(2010) 08 CAL CK 0087

Calcutta High Court (Port Blair Bench)

Case No: C.R.A. No. 1 of 2010

Shri Appanna		APPELLANT
	Vs	
The State		RESPONDENT

Date of Decision: Aug. 30, 2010

Acts Referred:

- Constitution of India, 1950 - Article 21
- Criminal Procedure Code, 1973 (CrPC) - Section 154, 186, 222, 313, 464
- Evidence Act, 1872 - Section 114(g)
- Penal Code, 1860 (IPC) - Section 109, 120B, 186, 201, 302

Citation: (2010) 4 CALLT 275

Hon'ble Judges: Subhro Kamal Mukherjee, J; Dipankar Datta, J

Bench: Division Bench

Advocate: N.N. Adhikari, Mr. A.K. Ray and Mr. Krishna Rao in CRA Nos. 1 and 3 of 2010, Lall in CRA No. 002/2010, Mr. Joypmalya Bagchi, Mr. Deep Chaim Kabir and Mr. Mohd. Tabraiz in CRA No. 005/2010, for the Appellant;Santosh Kumar Mandal, for the Respondent

Judgement

Dipankar Datta, J.
All these appeals are directed against the judgment and order dated December 31, 2009 and January 1, 2010 respectively passed by the Sessions Judge, Andaman and Nicobar Islands at Port Blair, while deciding Sessions Case No. 48 of 2008, arising out of Chatham Police Station Case No. 66 of 2008 dated March 20, 2008, and hence shall stand disposed of by this common judgment and order.

2. Shri Appanna (hereafter A-1), Shri Ganeshwar Lall alias Ganesh Lall (hereafter A-2) and Shanta Ram (hereafter A-3) have been convicted under Sections 332/34 of the Indian Penal Code (hereafter IPC) and each have been sentenced to suffer maximum imprisonment i.e. simple imprisonment for 3 (three) years and to pay a fine of Rs. 15,000/- (Rupees fifteen thousand only) each, in default to suffer further

simple imprisonment for 1 (one) year each.

3. Abdul Nawaz (hereafter Nawaz), has been convicted u/s 302 for murdering G. Shaji (hereafter the victim), a policeman (head constable) in uniform, and, accordingly, sentenced to suffer imprisonment for life and to pay a fine of Rs. 50,000/- (Rupees fifty thousand only), in default to suffer further rigorous imprisonment for 2 (two) years.

4. Chatham Police Station Case No. 66 of 2008 dated March 20, 2008 was registered on the basis of an oral complaint of Ratan Kumar Singh (PW 1), the scribe whereof was G. Madhav Rao (PW-53). The First Information Report (hereafter the FIR), marked as Exhibit-1 in course of trial, reveals PW-1 and Gregory John Topno (PW-3), who are both police constables, were on patrol duty on March 19. 2008. They had left Chatham Police Station at about 22.00 hours with VHF(sic) set and torch light on a motor cycle. They conducted patrolling of Haddo, Delanipur, Buniyadabad and defence area and when they reached old Chatham jetty at about 23.50 hours, they felt the odour of dicsel. They suspected that something was wrong nearby and according stopped the motor cycle. Search of the surroundings, by walk, led to a ding(sic) being found standing beside M.V. Pillokunji, a vehicle ferry boat (hereafter the said vessel), stationed at the jetty. Meanwhile, a PCR van (Power-3) also reached there and they asked it to stop. Head Constable Sunil Kumar (PW 2) and Constable K. Vijay Rao (PW-5) alighted therefrom.P Ws 1 and 3 to P Ws 2 and 5 that diesel was being taken out from the said vessel. They also felt the odour of diesel. The driver of the PCR van, Apoorva Das (PW-6) reached the spot and then P Ws 1, 2, 3, 5 and 6 landed on the said vessel. Two dinghies were found to be tied with the said vessel. One was loaded with 20 drums and one man was present on the said dinghy. In the other dinghy, there were 14 drums which were being filled with diesel through plastic pipeline from the said vessel by starting its pump engine. In this dinghy, 3-4 persons were present. As the police party reached near these dinghies, those four persons jumped on the other dinghy, which was stationed by its side, The rope of the dinghy was cut with a dao and after starting the engine, it fled away. While PW-1 was informing the matter to Alfa 71 Police Station, Chatham and Mike 1 Police Control Room through VHF, A- 1, A-3 and A-2 (Engineer, Master and Laskar of the said vessel respectively) attempted to snatch the VHF set from him. At this stage, PW-3 and staff of the PCR van came to the spot and caught them. After sometime, at about 00.30 hours, the victim and constable Amit Talukdar (PW-4) reached the place of incident from Police Station, Chatham. PW-1 narrated the entire incident to them. The victim then informed the matter to the Station House Officer, Chatham Police Station through mobile phone and requested him to reach the spot immediately. Aftar that the victim and PW 1 boarded the dinghy and A-1. A-2 and A-3 were left under the vigil of P Ws 2, 3, 4 and 6. PW-2 went to the control room by PCR van for giving information. At that juncture, a mobile phone lying on the dinghy started ringing which was recovered by the victim. It was a mobile phone of Sony Ericsson brand. Upon checking, the victim safely kept it in the pocket of his trouser. PW-1

climbed on the said vessel and very firmly tied the rope of the dinghy. At that time, the other dinghy that had earlier fled away returned to the spot. On board thereof were four persons. They boarded the dinghy on which the victim was standing. PW-1 could identify two of the four. One was Nawaz, resident of Chouldari and other one was Abdul Gaffar, resident of Prem Nagar. Those four persons attacked the victim for release of the dinghy. Scuffling ensued between the victim and those four persons. At about 00.40 hours, Nawaz picked up a dao from the dinghy and inflicted injury on the victim''s head. Nawaz then pushed the victim into the sea. The rope of the dinghi was cut and all of them escaped towards Bambooflat being on board the dinghy. PW-2 conveyed this incident to the Control Room through VHF set. At that time,

Station House Officer of Chatham Police Station, Sub Inspector S.S. Rathore (PW-65) also reached the place of incident and made attempts to search the victim in the nearby sea area with the help of police personnel present thereat and the dinghies of the fishermen. The victim was not found. The PW-1 felt, that the victim might have died.

5. It appears that the information of the entire incident was received at the ploice Station on March 20, 2008 at 01.30 hours. In the column meant recording details of information/suspect/unknown accused with full particulars (Sl. No. 7), "Nawaz and others" were named as accused.

6. On March 20, 2008 at about 06.15 hours, the dead body of the victim was recovered with the help of Coast Guard divers, followed by inquest Conducted by PW-65 and postmortem examination conducted by Dr. Subrata Saha, Medical Officer, G.B. Pant Hospital (PW-63). On completion of investigation by PW-65, charge sheet was filed for offences punishable under Sections 302/392/411/201/120B/341 IPC, under Sections 409, 393, 353, 186, 120B, 34 IPC, and also for the offences under Sections 109/120B IPC against 17 (seventeen) accused persons.

7. On receipt of charge sheet and upon committal, the case record was received by the Court of Sessions on November 21, 2008. Cognizance was also taken on the same date by the Court. The learned Trial Judge on February 12, 2009 framed charges against Nawaz, Pancracious Ekka alias Panku, John Xaxa and Abdul Gaffar under Sections 302/120B, IPC; 394/120B, IPC; 201, IPC; and 411/34, IPC. A-1, A-2, A-3 and G.C. Mirdha were charged under Sections 409/120B, IPC; and 392/120B, IPC. Charge was also framed against nine others for offences punishable under Sections 411, IPC; and 201/120B, IPC.

8. To drive home the prosecution case, as many as 66 (sixty six) witnesses were examined and almost similar number of documents, 65 (sixty five), were exhibited apart from material exhibits. The defence, however, did not produce any one as witness but produced 5 (five) documents as defence exhibits. A good number of prosecution witnesses were declared hostile.

9. On perusal of the judgment of the leaned Trial Judge, it appears that all the accused persons charged with offences under Sections 392/409/411, IPC relating to pilferage of diesel were acquitted. No appeal has been preferred by the State and, therefore, the decision has become final.

