

(2008) 08 CAL CK 0058

Calcutta High Court

Case No: C.R.A. No. 250 of 1996

Md. Hasem

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision: Aug. 22, 2008**Acts Referred:**

- Criminal Procedure Code, 1973 (CrPC) - Section 164
- Evidence Act, 1872 - Section 27, 32(2), 8
- Penal Code, 1860 (IPC) - Section 147, 302, 325, 337, 34

Citation: (2009) CriLJ 660**Hon'ble Judges:** Partha Sakha Datta, J; Girish Chandra Gupta, J**Bench:** Division Bench**Advocate:** Milon Mukherjee, Saibal Mondal, Mangaljit Mukherjee and Ranadeb Sengupta, for the Appellant; Biplab Mitra and Amajit De, for the Respondent**Final Decision:** Dismissed

Judgement

Partha Sakha Datta, J.

The appellant Md. Hasem assails the judgment and order dated 16th August, 1996 passed by the learned Additional Sessions Judge, 1st Court, Hooghly in Sessions Trial No. 119 of 1986 convicting him of the charge u/s 302 IPC and sentencing him to suffer R.I. for life.

2. One Soukat Ali of village Padripara under P.S. Chandernagore lodged a written ejahar with the O.C. Chandernagore P.S. at 22-45 hrs. on 23-06-1983 against one Md. Basir and the present appellant Md. Hasem alleging therein that at about 06-45 p.m. on 23-06-1983 a quarrel took place between the residents of the locality and the sons of Sk. Mustafa regarding drawing of water from a municipal tap. As Sk. Mustafa, the father of the appellant was allegedly a leprosy patient the residents of the locality forbade him to take water. Md. Islam who was the Secretary of Water Distribution Committee returned home at 09-45 p.m. from his duty at Gandalpara

Jute Mill. One Md. Halim then came to the house of Md. Islam and told him that the sons of Md. Mustafa would talk with him over drawing of water and then took Md. Islam to the house of Md. Hasem @ Bhombal. Soukat Ali also followed them to the house of Hasem. As soon as Islam entered into the house of Hasem he closed one leaf of the door. Inside the room was his brother Basir. A hurricane light was then burning. Then Md. Hasem struck Md. Islam by a knife on his belly and other parts of the body. His brother Basir assisted him. Islam fell down saying he had been knifed. Soukat raised alarm. Md. Osman and Md. Nizam came there. When they approached Islam, Md. Basir hurled brickbats against them causing injuries to their bodies and thereby resisted their entry to the room. The floor was stained with blood. By the rickshaw of a local rickshaw puller Genia @ Abbas Ali Md. Islam was taken to Chandernagore Hospital by Soukat Ali, Nizam and Md. Osman. Islam died on the way. It has been alleged that Md. Basir and Md. Hasem, the two brothers out of previous grudge and over the issue of drawing of water from the municipal tap murdered Md. Islam.

3. On this complaint Chandernagore Police registered Chandernagore P.S. Case No. 55/121 dated 23-06-1983 against Md. Basir and Md. Hasem u/s 302/34 of the IPC and submitted charge sheet under that section of the law.

4. Learned Additional Sessions Judge on the basis of 173 Cr.P.C. papers framed charges against the aforesaid two persons u/s 302 read with Section 34 of the IPC.

5. The accused Md. Basir being then a juvenile was tried separately in S.T. Case No. 119 A of 86. The prosecution examined 36 witnesses of which it is the evidence of P.W. 1, Soukat Ali, the FIR maker, P.W. 2, Md. Nazamuddin, the brother of the deceased Md. Islam and P.W. 3, Md. Osman who claimed to be the eye-witnesses to the incident merits consideration. The remaining 33 witnesses include a doctor, some police officers including the I.O. and some witnesses who witnessed seizure of some articles, garments of the accused and of the deceased and the weapon by which Islam was allegedly murdered.

6. Before we proceed to consider the evidence of the witnesses so as to appreciate the merit of the prosecution case the background of the present incident requires some narration.

