

**In the High Court at Calcutta
Criminal Appellate Jurisdiction
Appellate Side**

**Present:
The Hon'ble Justice Nadira Patherya
And
The Hon'ble Justice Asha Arora**

C.R.A 190 of 2006

- 1. *Bonomali Mondal (died during the pendency of the appeal)***
- 2. *Biswajit Mondal***
- 3. *Tapan Mondal***

...Appellants/accused.

Versus

***The State of West Bengal
...Respondent***

For the appellants: Mr. Milon Mukherjee
Mr. Sandipon Ganguly
Mr. Subhashis Dasgupta
Mr. Dipanjan Guha

For the State/respondent: Mr. Manjit Singh, P.P
Mr. Ranobir Roy Chowdhury
Mr. Pawan Kumar Gupta

For the de facto complainant: Mr. M. Mondal
Mr. Pinku Sarkar
Mr. Nasim Ahmed

Heard on: 19/8/2015, 20/8/2015, 26/8/2015, 31/8/2015 & 3/9/2015.

Judgment on: 30/9/2015

Asha Arora, J.:

1. The instant appeal is directed against the judgment and order dated 9th March, 2006 and 10th March, 2006 passed by the Additional Sessions Judge 3rd Court, Murshidabad in Sessions Trial No. 1 of July, 2001 arising out of Sessions Serial No. 81 of 1993 convicting the appellant nos. 1 and 3 for the offence punishable under Section 304 Part II read with Section 34 of the Indian Penal Code and the appellant no. 2 for the offence punishable under Section 304 Part II of the Indian Penal Code and sentencing the appellant no. 1 to suffer simple imprisonment for three years for the aforesaid offence while the appellant nos. 2 and 3 have been sentenced to suffer rigorous imprisonment for 10 years each. The appellant no. 2 has also been sentenced to pay a fine of Rs.10,000/- in default to suffer rigorous imprisonment for six months for the offence punishable under Section 304 Part II of the Indian Penal Code while the appellant no. 3 has been sentenced to pay a fine of Rs.5,000/- in default to suffer rigorous imprisonment for three months for the offence punishable under Section 304 Part II read with Section 34 of the Indian Penal Code (for short referred to as the I.P.C).

2. At this juncture it is significant to mention that during the pendency of the appeal one of the appellants namely, the appellant no. 1 Bonomali Mondal reportedly died. Accordingly, on the basis of his death certificate, the appeal abated as regards the aforesaid appellant Bonomali Mondal.

3. Prosecution case, bereft of unnecessary details is as follows:

On 12/3/91 at 07.45 hrs one Goutam Mondal (P.W 1) son of Uma pada Mondal lodged a written complaint at Berhampur Police Station stating that since long there has been dispute and litigation in respect of property between his father and uncle on one hand and the appellant no. 1 on the other. On 12/3/91 at about 6.30 a.m there arose a dispute over a plum tree which was situated on the 'ejmali' property. For making arrangement of a cooking space near the house for the marriage of Sankar Mondal, son of Anil Mondal (P.W 4), there was cutting of a small branch of the plum tree but the accused persons/appellants obstructed and started abusing in filthy language. They also threatened with 'heso', 'lathi' and 'sarki'. Pursuant to the dispute everyone proceeded towards the house and the plum tree including the *de facto* complainant's father and his two brothers. At that time the three accused persons/appellants took the *de facto* complainant's father/deceased victim within their grip. While the appellant nos. 1 and 3 caught hold of the victim and carried him towards the courtyard, appellant no. 2 Biswajit Mondal went to his house and brought a 'heso' which was struck in his abdomen in consequence of which the victim Uma pada Mondal was severely injured and the entrails of his abdomen came out. The injured victim was taken to Berhampore New General Hospital for treatment where he succumbed to the injuries on the same day at about 12.00 noon.

4. On the basis of the aforesaid written complaint (Exhibit 1), Berhampore P.S Case No. 70 of 1991 dated 12/3/91 under Section 326/34 of the I.P.C was initiated against the three accused/appellants. Investigation into the case culminated in the

submission of the charge-sheet under Section 304/34 of the I.P.C against the three accused persons/appellants.

5. The case being a sessions triable one was committed to the Court of Sessions Judge, Murshidabad wherefrom it was transferred to the Additional Sessions Judge 3rd Court, Murshidabad for trial and disposal.

6. The Trial Court framed charge under Section 304/34 of the I.P.C against the three accused/appellants. Being so arraigned, the accused persons/appellants pleaded not guilty to the indictment and claimed to be tried.