10. It further appears that for reasons recorded therein, the learned Trial Judge proceeded to convict Nawaz u/s 302, IPC and convicted A-1, A-2 and A-3 for committing offences punishable under Sections 332/34, IPC on the basis of his appreciation of the evidence on record. This Court is now called upon to decide whether the learned Trial Judge was justified in returning the finding he did and consequently convict Nawaz and A-1 to A-3 and sentence them, as referred to above.

11. Mr. Joymalya Bagchi, learned advocate representing Nawaz, in his introductory address contended that the evidence on record bears ample proof that Pvawaz was falsely implicated.

12. Firstly, he contended that 6 (six) eyewitnesses of the alleged occurrence deposed in course of trial, viz. PW-1 to PW-6. Amongst them, P Ws 3, 5 and 6 did neither name Nawaz, nor identify him in Court.P Ws 1, 5 and 6 were among the majority of the prosecution witnesses who were declared hostile, but although PW-3 failed to identify/name Nawaz, he was not declared hos(sic) PW-4 admittedly was a hearsay witness relating to the name and identity Nawaz and thus could not have been relied upon.

13. According to Mr. Bagchi, the prosecution consequently had to heaven rely on the evidence- of P Ws 1 and 2 in relation to the disclosure of name identity of the assailant of the victim. He submitted that PW-1 cannot be said to be truthful witness since his evidence is in gross deviation from the FIR purportedly lodge by him. PW-1 had named Abdul Gaffar as one of the accused persons in the FIR but ultimately at the trial, he came up with completely different version. Neither did he name Abdul Gaffar as accused nor did he identity him. He even wrongly identified two other accused as the persons who were allegedly on the dinghy with Nawaz, i.e. he failed to name and/or identify any of the others who he claimed to have recognized in the FIR.

14. He, thus, submitted that the evidence of PW-1 is of such nature that it would seem to inspire little or no confidence at all in respect of his alleged claim that he knew all the miscreants by name and/or face, and therefore could have recognized them on the particular night.

15. It was asserted that no evidence was led by the prosecution, far less any foundation laid in respect thereof, as to how PW-1 was able to name Nawaz in the FIR. Nawaz, according so him, dad not have criminal antecedents and thus could not be a person known to PW- 1. The facts and circumstances by which Nawaz could reasonably be known or acquainted with PW-1 did not surface during trial. The

prosecution made a desperate attempt not to subject PW-1 to a test identification parade for identifying Nawaz; instead, Nawaz was shown to PW-1 at the police station at 05.00 hours on March 20, 2008. The identification of Nawaz in Court by PW-1. thus, lost its significance. This incident alone was demonstrative of the manner in winch PW-1 came to know the identity of Nawaz.

16. Mr. Bagchi submitted that it is the cardinal rule of appreciation of evidence that to accept a piece of evidence, the same ought to be reasonable, probable and truthful in the light of ordinary course of human conduct. In the absence of any criminal record in respect of Nawax and/or the absence of any acquaintance between Nawaz and PW-1, it would make one wonder as to how PW-1 knew the identity of Nawaz. The evidence of PW-1, according to him, is artificial and, therefore, it would be dangerous to rely on such piece of evidence relating to disclosure of the name and identity of Nawaz through the mouth of PW-1, and thereby confirm the finding of guilt arrived at by the learned Trial Judge. The evidence of PW-1 being untrustworthy, he urged the Court to reject the same.

17. The version that Nawaz was identified by PW-1 at 05.00 hours on March 20. 2008, according to Mr. Bagchi is further corroborated by the evidence of P Ws 3, 4 and 5 who consistently said that the name/identity of the assailant did not transpire at the place of occurrence where they were present. PW-4 in fact, went a step further and said that the identity was disclosed only at Chatham Police Station. The overall assessment of the practice(sic) such prosecution witnesses, therefore, gives tise to the unerring ability(sic) that the namel identiry of the alleged assailant was not known to of the prosecution witnesses, including PW-1 at the place of occurrence, (sic)it was only later, upon the arrival of PW 65 and DSP Pabla in the scene it Chatham Police Station, that the identity/name of the alleged assailant was introduced by falsely implicating Nawaz.

18. Elaborating on the evidence of PW-1, Mr. Bagchi invited the Court''s attention to another contradiction and an embellishment. Portion of the evidence where PW-1 contradicted himself with regard to the number of persons in the dinghy, - in the FIR he said there were five persons, but in evidence he said they were four, was shown. Identification of Nawaz by commando light was cited as an embellishment, an incident omitted in the FIR. Further PW-1 claimed that he identified Nawaz with the help of commando light. No document/paper was produced to show that a commando light was requisitioned and/or issued to PW-1 or the others in the course of the raid. Such prevaricating stance of PW-1, he submitted, rendered him highly unreliable and it was argued that it is risky to rely on Ills evidence.

19. That apart, the radio log record, marked Exhibit 27, which according to the prosecution had been sent contemporaneously did not divulge the name of Nawaz, although the information about the incident was sent by Power 6, i.e. the motorcycle that P Ws 1 and 3 were allegedly riding on the date of the incident.

20. Referring to the judgment of the learned Trial Judge where reliance was placed on the evidence of PW-1 on the ground that his version with regard to Nawaz was wholly consistent, Mr. Bagchi contended that the learned Trial Judge failed to appreciate that identification of Nawaz by PW-1 by name was not corroborated by the other prosecution witnesses, viz.P Ws 3, 5 or 6. In the light of the prevaricating stance of PW-1 with regard to the manner and course of the incident, particularly his identification of Nawaz, he argued that it may not be prudent to rely on such inconsistent evidence without adequate corroboration.

21. It was, therefore, submitted that the evidence of PW-1 with regard to the disclosure of the name of Nawaz by him in the FIR and in course of tendering evidence is highly artificial/unnatural and should not be relied on at all.

22. It was also contended by Mr. Bagchi that the improbability of the prosecution version to the effect that PW-1 identified the alleged assailant and immediately divulged his name in the FIR (Ext. 1) as narrated by him to PW-53, is glaringly evident from Ext.E being the draft FIR admittedly prepared by PW 65. This document has been admitted by PW 53 and a suggesion as to the existence of the same had been made to the maker thereof, i.e. PW 65. According to him, a bare reading of the draft FIR would show that the issue of identity was overwritten and introduced therein. It is, therefore, clear that the FIR purportedly lodged by PW-1 was not a product of his own knowledge but a result of dictation by his superior police officer, viz. PW-65. It submitted that the learned Trial Judge misunderstood such argument a ignored the same, by observing that there is no controversy inasmuch as content of both the documents was identical. The crux of the arguments advanced was in the existence of overwriting in the draft FIR with regard the identity of Nawaz as well as the fact that the purported original the case was a product of dictation at the behest of PW-65 and not the origin creation of PW-1.

23. Mr. Bagcini also contended that identification of Nawaz in Court suffer a severe blow in view of the admission of the witness that the Appellant was shown to him at the police station on March 20, 2008 at 05.00 hours. This fact is explained by Nawaz in his examination u/s 313 of the Code of Criminal Procedure (hereafter Cr PC) where he states that he was brought to the police station at 03.00/03.15 hours whereas, on the contrary, PW-65 claims that Nawaz had been arrested by him at the Aberdeen Bazaar taxi stand on March 20, 2008 at 21.45 hours.

24. This inconsistent version of the prosecution case with regard to the arrest of Nawaz in the evening of March 20, 2008 and his identification at 05.00 hours in the police station, vide the version of PW-1, is irreconcilable and the prosecution has not made any effort whatsoever to explain away the same. On the other hand, the explanation given by Nawaz in his examination u/s 313, Cr PC supports the version of PW-1 and gives rise to a reasonable doubt in the mind of a reasonable man of ordinary prudence that Nawaz had been arrested earlier in the day and was shown to PW-1 at 05.00 hours, and that PW-1 was not aware of the identify/name of the

assailant until then, as claimed by him in his evidence.