7. At about 06-45 p.m. on 23-06-1983 a hue and cry was heard by one Sk. Maniruddin of the said locality at Padripara from municipal water tap. Hasem's father Sk. Mustafa had come to fetch water from the tap to which the boys of the locality objected because of the said Mustafa being a leper. Then four sons of Mustafa i.e. Kasem, Hasem, Nishar and Wahid and some women folk of the house came out in a body and hurled abuses towards the local boys. The local boys protested whereupon Mustafa's four sons being armed with bamboo rods rushed towards them, and then Kashem and Nishar assaulted Abdul Rahim, Sabir, Suleman on their persons and thereby caused injuries to them. Injuries of Sabir and Suleman

were serious. Then being not satisfied with that, the four sons of Mustafa trespassed into the house of Sabir and hurled brickbats and damaged the tiles of Sabir's room. When Maniruddin came there to dissuade the sons of Mustafa he was also assaulted by Nishar on his right hand by a bamboo. This was the FIR of Maniruddin with the O.C. Chandernagore P.S. who drew up Chandernagore P.S. Case No. 23 of 114 dated 23-06-1983 under Sections 147, 447, 337 and 427/325 IPC against the aforesaid four sons of Sk. Mustafa of Padripara.

8. Thus, over the issue of drawing of water by Sk. Mustafa one incident had taken place at 06-45 hrs. which was reported to the police station at 07-45 hrs. concerning assault on Sabir, Suleman and Abdul Rahim by the sons of Sk. Mustafa, while the second incident i.e. the present incident took place at 10-30 p.m. in the house of Sk. Hasem on the same day wherein Md. Islam was murdered allegedly by Sk. Hasem and Sk. Basir. It is the second incident which led to the registration of Chandernagore P.S. Case No. 55/121 dated 23-06-1983 u/s 302/34 of the IPC against Basir and Md. Hasem which is the subject matter of the present appeal. Evidence has it that in regard to the incident of 06-45 p.m. a trial had taken place though the result of the trial is not known to us.

9. The FIR maker of the present case Sk. Soukat AH in his evidence makes a passing reference to the earlier incident that took place in the evening on 23-06-1983 and then says that the appellant Md. Hasem called Md. Islam to his house when he was also present being a contiguous neighbour. The pretext was to have a talk about water as Islam was the Secretary of the Water Committee. P.W. 1 followed him. Abdul Rahim (P.W. 8) first entered into the house and then Islam entered. One leaf of the door was kept closed. The room was on the side of the road and standing at the door the room could be visible. P.W. 1 was at the very entrance of the door. A hurricane was then burning. Now P.W. 1 says:

Hasem struck Islam with knife. When there was resistance then Hasem's brother helped Hasem. Islam was assaulted upon his abdomen and also other parts of the body. Islam began to shout. I was struck by knife. Then I also began to shout.

10. P.W. 1 goes on saying that when many people assembled the accused persons fled away. Islam was taken to Chandernagore Hospital by the rickshaw of one Abbas Ali by Osman, while P.W. 1 proceeded to the police station where he narrated the incident and lodged the FIR (Exbt. 1). P.W. 2, Md. Nazimuddin, the brother of the deceased Md. Islam while spoke of the first incident that had taken place at 06-45 p.m. says that he proceeded to Gandalpara Jute Mill to bring his brother Md. Islam concerning earlier incident wherein Md. Sabir Hussain (P.W. 7), Suleman and Abdul Rahim (P.W. 8) were assaulted. Islam came at about 10-15 p.m. and Hasem called him to his house for a discussion of water problem. He also followed his elder brother. One leaf of the door was open and he saw Islam being struck by Hasem on his chest and throat by knife. He saw the incident by the light of the lantern. Basir who was there also aided his brother Hasem. Islam fell down. Osman and other

para people came and removed him to the hospital. He was also hurt because of hurling brickbats from Hasem"s house. Islam died on the way to the hospital.

11. P.W. 3, Md. Osman having come home from duty in the Jute Mill and having heard shout that there was a murder he came out of his house and proceeded towards the house of Hasem. He came near the mosque which is upon the road while Hasem"s house is on the other side of the road. While stopping at the door he saw Hasem assaulting Islam on his chest by knife.. A hurricane was lit in the room and Basir was standing by the side of Hasem. He also raised alarm. He found P.W. 1 and P.W. 2 also there. Many people came. Islam was taken to the hospital by a rickshaw and he died on the way.

12. P.W. 4, Md. Ismail, as per his evidence, is a post occurrence witness as having heard the alarm he came out of the house and found that Md. Islam was lying at the stairs contiguous to the door. The stairs are outside the door and it leads to the road. A brickbat fell on his head and he also sustained injury.

