reaching the spot, PW. 16 found the shop "Panchananda Jewellers" under lock and

key from inside. He could hear some noise from inside the said shop. He further noticed that Biswa Nath Dhara, his brother Raghunath Dhara, Sampad Kr. Ash and many others had already gathered there in front of the said shop. With a rod, supplied by Biswa Nath Dhara. Ranjit Sarkar and others applied pressure on the door of the said shop and forcibly broke open the door. On opening the shop P.W. 16 found that a person was tying in a pool of blood and he was groaning. Immediately with the help of Raghunath Dhara, Biswanath Dhara and some other persons who had already collected there together with police officers, said injured person being the deceased was brought out of the shop and was sent to hospital in a car for his treatment since he was till then alive. Ranjit Sarkar heard further sound, coming from inside the shop. He searched and found that another person (appellant) was laying under the bench. Said person was brought out but he stated nothing. However. P.W. 16 found that there were blood stains on his palm, leg as well as his head. Hair of that person was wet with blood. On enquiry he learnt from the persons present there that the name of the said person was Fulu alias Chandan Chatterjee (appellant). The appellant was also removed to the hospital for his treatment under police escort since P.W. 16 '' had suspicion about involvement of the appellant in the incident. Thereafter P.W. 16 recorded the statement of Biswanath Dhara at 10.45 p.m. on that very day and signature of Biswanath Dhara was obtained thereon and thereafter said statement was forwarded to the P.S. through constable Gitendranath Das for registration of an FIR. Accordingly, said statement as. recorded from Biswanath Dhara was registered at the P.S. as an FIR on that very day at about 11.15p.m. under sections 394/396/307 IPC

2. In the said FIR it was, inter alia, alleged by Biswanath Dhara that his second brother Kasinath Dhara (since deceased) had a. business of goldsmith in "Panchananda Jewellers". Radhanath Barik. aged about 13/ 14 years, was an employee of the deceased Kasinath Dhara. That evening P.W. 1 was also in the shop. However, at 8.36 p.m. on that day P.W. 1 and others left, the said shop after finishing their work. But, Gadhanath and She-deceased Kasinath were left behind ill the said jewellery shop as they'' continued to do Jewellery work. After leaving the said shop P.W. 1 came to Kamala Jewellers at Dorajur Market and therefrom he returned to his house. Little after that his younger brother Raghunath and his third brother-in-law Sampad Kr. Ash returned home at 10.15 p.m. Immediately after that Radhanath came and rang the door bell and simultaneously started shouting to open the door quickly as the appellant had killed the deceased. On hearing this P.W. 1 alongwith his father, younger brother, brother-in-law and others came out of their house and learnt from Radhanath that when P.W. 1 left the said jewellery shop, appellant came there in the said shop at about 9.15 p.m. with a bag in his hand and started talking with the deceased. On being requested by the appellant, the deceased Kasinath sent out P.W. 4 for bringing tea and cigarettes. Deceased also gave P.W. 4 a note of Rs. 10/- and asked him to bring some sweets for his home. Appellant then advised P.W. 4 to bring the sweets from Annapurna Sweetmeat

Shop, instead of bringing the same from Ma Tara Sweetmeat Shop'' as they were not of good quality. Soon after P.W. 4 came out of the shop in order to bring sweet, tea and cigarette, the appellant closed the shop door and locked the shop from inside. It was around 9.30 p.m. at that time. It was further stated in the said FIR that the appellant very often used to visit the deceased in the said shop and gossip with the deceased, about 8/10 minutes later when P.W. 4 was returning towards the shop with sweets, tea and cigarettes, he heard from a short distance cries "Oh Mother! Oh Father! I am being killed." Thereafter when he returned to the shop quickly and peeped through an aperture of the door which was closed under lock and key from inside, P.W. 4 could see that the deceased Kasinath received severe injury and he was profusely bleeding and he was writhing in pain on the floor of the shop and he was saying "Fulu murdered me, please call Sukumar, Tapu and all others". On hearing such crises P.W. 4 began to collect people. He also saw another person concealing himself inside the shop-room. Local people meanwhile collected there. P.W. 4 was sent by Tapu in a Rickshaw to the house of P.W. 1 for giving information. Immediately on learning the said news, P.W. 1 alongwith his younger brother, brother-in-law and many others of his locality came to the shop running. He found on reaching the shop that many people had already collected there and broke open the lock of the shop room. He saw that the deceased sustained severe injuries all over his body and was moving from here to there in severe pain. He was unable to speak. The appellant was creeping on the floor. Some injuries were also noticed on the back side of the head of the appellant Fulu. Inside the shop room he found blood stained bag, nepala (knife) etc. were lying near the deceased. He also found a big iron rod. The bag he found inside the shop belonged to the appellant. The iron-chest was open. The broken glasses of light and other articles were found lying scattered here and there. One bundle of currency notes of Rs. 50/- denomination was tying near the iron-chest and the said bundle was also stained with blood. The deceased was immediately sent out to Howrah for treatment. In these circumstances P.W. 1 expressed apprehension in his aforesaid FIR that the appellant began to make friendship with the deceased and came to the shop with rod. bhojali and knife to snatch away money from the deceased. In order to kill the deceased, appellant assaulted the deceased with bhojali and knife and caused severe injuries.

3. On the basis of the aforesaid FIR and after usual investigation police submitted chargesheet against the appellant under Sections 302/448 I.P.C. In course of time, the case was committed to the court of the learned Sessions Judge. Howrah for trial of the appellant.

4. On perusal of the materials on record, learned Trial Court framed charges under Sections 302 and 448 I.P.C. against the appellant to which he pleaded not guilty. In course of trial in all 16 P.Ws. were examined on behalf of the prosecution. None was examined on behalf of the appellant. In course of the trial defence of the appellant in brief was that the prosecution against him is utterly false and he was innocent However, in reply to all material questions in course of his examination u/s 313

Criminal Procedure Code, appellant stated that he did not know anything about the matter, but when the appellant was asked by the learned trial court during his examination u/s 313 Criminal Procedure Code as to whether he had anything to say with regard to this case, appellant replied that on the date of incident appellant had been to the shop of the deceased and on being asked by him. his assistant Radhanath brought tea and cigarette. Appellant then took the tea and smoked cigarettes while reading newspaper. Somebody then came horn behind and struck him on his head repeatedly. Thereafter be knew nothing as the appellant lost his sense. He regained his sense in the hospital. He narrated this incident to the doctor in the hospital. He submitted papers of his treatment in the hospital. One day a police officer met him in the hospital and the appellant narrated this incident to the police officer also. About 22 days later two police men came to the hospital and from there he was taken to the Howrah Court by the two police men. Therefore, appellant did not deny his presence inside the shop room at the tome of occurrence and he further admitted that he sustained injuries at that time for which he was treated in the hospital as an indoor patient for about 22 days. Therefore, his defence plea is that somebody suddenly struck hams blows from back side and he lost his sense and regained consciousness in the hospital. He could not see the person who had assaulted him.

5. On conclusion of the trial the appellant was convicted and sentenced as already stated.

Most important witness in this case is Radhanath Barik who was at file material point of time an employee of the deceased in his shop. At the time of the occurrence he was aged about 13/14 years and he read up to class V. In his evidence he stated before the trial court that he took up profession of goldsmith. He started working at the jewellery shop of the deceased. He worked as a craftsman in gold ornaments and was learning the job of making ornaments under the deceased in his shop. The business of goldsmith in the said shop was the business of the deceased However. P.W. 1 being the brother of the deceased used to run money lending business from the same shop. On the date of occurrence shop was opened at about 4.30 p.m. in the afternoon. Thereafter he narrated in his evidence as to how the wooden door of the shop could be opened. They used to close the shop generally at about 10/30.30 p.m. every night. Apart from wooden door, said shop had also a collapsible gate. PW. 1 used to leave the shop and return home at about 8.30 p.m. everyday. As usual on the date of occurrence at about 9 p.m. PW. 1 left the shop. Later on appellant came who had a nylon bag with him Something was there Inside the bag. On being shown the said bag was identified by this witness and marked as material Ext. V. As usual. they used to dose the shop at about 9 p.m. After closing the shop they used to continue the work of goldsmith inside the shop. It is stated by him that they used to start the work of jewellery making after the days transaction at about 8.30/9 p.m. after closing the wooden door of the shop room under lock and key. Said lock on being shown was identified by this witness and marked as material Ext xiv. After