25. Mr. Bagchi next scanned the evidence of PW-2 and contended that his presence on the said vessel at the time of alleged assault was highly doubtful. In the FIR, it was stated that PW-2 left for the control room by the PCR van immediately on arrival of the victim and PW-4. If this version of PW-2 is to be believed, then he could not have been present on the said vessel when the alleged assault took place. Although PW-1 resiled from such version in the FIR in his evidence in Court, PW-58 (the scribe) admitted that PW-1 stated such fact in the FIR. It was shown that PW-2 tried to salvage such situation by claiming in his evidence in Court that he left for the PCR alter the alleged incident. Therefore, from the prosecution evidence and materials on record, it was contended that two probable versions could emanate as to where PW-2 was when the alleged assault took place, - the FIR version is that he was not on board the said vessel and had left the spot for the PCR before the alleged incident of assault, whereas, in his evidence, he seeks to establish that he left the said vessel after the assault to seek permission to fire. When two probable versions emanate from the prosecution evidence, Mr. Bagchi sought to remind the Court of the established principle that benefit ought to be. extended to the accused. Further, according to him, the version in the FIR is more probable inasmuch as had PW-2, who was armed with a service revolver, been present at. the site where the alleged assault was taking to(sic) in probability he would have used such revolver to save his colleague not run to the PCR for seeking permission to fire. However, in the event was not on the spot, but 50/60 meters away near the PCR van, then it is only that on hearing the incident of alleged assault, he would probably seek commission to fire to bring the situation under control. The radio log book (at-27) would also show that the information of the incident was not sent PW-2 i e. Power 3, but by Power 6, being the motor cycle manned by P Ws and 3. Therefore, contemporaneous records establish that the message was definitely not sent by PW-2, as he was not present at the alleged place of occurrence.

26. Mr. Bagchi invited the Court''s attention to that part of the evidence of PW-2 corroborating PW-1 on the point that it was Nawaz who had pushed the victim into the water from the boat. Further, his evidence to the effect that Nawaz hit the victim with a dao was stated for the first time in Court, and he admitted that he had not stated such fact to the police during investigation. Such signicant omission of a material fact in the previous Statement of PW-2 made to the police officer, he contended, must be viewed as a vital contradiction rendering his evidence highly unreliable in nature.

27. It was next contended by Mr. Bagchi that like PW-1, PW-2 also did not bring to the fore as to how and in what manner he could be aware of the name of Nawaz. In fact, PW-2 had not named Nawaz in his previous statement to the police. Hence, it was incumbent on the part of the prosecution to hold a test identification parade in respect of Nawaz during investigation. Failure to do so, particularly in respect of

PW-2, who never named Nawaz in the course of investigation rendered his identification of Nawaz most unreliable in law and in fact. This lacunae of the prosecution case is further probabilised by the statement of Nawaz in his examination u/s 313, Cr PC that he was shown to the prosecution witnesses while he was detained at Chatham Police Station; a fact that was admitted by PW-1 himself.

28. The evidence of P Ws 3,4,5 and 6, according to Mr. Bagchi, probabihze the defence theory that neither PW-1 nor PW-2 was aware of the identity of the assailant at the place of occurrence. Hence none of the reported witnesses stated that the name/identity of the assailant was divulged to them at the place of occurrence. It was their consistent version that at the place of occurrence they heard that ''someone'' had allegedly assaulted the victim. In respect of PW-3, this was an embellishment inasmuch as he did not state this fact to PW-65, the Investigating Officer, during, his interrogation. Even if such version is believed, the prosecution ease is rendered doubtful as to whether P Ws 1 and 2 were aware of the identify of the assailant inasmuch as, if they were so aware, then it was most likely that the reported witnesses would have come to know of the name of the assailant at the place of occurrence itself. The absence of identity of the assailant at the place of occurrence is also corroborated from contemporaneous records namely radio log book (Ext 27). which would show that the name of the assailant was not disclosed therein. The name was subsequently introduced on the arrival of PW-65 and DSP Mr. Pabla by preparation of a draft FIR. into which the alleged recognition of the assailant by PW-1 was later introduced and, thereafter Nawaz was shown in the police station itself at 05.00 hours on March 20 200

29. Therefore, Mr. Bagchi argued, it is abundantly clear from the evidence of the prosecution''s two star witnesses P Ws 1 and 2 that the very presenc(sic) and/or identification of Nawaz at the place of occurrence as described no basis either in fact or in law, and ought not to be relied upon solely in the manner as the learned Trial Judge sought to do, for the purpose of conviction of Nawaz. The learned Trial Judge, he contended, rightly disbelieved the evidence of PW-4 with regard to the presence of Nawaz as a hearsay piece of evidence, and it is obvious from the evidence of PW-3 that Nawaz was not at all recognized, as also apparent from the evidence of P Ws 4, 5 and 6 not showing either the presence of Nawaz at the spot, or the positive identification of Nawaz by either name and/or face.

30. Moving on to his next point, Mr. Bagchi contended that the learned Trial Judge had not believed the manner, course and circumstances in which the alleged incident occurred and acquitted most of the co-accused persons of the charges leveled against them. The genesis of the prosecution case was to the effect that Nawaz and other acquitted accused persons in collusion with the staff of the said vessel (also acquitted) were pilfering diesel and at that time they had been surprised by a police party of which, purportedly, the victim was subsequently a member. This genesis of the case was not believed by the learned Trial Judge inasmuch as he

acquitted all the accused persons from the charges of Sections 392/409/411, IPC relating to pilferage of diesel. Such order of acquittal has not been challenged by the State and has become final and binding between all concerned parties.

31. The learned Trial Judge did not believe the seizure of the dinghies or seizure of a number of drums. The prosecution version that the pilfere oil was kept in the business premises belonging the family of Nawaz was also disbelieved. The chemical examiner''s report relating to the nature of oil seized by the investigating agency was also disbelieved. The learned Trial Judge also disbelieved a part of the prosecution case relating to recovery of the weapon of assault, viz. the dao. It was, thus contended by Mr. Bagchi that such findings clearly militate against the fact that Nawaz and others had been caught in the act of pilfering diesel and that in their effort to take away one of the dinghies the alleged incident had occurred. If the genesis or the attending circumstances relating to the aforesaid incident have not. been proved beyond reasonable doubt, he argued that it is preposterous to suggest that the prosecution has proved the case against Nawaz alone beyond reasonable doubt, and the finding of guilt against Nawaz is wholly unfounded and unjustified in either facts and circumstances, or in law. In other words, the stage itself was never set, for the drama to unfold, and as such, the entire incident itself is one that becomes difficult to believe.

32. Mr. Bagchi urged the Court to appreciate that if the prosecution case is disbelieved to the extent of pilferage of diesel and its recovery, then why is there no explanation in respect of alleged scuffle or exchange of hot words with the police party and the circumstances leading to the alleged presence (sic)police party at the place of occurrence. In view of the missing link, the prosecution case cannot be said to have been proved beyond reasonable exist. On the other hand, there is evidence on record that the police had (sic)extensive damage to the said vessel and no plausible explanation has to offered regarding the cause of such damage. It also surfaced from the prosecution evidence itself that on March 20, 2008, there was an agitation the marine staff because of detention and torture of marine staff including the crew of the said vessel which was completely smashed, including the cabins, glass and doors. This has also been corroborated by the doctor, PW-had also examined A-1, for extensive injuries sustained while in detention.

33. Insofar as registration of the FIR is concerned, it was argued that the "game was under suspicious circumstances rendering it highly doubtful. According to the prosecution case, the FIR was lodged by PW-1 and recorded by PW-53. This aspect of the prosecution case suffered a severe jolt when in cross-examination, a document (Ext-E) proved by the defence being a draft copy of the FIR written by PW-65, a superior police officer and the Investigating Officer of the case, was produced. A bare perusal of Ext-E would show severe overwriting and the suspicious manner in vhich the name of Nawaz was written at the corner of the said document. This fact gives rise to a reasonable doubt as to the truthfulness of the prosecution case and

renders It highly probable that the FIR naming Nawaz was a product of deskwork and machinations at the behest of PW-65 and not an honest rendition of the alleged incident by PW-1 to PW-53 as has been claimed.

34. The very initiation of the instant case against Nawaz, according to Mr. Bagchi, being highly doubtful and shrouded in deep mystery; one is left to wonder whether the implication of the Appellant is on mere surmise and conjecture of the police authorities or based on a truthful eyewitness account of the alleged incident.