13. P.W. 7, Md. Sabir Hussain gives a version which exclusively relates to the incident that happened at 06-45 p.m. and in respect of which a separate case was registered earlier to this case, but his evidence will not be out of place to mention as it gives a complete background to the present case involving murder of Md. Islam. When he was coming out from mosque at about 06-45 p.m. Md. Nishar, one of the sons of Sk. Mustafa called him and falsely attributed to him that he had rebuked his father Sk. Mustafa. He patiently asked him to understand the situation but without listening to anything Md. Nishar assaulted him on his nose by fists and blows. He raised shout. People of the locality came out and separated them. As he came home Md. Nishar and Md. Wahid came to the courtyard of his house and abused him. As he protested Md. Basir knocked him down on the ground, while Md. Kasem assaulted him on his head by a bamboo. He proceeded to the police station by a cycle and then to the hospital where he was medically treated. While he was in the hospital he heard that Md. Islam had been murdered.

14. P.W. 8, Abdul Rahim about whom there is a reference in the FIR as the person who had entered into the house of Hasem along with Islam does not say that he had been to that house, but says that at the relevant time he was at the police station. In fact, his evidence is not helpful to the prosecution although in terms of the FIR he was an important witness.

15. With respect to evidence of other witnesses a brief survey may be made. P.W. 6, Harul Al Rashid, Inspector of Police drew up the formal FIR (Exbt. 1). P.W. 12, Ajoy Kumar Goswami, Judicial Magistrate of Chandernagore recorded the statement of Md. Nizamuddin (P.W. 2) u/s 164 of the Cr.P.C. which is Exbt. 6. P.W. 18. Narendra Nath Mondal, another Judicial Magistrate of the station recorded the statement of Md. Osman (P.W. 13) u/s 164 Cr.P.C.

16. Evidence of P.W. 13, Md. Khadim, P.W. 14, Anwar Ali and P.W. 17, Ahid Hussain are important in this that they testified to seizure of knife by which the deceased was struck by the appellant Md. Hasem being abetted by Md. Basir. According to them, while in police custody the appellant Hasem pointed out an abandoned latrine within the garden compound of one Prafulla Chandra Sen wherefrom he picked up a knife which allegedly had been used by him for causing assault upon the deceased. P.W. 35, Rajendra Nath Tilokesh says in his evidence that when appellant was in police custody he made a statement pursuant to which he was brought to an abandoned latrine belonging to Prafulla Chandra Sen, Padripara at Chandernagore wherefrom he brought out a 12" knife with wooden handle which was seized under a seizure list (Exbt. 6) in presence of P.W. 13, P.W. 14 and P.W. 17. The knife has been marked Material Ext. I.

17. The other kind of seizure relates to sample of blood from the staircase leading to the room of the appellant in presence of P.W. 15, Prabhat Kumar Bairagi and P.W. 16, Sri Krishna Saha. by the I.O. at 23-45 hrs. on 23-06-1983.

18. P.W. 20, Swapan Saha, P.W. 21, Ram Mohan Saha are the two witnesses who testified to seizure of a blood stained shirt allegedly belonging to Basir by the I.O. under a seizure list (Ext. 9). Though in clear terms P.W. 20 says that the shirt was seized from Basir, P.W. 21 was reluctant to disclose as to from whom such blood stained shirt was seized, which is why he was declared hostile although he affirmed his signature on the seizure list saying that a shirt was seized by the police.

19. P.W. 22, Bholanath Mukherjee, a member of the Group-D staff of Chandernagore Government Hospital is a witness to the seizure of a bed head ticket (Ext. 10) of P.W. 3, Sk. Osman. in presence of P.W. 29, Gopi Mohan Sur who was the ward master of Chandernagore Sub-Divisional Hospital.

20. P.W. 27, Abani Kumar Banerjee who was one of the I.Os of the case seized a blood stained gangi from the possession of the accused Sk. Hasem under a seizure list (Ext. 12) in presence of P.W. 32, Arun Bikash Ghosal. Such seizure was effected on 26-06-1983 after the appellant was arrested.

