Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION
APPELLATE SIDE

Present:
The Hon'ble Justice Rajsekhar Mantha
&
The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 273 of 2017
With
CRAN 2 of 2019 (Old CRAN 2753 of 2019)
With
CRAN 3 of 2024
Sachindra Sarkar
Vs.
State of West Bengal & Ors.
With
C.R.A. 274 of 2017
With
CRAN 2 of 2019 (Old CRAN 2754 of 2019)
With
CRAN 3 of 2024
Badal Sarkar
Vs.
State of West Bengal & Ors.
With
C.R.A. 275 of 2017
With
CRAN 2 of 2024
Ajit Biswas @ Sujit
Vs.
State of West Bengal & Ors.
With
C.R.A. 276 of 2017
With
CRAN 2 of 2024
Binoy Sarkar
Vs.
State of West Bengal & Ors

Mr. Sandipan Ganguly, Senior Advocate
Mr. Satradu Lahiri
Mr. Karan Dudhwewala
Mr. Jyotirmoy Talukdar
... for the Appellants in all these appeals

Mr. Partha Pratim Das, A.P.P.
Mrs. Manashi Roy
.... for the State in all these appeals

Mrs. Amita Gaur
Mr. Nahid Ahmed
...for the State in CRAN 2 of 2019.

Mr. Debasish Roy, P.P.
Ms. Amita Gaur
Mr. Kaustav Banerjee
...for the State in CRAN 2 of 2019.

Mrs. Amita Gaur
Ms. Karan Bapuli
...for the State in CRAN 2 of 2024.

Heard on : 06th February, 2025

Judgment on : 21st February, 2025

Rajsekhar Mantha, J.:

1. The four appeals are directed against the conviction dated 15.03.2017 passed in Sessions Case No. 62 of 2013 passed by the Ld. Additional District and Sessions Judge, FTC-II, Islampur, Uttar Dinajpur. The appellants were convicted under Sections 448/302 of the IPC and Section 302 of the IPC read with Section 34 thereof.

2. The prosecution case is that on the 8th of March 2004, two persons, namely Nirmal Baperi (PW 11), a resident of Teghoriya Village, and Tapan Mondal (PW 12), a resident of Ukushbhasha Village, were allegedly stealing from a mustard field belonging to one Ananda

Biswas. They were beaten up, and released in the night itself, for their fate to be decided at a local “Salishi”(informal village court).

3. The place of occurrence was close to the house of the deceased, Upen Roy. Later that night, at about 2.30 am i.e. early next day i.e. 9th March 2004, about 19 persons, including the 4 appellants, broke open the door of the house of Upen Roy, who was asleep, along with his wife Manju Roy (PW1). The accused persons were armed with iron rods, sticks, hammersand wooden batams. They dragged the deceased out of his house and took him in front of the house of Paresh Roy and assaulted him with the weapons in their hands.

4. When PW1 (wife of the deceased)plunged to save her husband, the accused persons caught her by the tuft of her hair and threw her at a distance. They continued to assault the deceased/victim in front of the house of Paresh Roy. They later dragged the accused in front of a local school and continued to assault him with the weapons in their hands. The victim then lay unconscious, and the accused fled the scene.

5. The next morning, PW1 lodged a complaint with the Goalpokher Police Station, district Uttar Dinajpur. The complaint was scribed by PW3, Udhab Chandra Roy, also known as Udhab Master, on the instructions of PW.1. The reason for the assault on the victim was

political rivalry. The victim's sister was contesting the local election for a political party, rival to that of the accused persons.

6. On receipt of the complaint, FIR No. 29 of 2004 dated 10th March 2004 was registered against 14 persons, including appellants, under Section 143/448/341/325/326/302 of the IPC. The inquest on the body was conducted on the same day. The inquest report reveals the blunt force and cut-wound on the forehead and body of the victim, which were caused by sharp cutting instruments. The inquest report narrates the incident of theft at 10.30 PM the earlier night and also the latter one when the victim was killed.

7. The Post-Mortem was conducted on the body, which reveals the following injuries:

> *"Right Supra Orbital region 1 & ½' x ½' x skull vault rupture*
>
> *Right Parietal region 3, x ½ x vault rupture*
>
> *Occipital region 1'x ½ x ½ deep scalp injury*
>
> *Right leg below knee 1' x ½ lacerated injury*
>
> *Multiple abrasions on back and both hands*
>
> *Injury with Lathi—15 in number. Investigation was started.*
>
> *Scalp findings:*
>
> *Diffuse haematoma all over the brain matter with a large haematoma, and also rupture spleen.*
>
> *And in course of my post mortem I found the cause of death is cardioresp. Failure in a case of multiple head injury with*

haemtoma over cerebellum and rupture spleen which is homicidal in nature."

8. A charge sheet was filed against 19 persons, and charges were framed by the Trial Court against 1- Ananda Sarkar, 2- Moni Krishna Biswas, 3- Kamal Kapasia, 4- Ajit Biswas, 5- Binoy Sarkar, 6- Sunil Kumar Biswas, 7- Pabitra Biswas, 8- Probash Biswas, 9- Dilip Kapasia, 10- Sachindra Sarkar, 11- Sudhir Mandal, 12- Sukumar Biswas, 13- Badal Sarkar, 14- Profullya Sarkar, 15- Swapan Biswas, 16- Krishna Biswas, 17- Dinesh Roy, 18- Santi Mandal, and 19- Ananda Biswas, under Sections 143/448/341 and 326 of the IPC.

9. However, as against Benoy Sarkar, Sachindra Sarkar, and Sujit Biswas, three of the four appellants hereinabove, charges were additionally framed under Section 302 of the IPC. The trial commenced. The order sheet of the day when the charges were framed however indicated that all the accused would be charged under Section 302 as well.

10. PW1, the de facto complainant, was the wife of the deceased, Manju Roy. She narrated the incident similar to the prosecution case described hereinabove. She named the 4 appellants, Shanti and Pabitra and others as assailants. She stated that Sukumar had a wooden batam, Binoy had a hammer, Sachindra had a big stick, Ajit had an iron rod and Badal had a wooden batam. She stated that the accused persons killed her husband because her sister-in-law was

contesting an election for a rival political party and her husband was going to campaign for her. She deposed she lodged a complaint with the local P.S. the next day. She denied the fact that her husband stole any mustard.

11. PW2 was Tirtha Roy. He named the four appellants, Ajit Biswas, Binoy Sarkar, Badal Sarkar, and Sachindra Khalasi@ Sarkar, present at the time of the incident. He also named Sukumar, Shanti, Ajit Biswas and Pabitra Biswas as assailants. He was an eyewitness. He deposed that he woke up to PW1 shouting. He found the appellants along with some others, attacking the deceased victim with iron rods, hammer, and lathis. When he tried to save the victim, the accused chased him with a view to assault. He deposed that there was political rivalry between the deceased and the accused.

12. PW3 was also another eye-witness. He identified the four appellants along with others who were assaulting the victim on the date of the incident. He too woke up to the cries of PW1. He initially ran away from the scene and was informed by PW2 that the victim had died. He thereafter went and found the victim in front of the local school, lying dead. He accompanied PW1 to the police station and wrote the complaint according to her instructions. He also narrated, in cross-examination, the incident of theft where PW 11 and 12 were caught stealing from the field of Ananda Biswas the night before the death of

the victim. He confirmed that the accused Benoy, Ajit, Badol and Sachindra, assaulted PW11 and 12 severely that night.

13. PW4, Paresh Roy, woke up at about 2:30 AM after hearing a commotion outside his house. He could identify Binoy Sarkar, one of the appellants, and said that he saw him with a hammer in his hand, assaulting the deceased.