35. The next point urged by Mr. Bagchi related to non-production of contemporaneous records. The evidence of the members police party was rendered highly unreliable due to the failure of the prosecution to produce the relevant general diary entries and other materials which are required to be contemporaneously maintained in the course of official business. Admittedly, the prosecution had not produced the relevant outgoing general diary entry to the effect that P Ws 1 and P Ws 3 had gone out on patrol duty, resulting in the alleged incident. Further, the presence of P Ws 2, 5 and 6 in the PCR van which happened to pass the place of occurrence was also not established by production of relevant records. The fact that these two police parties had left the police station with the respective vehicles and other equipments including VHF set, commando light, service revolver, etc. was not proved by production of contemporaneous records in the General Diary Book which is maintained in the police station in ordinary course of business. Most importantly, the wireless message sent by VHF radio resulting in the arrival of the victim and PW-4 at the place of occurrence was also not proved by the production of relevant general diaries and/or documentation.

36. Under such circumstances, Mr. Bagchi urged the Court to draw(sic) adverse inference as to the truthfulness of the prosecution case due to non production of such vital documents. Such non production, he argued, throw a severe challenge to the prosecution version that P Ws 1 and 3 had actually gone out on patrol duty and had boarded the said vessel to prevent theft of(sic) diesel and hence, the very genesis of the prosecution case is put under grave doubt. The learned Trial Judge glossed over such fact and failed to draw an adverse inference u/s 114(g) of the Evidence Act for non-production of such vital documents which, under law, were required to be mandatorlly(sic) maintained. In the backdrop of non-production of such relevant records,it is highly unsafe, if not unwarrented, to rely upon the mutually inconsistent and highly artificial version of the alleged incident on the oral evidence of the members of the alleged raiding party, namely P Ws 1 to 6, especially where PW-6 denies his presence altogether, demonstrating the weakness in the prosecution version of the star witnesses.

37. On the question of seizure of the dao which was allegedly used for, inflicting injury, Mr. Bagchi contended that the learned Trial Judge rightly, disbelieved the part of the prosecution case relating to its seizure. However, most strangely, after disbelieving this part of the prosecution case, the learned Trial Judge relied on the

opinion of the doctor, PW-63, to the effect that the alleged injury could have been caused by the middle part of the seized dao, According to him, it is an absurd situation where the circumstances of the alleged crime did not exist and the purported weapon of offence is not believed, yet, Nawaz has been sought to be convicted in the absence of any proof beyond reasonable doubt that the incident actually ever occurred in the manner, course and under circumstances as sought to be proposed by the prosecution.

38. Extensive argument was advanced by Mr. Bagchi on the cause of death and circumstances of recovery of the body of the victim. It was the version of the inquest witness, PW-21, that blood and water were coming out from the nose and mouth of the victim. The doctor, PW-63, also admitted that there was trace of mild blood stained frothy fluid. In cross examination, PW-63 admitted that frothing from nose or mouth is very vital in deciding the cause of death, and that on examination of the lungs he noticed mild blood stained frothy fluid which showed that the victim had actually inhaled water. He also stated that in case of bleeding or frothing from nose and mouth while body was recovered from the water, it could be a case of typical drowning. PW-63 admitted that he had not mentioned in his report that the injury was ante mortem or post mortem. He also admitted that the injury on the victim is not borne deep, as he did not find a fracture. He had also not stated in his evidence/report that such injury was sufficient in the ordinary course of nature to cause death. He also admitted that cardio respiratory failure is the ultimate cause of death in various situtations and might be a result of drowning as well. Moreover, the PW-63 admitted that the seized dao was not shown to him in the course of investigation to formulate an opinion. PW-63''s version in Court that the middle part of the seized dao was used to cause the injury pales into insignificance in the face of the fact that there was no cogent evidence to establish that the seized dao was, in fact, the weapon used in commission of the alleged offence. On the face of such evidence. Mr. Bagchi submitted that it was highly unlikely that the victim died due to the injury allegedly caused on his head. This act, he emphasized, was actually accepted by the learned Trial Judge but he held that injury on the head coupled with the drowning in the water caused the death of the victim.

39. The time of death, it was next submitted, had also not been proved beyond reasonable doubt. While the prosecution version was that the victim died soon after the alleged assault at 00.40 hours on March 20, 2008, it is the evidence of PW-22 (inquest witness), PW-62 (the diver who recovered the deadbody) and PW-65 that the wound on the victim was profusely bleeding, at the time of recovery of the body from underwater at about 05.45 hours, and even continuing subsequently upto the time of holding inquest back at the G.B. Pant Hospital. It is the evidence of PW-63 that bleeding from the injury would stop within a few minutes or at best within half an hour of the death of the victim.

40. In view of such evidence of the medical expert, Mr. Bagchi urged the Court to hold that it is highly unlikely on the face of the uncontroverted evidence of P Ws 22, 62 and 65, to believe the prosecution version that the Victim died around after 00.40 hours immediately after the alleged assault. PW-63 in his cross-examination had admitted fluid which shows that the person had inhaled water and that frothing from nose or mouth and cyanosed nails are very vital factors indicating as phyxial death which occurs in drowning. Finally, PW-63 concluded by admitting that if a person had taken breath under water, possibility of his death by drowning was also there. Such admission on the part of PW-63 runs contrary to his earlier opinion that the head injury was the cause of death. The reason why PW-63 gave such erroneous opinion was due to the fact that the inquest report of the victim indicating such symptoms as frothing from nose and mouth and cyanosed nails were withheld from him, as admitted by him in his cross-examination. The opinion in the postmortem report was therefore on the basis of incomplete data furnished to PW-63 at the time of postmortem examination, as he also stated that nobody from the police or the Investigating Officer brought to his notice that the nails of the deceased were cyanosed. It was stated by him that it is another vital symptom of death which happens in case of asphyxial drowning. When the complete set of facts was divulged to him, he was constrained to admit that the death was possibly due to drowning. Ultimately, it was submitted that in the event the death is due to drowning, there is a possibility that the victim may have in the, course of the alleged scuffle lost his balance in the vacillating dinghy and suffered a head injury on the back of his head in the process of falling overboard from the unstable dinghy in the sea.

41. According to him, it is therefore unclear that the death of the victim was due to the injury suffered by him on his head or that he died due to an accidental fall, resulting in such injuries and subsequent drowning.

42. Investigation conducted by an incompetent officer was the next point urged by Mr. Bagchi. PW-65 was a Sub-Inspector of Police. However, he had undertaken the investigation as the FIR was registered at Chatham Police Station, of which he was the Station House Officer. He admitted that the offence u/s 302 is a grave offence, and as per the Police Manual this could be investigated only by a Circle Inspector or an officer above his rank. He denied that he had no authority or was not authorized to investigate the case or that only to suit the case and oblige his superiors he investigated the case.

43. Such admission on the part of the Investigating Officer, Mr. Bagchi asserted, clearly establishes that the investigation in the instant case was done without jurisdiction and/or authority of law, and the same completely vitiates the entire trial. It would also appear that the same was a highly motivated and machinated process of investigation; wherein several senior and/or superior police officers were interested and the same was not free from prejudice to the accused persons, especially Nawaz.

44. Further, the prejudice in conducting the investigation through PW- 65 who was not competent to investigate an offence like murder under the applicable Police Manual, according to him, is not far to seek. He was the author of the draft FIR, wherein the issue of identity of Nawaz was introduced through overwriting. This draft FIR was translated into the purported FIR of the case through PW-1 at his dictates. Thereafter, the investigation was also conducted at his behest in order to ensure the success of his Machiavellian plan to complete the false implication of Nawaz as the person inflicting the injury and subsequent pushing, when, on the basis of the materials on record, it would appear that at the place of occurrence nobody knew the identity of the man who allegedly dealt the blow on the victim and alleged pushed him into the sea.

45. Therefore, PW-65 was not only the author of the case and proposer of the theory of guilt of Nawaz, but he was also the subsequent architect of the prosecution case against Nawaz, seeking to prove his own theory. The fact that both such aspects were in the hands of PW-65 indicates a patent prejudice caused to Nawaz, especially when PW-65 was not empowered to investigate such a case. It is thus a sitmation where PW-65 was able to see through the entire case to the conclusion he wished, and build such a case, as is necessary on the materials, which he deemed fit to justify what had been manufactured against Nawaz.

46. In addition thereto, it. was submitted that from the version of PW-1 it is evident that enquiry into the matter was in fact by and at the behest of superior police officers, including DSP George Lalu, who was in tact conducting a simultaneous enquiry into the statements made by PW-1 and PW-2 during the course of the investigation which, however, never saw the light of day.