21. A group of doctors are there who examined different injured persons including the deceased. P.W. 23, Dr. Bholanath Dutta examined on 23-06-1983 P.W. 2, Nazamuddin who complained of abrasion on dorsal aspect of right leg. The defence got the injury report of P.W. 2 admitted in evidence as Exbt. C. P.W. 24, Dr. Alok Kumar Das of Chandernagore Sub-Divisional Hospital says that one Md. Islam of Padripara Vivekananda Sarani was brought to him for medical examination and he found him dead. He was brought by Md. Osman (P.W. 2) and he found one stab injury on the right lumbar region of his person. The doctor says that the history was given to him to the effect that he was stabbed by one Basir, Hasem and Wahid at 10-30 p.m. on 23-06-1983 at the residence of the patient. On the same night at 10-55 p.m. he examined Md. Ismail (P.W. 4) and found one lacerative wound on his

forehead and he was admitted in the male surgical ward. According to him, the patient told him that he was assaulted by Wahid, Hasem, Basir, Nazir and Abbas. He says that such injury could have occurred due to throwing of brickbats or by hard substance. P.W. 26, Dr. S.S. Marik of Chandernagore Hospital examined one Md. Salam at 08-10 p.m. on 23-06-1983 and found a small bruise measuring 1 1/2" x 1 1/2" on the back of the left shoulder joint, a small bruise, 1 1/2" x 1 1/2" on the medial side of the left toe and a small bruise 1 1/2" x 1 1/2" on the medial side of the left thigh. In the category of medical officers Dr. P.N. Roy (P.W. 33) comes last to say that on 25-06-1983 when he was posted at Memari Rural Hospital he examined one Sk. Hasem (appellant) and found one old scarmark on his ventral aspect of left forearm. The patient spoke of an incident that took place at 10-00 p.m. of 23-06-1983. He examined him and found tenderness on the right buttock and on the back of the neck. According to the doctor injury was simple and might be caused by light blunt weapon or by scuffle or by fall.

22. P.W. 28, Sachchida Nanda Mondal was the O.C. of Memari Police Station who says that before him the appellant surrendered to him on 26-05-1983 and recorded the fact in the G.D. and sent intimation to O.C. Chandarnagore P.S. A suggestion was given to the witness that two boys of Chandernagore chased the appellant, as a result of which he took shelter before him in the Memari Police Station or that at the instance of the said two boys he sent a message to Chandernagore which he denied forthwith.

23. P.W. 25, Subash Chandra Acharya is the last I.O. of the case who submitted charge sheet.

24. Having thus gained control of evidence of the witnesses let us proceed to have a critical appreciation thereof. There is a defence version emanating from cross-examination of the witnesses the central theme of which is that the appellant could not be the assailant of Md. Islam as, because of the incident that had taken place earlier at 06-45 p.m. on 23-06-1983 along with other sons of Sk. Mustafa the appellant was also arrested and there could have been no occasion on that part of the appellant to be present at his home at 10-30 p.m. to cause murder of Md. Islam. The defence story is that P.W. 7, Md. Sabir Hussain's father Abdul Khaleque was a worker of Gondalpara Jute Mill who took voluntary retirement because of his being paralyzed. The deceased Md. Islam who according to P.W. 7 was treated as adopted son of his father Abdul Khaleque was approached by the deceased for an employment in the Jute Mill and Abdul Khaleque was instrumental in securing a job for the deceased in the Jute Mill but in the Jute Mill he was known and employed as Sabir Hussain. P.W. 7, Sabir Hussain, the son of Abdul Khaleque was himself an unemployed person and he bore a grudge against Islam on the ground that his father could not provide him a job, while Md. Islam influenced his father to secure a job of for him and that too in the name of P.W. 7. Thus, to take a revenge against Islam it was Sabir (P.W. 7) and his men who caused murder of Md. Islam. Yet there is

another defence case which is that it was P.W.1, P.W. 2 and P.W. 3 led by P.W. 7 who murdered Md. Islam mistaking him to be the appellant.