14. PW5 was Pankaj Roy, another eyewitness. He had woken up to answer nature's call at about 2.30 AM on the fateful day. He heard a commotion outside Paresh Roy's house and found PW1 crying. He identified Badal Sarkar, Binoy Sarkar, Ajit Biswas, and Sachindra Khalasi as having assaulted the victim with hammer, sticks, and iron rods. Sachindra Khalasi, Ajit Biswas, and Bijoy Sarkar and others carried the injured Upen Roy to the front of the local primary school, where they continued to assault him.

15. PW6 was a witness to the first incident on the earlier night. PW7 was declared hostile. He woke up in the night and confirmed in the cross-examination that he saw three of the appellants—Binoy, Sachin, Ajit—and three others assaulting the victim.

16. PW 7 was Birat Sarkar, a resident of Ukushbhasha village. The morning after the incident occurred, he heard from the villagers, that the deceased had been killed in a public assault, as he tried to steal mustard. He was declared as a hostile witness.

17. PW8 reached the victim's house after hearing a commotion at about 2.30 AM at the time of occurrence. He saw the four appellants along with others breaking into the house of Upen Roy and assaulting him.

18. PW9, Sukumar Mondal, woke up after hearing the commotion outside his house at the time of occurrence. He heard the cries of PW1 and found the victim bleeding in front of the local school. He heard from PW1 that the appellant had attacked and brutally assaulted the victim.

19. PW10 was the post-mortem doctor. In his report, he stated that the injuries on the victim could have been caused by sharp objects, and they're rather homicidal in nature.

20. PW11 and 12 narrated the incident of alleged theft by them in the mustard field at about 11 to 11.30 PM the night before the incident. They confirmed that the appellants assaulted them with iron rods and other weapons. They also stated that they had gone to the mustard field to answer nature's call and not to steal from there.

21. PW13 was the doctor who treated PW11 and 12 at the Islampur Hospital.

22. All prosecution witnesses were cross-examined by the defense. The defense did not adduce any evidence.

23. The four appellants were examined under Section 313 of the Penal Code. It appears from the records that all 19 accused were represented by the same advocate throughout the trial.

24. Mr. Sandipan Ganguly, Ld. Senior Advocate appearing for the appellants, first placed the case of Badal Sarkar being CRA 274/2017. He argued that Badal Sarkar could not have been convicted under Section 302 since no charge was framed under the said section against him.

25. It however appears from the order sheet on the date of framing of charge dated 19th June, 2013, wherein the following was recorded.

> *"The all 19 accused are present in the court by filing hazira. Today is fixed for framing of charges. Per the C.D., F.I.R, C.S., 1st statement and P.M. report and other materials in C.D. I find there are sufficient materials on record against the accused to frame charges u/s 143, 448, 341, 326 and 302 of I.P.C. So charge is framed against the accused under above mentioned sections and kept with the record. The said charge is read out and explained to the accused, to which they plead not guilty and claim to be innocent.*
>
> *Fix 15/7/13 for fixing date of evidence."*

26. It is argued by Mr. Ganguly that had his client been specifically charged under Section 302, like the three other appellants, he would have been under notice of the same and would have been in a position to defend himself more effectively. Since no charge was

framed against Badal Sarkar under Section 302 by the Trial Court, the conviction under the said section resulted in a failure of justice. Badal Sarkar should therefore be acquitted, in terms of Section 464 of the CrPC.

27. Reliance is placed by Mr. Ganguly, firstly on the case of ***Willie (William) Slaney v. State of MP***, reported in ***AIR 1956 SC 116***, particularly on paras 43, 44, 89, 90, and 91. Further reliance is also placed by Mr. Ganguly on the case of ***Suraj Pal v. State of Uttar Pradesh***, reported in ***AIR 1955 SC 419***, particularly paragraphs 3, 4, and 5, and the decision of the Hon'ble Supreme Court in the case of ***Chintambaramma v. State of Karnataka***, *reported in* ***(2019) 17 SCC 208***, particularly paragraphs 6, 7, and 18 thereon.

28. This Court, however, finds that the principles laid down in the case of ***Main Pal v. State of Haryana***, reported in ***(2010) 10 SCC 130***, set out in paragraph 18 of the ***Chintambaramma judgment (supra)***, to be the appropriate principles to be followed in determining as to whether Badal Sarkar knew that he had to defend the charge under Section 302 of the IPC.

> "18. Later, in Main Pal v. State of Haryana, this Court found the following principles relevant consequent to omission of framing charges. The Court held as under:
>
> "17. The following principles relating to Sections 212, 215 and 464 of the Code, relevant to this case, become evident from the said enunciations:
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> (i) The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential

> facts that he has to meet. The charge must also contain the particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.
> (ii) The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced. Where an accused is charged with having committed offence against one person but on the evidence led, he is convicted for committing offence against another person, without a charge being framed in respect of it, the accused will be prejudiced, resulting in a failure of justice. But there will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge.
> (iii) In judging a question of prejudice, as of guilt, the courts must act with a broad vision and look to the substance and not to the technicalities, and their main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself."

29. Even in the ***Suraj Pal (Supra)*** decision at paragraphs 3, 4 and 5 it has been laid down that faced with a case where a charge is not framed against an accused, an appellate or reviewing court is required to determine whether the accused has been prejudiced by reason thereof. An Appellate court is required to determine whether the main facts established against the accused has been explained to him fairly and clearly and whether he has given fair chance to defend himself. Paragraphs 43, 52 and 56 of the of the ***Willie (William) Slaney (Supra)*** decision needs to be set out herein.

> "**43**. Now, as we have said, sections 225, 232, 535 and 537(a) between them, cover every conceivable type of error irregularity

referable to a charge that can possibly arise, ranging from cases in which there is a conviction with no charge at all from start to finish down to cases in which there is a charge but with errors, irregularities and omissions in it. The Code is emphatic that whatever the irregularity it is not to be regarded as fatal unless there is prejudice. It is the substance that we must seek. Courts have to administer justice and justice includes the punishment of guilt just as much as the protection of innocence. Neither can be done if the shadow is mistaken for the substance and the goal is lost in a labyrinth of unsubstantial technicalities. Broad vision is required, a nice balancing of the rights of the State and the protection of society in general against protection from harassment to the individual and the risks of unjust conviction. Every reasonable presumption must be made in favour of an accused person; he must be given the benefit of every reasonable doubt. The same broad principles of justice and fair play must be brought to bear when determining a matter of prejudice as in adjudging guilt. But when all is said and done, what we are concerned to see is whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly and whether he was given a full and fair chance to defend himself. If all these elements are there and no prejudice is shown the conviction must stand whatever the irregularities whether traceable to the charge or to a want of one.