47. It was lastly contended that from the evidence of the prosecution witnesses again, it is clear that the place of occurrence was a public area, being a jetty, next to which there was a, cargo jetty. Another boat was also berthed nearby, which would have had officers on watch.

48. In circumstances, it is unclear why there were no other independent witnesses with regard to the alleged incident, especially in an area that is bound to have some persons present in and around the alleged place of occurrence, except the persons of the raiding party who are naturally partisan and interested in the success of the prosecution case.

49. Before concluding his submissions, Mr. Bagchi without waiving his Contention that Nawaz was not guilty of murder and that the instant case would not in any event come within the parameters of Section 302, IPC advanced an alternative argument to the effect that evidence of Nawaz having the intention to kill the victim was absent and, therefore, if at all any offence has been committed, the same would attract Part II of Section 304, IPC for the reasons that

a) Nawaz did not come to the place of occurrence being armed but it is the prosecution case that he allegedly used the dao which was lying in the fishing dinghy;

…. b) The injury on the head of the victim is a product of a single blow which did not cause a fracture and has not been stated by the doctor, PW-63, to be sufficient in the ordinary course of nature to cause death;

c) It is accepted by the learned Trial Judge that the injury did not cause the death, but the victim succumbed due to drowning; and

d) The prosecution evidence as to whether Nawaz pushed the victim is contradictory inasmuch as PW-2 does not corroborate PW-1 on this score.

50. Based on the aforesaid elaborate and erudite submissions, Mr. Bagchi appealed to the Court to hold that the conviction is bad in law and on facts and that Nawaz is entitled to be set free and enjoy the liberty guaranteed under Article 21 of the Constitution of India.

51. Mr. N.N. Adhikari, learned senior advocate appearing for A-1 and A-3 contented that the learned Trial Judge grossly erred in convicting them for offences punishable u/s 332/34, IPC. According to him, assuming arguendo, that the entire evidence on record is true, there is no material on record to suggest that A-1 and A-3 caused any bodily pain, disease or infirmity to any person as contemplated in Section 319 of the IPC. On the contrary, Ext. D being the injury report would reveal that A-1 suffered serious injury as a result of grievous hurt caused to him by the police personnel. Approach of the learned Trial Judge in taking recourse to Section 222, Cr PC was severely criticized by him. Offence of the nature referred to in Section 332, IPC, according to him, is not a cognate offence of the nature of offence punishable under setions 392 or 409, IPC and, therefore, severe miscarriage of justice had resulted. Since no charge u/s 332 was framed against A-1 and A-3, takin defence did not and could not arise. He prayed for quashing of that part of the judgment and order of the learned Trial Judge whereby A-and A-3 had been deprived of their right of personal liberty, most illegally.

52. Mr. Tulsi Lall, learned advocate representing A-2 adopted the submission of Mr. Adhikari.

53. Mr. Mandal, learned Pubiic Prosecutor, in his reply fairly conceded that there was no material based whereon finding could be returned that A-1 A-2 and A-3 were guilty of offences punishable under Sections 332/34 IPC He, however, contended that there are sufficient materials on record to suggest that A-1, A-2 and A-3 had committed offences punishable u/s 186. IPC. Referring to Section 464, Cr PC, he submitted that the Court may be pleased to order that charge be framed u/s 186 and the trial, as against A-1, A-2 and A-3, be recommenced from that stage.

54. In so far as Nawaz is concerned, Mr. Mandal vehemently opposed the appeal. According to him, the materials on record were rightly considered to be sufficient by the learned Trial Judge to hold Nawaz guilty of committing murder of the victim. The ocular witnesses, P Ws 1 and 2, he contended, had proved not only the presence of Nawaz at the spot but had testified to the assault inflicted on the victim by Nawaz with the help of a dao and the subsequent push by Nawaz which resulted in the victim falling into the sea wafer. It was further contended that there was no evidence of enmity or animosity between Nawaz on the one hand and P Ws 1 and 2 on the other, He referred to the radio log, which was marked Ext. 27 on being proved by M. Jyoti, ASI, Radio Operator (PW-32) as a contemporaneous document regarding information in relation to the alleged incident of illegal transportation of diesel, the assault on the victim and subsequent pushing into the sea water. He also referred to some of the suggestions put to the prosecution witnesses on behalf of Nawaz in course of coss-examination to contend that the same are suggestive of admission of presence of Nawaz at the spot. Replying to the contention of Mr. Bagchi, he contended that minor inconsistency here and there in the evidence tendered by the prosecution witnesses arc inevitable having regard to lapse of some time between the date of the incident and the date on which the witnesses deposed and therefore the same ought not to be considered vital enough to upset the decision of the learned Trial Judge. It was also submitted by him that since it was established that Nawaz had assaulted the victim with the intention of killing him in order to obtain release of the dinghies, the provision contained in Section 304, IPC relating to punishment for culpable homicide would not be applicable in the present case. He, accordingly, prayed for dismissal of the appeal filed by Nawaz.

55. In course of his reply, Mr. Bagchi submitted that the inference to the effect that an innocent man will not be falsely implicated in the absence of enmity is belied from the records of the case itself. In the instant case, no less than 17 (seventeen) persons were charged of various offences, and 13 (thirteen) stood acquitted of all charges, while Nawaz was found guilty of murder and A-1, A-2 and A-3 were convicted of minor offences. It is nobody''s case that the acquitted individuals had been falsely implicated only due to inimical relations with the police. He reiterated that most importantly, the version of PW-1 loses credibility when he chooses to remain silent about Abdul (sic)who named in no uncertain terms in the FIR. According to him, it to the version of such an untruthful person as PW-1 which is touted as the hardwork(sic) of the prosecution case and such version is sought to be salvaged on the anvil of lack of inimical relations. It is always possible that Nawaz was a convenient scapegoat to be sacrificed when the identity of the actual assailant was not known, but for reasons best known to the prosecution, it was seen fit to implicate Nawaz in the instant case.

56. Regarding the suggestions put forth in course of cross-examination, it was contended that the submission made by Mr. Mandal is patently miconceived. The trend of the questions in cross examination reveals without shadow of doubt that

the defence denied the prosecution case entirely and, therefore, a view ought to be formed not on the basis of a question here and there put to a particular witness but on a complete reading of all the questions put to all the witnesses. He, accordingly, renewed his prayer for setting aside of the conviction of Nawaz.

57. This Court has heard the learned advocates for the parties and perused the materials record.

58. In so far as the appeal filed by A-1, A-2 and A-3 are concerned, this Court is satisfied that there is no iota of evidence to suggest that A-1, A-2 and A-3 had voluntarily caused hurt to any of the police officers who were present on board the said vessel. Voluntarily causing hurt to a public servant being the essential ingredient for constituting offence u/s 332, the learned Trial Judge in the considered view of this Court committed gross error in convicting A-1, A-2 and A-3 without there being any evidence to support the finding he reached. A-1, A-2 and A-3 were detained in custody for more than three months immediately after the FIR was registered and after pronouncement of the decision by the learned Trial Judge, they were again taken into custody. It has been represented before the Court that all three were detained in custody for more than the maximum period for which an accused may be imprisoned for committing offence punishable u/s 186, IPC. This submission has not been disputed by Mr. Mandal. From the injury report (Ext. D), it is clear that A-1 was severely injured. He is also a public servant. It has been contended on his behalf that the police personnel obstructed him from discharging official duty and, therefore, they ought to be proceeded against. Without entering into the controversy on this point, this Court is of the further considered view that remanding the matter back to the learned Trial Judge for framing fresh charges against A-1, A-2 and A-3 for commission of offence punishable u/s 186, IPC would serve no fruitful purpose in as much as even if they are found guilty and are accordingly convicted, the sentence that could legitimately be awarded would be lesser than the punishment already suffered by them for alleged commission of offence punishable under Sections 332/34, IPC, which has not been proved against them. In order to prevent miscarriage of justice, the conviction of A-1, A-2 and A-3 together with the sentence passed against each of them stands set aside.

59. It would now be the Court''s endeavour to assess the evidence on reco(sic) for the purpose of reaching a finding one way or the other on the appeal Nawaz. The several points raised by Mr. Bagchi appear to be of some relevancs. It would, therefore, exercise the consideration of the Court how far the same deserve acceptance for upsetting the decision of the learned Trial Judge and thereby quash the conviction of Nawaz and set him free.