25. Mr. Milon Mukherjee, learned Advocate appearing for the appellant strenuously submitted at the outset that neither the evidence of P.W. 1, nor that of P.W. 2 and P.W. 3 can be accepted to be evidence of eye-witnesses because oral testimonies of these persons partake of the character of the one mutually excluding the other at the scene of occurrence; and this is more so if one goes to the FIR where presence of P.W. 2 and P.W. 3, Nazimuddin and Md. Osman respectively has been excluded in the category of eyewitness. Mr. Mukherjee submits that when in the FIR, P.W. 2 and P.W. 3 are said to have come after P.W. 1 had raised alarm following striking against Md. Islam by the appellant on his belly and other parts of the body by knife it cannot be said that P.W. 2 and P.W. 3 can really be categorized as eyewitnesses to the incident, and at best if at all their evidence is taken into consideration they could be considered as post occurrence witness. It has been argued at great length that given the place of occurrence as depicted by P.W. 1 either in the FIR or in his evidence it cannot be said that it was at all possible for any of the aforesaid three witnesses to see the incident because the dead body of Islam was found lying in the stair-case within the house of Md. Hasem. An incident of assault can never be witnessed if it takes place inside the house. Therefore, evidence of P.W. 1, P.W. 2 and P.W. 3 must not be accepted, apart from the fact that they are vitally interested witnesses whose sole concern was to zeroing the appellant in the incident of death of Islam to the exclusion of all others, when the appellant was not at all available in his house. Further, it has been argued that if the 164 Cr.P.C. statements of P.W. 2 and P.W. 3 are closely read it would not appear that it was at all possible for P.W. 2 to see the incident from near the mosque or for P.W. 3 to see what really had happened inside the house of the appellant. It is argued that if one is prone to accept evidence of P.W. 2 and P.W. 3 though there is no reason for such acceptance then the mutually exclusive evidence of P.W. 1 also has to be discarded and the result would be that none was telling the truth. To appreciate the submission of Mr. Mukherjee it has become necessary to see the topography of the place of occurrence. As it appears from evidence of the witnesses, the place of occurrence is the room the appellant visible from the door situate upon the road itself. Consistent evidence has been this that one leaf of the door was kept open while the other was kept closed. The location of mosque is, in fact, not at a different place. As it appears from evidence of the I.O., vis-a-vis the evidence of the other witnesses and the sketch map which could not be assailed at the least the house of Islam and the house of Md. Hasem, the appellant is intervened by a mosque in the middle and the house of the appellant is exactly upon the road stretched from east to west. In fact, the mosque is contiguous to the house of the appellant. There is a clinching evidence further to the effect that the staircase where the dead body was found lying as per the evidence of the post occurrence witnesses is located outside the house for coming down to the main road. The incident of assault took place in the

room which is exactly road facing, and unassailably it has been established that when the incident of assault was going on one leaf of the door was kept open. It is not the defence case that the place of the incident so far as assault on Islam is concerned, is a different place far away from the house of the appellant. As to the credit-worthiness of the evidence of P.W. 1 who is the FIR maker there leaves no room for doubt to say that he was truly an eye-witness to the incident. His house is contiguous to the house of the appellant. In his presence the appellant called Islam to his house for a talk about water. Islam was called to the house of Hasem for discussion because he was the Secretary of the Water Committee. P.W. 1 was at the very entrance of the room when hurricane was burning and he says Hasem struck Islam with knife on his abdomen and other parts of the body. Then P.W. 2 and P.W. 3 rushed to the spot upon hearing alarm raised by the deceased himself. No amount of cross-examination of this witness could demolish the veracity of the statement of P.W. 1 so far as his witnessing the incident is concerned. It is true that as per the evidence of P.W. 1 following assault on Islam by Hasem alarm was raised both by Islam and P.W. 1, whereafter P.W. 2 and P.W. 3 rushed to the spot. Evidence of P.W. 2 is to the effect that he found Hasem striking Islam on his throat and chest by knife in the room when a door leaf was open. Similar is the evidence of P.W. 3. Who also says that from the door he saw the incident. Now even if P.W. 2 and P.W. 3 are considered to have not been present when the appellant first struck Islam still then presence of P.W. 2 and P.W. 3 no sooner than Islam was struck by appellant in the room of the appellant cannot be negated. It is the evidence of P.W. 2 that he also sustained injury, as a result of hurling brickbats. Similarly it was P.W. 3 who took Md. Islam to Chandernagore Sub-Divisional Hospital by a rickshaw from the room of the appellant. It is the defence case emanating from cross-examination of P.W. 2 and P.W. 3 that the group of people, P.W. 1, P.W. 2 and P.W. 3 included, led by P.W. 7, Sabir Hussain having entered into the room of Hasem, the appellant and assaulted Md. Islam mistaking him to be the appellant and the appellant then raised shout and went away by the next door of the room. This defence case as has been put to the three witnesses clearly establishes the place of occurrence to be inside the room of Hasem and that of presence of P.W. 1, P.W. 2 and P.W. 3 therein but the other part of the suggestion that it was P.W. 1, P.W. 2 and P.W. 3 led by P.W. 7 who murdered Md. Islam mistaking him to be the appellant is palpably absurd and a preposterous one. If P.W. 1, P.W. 2 and P.W. 3 or for that matter P.W. 7 had intended to murder Md. Islam, then obviously the place of murder would not be inside the room of the appellant which is the established fact. Inside the room of the appellant P.W. 2 and P.W. 3 also saw the appellant with knife together with the other accused Md. Basir. The further defence case that the cause of murder of Islam is the grudge of P.W. 7 as because P.W. 7 remained an unemployed youth while Islam managed to secure a job and that too in the name of Sabir Hussain is preposterous, highly improbable and in support of which there is absolutely no evidence. From the evidence of P.W. 7 it has come out that his father reared up Md. Islam from his boyhood as Islam's father died at an early age and a job was arranged by his father