7. During the trial, prosecution examined 15 witnesses namely, P.W 1 Goutam Mondal, who is an ocular witness. The other eye witnesses to the incident are P.W 3 Netai Sarkar, P.W 4 Anil Mondal, P.W 5 Tiloka Sarkar, P.W 6 Aloka Sarkar and P.W 10 Shib Prosad Mondal. P.W 2 Bikram Dutta is the scribe of the F.I.R (Exhibit. 1). P.W 7 Ajoy Kumar Biswas is a formal witness to the inquest. P.W 8 Mohit Mondal is another formal witness to the seizure of the weapon of offence, blood stained earth and a branch of 'kul' tree. P.W 9 Debasis Mondal is a post occurrence witness. He is also a witness to the inquest. P.W 11 S.I Sankar Bhattacharya is the Investigating Officer. P.W 12 Dr. Chittaranjan Das is yet another formal witness who forwarded the post mortem report of the deceased and countersigned the same. P.W 13 Dr. K.K Mazumder held post mortem examination on the corpse of the deceased victim. P.W 14 Tarun Kumar Sarkar is also a formal witness. He is an employee of the record keeping section of

Berhampore New General Hospital who produced the original admission register of the patients from 11/3/91 onwards for the purpose of proving the relevant entry therein under serial no. 1819 dated 12/3/91 (Exhibit. 9) in respect of the admission of deceased victim while P.W 15 Dr. Amal Kumar Moitra is the Medical Officer of Berhampur New General Hospital who examined the victim and advised his admission. Besides the witnesses referred, prosecution relied on several documents which were tendered in evidence.

8. The defence version is one of innocence, false implication and complete denial of the prosecution story. Accused Biswajit Mondal/appellant no. 2 pursued the plea of alibi. In support of such specific plea five witnesses have been examined by defence including the appellant no. 2 himself (as D.W 4) and a number of documents have been exhibited.

9. After hearing the learned Counsel for the parties and upon consideration of the evidence on record the Trial Court passed the impugned judgment and order of conviction and sentence as aforesaid against all the three accused/appellants.

10. Aggrieved, the convicted accused/appellants preferred the present appeal.

11. While assailing the conviction of the appellants on multifarious counts, Mr. Milon Mukherjee the learned Senior Counsel appearing on their behalf submitted that the time, place and manner in which the incident in question occurred is doubtful. Referring to the charge framed by the Trial Court, Mr. Mukherjee

drew our attention to the omissions therein to mention the time and the actual place of occurrence of the alleged incident. The further submission is that the place of occurrence is not the courtyard as shown in the sketch map (Exhibit. 6) but the place where the plum tree is situated from where the victim was dragged to the courtyard where he was assaulted. It has also been contended that non-mention of the existence of the plum tree and the earthen/indigenous oven in the sketch map makes the prosecution case doubtful. The further argument of the learned Counsel for the appellants is that the presence of undigested food in the stomach of deceased as stated by the post mortem doctor (P.W 13) and his opinion that deceased had sustained injury within 3 hours of his taking meal belies the time of occurrence as stated by the prosecution. It has also been canvassed that from the evidence of P.W 1, son of deceased as well as from the evidence of the Investigating Officer (P.W 11) it is clear that the victim made a statement to the Investigating Officer who recorded the same but no such statement or dying declaration of the victim has been produced and the Bed Head Ticket of the victim has also not been produced by the prosecution so adverse presumption should be drawn in view of Clause (g) to Section 114 of the Indian Evidence Act. In support of such submission learned Counsel for the appellants placed reliance on the case of **Subhas Kamkar versus State of Bihar** reported in **1985 (2) Crimes 129 Paragraph 8**. It has also been argued that the cross-examination of P.W 3 reveals the presence of three 'haluikars' who were engaged in making the indigenous/earthen oven but they have not been examined as witnesses. Such suppression of independent witnesses makes the prosecution case suspicious. Further submission on behalf of the

appellants is that the seized weapon of offence was not produced in Court for identification by the Investigating Officer nor was it shown to the Medical Officer who held post mortem examination to enable him to opine whether the injuries on the person of the deceased could be caused by such a weapon. It has also been contended that failure on the part of P.W 1 to mention the name of his father's assailants to the doctor who examined him is a serious lacuna which affects the credibility of the prosecution case. Learned Counsel for the appellants argued that there is nothing in the F.I.R or in the evidence of the witnesses to show that appellant nos. 1 and 2 exhorted appellant no. 3 to bring the 'hesua' or to assault the deceased. In the absence of any such evidence showing common intention of the appellants, the conviction with the aid of Section 34 of the I.P.C is not sustainable. To fortify his submission in this regard Mr. Mukherjee referred to the case of **Ramashish Yadav and others versus State of Bihar** reported in **AIR 1999 Supreme Court 3830 (paragraph 3)**. Reference has also been made to the decisions reported in **AIR 1998 Supreme Court 2798 (paragraph 2)** in **Ajay Sharma versus State of Rajasthan** and **AIR 1955 Supreme Court 216 (paragraph 32 to 34)** in the case of **Pandurang and others versus State of Hyderabad**. Further submission is that the alleged ocular witnesses are all related to the deceased and are inimical to the appellants. Therefore their evidence cannot be relied upon in the absence of independent witnesses which though available to the prosecution were not examined. It has also been argued that Dr. D. Bhattacharya under whom the victim was admitted at Berhampur General Hospital ought to have been examined. Mr. Mukherjee also sought to impress upon us that the appellants have been falsely implicated

on account of a criminal case which the appellant no. 2 had filed against the *de facto* complainant and his father as well as against P.W 3, P.W 4, P.W 9 and P.W 10. Further contention on behalf of the appellants is that there are contradictions and discrepancies in the evidence of the witnesses *inter se* as well as in relation to their statement made before the Investigating Officer under Section 161 of Cr.P.C and also with reference to the contents of the F.I.R which renders the prosecution story doubtful. Referring to the plea of alibi taken by the appellant no. 2, another limb of argument advanced by the learned Counsel for the appellants is that the burden of proving commission of offence by the accused remains on the prosecution and would not be lessened by the mere fact that the accused adopted the defence of alibi. In support of such submission reliance has been placed on the decisions in the case of ***Jayantibhai Bhenkarbhai versus State of Gujarat*** reported in ***2002 Supreme Court Cases (Cri) 1873 (paragraph 19)*** and ***Jumni and others versus State of Haryana*** reported in ***2014 Cri.L.J 1936 (paragraph 24-27)***.