60. Of the 66 (sixty-six) prosecution witnesses, the evidence tendered by all is not relevant for a decision on the appeal filed by Nawaz. To the mind of this Court, inter alia, evidence tendered by the police officers who were present at the site of occurrence (P Ws 1 to 5), the scribe of the FIR (PW-53), the Medical Officer who

conducted postmortem examination (PW-63) and the Investigating Officer (PW-65) are of relevance. Of these witnesses, the evidence of P Ws 1 and 2 arc absolutely relevant because they are ocular witnesses. It would, therefore, be proper to note their deposition in Court in some detail.

61. PW-1, more or less, has supported the version in the FIR registered on his complaint. In addition, he stated that by flashing commando light, he had recognized the person who had cut the rope of the dinghy which was tied to the said vessel and that person was Nawaz. He, however, could not recognize the other three persons. While he was tying one engine dinghy with the said vessel, he noticed that another engine dinghy was approaching the said vessel and came very near to the dinghy on which the victim was on board. All three persons, on board the approaching dinghy, jumped and came over to the dinghy on which the victim was standing. Nawaz was one of those three. Soon thereafter, a scuffle ensued between the victim and the said three persons. Apart from commando light and torch light, there was sufficient light over the jetty as well as within the said vessel. Nawaz had picked up a doa from within the dinghy and hit the victim on his head and he also pushed him from the dinghy resulting in the victim falling into the sea water. The offending dao was also seen by PW-1 to have been thrown in the sea water. PW-2 had transmitted such message about the incident to the Control Room through the set lying within the Power 3 Gypsy.

62. PW-1 was subjected to cross examination by the prosecution after he was declared hostile. The occasion to declare him hostile arose because of his statement that he did not mention the name of any other offender while narrating the incident to PW-53.

63. In course of cross examination on behalf of Nawaz, it was the version of PW-1 that he is aware of the contents of the FIR signed by him but he did not read the contents of the same before putting his signature; he-had read it afterwards. He admitted that Nawaz was shown to him at Chatham Police Station, on March 20, 2008 at 05.00 hours. He denied the suggestion that Nawaz was not present in the scene at the place of occurrence or that under the direction of his superior, he had put the signature on the FIR with a view to falsely implicate Nawaz.

64. Inter estingly, PW-1 was not questioned by the defence as to how he could identify Nawaz as the assailant because Nawaz had no criminal Respondents and, therefore, allegedly could not even be known to PW-1. He that in the FIR he had stated that PW-2 had left the place and went police Control Room for giving information while the incident of alleged had taken place. He had raised an alarm by shouting for help and PW-2 by showing his service pistol had cautioned the offenders not to to any untoward incident.

65. On facing cross-examination at the instance of A-1, A-2 and A-3, he also denied the suggestion that he did not know either A-1, A-2 or A-3 or mat(sic) their names

were simply delivered to him at the Police Station.

66. PW-2 stated that at the place of occurrence, he had heard the sound afrm(sic) approaching dinghy towards the jetty while he was on board the said vessel and had detained A-1, A-2 and A-3. He noticed PW-1 coming over to the said vessel for tying the rope of the detained dinghy tightly with it, while the victim was on the said dinghy. He further noticed that there were 3-4 persons on the dinghy which was approaching the said vessel. He recognized three of them as Nawaz, Panku and Jhon. He, however, could not identify the fourth person. PW-2 identified Nawaz correctly but could not correctly identity Panku and Jhon. Nawaz and Jhon (wrongly identified) came over to the dinghy on which the victim was on board. There was an exchange of hot words with the victim and closely thereafter, in course of altercation, Nawaz had picked up a dao from the dinghy and dealt a blow on the head of the victim. Thereafter, the victim was pushed away from the dinghy into the sea water PW-2 had his service pistol with him and, accordingly, had asked the offenders to stop doing any untoward incident or else he would open fire. That did not deter the offenders, whereupon he rushed to the PCR van for obtaining permission to open fire.

67. He denied the suggestion that he had been cited as a witness because the incident involved the death of a police personnel or that he had implicated Nawaz and others falsely or that he did never go to the place of occurrence on the relevant date. No question was also put to PW-2 as to how he could know Nawaz.

68. PW-3 stated that he had heard the alarming shouts of PW-1 and PW-2 that someone assaulted the victim and pushed him into the sea water.

69. PW-4 stated that after coming on board the said vessel, he was asked to remain on watch and guard three persons who were seated on the said vessel i.e. Engineer, Master and Laskar of the said vessel, meaning thereby A-1, A-3 and A-2 respectively. He correctly identified A-1, A-2 and A-3 in Court. In so far as the incident of assault is concerned, he stated that while remaining on guard duty of the detained staff, he suddenly heard the utterance of PW-1 that" dao chal gaya". Thereafter he noticed that two engine dinghies fleeing away by leaving the jetty. He candidly expressed that at the spot he did not hear who had inflicted blow with dao or to whom but after coming to Chatham Police Station, subsequently he had heard that Nawaz had inflicted blow on the victim.

70. PW-5 also stated that while he was on board the said vessel guarding its detained staff, suddenly, PW-2 had shouted and divulged that(sic) the victim was hit by dao and was pushed away into the sea water. It is his evidence that PW-2 came to the PCR van and informed about the incident to the PCR. He did not hear who had assaulted the victim by the dao by subsequently he had heard the name of the assailant but he could not remember his name at that stage.

71. From the above versions of the prosecution witnesses, it seems to be clear that the victim had been assaulted by a dao and then pushed into the sea water and it was thereafter that PW-2, for sending message, left for the PCR van. It is in the evidence of P Ws 1 and 2 that they noticed Nawaz to be the assailant of the victim. While PW-1 was categorical that Nawaz pushed the victim into the sea water, PW-2 did not specifically say who pushed the victim into the sea water but having regard to the sequence of events sighted by him which support the version of PW-1, it would not be unreasonable to conclude based on the version of PW-1 that it was Nawaz who had also pushed the victim into the sea water.

72. Number of similarities appears from a reading of the respective versions of P Ws 1 and 2, viz. that PW-2 and other staff who were on the vehicle approaching the jetty were stopped by PW-1; that there were 20 drums on one dinghy and 14 drums on the other; that through green coloured pipe, diesel was being supplied to the drums from the said vessel; that the victim picked up the mobile phone lying in the detained dinghy; that PW-1 had come over to the said vessel for tying the dinghy; that both recognized Nawaz as the person who picked up the dao from the dinghy and hit the victim. These are some evidence tendered by P Ws 1 and 2 which are absolutely mutually consistent. That apart, the other witnesses present at the spot (though had not recognized Nawaz or been informed about the identity of the assailant), had heard that the victim was assaulted with a dao.

73. The radio log (Ext. 27), proved by M. Jyoti, ASI, Radio Operator, PW-32, recorded at 00.25 hours of March 20, 2008 refers to diesel oil with dinghy being caught by Power 6 of which P Ws 1 and 3 were members. The document further reveals conveying of message at 00.40 hours in respect of illegal transportation of diesel with the help of two dinghies, one of which fled away and its return and consequent attack on the police party with dao. That the victim was badly injured and pushed into the sea water is also recorded there Power 3 (of which P Ws 2,4,5 and 6 were members), also present at the spot, seeking permission to fire to save themselves is also recorded there. The contents of Ext. 27 are corroborated by the contents of the radio log being Ext. 29, proved by A. Yougesh, ASI, Radio Operator (PW-33). Apart from the evidence of P Ws 1 and 2, one finds sufficient corroboration of the incident of assault on the victim and he being pusned into the sea water from these two contemporaneous exhibits.

74. Considering these evidences, the incident of assault on the victim and he being pushed into the sea immediately after the assault is, therefore, proved beyond reasonable doubt.

75. Much has been argued by Mr. Bagchi relating to the identity of Nawaz, noticed above. It is in the evidence of PW-1 that he recognized Nawaz to to the assailant, having inflicted injury on the head of the victim by a dao (sic)that it is Nawaz who pushed him into the sea. The version finds corroboration from the evidence of PW-2, except that PW-2 did not say that Nawaz pushed the victim into the sea.