52. Now it is true that there are observations there which, without close examination, would appear to support the learned counsel for the appellant. But those observations must be construed in the light of the facts found, the most crucial fact being that patent prejudice was disclosed. It was found that the appellant there was in fact misled in his defence and one of the factors taken into consideration, as indeed must always be the case, was that when he was told that he was to be tried u/s 302 read with section 149 of the Indian Penal Code that indicated to him that he was not being tried for a murder committed by him personally but that he was only being made vicariously liable for an act that another had done in prosecution of the common object of an unlawful assembly of which he was a member. But that was only one of the matters considered and it does not follow that every accused will be so misled. It all depends on the circumstances. The entire evidence and facts on which the learned Judges founded are not set out in the judgment but there is enough to indicate that had the appellant''s attention been drawn to his own part in the actual killing he would probably have cross-examined the doctor with more care and there was enough in the medical evidence to show that had that had been done the appellant might well have been exonerated. As judges of fact they were entitled, and indeed bound, to give the accused the

> benefit of every reasonable doubt and so were justified in reaching their conclusion on the facts of that case. Illustrations (c) and (e) to section 225 of the Criminal Procedure Code show that what the accused did or omitted to do in defence are relevant on the question of prejudice. If the Court finds that a vital witness was not cross-examined when he might have been, and that if he had been, the further facts elicited might well have been crucial, then material from which prejudice can be inferred is at once apparent : that is exactly Illustrations (c) and (e). That, however, was, and remains, a pure conclusion of fact resting on the evidence and circumstances of that particular case. The decision was special to the facts of that case and no decision on facts can ever be used as a guide for a conclusion on facts in another case.
>
> **56**. Now what is an accused person entitled to know from the charge and in what way does the charge in this case fall short of that ? All he is entitled to get from the charge is -
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> (1) the offence with which he is charged, section 221, Criminal Procedure Code,
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> (2) the law and section of the law against which the offence is said to have been committed, section 221(4),
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> (3) particulars of the time, section 222(1), and
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> (4) of the place, section 222(1), and
>
> (5) of the person against whom the offence is said to have been committed, section 222(1), and
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> (6) when the nature of the case is such that those particulars do not give him sufficient notice of the matter with which he is charged, such particulars of the manner in which the alleged offence was committed as will be sufficient for that purpose, section 223.
>
> He is not entitled to any further information in the charge : see Illustration (e) to section 223 of the Code.
>
> "A is accused of the murder of B at a given time and place. The charge need not state the manner in which A murdered B".

30. At para nos. 23, 44, and 52 of ***Willie (William) Slaney (Supra)*** it was held,that it must be shown, in fact, that the accused must establish that he has been misled by the non-framing of the charge. It is not the case of Ld. Counsel Mr. Ganguly that his client Badal Sarkar was

misled by a specific non-framing of charge. This Court, however, finds that the charge u/s 302 has indeed been framed, in substance, against him and he led evidence to disprove that charge.

31. It could not be argued that Badal Sarkar was so misled, given the fact that all the 19 accused before the Trial Court including Badal Sarkar were represented by the same Counsel seeking to rebut all the charges including the charge of murder (as noted under Para no. 44 of ***Willie (William) Slaney (Supra)*** that when the accused is represented by a counsel it is presumed that the accused was conscious of the charges of the trial. The trial, inter alia, proceeded under Section 143 of IPC, unlawful assembly, for commission of murder under Section 302. Badal Sarkar was the leader of that assembly. Hence the element of common intention of all the 19 accused to murder was examined before the Trial Court.

32. Further paragraph number 44 of the***Willie (William) Slaney (Supra)***, the objection to the non-framing of a charge must be taken at the earliest when an accused is represented by a counsel. Badal Sarkar was represented by a counsel during the trial. Therefore he would have objected to the trial under section 302 proceedings against him at the first instance which he has not done. This shows that he was aware of the said charge under section 302 read with section 34 of the IPC.

33. Applying the aforesaid principles to the instant case it is noticed as follows :-

a. On the date the charge was framed, the order sheet clearly indicated that a charge under Section 302, in addition to the charges under Sections 143/448/341 and 326 of the IPC, was being framed against *all* the accused persons.

b. The evidence of PW1, 2, 3, 4, and 5 clearly identified the role played by Badal Sarkar in either leading the assault or holding a hammer and assaulting the victim therewith.

c. The four appellants, along with other accused, adopted a common and singular cross-examination of each of the witnesses of the prosecution.

d. Badal Sarkar, in his examination under Section 313 of the CrPC, was specifically confronted with the circumstances against him and the other appellants in assaulting and causing the death of the victim.

e. None of the accused persons, including those against whom a charge under Section 302 was specifically framed, chose any other independent line of cross-examination against the prosecution case.

f. Badal Sarkar represented by a lawyer did not object to trial under section 302 and 34 proceeding against him at any stage in the Trial.

34. The aforesaid would clearly demonstrate that Badal Sarkar, at all material times, was aware of the charge under Section 302 against him. There is no prejudice demonstrated by Badal Sarkar by reason of the charge under Section 302 not being specifically framed against him. It therefore cannot be said that there has been any failure of justice against Badal Sarkar in his being convicted under Section 302 despite a charge specifically not being framed.

35. This is a case that may not attract the provisions under Section 464 of the Cr.P.C. at all, since the order sheet of the trial Court indicated that the charge under Section 302 was framed against all the accused persons. At paragraph no. 12 of the ***Willie (Supra)***, it has been held that, for the Court to hold that the trial stands vitiated on a particular charge, there shall be either an abhorrent failure of natural justice or there has been substantial and manifest prejudice caused to the accused by not indicating him the case against him. As discussed hereinabove both these requirements have not been fulfilled in the present case.

36. At paragraph number 44 of ***Willie (William) Slaney (Supra)*** it has also been clearly held that as to whether the non-framing of the charge will operate in favor of the accused shall depend on the special facts of each case. Para no. 44 is set out below:-

> "44. In adjudging the question of prejudice the fact that the absence of a charge, or a substantial mistake in it, is a serious lacuna will naturally operate to the benefit of the accused and if there is any reasonable and substantial doubt about whether he was, or was reasonably likely to have been, misled in the circumstances of any particular case, he is as much entitled to the benefit of it here as elsewhere; but if, on a careful consideration of all the facts, prejudice, or a reasonable and substantial likelihood of it, is not disclosed the conviction must stand; also it will always be material to consider whether objection to the nature of the charge, or a total want of one, was taken at an early stage. If it was not, and particularly where the accused is defended by counsel (Atta Mohammad v. King-Emperor [(1929) LR 57 IA 71, 74]) it may in a given case be proper to conclude that the accused was satisfied and knew just what he was being tried for and knew what was being alleged against him and wanted no further particulars, provided it is always borne in mind that "no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the advocate of the accused" (Abdul Rahman v. King-Emperor [(1926) LR 54 IA 96, 104, 110]). **But these are matters of fact which will be special to each different case and no conclusion on these questions of fact in any one case can ever be regarded as a precedent or a guide for a conclusion of fact in another, because the facts can never be alike in any two cases "however" alike they may seem. There is no such thing as a judicial precedent on facts though counsel, and even Judges, are sometimes prone to argue and to act as if there*were.*"**
>
> Emphasis Applied

37. It is made clear that the aforesaid analysis has been attempted by this Court only on the assumption that no charge, in fact, has been framed against the appellant.

38. Mr. Ganguly next argued that the appellants are entitled to acquittal since they are similarly placed as the named acquitted persons. The learned Trial Judge acquitted 15 persons from all charges and convicted the 4 accused persons for commission of offenses under Sections 302, 448 and 24 of the IPC. Amongst the acquitted accused two persons namely Sukumar Biswas and Pabitra Biswas have been named by several witnesses. There is no difference in the circumstances for which the 4 appellants have been convicted and the said Sukumar and Pabitra have been acquitted.

39. He therefore argues that the learned Judge erred in not believing the version of PW1 while acquitting 15 persons and in the same breath believing the prosecution witnesses in convicting the appellants. The evidence is common to all. There is no specific role attributed to any of the accused persons including the appellants in the offences in question. Hence if Pabitra and Sukumar have been acquitted on the same evidence the appellants must also be acquitted.