12. Repudiating the submissions on behalf of the appellants, Mr. Roy Chowdhury, the learned Counsel for the respondent/State countered that the weapon of offence was produced in Court and identified through P.W 8 Mohit Mondal but it was not produced before the Investigating Officer and the post mortem doctor. It has also been submitted that non-mention of the place and time of occurrence in the charge is not fatal to the prosecution case since no prejudice has been proved to have been caused to the appellants. On the point of non-production of the dying declaration of the victim, it has been argued on behalf of the State that Section

114(g) of the Indian Evidence Act will not come to the aid of the appellants since there is reliable and credit worthy evidence of the witnesses examined by the prosecution. Further submission on behalf of the State is that there is no anomaly with regard to the time and place of occurrence. The Learned Counsel for the State strenuously argued that the evidence of the post mortem doctor (P.W 13) who deposed in Court after a lapse of 10/11 years from the date of incident cannot prevail over the post mortem report dated 12/4/91 (exhibit. 8) and that the presence of undigested food in the stomach of deceased cannot conclusively determine the time of incident. Regarding the plea of alibi taken by accused Biswajit Mondal, learned Counsel for the State argued that in view of Section 103 of the Indian Evidence Act, it was for the accused/appellant to prove the same and there is no convincing evidence in support of the specific plea of alibi. To buttress his argument the learned Counsel for the State referred to the decision reported in **2009 (3) Supreme Court Cases (Cri) 431 (paragraph 46 to 48)** in the case of **Akbar Sheikh and others versus State of West Bengal**. Reference has been made to the decision in **Alamgir versus State (NCT, Delhi)** reported in **2003 Supreme Court Cases (Cri) 165 (paragraph 13)** to fortify the submission that the evidence of a witness if otherwise found to be creditworthy cannot be disbelieved merely because a portion of it was not available in his statement under Section 161 of the Cr.P.C. Learned Counsel for the State placed reliance on the decision reported in **(2012) 3 Supreme Court Cases (Cri) 685 (paragraph 57)** in the case of **Shyamal Ghosh versus State of West Bengal** in support of his submission that defective investigation cannot be a ground for acquittal of the accused.

13. Let us now come to the dispute regarding non-mention of the time and place of occurrence in the charge framed against the accused persons on 17/3/1999. The aforesaid charge reads thus:

“I, Shri A.K. Barua, Additional Sessions Judge 3rd Court, Murshidabad, hereby charge you 1. Bonomali Mondal 2. Biswajit Mondal, 3. Tapan Mondal as follows – That you, on or about the 12th day of March, 1991 at Boalia danga, P.S - Berhampore, district – Murshidabad in furtherance of the common intention of you all did commit culpable homicide not amounting to murder by causing the death of Umapada Mondal and thereby committed an offence punishable under Section 304/34 of the Indian Penal Code and within my cognizance.”

14. It is evident that the time and the actual place of occurrence have not been mentioned in the charge as required under Section 212 of the Code of Criminal Procedure (for short referred to as the Cr.P.C). The relevant provisions in the Cr.P.C dealing with the effect of such an omission in the charge are Section 215 and Section 464. Section 215 of the Cr.P.C provides as follows:

“No errors in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.”

15. As per Section 464 of the Cr.P.C **“no finding, sentence or order by a Court of competent jurisdiction shall be deemed**

invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.”

16. In our present case there is nothing on record to show that the accused persons/appellants were in fact misled or prejudiced by such an omission to mention the time and the exact place of the incident. The prosecution witnesses were cross-examined at length on behalf of the accused persons which shows that they clearly understood the details of the charge against them. The fact that accused persons defended themselves by cross-examining the witnesses and appellant no. 2 Biswajit Mondal adduced evidence in support of his specific plea of alibi goes to show that the accused persons were aware of the details of the charge against them and non-mention of the time and the place of occurrence in the charge has not occasioned a failure of justice. Therefore the argument in this regard on behalf of appellants is wholly devoid of merit.

17. This brings us to the question as to whether the death of the victim was homicidal in nature. To prove the homicidal death of the victim, prosecution relied on the ocular evidence of six witnesses and the medical evidence of P.W 13 Dr. K.K Mazumder who held post mortem examination on the corpse of the victim. The Medical Officer (P.W 13) testified in his evidence that on 12/3/91 he held post mortem examination on the dead body of Umapada Mondal being brought and identified by Home Guard 224, Govinda Singh in connection with Berhampur P.S Case No.