76. While concentrating on the point of identity of Nawaz, it would be useful to deal With two side arguments of Mr. Bagchi that (i) PW-2 did not corroborate PW-1''s version that Nawaz pushed into the sea, and (ii) as per the FIR version PW-2 had left the place of occurrence and, therefore, could not have seen the alleged incident.

77. Insofar as the first point is concerned, one must bear in mind that the evidence given by a witness would very much depend on his power of observation. It is quite possible that some aspects of an incident may be observed by one witness while the same may not be observed by another though both are present at the scene of offence. As held by the Supreme Court in Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat, discrepancies which do not go to the root of the matter and shake the basic version of the witnesses, therefore, cannot be given undue importance. More so, when the all important probabilities factor'' echoes in favour of the version narrated by the witnesses. It is also observed therein that by and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen. Ordinarily, a witness is overtaken by events and therefore, the mental faculties cannot be expected to be attuned to absorb the details. The powers Of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person''s mind, whereas it might go unnoticed on the part of another. A witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span, and is liable to get confused, or mixed up when interrogated later on. Court atmosphere and piercing cross-examination made by counsel often cause confusion and nervousness. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the Witness is giving a truthful and honest account of the occurrence witnessed by him. Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

78. That PW-2 did not say that Nawaz pushed the victim into the sea is not fatal for the prosecution case, having regard to the other evidence on record.

79. The submission on point (ii) supra also does not appeal to this Court. It is trite that an FIR does not constitute substantive evidence but can only be used to corroborate or contradict the maker thereof vis-a-vis the evidence given by him in Court or to impeach his credit. The version in the FIR that PW-2 had left for the PCR van to send message in respect of the alleged incident of pilferage is no reason to disbelieve the testimony of PW-2 given in Court which also finds support from the version of PW-1 that PW-2 had the place of occurrence after the alleged incident for obtaining permission fire. That the FIR cannot be used for corroborating or contradicting of witnesses is settled law [see Jer and Co. Vs. Commissioner of Income Tax, U.P.,

80. This Court is, therefore, unable to concur with Mr. Bagchi on Su(sic) points.

81. PW-1 having deposed that Nawaz was the assailant and pushed (sic) victim into the sea and the first part of this evidence having been corroborate by PW-2, it was not necessary for the prosecution to independently pro(sic) that PW-1 or, even, PW-2, in fact had the occasion to know Nawaz before the incident. The onus that lay on the prosecution stood duly discharged with Nawaz being named as the assailant by PW-1, since corroborated by PW-2 and the burden shifted to Nawaz for proving to the contrary. Interestingly as noticed above, no challenge was thrown in course of cross-examination or suggestion put forth on behalf of Nawaz that PW- 1, or even PW-2, had no occasion to know him before hand. In the absence of such suggestion and taking an overall view of the evidence on record, this Court finds no reason to accept the contention of Mr. Bagchi that P Ws 1 and 2, in the absence of criminal antecedents of Nawaz and there being no evidence of P Ws 1 and 2 having known him beforehand, could not have identified and named him as the one who had assaulted the victim with a dao. 82. At this juncture, it would also be the duty of the Court to consider Ext. E adduced on be half of Nawaz as defence exhibit. Mr. Bagchi contended that the FIR is the product of dictation of PW-65 who had prepared the draft (Ext. E) and had subsequently incorporated therein the names of Nawaz and Abdul Gaaffar. The material contents of the text of the draft, prepared originally, appear to read as follows:

Main oos dongi ki rassi ko boat main mazbooti se bandhney ke liye boat mein chad gaya tabhi doosrt bhagi hai dongi wapas aayee aur usmein charon log bandhi dongi mein jismey Shaji tahe aa gaye. Wo charo dongi ko churaney ke liye Shaji par hamla kardiye. Shaji unsey sangharsh /karta raha. Is beech Abdul Nawaz naam ka Chouldari ka aadmi jisey main janta hoon... illegible... dongi se dao uthakar Shaji ke sir mein dao mara aur oosey dhakka maarkar samunder mein gua diya gaya.

83. It is clear that in the original text of the draft, Nawaz, a resident of Chouldan whom PW-1 knew, was named as the assailant who had assaulted the Victim. However, the words "naam ka Chouldari ka aadmi jisey main janta hoon" were struck off. Instead, an insertion was made partly in the body of the draft and partly on the left side margin of the page, because of lack of writing space, to the effect that out of the 4 (four) persons who returned in a dinghy, PW-1 knew two of them, i.e. one was Abdul Nawaz, resident of Chouldan and the other was Abdul Gaffar, resident of Prem Nagar. Reference to Nawaz being resident of Chouldari in the portion extracted above was struck off in the original draft, because of the above insertion, possibly to avoid repetition but with the intention of conveying the same meaning. The argument that the name of Nawaz was incorporated in the FIR at the dictation of PW-65, in view of the situation leading to insertion as noticed above upon striking off a portion of the text, does not appeal to this Court. The FIR was written by PW-53 as per the version of PW-1 who, in the circumstances, it is reasonable to presume had dictated what had been written in the draft, prepared by PW-65 based on the version of PW-1. There is no inconsistency between the text of the draft and the complaint registered as FIR. u/s 154 Cr PC. There is thus no reason

to hold that the name of Nawaz had been inserted in the draft FIR as well as in the FIR being influenced by PW-65. Ext.-E, in the considered view of the Court, does not at all come to the rescue of Nawaz and had rightly been discarded by the learned Trial Judge as a piece of evidence which could be relevant for the purpose of establishing the innocence of Nawaz.

84. The incident of assault occurred at 00.40 hours and the FIR was registered near about 01.30 hours. Nawaz was named by PW-1 in the FIR as the one inflicting assault on the victim with a dao. There is no circumstance emanating from the evidence on record that PW-1 had been fed the name of Nawaz for his false implication in the case within the short span of time between the incident and the FIR. Inimical relationship between PW-1 and PW-2 on the one hand and Nawaz on the other hand was never suggested. There is no evidence on record in respect of prior enmity or animosity between them. Unless there is animosity or enmity it is not natural for any person to falsely implicate another. In such circumstances, the contention that Nawaz was falsely implicated has to be ruled out. Identification of Nawaz by PW-1 as the assailant, therefore, stands proved without doubt.

85. It has been observed by this Court in passing that Nawaz himself said that he is a resident of Chouldari while disclosing his identity before the learned Trial Judge when his examination u/s 313, Cr PC commenced.

86. Even if it is assumed that Mr. Bagchi is correct in his contention that PW-65 was the architect of inclusion of the name of Nawaz in the FIR, the question would arise as to how PW-65 could know Nawaz despite he not having criminal antecedents. Within the short period between the assault and the FIR, PW-65 could not have developed acquaintance with and animosity against Nawaz for nothing and falsely implicate him. This Court is, therefore, unable to accept Mr. Bagchi''s contention that PW-65 played an important role in falsely implicating Nawaz and that his version lacks credibility.

87. Emphasis laid by Mr. Bagchi on production of Nawaz at the Police Station at 05.00 hours on March 20, 2008 before PW-1 is not considered to be of any worth to enable the Court to hold in is favour. The defence did not put any suggestion in course of cross-examination to elicit how PW-1 came to know Nawaz, probably to avoid being further nailed. It is therefore accepted by Nawaz that he was known to PW-1 prior to the incident and, therefore, showing Nawaz to PW-1 at -05.00 hours is not a factor which would render the prosecution case vulnerable. This Court, therefore, has no hesitation in concluding that Nawaz inflicted on the victim a blow with a dao and thereafter pushed him and he was catapulted into the sea.

88. The other submission of Mr. Bagchi that PW-1 had named Abdul Gaffar as co-accused in the FIR but resiled form naming Abdul Gaffar in his evidence in Court, no doubt, is attractive but fails to lend any assistance to Nawaz since there has been no contradiction on the point of his identification as the assailant responsible for the

blow on the victim''s head and the subsequent act resulting in the victim being catapulted. Abdul Gaffar was rightly given the benefit of doubt and acquitted.

89. Now, the most important issue as to whether the blow that was inflicted by Nawaz on the victim and the subsequent act of pushing the victim into the sea ultimately resulting in his death would amount to commission of offence u/s 302, IPC or under either part of Section 304, IPC requires consideration.