coming to the said shop the appellant was reading a newspaper while sitting on the chair. Appellant kept his bag by the side of the chair when he was reading the newspaper. The deceased was checking his accounts and counting money at that time. PW. 4 was sitting inside the snap room. The deceased gave a note of Rs. 10/- and asked PW. 4 to faring sweets from "Ma Tara Mistanna Bhander. At that time appellant instructed PW. 4 to bring sweets from elsewhere instead of bringing sweets from "Ma Tara Mistanna Bhander" as the sweets made in "Ma Tara Mistanna Bhander" were not of good quality. He further advised PW. 4 to hiring, the sweets from "Annapurna Mistanna Bhander." Said "Annapurna Mistanna Bhander" was situated little far away from the shop of the deceased whereas "Ma Tara Mistanna Bhander" was situated comparatively at a shorter distance.. Deceased sent out PW. 4 for bringing sweets far his home. The sweets used to be purchased for the house of the deceased almost everyday. When PW. 4 went out for bringing sweets, the wooden door was closed and locked from inside. At that time the appellant and the deceased remained inside the shop room. After purchasing sweet PW.4 returned back abound 20 minutes later. When he was so returning, he could hear from some distance that the deceased was shouting "save me save me. I am being, killed by Fuluda." On hearing this alarm P.W. 4 rushed to the shop and by applying force he could slightly open the door and saw that the door was under lock and key. After slightly opening the door by giving pressure he could see through an aperture the appellant stabbing the deceased with a bhojali inside the shop. Deceased had a knife. Deceased was trying to save himself by trying to assault the appellant with the knife. The knife which was in the hand of the deceased was used for cutting fruits. On being shown, this witness identified the bhojali and has been marked as material Ext I. The knife with which the deceased was trying to defend himself was identified by this witness and marked as Ext. VI PW. 4 also saw the appellant striking the deceased with the bhojall 4/5 times and thereafter he dropped the bhojali on the gaddi. Deceased shouted that the appellant had murdered him and he asked PW. 4 to call Sukumar (landlord). On being called by PW 4. Sukumar (PW. 3) came down and then PW. 4 narrated the matter as seen by him and immediately after that he rushed towards the house of PW. 1. On reaching the house of PW. 1 he rang the door bell and simultaneously shouted that the appellant murdered the deceased, and requested them to come quickly. Soon after that owner of Kamala Jewellers, being Sampad. Biswanath and other family members of the house of the deceased came down and on learning this incident from PW. 4 rushed towards the shop. PW.. 4 also followed them. On reaching the shop he could find that Sampad. PW.1 and others were trying lo break open the door of the shop by means of a shovel and ultimately the door was forcibly opened. On entering the shop they found that the deceased was tying inside the shop room. The appellant, was sitting in a corner of the room. The appellant was crouching. The deceased was brought out by police and others and immediately the deceased was sent to hospital in a taxi.-The appellant was taken away by the police. He also saw the blood stained bhojah. knife, nylon bag, torch, rod. scabbard of the bhojah. currency notes were King in the shop

here and there. Of course currency notes were lying on the gaddi. All these objects being identified by PW. 4 were marked as material Exts. AD these objects were stained with blood. Currency notes were also stained with blood. This witness further stated in his evidence that he knew the appellant as he used to visit the shop quite often to take money from the deceased. He thereafter proceeded to give description of the wooden door of the shop. Apart from the wooden door there was no other entrance into the shop. Of course there was a window in the shop but it was fixed with grills and won bars attached to the window. This is in short the evidence given by this witness in course of his examination-in-chief. As a matter of fact PW. 4 is the only eye-witness for the prosecution. Other witnesses indirectly lent corroboration to the testimony of PW. 4 as to what they had heard from him. Of course, after the incident was over, rest of the witnesses arrived at the scene of occurrence and with the help of the police personnel who arrived there little later opened the door and found that deceased was lying with serious bleeding injuries and the appellant who was also injured.

6. Biswanath Dhara being the informant of this case is the elder brother of the deceased. The gist of the FIR lodged by him has already been stated in this judgment hereinabove. His evidence before the trial court in brief is that alongwith the deceased be used to run a jewellery shop under the name and style "Panchananda Jewellers" at Jhapardah Bazar. They woe running this business for the preceding 20/25 years worn the One of their father. Said jewellery shop was situated on the ground floor of a building of which Sukumar Das is the landlord. This building is a three-started building Said jewellery shop was situated on the ground floor and the adjacent room of the same building is a godown of said Sukumar Das. He gave description about the door of the said shop. There were two iron chests in the said shop. Deceased was a goldsmith by a profession and for this reason the deceased himself used to do all the jewellery work. They used to open the shop in the morning at about 7.30 a.m. and it remained open till 12.30/1 p.m. Again in the afternoon they used to open the shop at about 4/4-30 p.m. and close the shop at 8 p.m. However, work of jewellery used to be continued even after 8 p.m. when shop used to toe closed. When PW. 1 used to leave the shop at about 8 p.m., deceased remained back in the shop for jewellery work. Deceased'' had an employee, namely, Radhanath Barik who used to remain inside the shop with the deceased. Radhanath Barik was working also as an apprentice to learn the work of goldsmith. This witness used to run a money-lending business from the same shop and deceased used to manage the business of goldsmith. On the date of occurrence at about 8.30 p.m. PW. 1 left the shop as usual and went to Kamala Jewellers belonging to his brother-in-law Sampad Kumar Ash. He was there for some time and thereafter he left for his home at about 9.30 p.m. Little after P.W. 2 came back to his home, his younger brother Raghunath Dhara also returned home alongwith his brother-in-law Sampad Kr. Ash. Little after that Radhanath Barik rang the door bell and started shouting saying that the appellant murdered the deceased and, therefore, PW. 4 wanted this PW. 1 and

others to come to the shop immediately. It is further stated by this witness that the appellant used to visit the shop of the deceased quite frequently. He also used to visit the house of the deceased. On hearing the alarm raised by Radhanath. this witness alongwith his other family members as well as Sampad Kr. Ash came out hurriedly and rushed to the shop being followed by Radhanath Barik. On coming to the front side of the shop PW. 1 noticed that quite a good number of local persons had already collected there. The wooden door was closed from inside under lock and key. Meanwhile police also arrived at the spot and thereafter in presence of the police the lock was forcibly broken and the door was opened. After opening the door they found that the deceased was lying on the floor of the shop. He had bleeding injuries as described by PW. 1 in his evidence. Appellant was seen crouching in a corner of the shop. It appeared that the appellant had also incised wounds (cut marks). Appellants body was stained with blood. The deceased was then sent to the hospital for treatment as he was alive till then. Subsequently deceased was shifted to Howrah Hospital. This witness then proceeded to narrate the condition in which he found the shop room including blood stains splattered on gaddi, currency notes and other places. On noticing these things, it appeared to PW. 1 that at the relevant point of time deceased was counting his currency notes. He also described other articles including a nylon bag. scabbard of a nepala (sharp cutting weapon), one five cell torch, one iron rod about I cubit long kept inside the bag and a nepala lying on the gaddi of the shop. Knife was also stained with blood. He could not say to whom this knife belonged. But he stated that possibly the said knife belonged to the deceased who used it for cutting fruits. From the shop itself police sent the appellant in a police vehicle for his treatment. Thereafter he made a statement to the police which was subsequently treated as FIR. However, the deceased succumbed to his injuries on way to hospital. Police seized various articles including lock and weapon of offence from the said shop. All these articles seized from the scene of occurrence were marked as material Exts. on being identified by PW. 1. He further stated that deceased used to take sweets to his home quite often. This is in short the evidence given by this witness. In this judgment we are not dealing with the cross-examination part of the evidence of various witnesses as we do not consider the same to be necessary for just disposal of this case. Sampad Kr. Ash is the husband of the sister of the deceased. He had also a jewellery shop at some distance away from the shop of the deceased. His evidence is more or less similar to that of PW. 1. Alongwith, PW. 1, PW. 2 also arrived at the scene of occurrence and corroborated the evidence of PW. 1. For this reason and for the sake of brevity we do not like to enter into detailed discussion of the evidence of PW. 2.

Sukumar Das is landlord of the building on the ground floor of which the shop of the deceased was situated. The deceased was his tenant His building is a three-storeyed building. He used to reside at the top floor of the same building. At the time of occurrence he was in his house when Radhanath Barik called him stating that some fight was going on inside the shop room. PW. 4 further stated that

somebody assaulted the deceased in the closed shop room, learning this be came down hurriedly and found that the said shop of the deceased was closed from inside. By the time he came in front of the shop of the deceased, others had collected there. On being asked by others. PW. 3 went to the police station to give an information about this matter. However, on reaching the police station he could learn that police was already informed about the incident and a police team already started for the shop. On teaming this he came back in front of the shop and found police party had already arrived there. He also found other relations of the deceased had already arrived there. Police then broke open the door of the shop and went inside and brought out the deceased and also the appellant. For some reasons, this witness was declared hostile and with leave of the court he was cross-examined by the prosecution. However, by and large this witness corroborated the anther prosecution witnesses more or less in all material particulars.