70/91 dated 12/3/91. Deposing with reference to the post mortem examination report (Exhibit 8), P.W 13 found one sharp cutting incised injury on the lower left flank of the abdominal cavity measuring 6" X 4". The left kidney was also found to be incised. In the opinion of the post mortem doctor the cause of death was shock and haemorrhage due to the injuries mentioned, being ante mortem and homicidal in nature. According to P.W 13 the injuries might be caused by sharp cutting instrument such as 'heso' and 'pasli'. No suggestion was given to P.W 13 in cross-examination disputing the nature of injuries or the weapon of assault with which such injuries may have been caused. The opinion of the post mortem doctor regarding the homicidal nature of death and the weapon of assault used for causing such injuries remained unassailed in cross-examination. Therefore the argument on behalf of the appellants that the weapon of offence was not shown to the Medical Officer is of no avail. P.W 15 Dr. Amal Kumar Moitra is the doctor who first examined the victim and advised his admission at Berhampur General Hospital. Deposing in conformity with the post mortem doctor on the point of injuries, on examination P.W 15 found one stab wound on the left side of the abdomen measuring 12" X 4" abdominal cavity through which the intestine was coming out. He opined that such injury may be caused by sharp cutting weapon like 'heso', 'knife', 'chhora' or 'bhojali'. The aforesaid evidence of P.W 15 remained unchallenged in cross-examination. On the point of homicidal death of the victim, the ocular evidence of the witnesses is fully corroborated by the medical evidence on record. We are therefore convinced regarding the homicidal nature of death of the deceased victim.

18. Let us now evaluate the evidence of several eye witnesses who have been examined in support of the prosecution case. P.W 1 Goutam Mondal is the son of deceased who narrated the incident in the following manner: **“Late Umapada Mondal was my father. He was murdered on 12/3/91 at about 6.30 a.m. The said murder took place in the courtyard of the house of Bonomali Mondal. That date was fixed for the marriage of Sankar Mondal, son of Anil Mondal in the village Boaliadanga. Arrangement was being made for cooking in connection with the said marriage in the ejamli land under a ‘Kul’ tree adjacent to the courtyard of Bonomali Mondal. One branch of the said ‘Kul’ tree was truncated either by some persons or relatives of Bonomali Mondal which was causing disturbance and which was resisted by Bonomali Mondal and his two sons named Tapan Mondal and Biswajit Mondal. Altercation took place between the two parties and threatening was given by Bonomali Mondal and his two sons at that time. Thereafter, all of us including myself went to the site where the ‘Kul’ tree stands. Thereafter my father was forcibly taken by Bonomali and his son Tapan Mondal into the courtyard of his house. Thereafter, Bonomali Mondal told to bring the ‘heso’ from the house quickly and Biswajit complied with that order immediately. Biswajit Mondal assaulted my father with that ‘heso’ into the abdomen of my father as a result of which my father sustained bleeding injury. Thereafter ‘halla’ started and my father was taken to New General Hospital Berhampore for treatment of his injuries.....”.**

19. Leading us through the cross-examination of P.W 1, learned Counsel for the appellants referred to the contradictions in the evidence of this witness in relation to the contents of the F.I.R wherein it has not been mentioned that Biswajit brought the 'heso' from the house being told by Bonomali. In this context it is significant to mention that the F.I.R need not contain an exhaustive account of the incident. It is not the requirement of law to mention every minute detail in the F.I.R. In our present case the F.I.R was lodged on the same day with utmost promptitude within less than two hours of the incident revealing the names of the three accused persons including the genesis of the incident. Even the names of two eye witnesses find place in the F.I.R. We cannot expect a son overtaken by grief to give better particulars. The possibility of P.W 1 inventing a false story at that juncture trying to implicate the accused is absolutely ruled out. The fact that the F.I.R did not contain all the overt acts attributed to each of the accused which is required to be narrated and proved at the trial through the witnesses cannot be a ground for rejecting the prosecution case nor can the evidence of the witnesses who have stated the details of the incident including the overt acts attributed to the accused be thrown out on the ground of improvement or embellishment. There is also no substance in the argument that the presence of P.W 1 at the site of occurrence is doubtful since he stated in his cross-examination that he was sleeping at that time. It is a well-settled rule of appreciation of evidence that Court should not draw any conclusion by picking up an isolated portion from the testimony of a witness without advertent to the statement as a whole. The meaning of the portion referred would be clear from the preceding sentence wherein P.W 1 stated thus:

“My father took his morning tea and eased himself in the relevant morning. I was sleeping at that time.” The sentence referred does not indicate in any manner that P.W 1 was sleeping at the time of the incident. Searching and extensive cross-examination of this witness did not yield any fruitful result to the accused/appellants. Being quizzed in cross-examination P.W 1 categorically and unfalteringly stated that he was present at the P.O at the time of the incident but did not dare to help his father due to panic. This witness specifically denied the suggestion that accused Biswajit Mondal came to his house from his place of posting at Jammu after the alleged incident. Nothing could be elicited in the cross-examination of P.W 1 to belie his sworn version of the incident which withstood the test of incisive cross-examination.