40. Mr. Ganguly relied on the decision of the Supreme Court in ***Joginder Singh and Anr. v. State of Punjab*** reported in ***1994 SCC (Cri) 46.*** This Court firstly notes that the acquittal of the accused in the ***Joginder Singh case (supra)*** by the High Court, was that they were falsely implicated. The High Court stated as such in more than

one places that there was no such evidence against the appellants in the said case. The acquitted accused also inflicted injuries. The Supreme Court reasoned that if one set of accused who inflicted injuries could have been let off on the ground of false implication, the same rule must be applied to the appellants.The Hon'ble Supreme Court did not have occasion to apply the negative equality test in the said ***Joginder Singh Case (Supra)***.

41. Similarly in the case of ***Hardial Singh v. State of Punjab*** reported in ***1992 Supp (2) SCC 455,*** the co-accused were acquitted on the same evidence as that of the convicted appellants. The prosecution case rested on the testimony of three eyewitnesses who were all found interested and hence unreliable. The testimony of the eyewitnesses was rejected by the High Court on the ground that the witnesses probably made a mistake in identifying the assailants. Their truthfulness was also questioned on the ground of delay in lodging the FIR. The appellant therein was convicted on the sole ground that the fatal blow in the attack on the victim was inflicted by him. The Supreme Court however acquitted the appellant, applying the same principles for acquittal of the other accused.

42. This Court is of the view that the facts available in the said case are quite different from the facts of the instant case. The evidence in the

instant case, of each of the witnesses, is duly corroborated by one another. Each of the accused was named by PW 1, PW 2, PW 3 and PW 4. PW 5 was another eyewitness. The facts of the ***Hardial Singh case (supra)*** therefore are substantially different from the instant case.

43. In connection with the above argument, one must notice that Section 386 of the Cr.P.C. empowers the Appellate Court to reappraise evidence of its own. Although there is mention of Pabitra and Sukumar by some of the witnesses, an independent appreciation of the evidence by this Court will reveal that the role of the appellants was more distinct and specific as opposed to the role of Pabitra and Sukumar.

44. Useful reference may be made to the case of***Khujji @ Surendra Tiwari Vs State of M.P.***reported in ***(1991) 3 SCC 627.***

> **"12.** The ratio of the decision of this Court in *Brathi case* [(1991) 1 SCC 519 : 1991 SCC (Cri) 203] may be noticed at the outset to appreciate the contention urged by counsel for the appellant. In that case, the appellant and his uncle were tried under Section 302/34, IPC. The trial court acquitted the appellant's uncle but convicted the appellant under Section 302, IPC. The order of acquittal became final because the State did not choose to challenge it in appeal. The appellant, however, preferred an appeal against his conviction to the High Court. The High Court on a reappreciation of the evidence held that the fatal blow was given by the appellant's uncle and since the appellant was charged under Section 302/34, IPC, he could not be convicted substantively under Section 302, IPC. However, for assessing the credibility of the prosecution case, the High Court incidentally considered the involvement of the appellant's uncle and held that the eye-witnesses had given a truthful account of the occurrence and the appellant's

uncle had actually participated in the commission of the crime along with the appellant. In other words, the High Court came to the conclusion that the acquittal of the appellant's uncle was erroneous but since there was no appeal preferred by the State it could not interfere with that order of acquittal. It, however, came to the conclusion that the crime was committed by the appellant and his uncle in furtherance of their common intention and accordingly maintained the conviction of the appellant under Section 302, IPC, with the aid of Section 34, IPC. Before this Court the appellant contended that on the acquittal of his uncle the sharing of common intention disappeared and the High Court was not justified in invoking Section 34 for maintaining the conviction against him under Section 302, IPC. This Court while dealing with this submission held that in the matter of appreciation of evidence the powers of the appellate court are as wide as that of the trial court and the High Court was, therefore, entitled in law to review the entire evidence and to arrive at its own conclusion about the facts and circumstances emerging therefrom. To put it differently, this Court came to the conclusion that the High Court was not bound by the appreciation of the evidence made by the trial court and it was free to reach its own conclusions as to the proof or otherwise of the circumstances relied upon by the prosecution on a review of the evidence of the prosecution witnesses. This Court, therefore, held that when several persons are alleged to have committed an offence in furtherance of their common intention and all except one are acquitted, it is open to the appellate court under sub-section (1)(*b*) of Section 386 of the Code to find out on a reappraisal of the evidence who were the persons involved in the commission of the crime and although it could not interfere with the order of acquittal in the absence of a State appeal it was entitled to determine the actual offence committed by the convicted person. Where on the reappreciation of the evidence the appellate court comes to the conclusion that the appellant and the acquitted accused were both involved in the commission of the crime, the appellate court can record a conviction with the aid of Section 34 notwithstanding the acquittal of the co-accused. While the appellate court cannot reverse the order of acquittal in the absence of a State appeal, it cannot at the same time be hedged by the appreciation of the evidence by the lower court if that appreciation of evidence is found to be erroneous. This Court, therefore, pointed out that in such a fact-situation it is open to the appellate court to record a finding of guilt with the aid of Section 34 notwithstanding the acquittal of the co-accused since the English doctrine of repugnancy on the face of record has no application in this country as we are governed by our own statutory law. On this ratio this Court confirmed the conviction of the appellant under Section 302, IPC, but with the aid of Section 34, IPC. The fact-situation before us is more or less similar.

45. From the ***Khujji case (Supra)*** the following propositions emerge on the principle that *"a wrong acquittal will not impact the right conviction."*

> i. A piece of evidence that has been rejected (leading to the acquittal of one) cannot be revived (*without disapproving its rejection*) to place reliance on it to convict a person.
>
> ii. Therefore, a piece of evidence that has been disbelieved and consequently a co-accused has been acquitted, that same piece of rejected/disbelieved evidence cannot be relied upon to convict the others, unless the Court believes that evidence, *in appeal.*
>
> iii. Therefore, after appreciating the evidence if the High Court concludes that the rejected piece of evidence is reliable in the case of all the concerned accused, it is permitted to maintain the conviction of the accused *notwithstanding that the acquittal of other accused has not been challenged by the state,* but the evidence establishes their guilt.
>
> iv. The wrong/inadvertent acquittal order passed by the court below will ***never*** prevent the higher courts from saying that the acquittal order is wrong though it is not challenged and the acquitted accused person has not been heard.
>
> v. Hence such a wrong acquittal order will not benefit the other co-accused, who have been rightlyconvicted. The higher forum cannot be a party to the double standards adopted by the court below.

46. Insofar as the application of Section 149 (unlawful assembly) and common intention under Section 34 of the IPC, it is seen in the present case that all the accused had entered the dwelling house of the victim after breaking open a thatched wall. They had the common intention firstly, to drag the victim out of the house and then to brutally assault him. The medical evidence clearly indicates the role of all the accused persons in committing the murder of the victim.

There is enough evidence to prove commission of the offense under Section 302 IPC. In cases of an unlawful assembly, there will always be some person who leads the attacks.

47. The role of Badal Sarkar in leading the other accused persons is clear and evident. The common intention of all the accused persons to kill the victim is clear and established. The hammers, iron rods, and wooden sticks are enough to inflict fatal blows on the victim.

48. In ***Javed Shaukat Ali Qureshi v. State of Gujarat*** reported in ***(2023) 9 SCC 164*** at para 15 it was held as follows:

> **"15.** When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the criminal court should decide like cases alike, and in such cases, the court cannot make a distinction between the two accused, which will amount to discrimination."