7. We have already discussed the evidence of Radhanath Barik and. therefore, no further discussion of the evidence of PW. 4 is at all necessary. PW. 5 Smt. Basanti Dhara is the wife of the deceased. In her evidence she stated that her deceased husband used to return from the shop after finishing his work at about 10.30/11 p.m. and PW. 4 Radhanath also used to return with the deceased. On the date of occurrence at about 10 p.m. PW. 4 came to their house and rang the door bell shouting to open the door as the appellant had murdered the deceased. She further stated in her evidence that the appellant used to visit the deceased in his shop quite often. Appellant also used to come to the deceased for money whenever he was in need of money. That apart the appellant was an L.I.C. agent. This is in brief the evidence given by this witness. Raghunath Dhara is the younger brother of the deceased. So far as the main incident is concerned, his evidence is not so important. Ajoy Kr. Ghosh was the Assistant Director of State Forensic Science Laboratory. His report was submitted alongwith the report of the Serologist. Various articles were sent to the Serologist to find out the nature and group of blood stains found on all these items. After examining all these items of articles, the Serologist found the cuttings of a handkerchief and seat cushion with cover contained human blood of Gr-A. So far as blood stains found on other items are concerned, the Serologist was of the view that these blood stains had already disintegrated and the group or source of such blood stains could not be determined.

8. We do not like to discuss other evidence on record as we are of the view that apart from the evidence of Radhanath Barik, there is enough circumstantial evidence on record to lead to irrebuttable inference that the injuries found on the deceased to which he had ultimately succumbed could not be inflicted by anybody except the appellant himself. There is absolutely no reason to suspect the evidence of the witnesses who proved various circumstances of the case beyond all reasonable doubt leading to irrefutable inference that the injuries found on the deceased could be inflicted only by the appellant.

9. We have heard learned counsel for the appellant as also Mr. Kazi Safiullah, learned P.P. for the State. They have also taken us through the evidence on record.

After analysing the evidence on record following circumstances appear to have been established beyond all reasonable doubt:

i) The appellant was on friendly terms with the deceased. Appellant was an L.I.C. agent. He used to collect premium for the L.I.C. policy from the deceased. He used to visit the deceased quite often in his shop as well as the residence of the deceased and from this it appears that the appellant was on visiting terms with the deceased. Even the wife of the deceased was personally acquainted with the appellant. It is also in the evidence on record that occasionally the appellant used to borrow money from the deceased.

ii) On the date of occurrence at about 8.30 p.m. Biswanath Dhara left the shop leaving behind the deceased and Radhanath Barik. It further appears from the evidence on record that there was no further exit/entry door from or into the shop except the front side door. If the front side door was closed from inside, none could enter the shop as there was no further entry/exit point into/from the shop.

iii) After departure of Biswanath Dhara, deceased alongwith Radhanath Barik was continuing with their jewellery work as usual It is also in the evidence on record that the deceased used to continue his work in the shop alongwith Radhanath every night after departure of Biswanath Dhara at about 8.30 p.m. After departure of Biswanath. they used to close the shop and the ''deceased and PW. 4 used to continue to carry on with their goldsmith work for about two hours or so.

iv) After PW. 1 had left the shop, appellant came to the shop and started gossiping with the deceased. At this point, as is evident from the evidence of Radhanath Barik, deceased gave a note of Rs. 10/- to PW. 4 to buy some sweets for his home. At that time appellant advised PW. 4 to purchase sweets from "Annapurna Mistanna Bhander" as the sweet of that shop were found to be better in quality than the sweets sold from the "Ma Tara Mistanna Bhander." After PW. 4 left the shop, the wooden door of the shop was closed from inside and was put under lock and key. This being a jewellery shop, it was natural that after 8.30 p.m. shop used to be closed form inside to prevent any possible dacoity.

v) After purchasing the sweets when PW. 4 was returning, he heard cries of the deceased saying that he was being killed by ''he appellant. Somehow he peeped into the room through an apperture on the door of the shop and found that the appellant was assaulting the deceased with bhojali/nepala. At that time deceased was holding a knife with which he was trying to resist the attack upon him.

vi) Thereafter PW. 4 called the landlord being Sukumar Das. Others were also brought there. All of them found the shop door closed from inside under lock and key. Meanwhile policy party arrived at the scene of occurrence.

vii) The policy party led by Ranjit Sarkar being the Officer-in-charge of Domjur P.S. broke open the door of the shop by an iron rod and found the deceased in injured condition. They also found the appellant in injured condition. Both of them were sent to the hospital for treatment. However, deceased succumbed to his injuries either in the hospital or on his way to hospital.

10. Even if we disbelieve Radhanath Barik that he saw the occurrence, other circumstances proved in this case establish beyond reasonable doubt that in the circumstance of the case none except the appellant could have inflicted the injuries on the deceased to which he ultimately succumbed. For obvious reasons we do not like to discuss evidence of other witnesses as evidence of other witnesses by and large corroborate PW. 4 in the sense that when they were brought to the shop by PW. 4. the door of the shop was found closed under lock and key from inside. When they broke open the door in presence of police, both appellant and deceased were recovered in injured condition. It is already seen that after the front door of the shop is closed from inside under lock and key, there was no other exit/entry point from/into the shop. When PW. 4 left the shop to bring sweets, he saw appellant and deceased only inside the shop. He also saw the door of the shop was" closed and put under lock and key from inside. When PW. 4 returned alter purchasing the sweets, he found that the shop was till closed under lock and key from inside. Therefore, during this intervening period, there was absolutely no possibility of any third party entering the shop or assaulting the deceased. When police alongwith other witnesses broke open the door of the shop, they found both appellant and the deceased in injured condition in the shop. Apart from the testimony of the only eye-witness being Radhanath Barik, circumstantial evidence discussed above has proved beyond all reasonable doubt that the injuries to which the deceased ultimately succumbed could not have been caused or inflicted by anybody except the appellant. For this reason we are unable to accept the explanation given by the appellant during his examination before the trial court u/s 313 Criminal Procedure Code that suddenly somebody from behind struck him blows and he fell senseless and thereafter he regained his sense in the hospital. In view of the most convincing evidence on record, both circumstantial as well as direct, we are constrained to hold the explanation given by the appellant during his examination u/s 313 Criminal Procedure Code is palpably false.

11. However, what acquires great importance in this case is that appellant also sustained 5/6 incised wounds on the occipital region of his head. For this reason he has undergone treatment in the hospital as an indoor patient for about long 22 days. Apart from various PWs.. it is also the evidence of police witnesses that the appellant was arrested in injured condition from inside the shop alter its door was forcibly opened. Thereafter from the place of occurrence appellant was sent directly to the hospital About 22 days thereafter when the appellant was discharged from the hospital, he was produced by the police before the court of the learned Judicial Magistrate. These circumstances acquire great importance in this case. Ext. 6 is the

"Record of In-Patient" of the hospital where the appellant had undergone treatment as an indoor patient. Appellant was sent by the police on 27.1.90 from the shop room to the hospital. It appears from the said "Record of In-Patient" being Ext. 6 that all these injuries were located on the occipital region of the skull of the appellant. All his injuries were found to be incised injuries. It further appears that the appellant suffered 5/6 incised wounds on the occipital region of his skull. It further appears from the forwarding report dated 17.2.90 submitted by the Officer-in-charge of the said P.S. before the Sub-Divisional Judicial Magistrate that appellant was admitted in Howrah Hospital as an indoor patient on 27.1.90 in its prisoners'' ward with some injuries. And after he was discharged from the said hospital, he was produced before the learned Magistrate. Therefore, it is apparent that the appellant also had serious injuries on his person inflicted by sharp cutting weapons. All these injuries were found to be incised wounds. They were 5/6 in number. All these injuries were located on the occipital region of the head of the appellant. Therefore, these injuries acquire great importance to decide the fate of this appeal. It is true that appellant never pleaded that he was acting in self-defence. Rather he pleaded during his examination u/s 313 Criminal Procedure Code that inside the said shop when he was taking tea and reading newspaper, suddenly someone struck him blows from behind and he fell senseless and thereafter he regained his sense only in the hospital. He did not say as to who had assaulted him as according to the appellant he did not see the person who had suddenly assaulted him from his back side.

12. We have already held that the defence plea of the appellant which he stated during his examination u/s 313 Criminal Procedure Code is totally false in the circumstances of the case.