20. The evidence of P.W 1 is corroborated by the testimony of P.W 3 Nitai Sarkar who deposed in the same voice regarding the incident by stating in his evidence that Bonomali and Tapan took Umapada forcibly in the courtyard of the house of Bonomali whereafter Bonomali called Biswajit Mondal who came with ‘heso’ and assaulted Umapada in the abdomen with ‘heso’. The name of this witness finds place in the F.I.R. His presence at the P.O at the time of incident is beyond the pale of suspicion. P.W 3 successfully withstood the test of cross-examination. P.W 3 is not related to the deceased. He is not an interested witness. Nothing has emerged in the cross-examination of P.W 3 to doubt the creditworthiness of his evidence. No motive could be assigned to him for deposing falsely against the accused and in favour of the *de facto* complainant. He is an independent witness whose evidence inspires confidence. The

name of Anil Mondal (P.W 4) also figures in the F.I.R as an eye witness. This witness testified in his evidence that on the date of incident preparation was on for the construction of an indigenous oven in the courtyard in the ejmali land under a 'Kul' tree. Over this issue there was dispute between him and Bonomali. Umapada intervened by stating that no harm would be caused if the branch of the plum tree is truncated. Bonomali then dragged Umapada and took him to his house. Biswajit, the youngest son of Bonomali gave a blow with 'heso' in the abdomen of Umapada. It has surfaced in the cross-examination of P.W 4 that there was dispute between accused Bonomali and deceased with regard to the ownership of the plum tree. It has also emerged in the cross-examination of P.W 4 that he is one of the accused in a case filed by accused Biswajit prior to the incident. Learned Counsel for the appellants pointed out that the name of accused Tapan Mondal does not find place in the evidence of P.W 4. Even the place of occurrence has shifted according to his evidence. An attempt has been made to impress upon us that P.W 4 deposed falsely out of grudge in view of the criminal case filed against him by accused Biswajit Mondal. In this context it is worthwhile to mention that if a witness is found to be true and reliable, his testimony cannot be thrown out by branding him as an inimical witness. We cannot lose sight of the fact that animus is a double edged weapon which cuts both ways. Just as it can be a ground for false implication, it can also be a ground for assault. There is also no substance in the argument that the evidence of P.W 4 cannot be relied upon in view of the discrepancies in relation to the evidence of P.W 1 and P.W 3. By now it is a well-settled proposition of law that while appreciating the evidence of a witness, minor discrepancies on trivial matters

without affecting the core of the prosecution case, ought not to prompt the Court to reject the evidence in its entirety.

21. P.W 5 Tiloka Sarkar is another independent ocular witness who corroborated in toto the version of P.W 1 and P.W 3 regarding the incident. She categorically stated in her evidence that Bonomali and his son Tapan Mondal dragged Umapada Mondal and took him to the courtyard of their house. Being asked by Bonomali and his son Tapan, another son Biswajit came with a 'heso' and assaulted Umapada in his abdomen. Referring to the contradictions in the evidence of P.W 5 in relation to her statement under Section 161 of Cr.P.C it is the contention on behalf of the appellants that the evidence of this witness is not worthy of credence. In the case of ***Alamgir versus State (NCT, Delhi)*** reported in ***2003 Supreme Court Cases (Cri) 165*** cited on behalf of the State/respondent it has been held by the Apex Court that if a piece of evidence was not available in the statement of a witness under Section 161 of Cr.P.C, it would not amount to rejection of an otherwise creditworthy and acceptable evidence. In our present case no plausible motive could be attributed to P.W 5 for deposing falsely against the accused persons. There is no reason to disbelieve her evidence. P.W 6 Aloka Sarkar is the wife of P.W 3. Her evidence is in conformity with the evidence of the other ocular witnesses. She categorically stated in her evidence that Bonomali and Tapan Mondal pulled Umapada Mondal and took him to their courtyard. She further stated that Bonomali asked Biswajit to bring 'heso' who brought the same and assaulted Umapada with it in his abdomen. It is true that this piece of evidence of P.W 6 has been pointed out as a contradiction in relation to his statement

under Section 161 of Cr.P.C. On this count alone the entire evidence of P.W 6 cannot be thrown out as untrustworthy. P.W 10 Shib Prosad Mondal is the brother of the deceased. We get from his evidence that Tapan and Bonomali dragged Umapada to their courtyard. At that time Biswajit Mondal brought 'heso' from his house and assaulted Umapada in his abdomen.

22. There is no merit in the argument that the evidence of P.W 1 and P.W 10 cannot be relied upon since they are closely related to the deceased. The Apex Court has time and again reiterated that relationship of a witness with deceased is no ground to reject his evidence. On the contrary, a close relative of the deceased would normally be most reluctant to spare the real murderer and falsely implicate an innocent person. In the given facts of the present case P.W 1 and P.W 10 are but natural witnesses whose evidence instils confidence.

23. We are also not impressed with the argument that due to non-examination of the 'haluikars' the prosecution case has become doubtful. It is not the requirement of law that prosecution must examine all the eye witnesses. Under Section 226 of the Cr.P.C it is for the Prosecutor to decide by what evidence he proposes to prove his case. In our present case we have the evidence of several eye witnesses who have consistently testified with regard to the incident and the culpability of the accused/appellants.