in the Jute Mill for Md. Islam but was treated to be an adopted son of P.W. 7's father Abdul Khaleque. The incident that had happened at 06-45 p.m. is closely related to the incident concerning murder of Md. Islam, and the genesis of the two incidents or rather two parts of one incident is obstruction to Sk. Mustafa by the local boys to draw up water because of Sk. Mustafa suffering from leprosy. Such obstruction enraged the sons of Sk. Mustafa who in order to take revenge called Islam as he was the Secretary of the Water Distribution Committee. The theory of murder of Md. Islam at the hands of P.W.1, P.W. 2, P.W. 3 and P.W. 7 to take revenge against Islam because of his getting an employment to the exclusion of P.W. 7 or that they murdered Islam mistaking him to be the appellant is really a defence invention having no root in evidence of the witnesses.

26. The submission of the learned defence counsel that 164 Cr.P.C. statement of P.W. 2 excludes the presence of P.W. 1 at the place of occurrence cannot be accepted because in the first place 164 Cr.P.C. statement does not negate the presence of P.W. 1, and secondly P.W. 1 was supposed to say what he has seen and not what others have seen or who else was present. It was P.W. 1 who instead of rushing to the hospital proceeded to the police station from the place of occurrence while deputing P.W. 3 to take the deceased to the hospital from the room of Hasem. Presence of P.W. 1 further at the place of occurrence has been testified to by P.W. 3 in his evidence which could not be demolished.

27. Mr. Mukherjee submitted that in his evidence P.W. 1 has stated that Rahim entered into the house of the appellant and then Md. Islam entered being called by the appellant, but P.W. 8, Abdul Rahim does not say that he had entered into the room of the appellant followed by Md. Islam. True it is, but that does not nullify the prosecution case. In fact, P.W. 8 was not examined-in-chief which was highly irregular and was simply tendered for cross-examination direct. It was the prosecution's folly in tendering a witness for cross-examination without being examined-in-chief as this is not sanctified by the law. Therefore, P.W. 8 had no scope to say the prosecution case in his examination-in-chief and the defence took the opportunity to extract from his evidence in cross-examination that at the relevant time he was at the police station. But P.W. 1 has faithfully translated the FIR into his evidence and there can be no manner of doubt to say that he was not the eye-witness to the incident.

28. Mr. Mukherjee argued that the Investigating Officer did not seize the lantern which was said to have been lit in the room during assault upon Islam. Non-seizure of the lantern does not demolish the prosecution case. There is no evidence that the room was enveloped by darkness. Both the prosecution witnesses and the accused belong to the same place and were known to each other and there cannot be any mistaken identity either of the assailant or of the person assaulted.

29. Mr. Mukherjee argued that it has come out in evidence of the witnesses that immediate after the incident that had taken place at 06-45 p.m., the police arrested

the sons of Sk. Mustafa and as such presence of Hasem, one of the sons of Sk. Mustafa at the place of occurrence or immediate there- after cannot be vouchsafed. It is the alter-" native defence case that Hasem came out of the room after the group of Sabir Hussain assaulted Islam mistaking him to be the appellant in the room of the appellant at 10-30 p.m. There is clear evidence that Hasem could not be arrested immediate after the incident that had taken place at 06-45 p.m. in respect of which there was a separate FIR lodged by Sk. Moniruddin. It appears from evidence of P.W. 28, the O.C. of Memari P.S. that the appellant had surrendered before Memari P.S. on 26-06-1983 and intimation was sent to Chandernagore P.S. This clearly shows that immediate after the murder of Md. Islam the appellant absconded. The submission of Mr. Mukherjee that the appellant had taken shelter in the Memari P.S. on 23-06-1983 is not borne by evidence on record.