13. In these circumstances Mr. S. K. Basu, learned counsel for the appellant contended that in the circumstances of the case as there was none inside the shop of the deceased at the material point of time apart from appellant and deceased themselves and as the door of the shop was closed from inside under lock and key, there was no possibility of any third party entering the shop and assaulting the appellant or the deceased. He further contended that the only eye-witness, namely, Radhanath Barik stated in his evidence that when he peeped through an apperture of the door of the shop he found only the appellant assaulting the deceased with a bhojali or nepala and the appellant was trying to resist such assault with a knife. However, PW. 4 never claimed that he saw the deceased inflicting any injury upon the appellant. In these circumstances there is no escape from the conclusion that assault on the appellant could have been made only by the deceased and perhaps it preceded assault on the deceased by the appellant. His specific case is that deceased himself first assaulted the appellant and inflicted 5/6 incised wounds with his knife on the occipital region of the head of the appellant. The assault on the appellant must have preceded the appellant''s assault on the deceased. He further submitted in these circumstances of the case none except the deceased himself

could have been the author of the injuries found on the occipital region of the appellant. The appellant had undergone treatment as an indoor patient in Howrah General Hospital for long 22 days and, therefore, as per definition of the term grievous hurt as given in Section 320 I.P.C., the appellant suffered grievous injuries in the very same incident in which deceased also sustained certain injuries to which he ultimately succumbed. In these circumstances appellant had apprehension of death or grievous hurt at the hands of the deceased and, therefore, by inflicting injuries on the deceased in exercise of his right private defence of person, appellant did not commit any offence whatsoever.

14. On the other hand, learned Public Prosecutor submitted that appellant never pleaded that he acted in self-defence or that deceased was the aggressor and had first attacked the appellant. Rather the plea of the appellant was that some person suddenly assaulted the deceased and gave some blows from the back side and he fell senseless and thereafter he regained his sense in the hospital. In these circumstances his explanation having been held already by this court to be false, he is not entitled to plea of self-defence. Further contention of the learned P.P. is that falsity of the defence version of the appellant is an additional circumstance in favour of the prosecution and lends ample corroboration to the prosecution story. Learned P.P. drew our specific attention to Section 105 of the Indian Evidence Act. Section 105 provides that when a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code or within any of the general exceptions or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the court shall presume absence of such circumstances. According to learned P.P. the appellant had not discharged the burden laid upon him u/s 105 of the Evidence Act. His plea is quite different and not of self-defence. He never pleaded any general exceptions provided under the Indian Penal Code and, therefore, he is not entitled to raise such plea for the first time in the appeal. u/s 105, court is bound'' to presume absence of any such circumstances bringing the case within the general exceptions. Therefore, according to the term "shall presume" as provided in Section 4 of the Evidence Act, burden is entirely upon the accused to rebut such presumption. The accused has not discharged that burden by raising such a plea in the trial court and by adducing any evidence whatsoever to rebut the presumption available against him u/s 105 of the Evidence Act. Section 4 defines the term "shall presume". It provides that whenever it is directed by this Act that court shall presume a fact, it shall regard such fact as proved, until and unless it is disproved. Now. Section 105 directs in clear and unambiguous terms that the court shall presume absence of such circumstances to bring the case within ''the general exceptions as provided in the Indian Penal Code. Accused having not discharged the burden of disproving such presumption, court is bound to hold that the appellant is guilty of the offence and there is absolutely no reason to interfere with the impugned judgment of conviction and sentence. Section 105 is an

important qualification of the general rule that in the criminal trials the onus of proving everything essential to the establishment of the charge against the accused lies upon the prosecution. Now the question is in view of falsity of plea of the appellant, as has been found by us, and for failure on the part of the appellant to raise such a plea of exception and to adduce any evidence to rebut the presumption available against him u/s 105 of the Evidence Act, whether it would be correct for us to say that in these circumstances of the case he is not entitled to raise a plea of self-defence for the first time in this appeal?

15. In the State of U.P. Vs. Ram Swarup and Another, it has been held by the Supreme Court that rules of pleading under civil law does not govern the right of an accused in a criminal trial. Unlike in a civil case it is open to a criminal court to find in favour of an accused a plea not taken up by him and by so doing court does not invite a charge that it has made out a new case for the accused. The accused may not have pleaded as defence and yet court may find from the evidence of the witnesses examined on behalf of the presumption and the circumstances of the case either that what would be otherwise an offence is not one because the accused acted within strict confines of his right of private defence or that the offence is mitigated because the right of private defence has been exceeded. It has further been held by the Apex Court in the very same case that nature and effect of different types of presumptions arising u/s 105 of the Evidence Act is that while the initial presumption regarding absence of circumstances to bring the case within an exception may be met by showing existence of appropriate facts from the prosecution evidence itself. The Supreme Court also held in Shankarlal Gyarasilal Dixit Vs. State of Maharashtra, that falsity of defence case cannot take the place of proof of facts which prosecution has to establish in order to succeed. A false plea by the defence can be best considered as an additional circumstance provided other evidence on record unfailingly point to the guilt of the accused. Therefore, if the evidence on record fails to point to the guilt of the accused beyond reasonable doubt, it is of no consequence whether or not the defence version is false. Again in Haripada Dey Vs. The State of West Bengal and Another, it was held by the Supreme Court that the prosecution has to prove its case beyond reasonable doubt and the accused need not open his mouth nor lead any evidence. If the prosecution succeeds in establishing its case, the conviction will follow, but if the prosecution fails to discharge that general burden which lies upon it to prove the charge which has been framed against the accused, he is entitled to acquittal. However, if the prosecution proves its case by evidence of the witnesses then it is of course the bounden duty of the accused if he wants to prove his defence to adduce evidence in support of his contentions and if he does not do so, he has only to thank himself for it. Therefore, what we are required to consider in this case is whether the prosecution has proved its case beyond all reasonable doubt that the accused committed the offence within the meaning of law. If however, prosecution evidence itself or other materials on record brings the case within the general exceptions

under the Penal Code, then accused has no further burden to discharge within the meaning of Section 105 of the Evidence Act in order to rebut the presumptions available against him. In Woolmington vs. Director of Public Prosecutions, it was observed by Viscount Sankey as follows:

"When evidence of death and malice has been given (this is a question for the jury) the prisoner is entitled to show, by evidence or by examination of circumstances advanced by the crown that the act on his part which caused death was either unintentional or provoked. 11 the jury are either satisfied with his explanation or upon review of all the evidence, are left in reasonable doubt whether, even if his explanation be not accepted, the act was unintentional or provoked, the prisoner is entitled to be acquitted.... Just as there is evidence on behalf of the prosecution so there may be evidence on behalf of the prisoner which may cause a doubt as to his guilt. In either case he is entitled to the benefit of doubt. But while the prosecution must prove the guilt of the prisoner, there is no such burden laid on the prisoner to prove his innocence and it is sufficient for him to raise a doubt as to his guilt; he is not bound to satisfy the jury of this innocence.... Throughout the web of English Criminal Law one golden thread is always to be founds that it is the duty of the prosecution to prove the prisoners'' guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If at the end of and on the whole of the case, there is reasonable doubt created by the evidence given by either the prosecution or the prisoner, as to whether prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to as acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law in England and no attempt to whittle it down can be entertained."

16. Above noted principle was relied upon by the Apex Court in V.D. Jhangan Vs. State of Uttar Pradesh, and also in Vijayee Singh and others Vs. State of U.P., and quoted with the approval.

17. Again in AIR 1937 83 (Rangoon) , a Full Bench of the Rangoon High Court following the law laid down in this respect in Woolmington case, held that the ratio therein is not in any way inconsistent with the law in British India and that indeed the principles there laid down form valuable guide to the correct interpretation of Section 105 of the Evidence Act and the Full Bench of Rangoon High Court further laid down that even if the evidence adduced by the accused falls to prove the existence of circumstances bringing the case within exception or exceptions pleaded, the accused is entitled to be acquitted if upon consideration of the evidence as a whole the court is left in a state of reasonable doubt as to whether accused is or is not entitled to the benefit of the exception. Same view of Rangoon High Court was reiterated by our Apex Court in the case of Vijaya (supra) and in the case of V.D. Jhingan. Our Supreme Court observed that this principle laid down in the case of Woolmington is also a fundamental part of the English Common Law

and same position prevails in the Criminal Law of India.