24. The ocular evidence of P.W 1, P.W 3, P.W 4, P.W 5, P.W 6 and P.W 10 is convincing, credible and trustworthy. The role of the

accused persons/appellants in the offence stands clearly established. We get from the evidence of P.W 1, P.W 3, P.W 5, P.W 6 and P.W 10 that Bonomali Mondal and Tapan Mondal dragged the deceased to the courtyard of their house while Biswajit Mondal struck him with a 'heso' in his abdomen. The fact that P.W 4 omitted to mention the name of Tapan Mondal does not belie or falsify the evidence of the aforesaid five eye witnesses. We cannot lose sight of the fact that when an eye witness is examined in Court after several years from the date of incident it is quite natural that there would be some omissions and discrepancies in his evidence. In our present case P.W 4 adduced evidence on 4/7/2001 relating to an incident dated 12/3/91. Even when truthful witnesses give evidence, there can be contradictions and discrepancies on account of differences in powers memorization, perception and narration. Errors of memory may occur due to lapse of time. It is the totality of the evidence of witnesses that has to be taken into consideration. In our case in hand the manner of assault, the weapon used and the part of the body of the victim targeted as narrated by the eye witnesses stand fully corroborated by the medical evidence of the post mortem doctor (P.W 13) as well as by P.W 15 who first examined the victim.

25. On the question of applicability of Section 34 of the I.P.C we have the clear and categorical evidence of several eye witnesses that accused Bonomali Mondal and Tapan Mondal dragged the victim to the courtyard of their house and accused Biswajit Mondal struck him with 'heso' in his abdomen. Though the overt act of assaulting the victim is attributed to accused Biswajit Mondal, the evidence on record convincingly proves that the other two accused

shared the common intention with Biswajit Mondal by dragging the victim forcibly to the courtyard of their house to facilitate the assault upon him by Biswajit Mondal. The decision in ***Ramashish Yadav and others versus State of Bihar (AIR 1999 Supreme Court 3830)*** relied upon by the appellants differs on facts from our case in hand. In the case law referred, it was held that the mere fact that the other two accused caught hold of the victim, whereafter the assailants came with 'gandasa' it cannot be said that the other two accused shared the common intention with the assailants. In our case in hand, as already discussed in the foregoing paragraphs, accused Bonomali and Tapan not only caught hold of the victim, they dragged him forcibly to the courtyard of their house to facilitate the assault upon him by Biswajit Mondal. In the aforesaid case law the Apex Court held that the common intention implies acting in concert and the existence of a prearranged plan is to be proved either from the conduct or from the circumstances or from any incriminating facts. In our case in hand common intention is proved from the circumstances and the incriminating facts herein before discussed. It has also been held in the case law referred that the common intention can also be developed at the spur of the moment as in our present case. In order to bring a case under Section 34 of the I.P.C it is not necessary that there must be a prior conspiracy or premeditation. The common intention can be formed in the course of occurrence. In the case of ***Lallan Bhai versus State of Bihar*** reported in ***AIR 2003 Supreme Court 333*** it has been held that the requirement of statute is sharing the common intention upon being present at the place of occurrence. Mere distancing from the scene cannot absolve the accused. The decision in ***Ajay Sharma's***

case reported in **AIR 1998 Supreme Court 2798** also finds no application on facts to our case in hand. In the case law cited the accused caught hold of deceased and exhorted the main accused to strike him. On such exhortation the main accused inflicted 'Kirpan' blows on the person of deceased. It was held that the appellant only said 'Maro' which did not mean 'to kill', therefore, it cannot be said that he had shared the common intention to kill the victim. In our present case though exhortation by the other two appellants could not be convincingly proved, it can be gathered from the circumstances appearing in evidence that the other two accused shared the common intention with the main accused/assailant of the deceased. For the same reasons the decision in **Pandurang and others versus State of Hyderabad** reported in **AIR 1955 Supreme Court 216** is of no help to the appellants.

26. Learned Counsel for the appellants argued that there is conflict between the ocular and medical evidence on the point of time of the incident. In this context our attention has been drawn to the cross-examination of P.W 13 Dr. K.K. Mazumder who stated therein that he found undigested food in the stomach so it can be said that the deceased sustained injury within 3 hours of his taking meal. Reference has also been made to the evidence of P.W 15 Dr. Amal Kumar Moitra who first attended the victim. Being quizzed in cross-examination this Medical Officer stated that the age of the injury was within four hours. The contention raised at the Bar that in view of the medical evidence on record the time of incident as stated by P.W 1, P.W 3, P.W 4 and P.W 10 belies the prosecution case is wholly devoid of merit. The reason is not far to seek. It is a

well settled proposition of law that the evidence of eye witnesses will prevail in case of inconsistency between medical and ocular evidence. The value of medical evidence is only corroborative. The fact that undigested food was found in the stomach of deceased cannot determine the time of incident. The time taken normally for digesting food would depend upon the quality and quantity of food, atmospheric condition, the digestive capacity of a person and various other factors. Therefore merely on this score the evidence of the ocular witnesses cannot be disbelieved. It is trite law that where the eye witnesses account is found credible and trustworthy, hypothetical answers of medical witnesses or medical opinion pointing to alternative possibilities cannot be accepted as conclusive.

27. Equally unacceptable is the submission on behalf of the appellants that the victim did not mention the name of his assailant to P.W 15 Dr. Amal Kumar Moitra. Mentioning or non-mentioning the name of assailant in the injury report is not decisive. The duty of a doctor is to save a patient. He is not expected to elicit from the injured or from those who brought him about the identity of the assailant.