30. Mr. Mukherjee refers to evidence of P.W. 33, Dr. P.N. Roy, the medical officer of Memari Rural Hospital in support of his submission that it was the appellant Md. Hasem who was assaulted by the group led by P.W. 7 on 23-06-1983. Now if we go by the evidence of P.W. 33 two things appear. Firstly, the appellant told P.W. 33 about an incident that had taken place at 10-00 p.m. approximately on 23-06-1983. This clearly signifies presence of the appellant at the scene of the crime in the night of 23-06-1983. The second aspect of the matter is that the doctor did not find any injury whatsoever on the appellant. One old scarmark was found on the ventral aspect of the left forearm which was not the injury as a result of the incident in question. The doctor found tenderness on the right buttock and on the back of the neck which by no means can be magnified in support of probable or possible proposition of fact that the group allegedly led by P.W. 7 was the assailant of the appellant. Therefore, Hasem was not arrested immediately after the first incident that took place at 06-45 p.m.

31. Mr. Mukherjee argued that the post mortem doctor has not been examined. The records of the learned trial court reveal that the post mortem doctor was summoned for his evidence but it appears that the doctor's presence could not be secured as following three heart attacks he was bed ridden and was not in a position to come to court. Accordingly, the learned trial court having regard to the provision of Section 32(2) of the Evidence Act marked the post mortem report as Exbt. 14 which clearly reveal stab injury on neck, chest and right side of abdomen. There may be cases where the evidence of the doctor holding post mortem examination may not be available but non-examination of doctor in such circumstances is of no consequence provided oral evidence and the circumstances of the case clearly establish the commission of the offence, and link such offence to the offender. Evidence of P.W. 24, the Dr. Alok Kumar Das is most relevant and useful. He first examined the deceased being brought by P.W. 3 at Chandernagore Sub-Divisional Hospital and found one stab injury on the right lumber region on his person. When P.W. 1 says that Md. Hasem struck Islam on his abdomen, he was not telling a lie. His evidence is borne out by post mortem report as also by the evidence

of P.W. 24 who says in his cross-examination that the stab injury was at the right side of abdomen. The doctor who held post mortem examination found injuries located at throat, chest and abdomen. P.W. 2 says that assault was caused on throat. Therefore, evidence of P.W. 2 cannot be said to be an afterthought. Now, evidence of P.W. 24 is important in this that he was told that Basir, Hasem and Wahid were the assailants of the deceased. The doctor examined Islam as soon as he was brought dead to the hospital and it was the first information to the medical man at the earliest point of time where the names of the assailants were disclosed, and he was further told that the occurrence had taken place at 10-30 p.m. on 23-06-1983. The learned defence counsel capitalized the evidence of P.W. 24 with respect to the place of assault. The doctor says that the incident occurred on 23-06-1983 at 10-30 p.m. in the "residence of the patient". The word "residence of the patient" is now emphasized by the defence to say that the appellant could not be the assailant. It is nobody's case that the place of occurrence is the house of Md. Islam. It is the defence case that in the house of the appellant the group led by P.W. 7 murdered Islam mistaking him to be Hasem, the appellant. The defence case is inconsistent and is contradictory one. It is suggested that the Islam was murdered mistaking him to be the appellant, and again it is suggested that Islam was murdered out of grudge by P.W. 7 who could not get the job in the Jute Mill. Therefore, the word "residence of the patient" as has been said by P.W. 24 leads us nowhere.