18. Therefore, whether or not accused has pleaded an exception or whether or not his another plea of defence has been found to be false are all immaterial if after considering all the matters before it the court is left in a state of reasonable doubt. If the reasonable doubt still lingers that may be the accused had acted in self-defence, the benefit thereof must be given to him whether or not he had adduced any evidence to rebut the presumption available against him u/s 105 of the Evidence Act. In fact in Vijayee Singh (supra) it has been laid down by the Apex Court that taking Section 105 as a whole the burden of proof and the presumption have to be considered together. The accused may raise a plea of exception either by pleading the same specifically or by relying on probabilities and circumstances obtaining in the case. He may adduce evidence in support of his plea directly or rely on the prosecution case itself or he can indirectly introduce such circumstances by way of cross-examination and also rely on probabilities and circumstances obtaining in the case. He may adduce evidence in support of his plea directly or rely on the prosecution case itself or he can indirectly introduce such circumstances obtaining in the case. He may adduce evidence in support of his plea directly or rely on the prosecution case itself or he can indirectly introduce such circumstances by way of cross-examination and also rely on probabilities and other circumstances. The initial presumption against the accused regarding non-existence of circumstances in favour of his plea gets displaced once on an examination of the material if a reasonable doubt arises, benefit of it must go to the accused. In the very same case of Vijayee Singh (supra), the Apex Court further observed that phrase ''burden of proof is not defined in the Act. In respect of criminal cases it is an accepted principle of criminal jurisprudence that the burden is always on the prosecution and it never shifts. This follows the cardinal principle that the accused is presumed to be innocent unless proved guilty by the prosecution and the accused is entitled to the benefit of every reasonable doubt Section 105 to some extent places the onus of proving any exception in a penal statute on the accused. The burden of proving the existence of circumstances bringing the case within the exceptions mentioned therein is upon him. The section further lays down that the court shall presume non-existence of circumstances bringing the case within an exception. The words burden of proving the existence of the circumstances occurring in this section are very significant. This burden which rests on the accused does not absolve the prosecution from discharging its initial burden of establishing the case beyond reasonable doubt. The accused need not set up a specific plea of his defence and adduce evidence so long as prosecution does not discharge it onus. Some principle has been followed in AIR 1991 8 (SC) .

19. Following the same principle, it has been laid down by the Supreme Court in Onkarnath Singh and Others Vs. The State of U.P., that the evidence as a whole must be considered, whether it comes from the side of the prosecution or the defence, to determine whether infliction of injuries for which an accused is prosecuted were

either proved by balance of probabilities to have been inflicted in the course of exercise of a right of private defence, or, even if the accused fails to do that, it is sufficient to make the prosecution case doubtful on an ingredient of the offence. It is only in one of these two possible situations that accused could get an acquittal. In Yogendra Morarji Vs. State of Gujarat, . the Apex Court observed that material for discharging the burden upon the accused u/s 105 of the Evidence Act consist of oral or the documentary evidence, admission appearing in the evidence led by the prosecution or elicited from the prosecution witnesses in cross-examination, statement of accused u/s 313 Criminal Procedure Code etc. From the aforesaid discussion of various decisions of the Apex Court it appears that accused can always claim the benefit of general exception under penal law on the basis of materials on record irrespective of whether same was adduced by the prosecution or by the accused. If after considering the materials before it, court is left in a state of reasonable doubt as to whether the accused indeed committed the offence with which he has been charged or whether he is entitled to benefit of a general exception engrafted in the penal law of the land, benefit of the same has to be given to him. Likewise the Supreme Court held in AIR 1969 SC 702 and 1970 Cr.L.J. 1004 (SC) that even if an accused does not plead self-defence in a prosecution against him, it is open to the court to consider such a plea if the same could legitimately arise from the evidence and material on record. Foundation for a plea of self-defence may be available in prosecution evidence itself or in cross-examination of PWs. When the materials for bringing the case under any of the general exceptions is available from the prosecution evidence itself due to some admissions or other materials on record, the onus upon the accused to disprove the presumption available against him u/s 105 of the Evidence Act stands automatically discharged and he is not required to open his mouth or to discharge any further onus in this respect. In this respect we may refer to the decision of the Apex Court in Tara Chand and Another Vs. State of Haryana, . Again in Bahadur Singh vs. State of Punjab. (1992) 4 SCC 403 it has been held by the Apex Court that the circumstances and admissions made by PWs relating to Exception 2 of Section 300 I.P.C, can be relied upon by the accused without even raising any specific plea of self-defence.

20. In this respect Mr. S. Basu, learned counsel for the appellant referred to a recent decision of the Apex Court in Moti Singh Vs. State of Maharashtra, and in that case in paragraphs 12. 13 and 14 it has been held by the Apex Court that it would be quite unjust to deny right of private defence to the accused merely on the ground that he adopted different line of defence. If the evidence adduced by the prosecution indicates that the accused were put under a situation where they could reasonably have apprehend grievous hurt even to one of them, it would be inequitable to deny the right of private defence to the accused merely on the ground that he has adopted a different plea during the trial. The crucial factor is not what the accused pleaded, but whether accused had the cause to reasonably apprehend such danger. A different plea adopted by the accused would not foreclose the judicial

consideration on the existence of such a right While laying down the aforesaid proposition of law, the Apex Court in the case of Moti Singh relied upon another earlier decision of the Apex Court in State of U.P. Vs. Lakhmi, wherein the following observations were made:

The law is that burden of proving such an exception is on the accused. But the mere fact that the accused adopted another alternative defence during his examination u/s 313 of the Code without referring to Exception 1 of Section 300 I.P.C, is not enough to deny him the benefit of the Exception, if the court can call out materials from evidence pointing to the existence of circumstances leading to that exception. It is not the law that failure to set up such a defence would foreclose the right to rely on the exceptions once and for all. It is axiomatic that burden on the accused to prove any fact can be discharged either through the defence evidence or even through prosecution evidence by showing a preponderance of probability."

21. Likewise in Periasami and Another Vs. State of T.N., the Apex Court stated this law in the following language:

"We may point out that the appellants have not stated, when examined u/s 313 of the Code, that they have acted in exercise of such right. Of course, absence of such a specific plea in the statement is not enough to denude them of the right if the same can be made out otherwise."

22. Mr. Basu, learned Counsel for the appellant also cited another recent decision of the Apex Court in Kasiram vs. State of Madhya Pradesh, 2002 SCC (Crl.) 68. In this case the Apex Court held that though Section 105 of the Evidence Act annexed a rule regarding burden of proof but it does not follow therefrom that the plea of private defence should be specifically taken and if not taken shall not be available to be considered though made out from the evidence available in the case. A plea of self-defence can be taken by introducing such plea in the cross-examination of prosecution witnesses or in the statement of the accused persons recorded u/s 313 Criminal Procedure Code or by adducing defence evidence. And, even if the plea is not introduced in anyone of these three modes still it can be raised during the course of submissions by relying on the probabilities and circumstances obtaining in the case. It is basic criminal jurisprudence that an accused cannot be compelled to be examined as a witness and no adverse inference can be drawn against the defence merely because an accused person has chosen to abstain from the witness box. In, this case the High Court was held to have not been right in criticising and discarding availability of the plea of self-defence to the accused persons on the ground that the plea was not specifically taken by the accused in their statements recorded u/s 313 Criminal Procedure Code and because the accused did not enter the witness box. Aforesaid observations were made by the Apex Court in the case of Vijayee Singh (supra).

23. After analysing all the aforesaid authorities of the Apex Court what appears to us is that if after considering entire the materials on record, whether adduced by the prosecution or by the accused, court is left in a state of reasonable doubt as to the guilt of the accused and that the accused might have had acted in exercise of right of private defence though he has not been able to prove the same beyond reasonable doubt, benefit of such doubt must be given to the accused irrespective of whether he raised such a plea during the trial. Rule of pleading of civil cases are held to be totally inappropriate in a trial of an accused in a criminal case. In fact in the case of Yogendra Morarjee (supra) the Apex court laid down that there may be cases where despite the failure of the accused to discharge his burden u/s 105, the material brought on the record may, in the totality of the facts and circumstances of the case, be enough to induce in the mind of the court a reasonable doubt with regard to the mens rea within the meaning of the Penal Code as defined in Section 299 I.P.C. In Mohinder Pal Jolly Vs. State of Punjab, the Supreme Court held that the onus is on the accused to establish the right of private defence of property or person not on the basis of the standard of proving it beyond doubt but on the theory of preponderance of probability. He might or might not take this plea explicitly or might or might not adduce any evidence in support of it but he can still succeed in his plea if he is able to bring out materials in the records of the case on the basis of the evidence of prosecution witnesses or on other pieces of evidence to show that apparently the criminal act which he committed was justified in the exercise of his right of private defence of property or person or both.

24. Aforesaid being the position of law and in the circumstances of the case, court has a duty to see whether it can find a plea of general exceptions in favour of the accused on the basis of evidence on record. This is the consistent view of the Apex Court since many years. This is also the common law obtaining in England and same principle has been applied in this country also since over a century.