28. Non-production of the seized weapon of offence for identification by the Investigating Officer (P.W 11) is an omission which is certainly not sufficient to put the prosecution case out of Court. The seized weapon of offence ('heso') was produced in Court and identified by P.W 8 Mohit Mondal, a witness of seizure and marked as material exhibit II collectively along with the seized blood stained earth and a branch of the plum tree. It is true that

the seized weapon of offence ought to have been produced before the Investigating Officer for identification by him in course of his evidence but failure to do so does not affect the credibility of the prosecution case.

29. Reference to the case of Subhas Kamkar versus State of Bihar reported in 1985 (2) Crimes 129 (paragraph 8) with regard to Section 114 (g) of the Indian Evidence Act is also of no avail to the appellants. Learned Counsel for the appellant pointed out that the evidence of P.W 1 and P.W 11 reveals that the statement of the victim was recorded by the Investigating Officer but the said statement was not produced. Further, the Bed Head Ticket of the victim was also not produced and Dr. D. Bhattacharya under whom the victim was admitted has not been examined. Therefore in view of Section 114 (g) of the Indian Evidence Act an adverse inference should be drawn against the prosecution. Under Section 114 (g) of the Indian Evidence Act the Court may presume that evidence which could be and is not produced would, if produced, be unfavourable to the person who withholds it. Under this section the Court has discretion on facts of each case to draw presumptions of facts. In the decision referred the question arose whether reliance could be placed on the sole testimony of P.W 5. It was observed that the evidence of this witness suffered from several blemishes so it was not safe to place any reliance on her evidence. It was further observed that she was a highly interested witness so it was not safe to base the conviction on her evidence. In this backdrop and in view of the facts of the particular case it was held that the dying declaration of deceased Ram Chandra which was a very important piece of evidence ought to have been brought on

record and from its non-production adverse inference has to be drawn against prosecution that the document was withheld only because it did not support the prosecution case. Furthermore, the document was looked into and it gave a different picture. In the circumstances the learned Single Judge of Patna High Court set aside the conviction and sentence of the appellants. Evidently the decision referred is in no way similar to our present case on facts, where we have credible and convincing evidence of several eye witnesses who deposed unequivocally and consistently regarding the incident. On the face of such unimpeachable and unassailable evidence and in view of the facts of the case we are not inclined to exercise our discretion for drawing an adverse inference against prosecution due to non-production of the statement of the victim and the bed head ticket and non-examination of the Medical Officer under whom the victim was admitted at Berhampur New General Hospital.

30. On the point of lapses in the investigation as referred on behalf of the appellants, the law on this issue is well settled that defects in investigation cannot be a ground for acquittal of the accused. So, failure to send the seized weapon of offence to Forensic Science Laboratory in the circumstances of the case is no more than a deficiency in the investigation and such deficiency does not lead to the conclusion that prosecution case is unworthy of credence.

31. Coming to the specific defence of alibi taken by accused Biswajit Mondal, we find that in support thereof five witnesses including the accused himself have been examined. The foregoing

discussion leads to the inevitable conclusion that prosecution succeeded in proving its case beyond any shadow of doubt. In view of Section 103 of the Indian Evidence Act it is now incumbent on the accused taking the plea of alibi to prove it with absolute certainty so as to exclude the possibility of his presence at the place and time of occurrence. In his evidence as D.W 4 accused Biswajit Mondal stated that in the year 1991 he was posted at Srinagar in 14 Wireless Experimental Unit. From 11/3/91 to 30/3/91 he took leave from his duty. Accused Biswajit Mondal categorically stated in his evidence that he started his journey from Jammu station by Jammu Delhi Mail at 7.00 p.m on 10/3/91. On 11/3/91 the said train reached Delhi at about 4.30 a.m. Thereafter he availed the Kalka Mail at 6.30 a.m on 11/3/91. On 12/3/91 he alighted from the train at 4.00 a.m at Asansol. From Asansol he went to Suri by Taxi and therefrom by bus to Church More, Berhampur. According to D.W 4 he reached Church More, Berhampore at 8.30 a.m on 12/3/91. D.W 4 found Netai Das a rickshaw puller (D.W 2) who took him to his village Boalidanga. It is the assertion of D.W 4 that when he reached his village at about 9.30 a.m the incident was over. D.W 5 C.S. Chowdhury is the Junior Commissioned Officer attached to 14 Wireless Experimental Unit at Srinagar through whom the Leave Certificate of accused Biswajit Mondal has been proved but no iota of document is forthcoming in support of the time consumed for the journey as mentioned by him in his evidence. D.W 4 admitted in his cross-examination that he received concessional voucher warrant from his employer for undertaking the journey to his native place. In reply to such a query in cross-examination D.W 4 gave out that the warrant has been retained by the Railway Officials at the exit gate