49. In ***R Muthukumar v. TANGEDCO reported in 2022 SCC OnLine SC 151*** at Paragraph 28 and 29 it was held as follows:

> **28.** A principle, axiomatic in this country's constitutional lore is that there is no negative equality. In other words, if there has been a benefit or advantage conferred on one or a set of people, without legal basis or justification, that benefit cannot multiply, or be relied upon as a principle of parity or equality. In *Basawaraj* v. *Special Land Acquisition Officer*[14], this court ruled that:
>
> > *"8. It is a settled legal proposition that Article 14 of the Constitution is not meant to perpetuate illegality or fraud, even by extending the wrong decisions made in other cases. The said provision does not envisage negative equality but has only a positive aspect. Thus, if some other similarly situated persons have been granted some*

> *relief/benefit inadvertently or by mistake, such an order does not confer any legal right on others to get the same relief as well. If a wrong is committed in an earlier case, it cannot be perpetuated."*
>
> **29.** Other decisions have enunciated or applied this principle (Ref : *Chandigarh Admn.* v. *Jagjit Singh*[15], *Anand Buttons Ltd.* v. *State of Haryana*[16], *K.K. Bhalla* v. *State of M.P.*[17]; *Fuljit Kaur* v. *State of Punjab*[18], and *Chaman Lal* v. *State of Punjab*[19]). Recently, in *The State of Odisha* v. *Anup Kumar Senapati*[20] this court observed as follows:
>
> *"If an illegality and irregularity has been committed in favour of an individual or a group of individuals or a wrong order has been passed by a judicial forum, others cannot invoke the jurisdiction of the higher or superior court for repeating or multiplying the same irregularity or illegality or for passing a similarly wrong order. A wrong order/decision in favour of any particular party does not entitle any other party to claim benefits on the basis of the wrong decision."*

50. Applying the dicta in the ***Javed Shaukat Ali Qureshi*** and ***R Muthukumar decisions (supra)***, it follows that the principle of parity cannot be invoked to grant acquittal to a convicted person when his partner in crime and a similarly situated person has been acquitted. This Court on an independent re-appreciation of the evidence finds Pabitra and Sukumar Biswas equally guilty of the offence in question. It is for the State to take a decision with regard to appealing against their acquittal. Hence parity by itself will not ipso facto lead to the acquittal of the 4 appellants. It is seen that the roles of the 4 appellants and Pabitra and Sukumar are uniformly stated by three several witnesses. Each of them is guilty of unlawful assembly and common intention to kill the victim who was going to campaign for a rival political party. The unlawful acquittal of Sukumar and Pabitra cannot upset and undo the correct conviction of the 4 appellants.

51. In view of the above, the argument of learned Counsel for the appellants, Mr. Ganguly about the acquittal of the appellants on the ground of parity with Sukumar and Pabitra cannot, therefore, be accepted.

52. The next argument advanced by Mr. Ganguly is by reference to the case of ***Sujit Biswas v. State of Assam (2013) 12 SCC 406).*** In the said case the bloodstain of the victim was found on the underwear of the accused. The FSL report was not confronted to the accused in examination under Section 313 of the CrPC. Hence it was held that the accused did not get an opportunity to answer the evidence against him. The said case has no manner of application to the facts of the instant case as the post-mortem report was confronted to each of the appellants in the above case against question no. 10 under Section 313 of the Cr.P.C.

53. Even otherwise in ***Gulam Hassan Beigh Vs Mohd. Maqbool Magrey***reported in ***(2022) 12 SCC 657*** at para 29 and 30 it is held as follows:-

> **"29.** What did the trial court do in the case on hand? We have no doubt in our mind that the trial court could be said to have conducted a mini trial while marshalling the evidence on record. The trial court thought it fit to discharge the accused persons from the offence of murder and proceeded to frame charge for the offence of culpable homicide under Section 304IPC by only taking into consideration the medical evidence on record. The trial court as well as the High Court

> got persuaded by the fact that the cause of death of the deceased as assigned in the post-mortem report being the "cardio respiratory failure", the same cannot be said to be having any nexus with the alleged assault that was laid on the deceased. Such approach of the trial court is not correct and cannot be countenanced in law.
> **30.** The post-mortem report, by itself, does not constitute substantive evidence. Whether the "cardio respiratory failure" had any nexus with the incident in question would have to be determined on the basis of the oral evidence of the eyewitnesses as well as the medical officer concerned i.e. the expert witness who may be examined by the prosecution as one of its witnesses."

54. In ***Naresh Kumar Vs State(NCT of Delhi)*** reported in ***2024 SCC Online SC 1641*** it was held in para 22 it was held as follows :-

> **22.** In the light of the above view of the matter, we are inclined to consider the further question whether the non-questioning on the aforesaid twin incriminating circumstances to the appellant during his examination under Section 313, Cr. P.C., had caused material prejudice to him. The decision of this Court in *State of Punjab* v. *Swaran Singh*[8], constrain us to consider one another factor while considering the question of prejudice. In *Swaran Singh's case* (supra), this Court held that where the evidence of the witnesses is recorded in the presence of the accused who had the opportunity to cross examine them but did not cross examine them in respect of facts deposed, then, omission to put question to the accused regarding the evidence of such witnesses would not cause prejudice to such an accused and, therefore, could not be held as grounds vitiating the trial *qua* the convict concerned. We have already found that Anil Kumar (PW-7), Smt. Prem Devi (PW-8), Mrs. Madhu (PW-19) and Anand Kumar (PW-22) have deposed about the said circumstances. A scanning of their oral testimonies, available on record, would undoubtedly reveal that on both the points, on behalf of the appellants they were cross examined.

55. The appellants had the opportunity to cross-examine the witnesses of the prosecution on all issues. Not having done so, they cannot raise any objection of non-confrontation of such evidence to them under Section 313 of the CrPC.

56. It is argued by Mr. Ganguly that the observation of the post-mortem doctor that the injuries found on the victim during post-mortem are not sufficient to kill a person save and except for haemorrhage, did not find any other internal injury.

57. This Court notes that the statement of the post-mortem doctor in cross-examination is restricted to the external injuries sustained by the victim. The corresponding internal injuries, resulting from the external injuries which causedhaemorrhage and hematoma all over the brain matter and ruptured spleen, were opined to be homicidal innature. The cardio-respiratory failure was occasioned only by the internal injury resulting from the external injuries. Further statement that this sort of injury may be caused by blunt weapons such as lathis or wooden sticks as deposed by the evidence of the post-mortem doctor PW 10, is not reflected in the post-mortem report.

58. In the case of ***Ram Lal v. Delhi Administration*** reported in ***(1973) 3 SCC 466,*** relied upon by the Counsel for the appellant, the Court found that the appellant Ram Lal had given only one blow with the stick on the head of the deceased. The medical evidence indicated two blows on the victim. The High Court concluded that since the appellant Ram Lal inflicted one blow, he must have inflicted the other blow as well. This was found to be inconsistent and the conviction

under Section 302 was set aside and the appellant was convicted under Section 325 of the IPC. As opposed to the said decision, the facts in the instant case clearly indicate that each of the accused persons had uniformly inflicted all the fatal blows on the head, chest and body of the victim. In the above circumstances, the ***Ram Lal decision (Supra)*** cannot come to the aid of the appellant.

59. Insofar as the case of the ***Vijay Singh and Anr. v. State of MP*** reported in ***(2014) 12 SCC 293*** relied upon by the Counsel for the appellant is that there was a distinct and specific role attributed to each of the accused persons. The death of the victim occurred on account of shock and excessive bleeding out to the injuries on the deceased and the death has not taken place as a result of the injuries specifically caused by the appellants therein. It is in those circumstances that the charge against the accused was converted from Section 302 to Section 326 of the IPC. The facts of the said case are completely different from the facts of the instant case.