90. From the postmortem examination report (Ext-52) prepared by PW-63, it appears that the deceased was aged about 35 years. He mentioned the time of death as 12-24 hours before examination, which was conducted on March, 20, 2008 between 12.00 hours and 13.00 hours. The condition of the subject examined was observed as ''well built''. Insofar as nature of wound is concerned, he opined that there was a solitary wound on the left side back portion of the skull, the depth of which wus about .5 cm to 2 cm, the length about 05 cm and breadth about .5 cm to 1.5 cm. The wound, in his opinion, had been caused by a sharp weapon. The cause of death was attributed to cardio-respiratory failure, due to head injury.

91. Turning to the circumstances that have been proved, it seems to be clear that the victim was standing on the detained engine dinghy. Pour persons including Nawaz on another engine dinghy approached the said vessel. Nawaz and others jumped and cam aboard the engine dinghy on which the victim was standing. There was exchange of hot words (altercation) followed by scuffling. At this juncture, Nawaz picked up a dao from the floor of the dinghy and inflicted blow on the head of the victim. He thereafter pushed the victim into the sea. The victim drowned without trace. Nawaz and others then fled with the detained engine dinghy. The police personnel searched for the victim but in vain. Ultimately, the dead body of the victim was recovered at about 06.00 hours of March 20. 2008 with the help of divers attached to Coast Guard.

92. No evidence has been led on the point as to whether the victim knew swimming or not. The situation, thus, may be considered from both the angles, i.e. (i) the victim knew swimming and (ii) the victim did not know how to swim.

93. If the victim knew swimming and if the contention of Mr. Bagchi is to be accepted that the blow allegedly inflicted by Nawaz was not sufficient to cause death in the ordinary course, it is obvious that the victim, being a well-built person, would have mustered the necessary strength to swim to safety instead of being drowned. Now, on the contrary, if the blow inflicted on the (sic)was not sufficient to cause death in the ordinary course and if it is assuamed(sic) that the victim did not know swimming and, therefore, was not in position to swim to safety, he would have, as a normal reaction, raise some alarm either by lifting his arms or by shouting for help which could have been noticed even at that hour of the night since there is sufficient evidence to reach a conclusion that there was enough light in and around the jetty at that point of time. That the victim despite being well built was unable to raise any

alarm to attract the other police personnel present thereat to save him, that he was not found despite vigorous search conducted immediately after he was pushed into the sea is a pointer to the shock created by the wound inflicted by the dao to be of such nature that the poor victim, did not even have the slightest chance of raising an alarm and consequently drowned.

94. The mens rea of Nawaz is evident in that securing release of the detained engine dinghy was his prime concern for which he first fled away from the spot and again returned within a short while. After the altercation and scuffling that ensued since the time he jumped on to the detained engine dinghy on which the victim was standing, he inflicted blow with the dao and pushed the victim into the sea knowing only too well that such act is likely to cause death of the victim in the ordinary course. In the present case, even it is is assumed that the blow was not sufficient in the ordinary course of nature to cause the death of a person like the victim who was in a sound state of health, the subsequent push given by Nawaz to the victim thereby catapulting the victim into the sea was definitely with the intention of killing the victim and, therefore, there can be no escape from the conclusion that Nawaz committed murder, albeit not pre-planned.

95. Mr. Bagchi referred to the evidence of PW-62 and PW-65 for buttressing the point that at the time of recovery of the dead body from the sea and also at the time of inquest, blood was oozing out from the wound and keeping in mind the evidence of PW-63 that after the death of a person having scull injury, the bleeding would be stopped within a few minutes or at best within half an hour, the victim did not die immediately after being catapulted in the sea and, therefore, it is a case which attracts Part-II of Section 304, IPC.

96. The argument has left this Court unimpressed. The dead body of the victim was recovered by PW-62 at about 05.40/05.45 hours from the sea by him and another diver Mr. Prasad. PW-62 noticed, after lifting of the dead body above the sea water, that blood was oozing out from the left side of the back portion of the head and his left arm had become stained with drops of blood. The floor of the boat had also been stained with profuse blood that came out from the wound of the dead body. PW-65, who conducted inquest also observed blood oozing out from the wound. The inquest was conducted between 06.45 hours and 07.30 hours on March 20. 2008. There also, PW-65 observed that blood was oozing out from the injury. However, the nails of the victim at the time of inquest showed signs of cyanosis. The cumulative effect of the evidence pertaining to the possible sequence of events leading to recovery of the dead body of the victim clearly manifest inability of a police man in a sound state of health to raise any alarm after being catapulted into the sea and gradually approaching his death for lack of oxygen under seen(sic) level. If is difficult to presume, in the circumstances, that the victim despite being under water for nearly five hours had survived without any oxygen and may have died half an hour before his dead body was recovered. The observation of PW-65 that the nails of the

victim were cyanosed and the version of PW-63 that possibility of drowning was also there leads one to the conclusion that the victim died of asphyxia.

97. This Court is unable to persuade itself to agree with Mr. Bagchi''s alternative argument that the offence of murder had not been committed by Nawaz; if at all, he had committed culpable homicide not amounting to murder punishable under the second part of Section 304. Evidence on record as noticed above have been considered by this Court sufficient enough to prove that Nawaz had pushed the victim into the sea after inflicting blow on his 1 head. In consideration thereof, the argument that there was a possibility of the victim in course of alleged scuffling losing his balance in the vacillating dinghy and suffered head injury on the back of his head in the process of falling overboard from the unstable dinghy is ruled out.

98. The other arguments advanced by Mr. Bagchi in relation to non-production of contemporaneous records, version of the prosecution relating to recovery of the dao not being believed by the learned Trial Judge and therefore the seized dao had not been used as the weapon for committing the alleged offence, investigation had not been conducted by a competent officer and absence of any independent evidence have also not impressed this Court to record that the offence of murder has not been proved.

99. Non production of relevant documents relating to GD entries would at best enable the Court to draw an inference that had the GD entry book been produced, the version of PW-1 to PW-6 that they were an patrol duty could be disbelieved. However, that does not wipe out the alleged occurrence which has duly been proved. The victim was in uniform when the dead body was recovered. This proves that he was on duty. Even if the version of commando and torch lights being put to use is disbelieved, there was sufficient light at the jetty and the said vessel itself. This piece of evidence has not been demolished. The offending weapon allegedly was recovered three days after the incident. The fact that the learned Trial Judge did not accept the material exhibit in course of trial to be the offending weapon, again, does not have the effect of eroding the efficacy of the evidence tendered by P Ws 1 and 2 who noticed Nawaz to inflict blow on the victim''s head with a dao. Even if the offending weapon had not been recovered, that would not. form valid ground for holding that the conviction is vulnerable. Similarly, non-production of any independent public witness or conducting of investigation by an incompetent officer does not also have the effect of vitiating the conviction. The incident took place at about midnight and, therefore, independent witnesses may not have been available. Even otherwise, the independent witnesses could have only corroborated the version of P Ws 1 to 5 in respect of the alleged incident. The direct evidence of P Ws 1 and 2 have been found to be trustworthy and hence, have been accepted by the Court. za(sic)has not been able to demonstrate any prejudice caused to him by version(sic) of investigation conducted by an incompetent officer. Submission of as(sic) Bagchi that PW-65 had engineered the entire episode by starting to write the

draft FIR lacks substance in view of the discussion hereinabove for which this Court has held that the PW-65 did not indulge in any act for which of the FIR itself has to be doubted.

100. Some contradictions here and discrepancies there in the evidence led in a criminal trial are not unnatural due to lapse of time or for other reason, However, since the basic version of the principal witnesses (PWs 1 and 2) have been consistent and sound on the material aspects and has not been shaken after thorough cross-examination, the contradictions and discrepancies as pointed out by Mr. Bagchi, on facts, do not prove fatal to the prosecution case. This Court finds no reason to interfere insofar as the appeal filed by Nawaz is concerned.

101. The conviction recorded by the learned Trial Judge that Nawaz is guilty of murder is upheld and, accordingly, CRA No. 5 of 2010 stands dismissed.

102. CRA No. 1 of 2010, CRA No. 2 of 2010 and CRA No. 3 of 2010 stand allowed. The Appellants are discharged from all undertakings.

Photocopy of this judgment and order shall be retained with the records of CRA Nos. 2 of 2010, 3 of 2010 and 5 of 2010, duly countersigned by the Assistant Court Officer.

Subhro Kamal Mukherjee, J.

I agree.