of the station and he did not collect its copy from his office. The argument on behalf of appellants that prosecution could have called for the required documents from the concerned office is noted only to be rejected for the simple reason that the burden rests heavily on the accused to prove with absolute certainty the defence taken by him that he was not present at the place and time of occurrence. In **Jayantibhai's case (2002 Supreme Court Cases (Cri) 1873)** relied upon by the appellants there was overwhelming defence evidence adduced by the accused appellant in support of his plea of alibi by reason of which a reasonable doubt was created in the prosecution case so far as the participation of the accused/appellant in the incident was concerned. In the decision referred, it was observed by the Apex Court that the accused-appellant, from the very beginning, no sooner he learnt of the accusation against him, took the defence of alibi by informing the necessary facts to the Investigating Officer on 8/7/1989 itself (the incident took place on 6/7/1989). Thereafter, this plea of alibi had been consistent and reflected in several documents of undoubted veracity. In the said case there was supporting documentary evidence of unimpeachable veracity adduced in support of the defence plea. This is clearly and conspicuously wanting in our case in hand. There is no documentary evidence to substantiate the *ipsi dixit* of D.W 4 with regard to the train journey and bus journey alleged to have been undertaken by him on the date and time mentioned by him so as to completely exclude the possibility of his presence at the time and place of occurrence. In our instant case the presence of the accused at the site of occurrence has been established satisfactorily by the prosecution through convincing and credible evidence. The

counter evidence adduced by the accused/appellant Biswajit Mondal to the effect that he was elsewhere at the time of occurrence is not of such a quality and of such a standard that the Court may entertain some reasonable doubt regarding his presence at the time and place of occurrence. The evidence of D.W 1, D.W 2 and D.W 3 is far from credible and convincing. D.W 1 Debu alias Dibaker Dafadar is a co-villager whose presence at the place of occurrence at the time mentioned is doubtful. He testified in his evidence that 12/13 years ago in the month of Falgoon at about 7.00 a.m while he was proceeding towards his sister's house he found Bonomali Mondal altercating with Anil Mondal. Umapada Mondal, Mohini Mondal, Bhadu Mondal, Joy Mondal and Nripen Mondal came to the P.O with deadly weapon like 'jhaba', 'da', 'pattangi'. D.W 1 further stated that during this altercation Umapada sustained injury under the 'kul' tree which is inside the house of Netai Sarker. He (D.W 1) also stated that Biswajit Mondal was not in his house at the relevant time. It has emerged in the cross-examination of D.W 1 that he left his house for the field at 6.00/7.00 a.m in the morning and his house is in the northern extremity of the village while Bonomali's house is in the Southern extremity. He further gave out that his land is also situated in the northern extremity of the village. So how could he have been at the place of occurrence at the relevant time as claimed by him? Being quizzed in cross-examination D.W 1 could not say the Bengali month two months ago but he accurately mentioned that the incident occurred in the month of Falgoon. Evidently he is a tutored witness whose testimony is not worthy of credence. D.W 2 Netai Das is a rickshaw puller who asserted that about 12/13 years ago he took Biswajit Mondal in his rickshaw from Church More

Berhampore to Boaliadanga at about 8.00/8.30 a.m and it took one and half hours to reach the village. He also stated that when he was unloading the luggage from the rickshaw he heard hue and cry and came to know that Umapada has been injured. Through D.W 2 accused/appellant Biswajit Mondal sought to prove that on the date of incident he reached Church More Berhampore at about 8.00/8.30 a.m but on query in cross-examination D.W 2 stated that he has no knowledge regarding the date, month and year. It is indeed incredible and it may not even be expected of a rickshaw puller, an illiterate person (who gave his L.T.I on his deposition) to state the relevant timing and the sequence of events with such exactitude after a lapse of more than 12 years from the date of incident. The evidence of D.W 2 is nothing but a tutored impact which cannot be relied upon. D.W 3 Dilip Mondal is another such unreliable witness. This witness, a co-villager of accused tried to corroborate the evidence of the rickshaw puller by stating that on hearing about the murder of Umapada he had been to the house of Netai Mondal. While returning, on the way he met the rickshaw puller Netai who was carrying Biswajit in his rickshaw and it was about 9.00/9.30 a.m. Being quizzed in cross-examination D.W 3 could not say the date, month and year of occurrence nor could he say from whom he heard about the murder but surprisingly he could state the relevant time of arrival of accused Biswajit with such accuracy and precision after a long lapse of more than 12 years. The evidence of D.W 3 is far from believable and trustworthy. We therefore unhesitatingly hold that the accused/appellant Biswajit Mondal failed to establish his plea of alibi. Having reached this conclusion we find that the decisions in ***Jayantibhai's case (2002 Supreme Court Cases (Cri) 1873)*** and

the one in ***Jumni and others versus State of Haryana*** reported in **2014 Cri.L.J 1936** are of no help to the appellants being distinguishable on facts from the present case.

32. In the ultimate analysis, the inevitable conclusion that necessarily follows is that the accused/appellants failed to make out any case for interference with the impugned judgment and order of conviction and sentence passed by the Trial Court.

33. Consequently the appeal is dismissed.

34. The appellants Biswajit Mondal and Tapan Mondal are directed to surrender before the Trial Court within one month from this date to serve out their sentence in default of which the Trial Court shall take appropriate steps in accordance with law for execution of the sentence.

35. L.C.R along with a copy of judgment shall be sent immediately to the Trial Court for intimation and necessary action.

36. Urgent photostat certified copy of this judgment, if applied for, shall be given to the parties subject to compliance of requisite formalities.

(Asha Arora, J.)

(Patherya, J.)

I agree.