32. With regard to recovery of knife allegedly at the instance of the appellant lot of arguments have been advanced by the learned Counsel for the appellant. It is the evidence of P.W. 35 that pursuant to the statement of the appellant the knife which was the offending weapon was seized from an abandoned latrine belonging to one Prafulla Chandra Sen of Padripara, Chandernagore. It is the evidence of P.W. 35 that it was the appellant who had shown the place wherefrom he himself brought out one 12" knife with wooden handle. As said above P.W. 13, P.W. 14 and P.W. 17 are the three witnesses in whose presence such seizure of knife was effected from the latrine of Prafulla Chandra Sen of Padripara. Mr. Mukherjee argued that there could not be any seizure of the knife from the abandoned latrine of Prafulla Chandra Sen of Padripara because while in police custody the appellant made a statement reduced to writing by the I.O. (Ext.F) wherein the appellant said that he had thrown away the blood stained knife in a nearby doba. If such was the statement of the appellant reduced to writing then the question of recovery of knife from the abandoned latrine of Prafulla Chandra Sen at the instance of the appellant would be an untrue one. Now, that the knife was not recovered from doba is a fact. Equally it is the fact that the knife was recovered from the abandoned latrine of Prafulla Chandra Sen as it was pointed out by the appellant. Evidence of P.W. 13, P.W. 14 and P.W. 17 read with the evidence of P.W. 35 would bear out the fact. The mere fact that the appellant made statement about throwing away the knife in the doba does not disprove the recovery of the knife from the abandoned latrine being pointed out by the appellant. Recovery of the knife from the abandoned latrine is a fact

adequately proved. Such statement of the appellant might be an incorrect statement and if the knife would have been recovered from the doba there was no earthly reason why the witnesses would locate the recovery of the knife at the abandoned la-trine of Prafulla Chandra Sen. It was argued by Mr. Mukherjee that no statement leading to the recovery of the knife from the abandoned latrine was recorded by the I.O. u/s 27 of the Evidence Act and any such statement to that effect would be inadmissible. It appears from the evidence of the I.O. that during interrogation accused made the statement which was not reduced to writing. Obviously, there was no statement leading to the recovery from the abandoned latrine u/s 27 of the Evidence Act, although recovery was a fact. Such recovery is not wiped out merely because of the fact that recovery was not preceded by a recorded statement u/s 27 of the Evidence Act. Even if there was no recorded statement recovery is admissible u/s 8 of the Evidence Act.

33. It was argued by the learned defence counsel that while P.W. 13 and the I.O. have said that the knife was 12" length seizure list contains that it was 22" length. Again while P.W. 13 and I.O. speak of the length of knife as 12" length but the forensic report mentions the knife to be about 8" long with wooden handle. In fact, if we closely read the seizure list it would appear that the dig-its "12" written in Bengali would read as "22", but it is actually 12". It has been submitted by the learned State Advocate that the measurement of the knife as noted in the forensic report is the measurement of the blade and was not inclusive of the wooden handle portion. In our opinion, at the time of seizure no measurement was taken of the knife and the measurement was recorded as per eye estimation. It was argued that the knife was not identified by the witnesses. The argument is not tenable. It is not that P.W. 13 and P.W. 17 saw the appellant murdering Md. Islam by the knife which was seized from the abandoned latrine of Prafulla Chandra Sen of Padripara. They were the witnesses to the recovery of the knife. Knife was produced before the court and was shown to the witnesses to the seizure list. Knife was recovered on 27-06-1983, while P.W. 13 and P.W. 17 were examined in court exactly 8 years after such recovery. It was not possible for the witnesses to keep in memory the exact size and" nature of the knife. In such circumstances if P.W. 13 said that he could not remember whether this was the knife which was recovered and P.W. 17 said that the knife which was produced was of that kind we cannot say that their evidence is infirm or that they were not present at the time of recovery.

34. It appears from the evidence of P.W. 27 that in course of investigation a gangi stained with blood was seized from the possession of the accused on 26-06-1983 under a seizure list. P.W. 32 is a witness to such recovery. The said gangi seized from the possession of the appellant was sent to the Forensic Laboratory and the report was that it had contained blood. The wearing apparels of the deceased which was seized were also sent for chemical examination and it has been reported that lungi, short pant, jungia and shirt were all stained with blood. The knife also was found to contain blood.

35. In the circumstance, we find no merit in the appeal and accordingly, the appeal is dismissed.

36. The judgment and the order of the learned trial court is affirmed. The appellant who is on bail shall surrender to learned trial Court to serve out the sentence failing which learned trial Court will take appropriate steps for apprehension of the appellant to have the sentence executed in accordance with law.

37. A copy of this judgment shall be sent to the learned Additional Sessions Judge, 1st Court, Hooghly along with the LCR for information and necessary action.

38. The learned Registrar General of this Court is directed to communicate forthwith operative part of the judgment to the concerned learned Trial Court under Rule 8 Chapter XI of the Appellate Side Rules of this Court for information and necessary action.

Urgent xerox certified copies of this order, if applied for, be given to the parties as expeditiously as possible.

Girish Chandra Gupta, J.

38. I agree.