25. We have seen while discussing the evidence on record in this judgment that there was absolutely no possibility of any third party to enter into the shop room of the deceased and assault the appellant as the door was closed under lock and key from inside the shop and there was no other 2nd door or exit in the said shop. PW. 4 Radhanath Bank left the appellant and the deceased in the shop while going out for purchasing sweets. At that time the door of the shop was closed from inside and put under lock and key. Therefore, there was absolutely no possibility of any third party entering the shop of the deceased and assaulting both appellant as well as the deceased. When PW. 4 returned to the shop he saw while peeping through an apperture of the door that appellant was assaulting the deceased with a bhojali or nepala. At that time he did not see the deceased assaulting the appellant with any sharp cutting weapon. At that time also shop was closed from inside under lock and key. Therefore, the infliction of 5/6 incised wounds on the back side of the head of the deceased must have preceded the assault on the deceased by the appellant In these circumstances there is perhaps no escape from the conclusion that the

deceased was the aggressor or at least the possibility that the deceased first attacked the appellant from back side and assaulted him with sharp cutting weapon or a knife on the occipital region of the head of the appellant cannot be ruled out In these circumstances the appellant inflicted injuries with bhojali/nepala upon the deceased as seen by PW. 4. We are, therefore, constrained to hold that on the basis of material on record we are unable to rule out a strong possibility that the deceased had first assaulted the appellant with knife of a sharp cutting weapon on the back side of the head of the appellant If the injuries were inflicted on the back side (occipital) of the head of the appellant we cannot say that such injuries were inflicted on the appellant when he attacked the deceased. If such injuries were inflicted on the appellant when he was attacking the deceased. invariably such injuries would have been located on the front side of the appellant Accordingly we are of the further view that a strong possibility that the appellant inflicted injuries with bhojali/nepala on the deceased while he was apprehending danger to his life and. therefore, his act of inflicting fatal injuries on the deceased were perhaps fully justified and on that basis the mens rea to hold the appellant guilty u/s 302 I.P.C, or under any other provision of the penal law are absent in this case and such possibility cannot be ruled out by us.

26. In the aforesaid circumstances available on the prosecution evidence on record supported by unimpeachable documentary evidence we are constrained to hold that appellant cannot be convicted u/s 302 I.P.C. or under any provision of the penal law without entertaining serious doubt in our mind as to his guilt.

27. Of course in view of large number of injuries inflicted upon the deceased, a question may be raised as to whether appellant had exceeded his right of private defence ? We have seen from the evidence of PW. 4 that PW. 4 saw last part of the incident in which the appellant inflicted 4/5 blows upon the deceased with nepala. At that time PW. 4 also saw that the deceased was weilding a knife. PW. 4 interpreted such conduct of the deceased by stating that deceased was resisting the appellant with the said knife. I am not sure as to how far PW. 4 was correct when he stated that by weilding the knife the deceased was merely resisting the assault upon him by the appellant. A question will naturally arise as to whether deceased was till then trying to attack the appellant and to inflict further blows with a knife -- if it was indeed that the deceased was trying to inflict further blows upon the appellant with a knife, then we cannot reject the case of the appellant that he was till suffering from an apprehension of death or grievous hurt and, therefore, he was fully justified in inflicting the number of injuries found on the deceased. PW. 14 Dr. K.M. Hossain held post-mortem examination on the dead body of the deceased. On examination he detected as many as 14 incised wounds on the person of the deceased and they are as follows :-

"1) Sharp-cut injury on the scalp, left side of occipital region 5"x 1 1/2" x bone deep.

2) Sharp-cut injury on front-partial region 3" x 2" bone deep.

3) Sharp-cut injury on left cheek, 3"x 1 1/2" x bone deep.

4) Sharp-cut injury on left front-maxillary region 2 1/2" x 1/2" x bone deep. On dissection extra-vessasion of blood in the brain was observed.

5) Sharp-cut injury on mid-frontal region 2"x 1 1/2" x bone deep injury.

6) Sharp-cut injury on left arm, fore-elbow joint 2 1/2" x 1 1/2" bone deep.

7) One Sharp-cut injury on left fore-arm 3" x 2 1/2" x muscle deep.

8) Three sharp-cut injuries on dorsuni of left hand, measurement not given.

9) Injury to left thumb.

10) Sharp-cut injury to the right shoulder.

11) Sharp-cut injury to occipital region, 4" x 2" bone injury

12) Sharp-cut injury on the left scapular region 3"x2"- muscle deep.

13) Sharp-cut injury to left arm.

14) Sharp-cut injury on the right fore-arm 1 1/2" x 1 1/2" bone injury."

28. As we are unable to accept the version of PW. 4 that deceased was merely resisting the assault upon him with a knife, and also as we are unable to rule out the possibility that the deceased might have been trying till then to assault the appellant with the knife and therefore, the appellant was acting in his self-defence till the end of the incident He had full justification to inflict the injuries ultimately found on the person of the deceased by PW. 14 Dr. K. M. Hossain. It must be noted here that when the appellant was inflicting blows upon the deceased in exercise of his self-defence, he was certainly in a state of great confusion and excitement and we cannot expect the appellant to exercise his right of private defence step by step and to modulate the same in a golden scale. Therefore, it is not possible to hold that the appellant exceeded the right of private defence in inflicting 14 incised wounds upon the deceased. After having inflicted 5/6 incised wounds on the occipital region of the head of the appellant and as the deceased was till weilding his knife towards the appellant till the end of the incident, the appellant had lull justification for inflicting 14 incised wounds.

29. It was of course contended by the learned Public Prosecutor that perhaps the accused tried to rob the deceased of his money and other valuables like gold ornaments and in such circumstances if the deceased assaulted the appellant, he cannot claim the right of private defence of person. We are sorry to observe here that it may be possible that appellant tried to rob the deceased of money and valuables as the deceased was a goldsmith and was counting money at that time, but such a possibility is based on assumptions without any foundation in the evidence on record. It is true that prosecution has adduced evidence that in the bag

carried by the appellant there was bhojali or nepala. On that basis learned P.P. contended that if appellant had no intention to rob the deceased of his money and valuable ornaments, it is not understood as to why he was carrying in his hag a bhojali or an iron rod. It is in the evidence on record that appellant was an L.I.C. agent. He used to collect premium from various L.I.C. policy holders. Therefore, if he carried a bhojali in his bag for protection against any attempt on him to snatch the money. we cannot bold on conjecture and surmise that appellant came to the shop of the deceased to rob him of his money and valuable ornaments. Such argument is based purely on conjecture and surmise without any basis in the evidence on record. On such assumption without any foundation in the evidence on record we cannot hold the appellant to be guilty u/s 302 I.P.C. We agree that on the basis of evidence on record we are unable to rule out any of the following possibilities:

i) Thai the appellant came to the shop of the deceased with a view to rob the deceased of his valuable ornaments and money which the deceased was counting at that time, or

ii) That the appellant acted in self-defence as the deceased inflicted 5/6 incised wounds on the occipital region of the head of the appellant first and hence he was justified in inflicting fatal blows with bhojali or nepala on deceased and even thereafter, deceased was welding the knife.

30. Even if we are unable to rule out either of the aforesaid two possibilities on the basis of the evidence on record, in such circumstances we are constrained to give benefit of that possibility which is in favour of the appellant.

31. There may be so many psychological factors responsible for the accused not taking the plea of private defence in course: of his trial. It is needless to mention here that all are not equally bold and courageous to candidly say that he killed the man and such act of killing was justified in the circumstances of the case as he acted in self-defence. For failure of an accused to take such a bold plea expressly, we cannot deny him benefit of right of private defence if after considering the entire evidence on record court is at least left in a state of reasonable doubt as to the guilt of the accused. The law of self-defence springs from the primordial instinct of self-preservation. Byron said that "Self-defence is a virtue and sole bulwork of all right- Similarly Shakespeare said "measure for measure must be answered." Dryden described the self-defance as the natures oldest law. In the Code of Manu in Sutras 350 and 351, chapter viii. it was written as follows:

"One may slay without hesitation an assassin who approaches with murderous intent, whether he be one''s own teacher, a child or an aged man or a Brahmana deeply versed in Vedas." This was stated by Manu around 1280 B.C. Therefore, this right of self-defence was recognised as a valuable right at the dawn of human civilization. Instinct of self-preservation is, therefore, a primordial instinct. Dicey rightly remarked The rule which fixes the limit to the right self-help must, from the

nature of things, be a compromise between the necessity, on the one hand, of allowing every citizen to maintain the right against wrong-doers, and the necessity, on the other hand, of suppressing private warfare. Discourage self-help and loyal subjects become the slaves of ruffians; over stimulate self-assertion and for the arbitrament of course you substitute the decision of the sword or the revolver."

Therefore, right of self-help is subject to limitations as prescribed by law.