60. In the case of ***Camilo Vaz v. State of Goa*** reported in ***(2000) 9 SCC 1,*** relied upon by Counsel for the appellants, the facts therein indicate that there was a group rivalry between boys of two villages. The appellants and others were armed with dandas, bottles and cycle chains. They were found to have come only to thrash the deceased

and his brothers who belong to another village. The appellant hit the victim on the head with such force that the appellant fell on the ground and succumbed to his injuries. There was no evidence on record indicating that the appellant was bent upon killing the deceased. It is in that context the conviction was converted from Section 302 to Section 304 (ii) of the IPC. The conviction under Section 302 by the Trial Court and the High Court was set aside. In the facts available in the instant case the evidence against the appellants duly corroborated by the medical evidence would clearly lead to the conclusion that the appellants intended to end the life of the victim to prevent him from campaigning for their rival political party.

61. In the instant case the victim was sleeping with his wife in the middle of the night when the first incident at 10 O'clock in the night of theft in the master field conducted by PW 11 and PW 12 was a mere ruse to attack the deceased. There is no evidence whatsoever on record that the deceased also participated in the theft at the master field of Ananda Biswas. The first incident at 10 O'clock in the night was therefore a mere ruse and part of a game plan to find an excuse to jointly attack the deceased. The 4 accused along with Pabitra and Sukumar have clearly been named to participate in committing the

murder the victim. The said case therefore cannot come to the aid of the appellant.

62. Mr. Ganguly has next argued that the versions of the witnesses are unbelievable to convict the appellants. He pointed out that non-seizure of the broken door of the house of the victim is fatal to the prosecution. This Court notices that the door was made of straw and thatched leaves. It only facilitated the entry of the accused into the house of the deceased. There is no challenge of cross-examination that the deceased was not sleeping in the house when he was picked up and dragged out and brought near the house of Paresh Roy where he was severely assaulted. The absence of the seizure of the door is totally irrelevant to the commission charge against the appellant.

63. It is next argued that specific roles have not been attributed to each of the accused. Admittedly the incident occurred at 2:00 AM. It is not possible for anyone even after identifying the assailants to also specifically identify the weapons they wielded or to indicate, as to who inflicted what blow on the victim. Suffice it to say it is uncontroverted that all the appellants Pabitra and Sukumar inflicted several injuries on the victim with lathis, iron rods, wooden batam and a hammer.

64. The role of Badal Sarkar is singled out by two witnesses as he was leading the accused persons in the assault on the victim. A slight

difference in the names of the accused or the weapons they are carrying in the versions by PW 1, PW 2, PW 3 and PW 4 cannot be fatal to the prosecution. It is natural and normal that people seeing an assault from different angles may have a slight difference in what weapons was being carried out by each of the accused persons.

65. PW 1, being the wife of the victim and having tried to save her husband during the assault, was clearly an eyewitness to the assault. The evidence of PW 1 is corroborated by the evidence of PW 2 and PW 3. Admittedly PW 1, PW 2, PW 3 and PW 4 had recorded statements before the Investigating Officer immediately after the incident. The absence of the statement of PW 5 before the police was therefore not fatal to the prosecution. The evidence of PW 1, PW 2, PW 3 and PW 4 was duly corroborated with the statements made before the police.

66. It is now well settled that in villages in the darkness of the night it is not impossible for a person to identify another merely because it is dark. The absence for a T.I. Parade is never fatal to a prosecution, each of the accused persons have been identified. In the case of ***Dharmendra Kumar @ Dhamma v. State of MP***reported in***2024 INSC 480*** at para 47 it was held as follows-

> "47. It is trite law that identification tests (TIP) do not serve as substantive evidence but are primarily intended to assist the investigating agency in ensuring that their progress in investigating the offence is on the correct path. Holding a TIP is not obligatory.

> Further, a failure to hold TIP cannot be a ground to eschew the testimony of witnesses whose evidence was concurrently accepted by the trial and appellate courts.3 Additionally, a failure to hold a parade would not make inadmissible the evidence of identification in the court."

67. On the arguments of the appellants that there was poor visibility in the night and hence the eyewitnesses could not have seen the accused in the village, the Decision of the Supreme Court in the case of ***Dharmendra Kumar decision (supra)*** particularly para 48 and 49 must be noticed. (Set out Para 48 49):-

> 48. Similarly, the contention of poor visibility owing to darkness at the spot of occurrence is also not tenable. In analysing the incidents occurring at night, this Court in ***Nathuni Yadav v. State of Bihar*** has taken into account several factors, including:
>
> (i) The proximity at which the assailants would have confronted the injured.
>
> (ii) The possibility of some ambient light reaching the scene from the stars.
>
> (iii) The familiarity of the witnesses with the appearance of each assailant.
>
> 49. In the instant case, firstly, the place of occurrence, i.e., Bharav Shastri's Jhuggi, was adjacent to that of the Complainant (P.W.10) making it easier for the witnesses to observe and identify the accused persons. Secondly, each accused, particularly the Appellant, was familiar to the eyewitnesses. Thirdly, considering that the incident occurred on a summer night, there would have been minimal obstruction to visibility for the witnesses. Fourthly and most importantly, the Appellant, in his 313 CrPC Statement, has nowhere taken the plea of alibi. He did not pursue this defence during the cross examination of witnesses either.

68. The above may be a reiteration of the law laid down in the case of ***Shivaji Sahabrao Bobade and Anr. v. State of Maharashtra***

reported in***(1973) 2 SCC 793.*** At Paragraph 8 of the said decision it has held as follows:-

> **"8.** Now to the facts. The scene of murder is rural, the witnesses to the case are rustics and so their behavioural pattern and perceptive habits have to be judged as such. The too sophisticated approaches familiar in courts based on unreal assumptions about human conduct cannot obviously be applied to those given to the lethargic ways of our villages. When scanning the evidence of the various witnesses we have to inform ourselves that variances on the fringes, discrepancies in details, contradictions in narrations and embellishments in inessential parts cannot militate against the veracity of the core of the testimony provided there is the impress of truth and conformity to probability in the substantial fabric of testimony delivered. The learned Sessions Judge has at some length dissected the evidence, spun out contradictions and unnatural conduct, and tested with precision the time and sequence of the events connected with the crime, all on the touchstone of the medical evidence and the post-mortem certificate. Certainly, the court which has seen the witnesses depose, has a great advantage over the appellate Judge who reads the recorded evidence in cold print, and regard must be had to this advantage enjoyed by the trial Judge of observing the demeanour and delivery, of reading the straightforwardness and doubtful candour, rustic naivete and clever equivocation, manipulated conformity and ingenious unveracity of persons who swear to the facts before him. Nevertheless, where a Judge draws his conclusions not so much on the directness or dubiety of the witness while on oath but upon general probabilities and on expert evidence, the court of appeal is in as good a position to assess or arrive at legitimate conclusions as the Court of first instance. Nor can we make a fetish of the trial Judge's psychic insight."

69. It is next argued that the delay in examination of the eyewitnessesis fatal to the case of the prosecution.Mr. Ganguly relied upon the case of ***Shahid Khan v. State of Rajasthan***reported in ***(2016) 4 SCC 96***. In this case, a delay of three days in recording the statements of the eyewitnesses left a doubt in the mind of the Supreme Court as regards their evidence. The police waited for three full days to record the statements of the two eyewitnesses- PW 24 and PW 25 in the said

case. It was the other surrounding circumstances namely the unexplained silence and the delay in the statement of police that rendered PW 24 and PW 25 as unreliable witnesses. What is crucial and vital is that their evidence was not corroborated by the other witnesses by any independent source either. The facts of the said case are quite distinct and different from the facts of the instant case. The said decision therefore cannot be applied herein.

70. In ***Harbeer Singh v.Sheeshpal and Ors.*** reported in ***(2016) 16 SCC 418*** the Hon'ble Supreme Courtfound that there was a delay of two days in recording the evidence of PW 1 and PW 5 and three days in the case of PW 6 and 10 days in the case of PW 7. It was held that a delay in recording the statement of eyewitnesses under Section 161 of the Cr.P.C. would render their evidence unreliable unless their testimony is cogent and credible and the delay is explained to the satisfaction of the Court.

71. There is no evidence brought on record by the appellants that there was delay in recording the versions of PW 1, PW 2, PW 3 and PW 4 under Section 161/164 of the Cr.P.C. The only argument advanced is that the eyewitnesses were deposed after 8 years. In the said judgment and several others, it is now well settled that a delay in recording the statements of eyewitnesses would not ipso facto render

their evidence unreliable. It was only when their evidence is not cogent or inconsistent or not corroborated by the other evidence and the presence of other persons that their evidence may be discarded. In the instant case several other witnesses found PW 1 at the place of occurrence immediately with the body of her deceased husband wherein he had been severely assaulted in front of the house of Paresh Roy and dragged in front of the nearby primary school where the deceased was further assaulted.

72. The evidence of the eyewitnesses whose statements have been recorded by the police under Section 161 are duly corroborated by the evidence of the other witnesses on record. There is nothing to disbelieve the evidence of PW 1, PW 2, PW 3 and PW 4. The ***Harbeer Singh decision (Supra)*** of the Supreme Court would have no manner of application in the facts of the instant case.

73. Mr. Ganguly next argued that the non-seizure of the weapons and absence of fingerprints thereto and co-relating the same with the appellants is fatal to the case of the prosecution. In this regard, he placed reliance upon the case of ***Mohinder Singh v. State*** reported in ***1950 SCC 673.*** In the said case itappears that the main weapon used was a rifle or a gun. The rifle was never seized. There was no ballistic report. It is not clear in the said case as to whether the two

shots fired at the victim were by the same weapon and the same person amounted to a serious gap in the prosecution case and in the instant case.

74. However the weapons used in the instant case are, mostly rods, sticks and hammers, easily available in every household. The specific non-production or non-seizure of the weapons cannot be fatal to the prosecution case. The post-mortem report and the evidence of the witnesses clearly establish the weapons used by the appellants on the victim. The non-seizure of the weapons by the prosecution and non-production thereto in the Trial Court or absence of fingerprint report of the appellants on the weapons is therefore not fatal to the prosecution case. The Mohinder Singh decision would have no manner of application in the facts of the instant case.

75. In ***Ram Singh v. State of UP*** reported in ***2024 INSC 128,*** it was held that the non-production of the ballistic report was not fatal to the prosecution case, if there is cogent and clear independent evidence to support it. At para 29 it was held as follows:-

> "29. Thus, what can be deduced from the above is that by itself non recovery of the weapon of crime would not be fatal to the prosecution case. When there is such non-recovery, there would be no question of linking the empty cartridges and pellets seized during investigation with the weapon allegedly used in the crime. Obtaining of ballistic report and examination of the ballistic expert is again not an inflexible rule. It is not that in each and every case where the death of the victim is due to gunshot injury that opinion of the ballistic expert should be

obtained and the expert be examined. When there is direct eye witness account which is found to be credible, omission to obtain [2024] 2 S.C.R. Ram Singh v. The State of U.P. 683 ballistic report and non-examination of ballistic expert may not be fatal to the prosecution case but if the evidence tendered including that of eyewitnesses do not inspire confidence or suffer from glaring inconsistencies coupled with omission to examine material witnesses, the omission to seek ballistic opinion and examination of the ballistic expert may be fatal to the prosecution case."

76. This Court is reminded of the dicta of the Supreme Court in the case of ***Munna Lal v. The State of Uttar Pradesh*** reported in ***2023 3 SCR 224*** at para 40 and 42 are set out herein below:-

> **"40.** As far as non-obtaining of ballistic report is concerned, it is no doubt true that its essentiality would depend upon the circumstances of each case. Here, since no weapon of offence was seized, no ballistic report was called for and obtained. Although Mr. Giri contended that Munna Lal had a licensed gun, this Court has not been able to trace any evidence in the records in regard thereto. However, nothing turns on it. The failure/neglect to seize the weapons of offence, on facts and in the circumstances of the present case, has the effect of denting the prosecution story so much so that the same, together with non-examination of material witnesses constitutes a vital circumstance amongst others for granting the appellants the benefit of doubt.
>
> **42.** Although, mere defects in the investigative process by itself cannot constitute ground for acquittal, it is the legal obligation of the Court to examine carefully in each case the prosecution evidence *de hors* the lapses committed by the Investigating Officer to find out whether the evidence brought on record is at all reliable and whether such lapses affect the object of finding out the truth. Being conscious of the above position in law and to avoid erosion of the faith and confidence of the people in the administration of criminal justice, this Court has examined the evidence led by the prosecution threadbare and refrained from giving primacy to the negligence of the Investigating Officer as well as to the omission or lapses resulting from the perfunctory investigation undertaken by him. The endeavour of this Court has been to reach the root of the matter by analysing and assessing the evidence on record and to ascertain whether the appellants were duly found to be guilty as well as to ensure that the guilty does not escape the rigours of law. The disturbing features in the process of investigation, since noticed, have not weighed in the Court's mind to give the benefit of doubt to the appellants but on proper evaluation of the various facts and circumstances, it has

> transpired that there were reasons for which PW-2 might have falsely implicated the appellants and also that PW-3 was not a wholly reliable witness. There is a fair degree of uncertainty in the prosecution story and the courts below appear to have somewhat been influenced by the oral testimony of PW-2 and PW-3, without taking into consideration the effect of the other attending circumstances, thereby warranting interference."

77. The argument of the appellants that each of the eyewitnesses gave different names and different versions or omitted some names and gave a slightly different version of the incident would in fact lend more credence to their evidence. It would show that the witnesses have not been tutored. Reference in this regard is made to the decision of the Supreme Court in the case of ***Bharwada Bhoginbhai Hirjibhai v. State of Gujarat*** reported in ***(1983) 3 SCC 217*** at para 5 thereof.

> **"5.** It appears that the parents of PW 1 as well as parents of PW 2 wanted to hush up the matter. Some unexpected developments however forced the issue. The residents of the locality somehow came to know about the incident. And an alert woman social worker, PW 5 Kundanben, President of the Mahila Mandal in Sector 17, Gandhinagar, took up the cause. She felt indignant at the way in which the appellant had misbehaved with two girls of the age of his own daughter, who also happened to be friends of his daughter, taking advantage of their helplessness, when no one else was present. Having ascertained from PW 1 and PW 2 as to what had transpired, she felt that the appellant should atone for his infamous conduct. She therefore called on the appellant at his house. It appears that about 500 women of the locality had also gathered near the house of the appellant. Kundanben requested the appellant to apologize publicly in the presence of the women who had assembled there. If the appellant had acceded to this request possibly the matter might have rested there and might not have come to the court. The appellant, however, made it a prestige issue and refused to apologize. Thereupon the police was contacted and a complaint was lodged by PW 1 on September 19, 1975. PW 1 was then sent to the Medical Officer for medical examination. The medical examination disclosed that there was evidence to show that an attempt to commit rape on her had been

made a few days back. The Sessions Court as well as the High Court have accepted the evidence and concluded that the appellant was guilty of sexual misbehaviour with PW 1 and PW 2 in the manner alleged by the prosecution and established by the evidence of PW 1 and PW 2. Their evidence has been considered to be worthy of acceptance. It is a pure finding of fact recorded by the Sessions Court and affirmed by the High Court. Such a concurrent finding of fact cannot be reopened in an appeal by special leave unless it is established : (*1*) that the finding is based on no evidence or (*2*) that the finding is perverse, it being such as no reasonable person could have arrived at even if the evidence was taken at its face value or (*3*) the finding is based and built on inadmissible evidence, which evidence, if excluded from vision, would negate the prosecution case or substantially discredit or impair it or (*4*) some vital piece of evidence which would tilt the balance in favour of the convict has been overlooked, disregarded, or wrongly discarded. The present is not a case of such a nature. The finding of guilt recorded by the Sessions Court as affirmed by the High Court has been challenged mainly on the basis of minor discrepancies in the evidence. We do not consider it appropriate or permissible to enter upon a reappraisal or reappreciation of the evidence in the context of the minor discrepancies painstakingly highlighted by learned Counsel for the appellant. Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious :

"(*1*) 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.