32. In these circumstances as no evidence is available on record as to how the appellant came to sustain 5/6 incised wounds on the back side of his head, we are constrained to hold that none except the deceased could have inflicted such injuries (grievous) on the appellant and also because PW. 4 claimed to have seen the entire incident of assault on the deceased by the appellant but having not seen the deceased assaulting the appellant, we are constrained to hold that assault on the appellant inflicting grievous injuries with sharp cutting weapon on the occipital region of his head must have preceded the assault on the deceased by the appellant. At least we are unable to rule out such a possibility. We have also seen from the evidence of P.W. 4 that when the appellant was inflicting blows 5/6 times with a bhojali or nepala on the deceased, deceased was holding a knife to resist the assault on him. We do not know how far PW. 4 was correct when he stated that deceased was trying to resist assault on him by the appellant. It may be also true that after having inflicted 5/6 incised wounds on occipital region of the appellant''s head, deceased was still trying to give further blows with knife on the appellant. Therefore, in these circumstances appellant had every right to apprehend danger to his life and hence we are also unable to rule out the possibility that the appellant might have had acted in exercise of the right of his private defence. As the deceased was weilding knife against the appellant even after having already inflicted 5/6 incised wounds on the occipital region of his head, appellant had every justification lo inflict the injuries on the deceased. Act of weilding a knife by the deceased after having already inflicted 5/6 wounds on the backside of the head of the appellant cannot be interpreted as an innocent act of mere resistance. In view of the aforesaid, it is apparent that the learned trial court failed to consider all these facts and various aspects of law of private defence of person and the cardinal principles of criminal jurisprudence that prosecution must prove its case beyond reasonable doubt. Trial Court also failed to consider in their proper perspective certain circumstances as to how the appellant came to sustain certain grievous injuries and as to who had inflicted those injuries upon him. Without considering such aspects of facts and law, the trial court most credulously accepted the mouthful prosecution version and held the appellant guilty u/s 302 I.P.C. Such conviction cannot be sustained.

33. As regards conviction of the appellant u/s 448 I.P.C, we find that as the appellant was on visiting terms with the deceased and as he used to visit the deceased at his shop as well as residence quite often, permission to visit the shop of the deceased is

implied. Therefore, such visit of the appellant in the shop of the deceased cannot amount to criminal trespass within the meaning of Section 448 I.P.C. After all both appellant and deceased were on friendly terms. Of course, there is no evidence on record as to why at the time of occurrence suddenly two friends turned into foes. In these circumstances'', conviction of the appellant u/s 448 also was most unwarranted and must be set aside.

34. In these circumstances we are left with no option but to allow this appeal and set aside the impugned judgment of conviction and sentence. We further direct that the appellant shall be set at liberty forthwith.

35. While parting with the record of this case we record our observation that we feel sorry for the appellant that he is languishing in Jail since he was convicted and sentenced in 1994 by the impugned judgment though we are holding him now not guilty and setting aside the impugned judgment of conviction and sentence. Except this we have no further power to compensate the sufferings that the appellant has undergone this long 8 years.

36. Appeal is thus allowed and disposed of Narayan Chandra Sil, J, :

37. I have the'' privilege to peruse carefully the judgment of my learned senior brother who has taken the pains to deal with the facts of the case and evidence adduced/produced therein all details and this is why I shall refrain myself from repeating the same once again. I agree with all his observations made in the judgment except the benefit of private defence which his Lordship has considered to give to the appellant-accused Chandan Chatterjee alias Fulu and my dissenting notes with reasons in this regard are as follows:

Like my learned senior colleague I also find that the following facts have been established from the evidence adduced by the prosecution before the learned trial Judge:

1. The appellant was an agent of Life Insurance Corporation and he is to collect the prmia from his different clients including that of the deceased Kashinath Dhara. He was also in friendly terms with the deceased.

2. The accused-appellant had visiting terms in the shop of the deceased.

3. The occurrence took place at about 8.30 p.m. when the P.W. 1 Biswa Nath Dhara, one of the brothers of the deceased had left the Jewellery shop as usual leaving the deceased and the PW. 4 Radhanath Bank. The said jewellery shop is closed from inside everyday at about 8.30 p.m. as usual, but the deceased and the PW. 4 continued their work still thereafter from inside the shop.

4. After the departure of the PW.1 there were only the PW. 4 and the deceased in the shop when the accused appellant went there.

5. The accused-appellant asked the de(sic)d to arrange for tea and cigarette and the deceased asked the PW. (sic) bring the same when the deceased had also given a 10/- rupee note to the PW. 4 to bring sweets for the house.

6. The appellant asked the PW. 4 to bring better quality of sweets from a far off shop.

7. The PW. 4 accordingly left the shop and then the appellant-accused closed the door of the shop from inside by putting lock.

8. After some time when the PW. 4 came back he heard the deceased crying saying that he was being murdered by the appellant-accused and the PW. 4 managed to peep inside the shop and found the appellant assaulting the deceased with a dagger and the deceased is defending himself with a knife in his hand.

The said knife in the hand of the deceased was being used for cutting fruits.

9. Thereafter with the advent of police on information and other persons including the landlord of the shop and the members of the deceased''s house the shop room was broken open when Kashinath was found in serious injured condition without any power to speak anything. The appellant was found in such a condition as if he was trying to conceal himself and he had also sustained injuries. It was also found that the glasses of the shop were broken and the bundles of notes were strewn which had also blood marks.

10. Kashinath died immediately thereafter but the appellant after treatment of about 20 days in the hospital survived.

11. Occasionally the appellant used to borrow money from the deceased.

12. The presence of third party inside the shop room at the time of occurrence is totally dispelled.

38. Thus having had the above background to the case I may go for the injuries of the deceased and also'' that of the appellant. The PW. 14 who held post mortem examination over the corpse of Kashinath found the following injuries:

1. Sharp-cut injury on the scalp, left side of occipartial region 5" x 1 1/2" bone deep.

2. Sharp-cut injury on front-partial region 3" - 2" x bone deep.

3. Sharp-cut injury on left cheek. 3"x 1 1/2" x bone deep.

4. Sharp-cut injury on left fronto-maxillary region 2 1/2" x 1/2" x bone deep. On dissection extra-vessasion of blood in the brain was observed.

5. Sharp-cut injury on mid-frontal region 2" x 2 1/2" x bone deep injury.

6. Sharp-cut injury on left arm, fore-elbow joint. 2 1/2" x 1 1/2" bone deep.

7. One Sharp-cut injury on left fore-arm 3" x 2 1/2" x muscle deep.

8. Three sharp-cut injuries on dorsum of left hand, measurement not given.

9. Injury to left thumb.

10. Sharp-cut injury to the right shoulder.

11. Sharp-cut injury to occipital region, 4"x2" bone injury.

12. Sharp-cut injury on the left scapular region- 3" x 2"-muscle deep.

13. Sharp-cut injury to left arm.

14. Sharp-cut injury- on the right fore-arm 1 1/2" x 1 1/2" bone injury.

The nepala/dagger seized from the place of occurrence was shown to this witness and he opined that the above injuries might be caused by that instrument. In fact, he is very candid in his opinion when it was stated by him that in order to cause such injuries the weapon was to be on the heavier size though not too heavy. The PW. 14 was shown the Ext 6 which is the bed head ticket of the appellant-accused. It appears from the said bed head ticket that there were as many as 4 following injuries on the occipital region.:

1. 1" x 1 1/2" x 1 1/2"

2. 1 1/2" x 1 1/2" x 1 1/2"

3. 4" x 1 1/2" x 1 1/2"

4. 2 1/2" x 1 1/2" x 1 1/2"

It is also stated in one portion of the said bed head ticket that the patient sustained "incised wounds over occipital scalp 5-6 in number".

It is also in the said bed head ticket that the injury over head was caused a sharp cutting instrument, "following an assault by 4/5 strangers according lo patient."

39. It appears from the evidence of the PW. 16 who is a police officer and who along with other police officials entered into the Jewellery'' shop in question breaking open its door that he found a spring knife about 8" in length including its handle and the said spring knife was also open with Hood-stains on its. blade. In this connection the reply of the accuse I at the time of the examination u/s 313 of the Criminal Procedure Code deserves mention. Thus, when he was asked that he was found in the shop room with injuries he replied that be did not know anything about the same and then when he was asked he started assaulting Kashinath with bhojali and Kashinath in order to save himself assaulted the appellant with a comparatively smaller knife, the appellant-accused stated again that he did not know anything about the same. But when he was asked whether he had got anything more to say, he replied as below:

"Sir, 1 went to shop on 27th January, after I. went to his shop and return back with him. When I went lo the shop Kashinath told me Fulu Das seat down. I sat on the chair then he told his assistance Radhanath to bring tea; we drank tea and smoke cigarettes. I read out newspaper. Sir. I thought somebody coming quickly began to struck behind my head. Thereafter I know nothing and I have lost my senses. When 1 regain my senses I saw that I was in hospital. I told everything to my doctor." (as appears in the paper hood, though in original the questions and answers are in Bengali.)

40. Thus, the above quoted reply of the accused during the time of his examination u/s 313 Criminal Procedure Code substantially supports the prosecution case, though it materially differs from what he got recorded in the bed-head ticket (Ext. 6) as regards the number of persons by whom he was assaulted. In fact, from the evidence of the prosecution there is no scope to introduce the presence of any other persons inside the shop room at the time of occurrence except the deceased and the appellant-accused. Thus, it is beyond all reasonable doubts that the deceased was assaulted by the appellant - accused But the question still remains as to how the appellant-accused received the injuries. The submission of the learned P.P. in this regard that the accused might have received those injuries by fall on the broken glasses cannot be accepted inasmuch as there is absolutely no evidence in regard and on the other hand it is in the evidence of the PW 4 who is the most vital witness and the only eye-witness of the occurrence. that on peeping through the shop he found the deceased holding a knife was trying frantically to save himself and the same knife with bloodstains was seized from the place of occurrence, Thus, it is also established beyond all reasonable doubts that the accused-approved injuries from the deceased at the time of occurrence and this brush aside the statement of the accused during his examination u/s 313 Criminal Procedure Code that he was assaulted either by "someone" or by 4-5 strangers" as appeared in the bed head ticket. (Ext- 6).

41. In view of the above background the following striking features have surfaced to be pondered over:

i) The appellant-accused came of his own in the shop of the deceased at such juncture of hours when the PW. 1 usually leaves the shop and only the deceased and PW. 4 remain.

ii) The facts that the PW. 1 leaves the shop at such hours of night and the deceased and PW. 4 remain inside the shop were known to the accused appellant.

iii) The appellant accused suggested the PW. 4 to go to a far off shop for sweets.

iv) The appellant-accused used to borrow money from the deceased.

v) The appellant-accused carried a nepala. Is it for his own safety because he was an LIC agent and used to collect money from his clients ?

vi) The deceased was counting notes or at the place of occurrence the bundle of notes were found strewn. Has it got any implication ?

42. After analysis of the evidence it is sufficiently perspicuous that the presence of the appellant accused at such juncture at hours in the shop of the deceased does not invite any special implication, for the accused was in such habitual visit and the deceased and the accused being in friendly terms with each other suggesting the PW. 4 to go to a far off shop to bring better quality of sweets does not appear also to have any special implication inasmuch as it was the deceased who asked the PW. 4 to bring the sweets and not the accused-appellant. True the accused asked the deceased to arrange for tea and cigarettes and there is nothing in the evidence of the witnesses that the shop of tea and cigarettes are at a far off place. It cannot be conceived that the accused knew it that when the PW. 4 would be sent to fetch tea and cigarette he would also be asked by the deceased to bring sweets and the opportunity would impromptu appear to the appellant-accused. Similarly, it cannot be conceived that the appellant-accused carried that nepala with him to kill the deceased, for, it was known to him even after departure of PW. 1 at such hours of night not only the deceased but also the PW. 4 would remain in the shop. It would be too much to think that the accused had the intention to kill both the deceased and the PW. 4 on that fateful night and so he carried that nepala. Thus, the carrying of nepala,. for whatever reason it might be, by the accused cannot be tagged with the motive, if any, of the accused. It has come in the evidence of the witnesses that the deceased used to count the sale proceeds after the end of his day''s work and the accused-appellant had the free access to the shop of the deceased at all hours of business. That being the position the seizure of strewn notes from the place of occurrence does not appear to have any significance.

43. The learned Advocate for the appellant has referred to the ratio decided in the case of Moti Singh vs. State of Maharashtra, [JT 2002 (2) SC 1331 in which it was, inter alia, held that Section 100 of the Indian Penal Code confers the right of private defence of the body upto the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the acts as may reasonably cause the apprehension that grievous hurt be the consequence of such assault.

44. It is also observed by the Hon''ble Apex Court that though the dimension of the injuries cannot be regarded as very serious, the situs of them indicates that he was then in a dangerous situation. The depth of the lacerated wound on the occipital region, injury on his lower lip and the one of his left pinna could possibly account for three different strikes inflicted on him with blunt objects. If such an attack was made on him by a crowd just in front of his house the accused could reasonably entertain the apprehension that at least grievous hurt would be caused to them by the assailant unless the aggression is thwarted. In the said case the admitted position was that after the occurrence, witnesses and the deceased together went towards

the house of the accused during the untimely hour, on being told that one of them was attacked by the appellant and his brother a little earlier. The injury sustained by the appellant gave a clear indication that the prosecution party was armed with blunt objects. It was not the case of the prosecution that the injuries found on the appellant were inflicted only subsequent to the injuries which the deceased sustained and in all such probabilities, the Hon''ble Apex Court observed, the appellant would have sustained the Injuries prior to the deceased received the fatal injury.

45. Thus, it is clear that the facts in the case of Moti Singh (supra) are absolutely different from the facts of the instant case inasmuch as in that case the prosecution party was the aggressor at the untimely hour, so, the question in order- to determine the right of private defence of the appellant is as to who is the aggressor. The facts and circumstances of this case suggest that the occurrence took place in the shop of the deceased and it was the appellant who of his own came up there at the material point of time and when the appellant asked the deceased to arrange for tea and cigarettes, the deceased immediately obliged him by sending the PW. 4 to fetch the same. Let us visualize the scene at the place of occurrence. The PW. 4 went out to fetch tea and cigarettes and also sweets. The appellant started reading a newspaper sitting on a bench/chair in the shop and the deceased was at his work and he was checking the accounts. In fact this is the unchallenged evidence of the PW. 4. Thus, it cannot be conceived that the appellant was sitting there keeping his back side towards the deceased so that he got the opportunity to cause the injuries all- on a sudden on the back side of the head of the appellant. It can also be visualized very easily that the appellant was sitting somewhat on a high place and the deceased was working sitting on the floor and in such situation it cannot again be conceived that the deceased suddenly pounded upon the appellant and caused injuries on the back side of his head. Rather the probability of the reverse is all (he more appealing that from the high place it was the appellant-accused who attacked the deceased. That apart it may also come to the mind of a person of a common prudence as to what will prompt the deceased, a friend who stands in need of the appellant by giving loans and responded to the call of hospitality when tea and cigarette were demanded, to attack first the appellant.

46. Now, if the different kinds of injuries of both the deceased and the appellant as mentioned earlier are juxtaposed it will be very- much candid that the deceased sustained as many 8 bone-deep injuries and from the injury No. 4 it appears on dissection that extra-vessassion of blood was (here in the brain. Besides the deceased sustained as many as 14 very serious type of injuries at various places of his body including the occipital region whereas there are only 4 injuries all on the occipital region of the appellant. In order to over-power the deceased there was absolutely no necessity to cause as many as 14 serious type of injuries. It is true that the appellant was in the hospital for treatment for 20 days and he sustained four incised wounds and as such technically the definition of "grievous hurt" u/s 320 of

the Indian Penal Code with the help of Eighth Clause of that section is satisfied. But in any case in order to avail of the benefit of private defence it is not at all required that one is to sustain grievous hurt. And as such the question is again who is the aggressor.

47. PW. 4 is the only eye-witness of the occurrence and it was he who had collected the other persons there. PW. 4 stated in his evidence that he found peeping through the shop that the appellant was assaulting the deceased and the deceased holding knife meant for cutting the fruits tried to save himself. Thus, naturally the question appears who was taking the self-defence at the time of occurrence-was it the appellant-accused or the deceased himself. Admittedly the knife which the PW. 4 found in the hand of the deceased and it was subsequently seized from the place of occurrence was used for cutting fruits in the shop. If that be so what prompted the deceased to use that knife against the appellant? Was it then the deceased used that knife only being compelled or only for self defence? The probability in this regard leans heavily not in favour of the appellant-accused but in favour of the deceased, for, the deceased was sitting on the ground and at work while the appellant was sitting at a comparatively high place? And this leads me to hold that it was the accused-appellant and not the deceased who was the actual aggressor. From that point of view the accused-appellant is not entitled to get the benefit of private defence to cause death of the deceased.

48. But the facts and circumstances of the case definitely suggest that the accused had no intention to commit murder of the deceased outright. They are after all friends of each other and such a friend in whose need the deceased always used to stand by extending loan and hospitality. On the date of occurrence the appellant-accused had also come over there with the said mood and initially ambiance in the shop was very much congenial. But unimaginably the foray came upon and one of the friends saw the last day of this life other came back after 20 days of his treatment from the hospital. For this impromptu incident the accused-appellant cannot be liable for committing the offence u/s 302 of the Indian Penal Code. Instead he is liable, in my considered view, for committing culpable homicide not amounting to murder under Part I of Section 304 I.P.C. The appellant-accused is thus found guilty of committing offence u/s 304 Part-I of the I.P.C. and he is sentenced to suffer rigorous imprisonment for a term of 10 years and also to pay a fine of Rs. 5,000/-, in default to suffer further rigorous imprisonment for six months. The judgment of conviction and sentence passed by the learned trial Judge is modified accordingly.

S. Barman Roy, J.

49. As we are divided in our opinion in this appeal, let this matter be laid before another Judge of this court to whom case may be assigned by the learned Chief Justice in terms of Section 392 Criminal Procedure Code for his opinion.

Narayan Chandra Sil, J.

I agree.