(*2*) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprised. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(*3*) 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.

(*4*) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(*5*) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(*6*) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

> (*7*) A witness, though wholly truthful, is liable to be overawed by the court atmosphere and the piercing cross-examination made by counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. 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. In the case of ***Rammi v. State of MP*** reported in ***(1999) 8 SCC 649*** at para 24 thereof.

> **"24.** When an eyewitness is examined at length it is quite possible for him to make some discrepancies. No true witness can possibly escape from making some discrepant details. Perhaps an untrue witness who is well tutored can successfully make his testimony totally non-discrepant. But courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the court is justified in jettisoning his evidence. But too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny."

79. The arguments of Mr. Ganguly that the role of each of the accused particularly the appellants have not proved by the prosecution and hence his clients must be acquitted is equally unacceptable. In the case of ***Baban Shankar Daphal& Ors. v. The State of Maharastra***reported in ***2025 INSC 97***, it was held as follows:-

> "In this case, the testimony of the eyewitnesses was consistent on the critical facts:the presence of the accused at the scene, their involvement in the attack, and thevictim being beaten with sticks. The High Court underscored that the core elementsof their testimony remained unshaken under cross-examination and were supportedby other evidence.

80. On the proposition that the role played by each of the accused also need not be proved by the prosecution reference may be made to the paragraph 14 and 15 of the decision of the SC in the case of ***Parshuram v. State of M.P***. reported in. **2023 INSC 973.**

> "14. It could thus clearly be seen that the Constitution Bench has held that it is not necessary that every person constituting an unlawful assembly must play an active role for convicting him with the aid of Section 149 of IPC. What has to be established by the prosecution is that a person has to be a member of an unlawful assembly, i.e. he has to be one of the persons constituting the assembly and that he had entertained the common object along with the other members of the assembly, as defined under Section 141 of IPC. As provided under Section 142 of IPC, whoever, being aware of facts which render any assembly an unlawful assembly, intentionally joins that assembly, or continues in it, is said to be a member of an unlawful assembly.
>
> 15. Undisputedly, from the evidence of Chironji (PW-6) and Ramhet (PW-12), it is clear that the present appellants were members of the unlawful assembly. No doubt that there is no specific role attributed to the present appellants of assaulting the deceased Madan. However, since the appellants were members of the unlawful assembly, in view of the law laid down by this Court in the case of Masalti (supra), it is not necessary that such a person, for being convicted, must have actually assaulted the deceased."

81. It is equally well settled that proof beyond all reasonable doubts in some cases is not required for conviction in offences. Reference in this regard is made to ***Goverdhan & Anr. Vs State of Chattisgarh reported in 2025 INSC 47*** at para 18 and 20. Reference in this regard may also be made to the decisions of the ***State of Haryana Vs Bhagirath reported in (1999) 5 SCC Pg 96*** Para 9 &10 thereof and the case of ***Ramakant Rai Vs Madan Rai reported in (2003) 12 SCC Pg 395***, particularly Paragraph 23 and 25 thereof.

82. In so far as the defects in the investigation pointed out by Ld Counsel for the appellants, useful reference to the decision in the case of ***Munna Lal (supra):-***

> **28.** Before embarking on the exercise of deciding the fate of these appellants, it would be apt to take note of certain principles relevant for a decision on these two appeals. Needless to observe, such principles have evolved over the years and crystallized into 'settled principles of law'. These are:
>
> (a). Section 134 of Indian Evidence Act, 1872, enshrines the well-recognized maxim that evidence has to be weighed and not counted. In other words, it is the quality of evidence that matters and not the quantity. As a sequitur, even in a case of murder, it is not necessary to insist upon a plurality of witnesses and the oral evidence of a single witness, if found to be reliable and trustworthy, could lead to a conviction.
>
> (b). Generally speaking, oral testimony may be classified into three categories, viz.:
>
> (i) Wholly reliable;
>
> (ii) Wholly unreliable;
>
> (iii) Neither wholly reliable nor wholly unreliable.
>
> The first two category of cases may not pose serious difficulty for the court in arriving at its conclusion(s). However, in the third category of cases, the court has to be circumspect and look for corroboration of any material particulars by reliable testimony, direct or circumstantial, as a requirement of the rule of prudence.
>
> (c). A defective investigation is not always fatal to the prosecution where ocular testimony is found credible and cogent. While in such a case the court has to be circumspect in evaluating the evidence, a faulty investigation cannot in all cases be a determinative factor to throw out a credible prosecution version.
>
> (d). Non-examination of the Investigating Officer must result in prejudice to the accused; if no prejudice is caused, mere non-examination would not render the prosecution case fatal.
>
> (e). Discrepancies do creep in, when a witness deposes in a natural manner after lapse of some time, and if such discrepancies are comparatively of a minor nature and do not go to the root of the prosecution story, then the same may not be given undue importance.

> **42.** Although, mere defects in the investigative process by itself cannot constitute ground for acquittal, it is the legal obligation of the Court to examine carefully in each case the prosecution evidence *de hors* the lapses committed by the Investigating Officer to find out whether the evidence brought on record is at all reliable and whether such lapses affect the object of finding out the truth. Being conscious of the above position in law and to avoid erosion of the faith and confidence of the people in the administration of criminal justice, this Court has examined the evidence led by the prosecution threadbare and refrained from giving primacy to the negligence of the Investigating Officer as well as to the omission or lapses resulting from the perfunctory investigation undertaken by him. The endeavour of this Court has been to reach the root of the matter by analysing and assessing the evidence on record and to ascertain whether the appellants were duly found to be guilty as well as to ensure that the guilty does not escape the rigours of law. The disturbing features in the process of investigation, since noticed, have not weighed in the Court's mind to give the benefit of doubt to the appellants but on proper evaluation of the various facts and circumstances, it has transpired that there were reasons for which PW-2 might have falsely implicated the appellants and also that PW-3 was not a wholly reliable witness. There is a fair degree of uncertainty in the prosecution story and the courts below appear to have somewhat been influenced by the oral testimony of PW-2 and PW-3, without taking into consideration the effect of the other attending circumstances, thereby warranting interference.

83. The Evidence of the witnesses has been considered by this Court in the light of the above observations.

84. For the reasons as stated hereinabove, the appeals failed and hereby dismissed. No order as to costs.

85. Let the TCR along with judgment be returned to the Court below for information and necessary action.

86. Urgent photostat certified copy of this order, if applied for, be supplied to the parties as early as possible.

(*Rajasekhar Mantha, J.*)

I agree.

(*Ajay Kumar Gupta, J.*)