

**CRIMINAL APPEAL**

**Present: The Hon'ble Justice Debiprasad Sengupta**

**And**

**The Hon'ble Justice PrabhatKumarDey**

**Judgment on: 24.03.2010**

**C.R.A. No. 245 of 1999**

**RAHIT HAZRA & OTHERS**

**Versus**

**STATE OF WEST BENGAL**

**POINTS:**

REASONABLE DOUBT -Delay in filing First Information Report without explanation-Deposition of witnesses after five years-No names of assailants revealed before Inquest Officer-Non production of seized articles before Court whether court can draw adverse presumption-Contradictory statements made by eyewitness before Inquest Officer -Sentence passed whether correct-Indian Penal Code, 1860 Ss.34, 302 -Code of Criminal Procedure ,1973 S.161.

**FACTS:**

A case was registered on the basis of a complaint lodged by the father of the deceased. In the First Information Report it was alleged that victim and his friend were returning home by their respective bicycles when they were detained by six accused persons near a culvert. The accused persons dragged the victim to a nearby paddy field and assaulted him with fists and blows. Accused had tied a rope around the neck of the victim and pulling it in the opposite direction. Two of the accused assaulted the victim by iron rod and lathi while the other two caught hold of legs of the victim. When the people raised hue and cry, the accused persons fled away from the spot. P.W. 1

with the help of P.W. 4 untied the nylon rope from the neck of the deceased. He was taken to the hospital by an auto rickshaw where he died after sometime.

Charge was framed against the accused appellants under Section 302 read with Section 34 of the Indian Penal Code.

Appeal was preferred against the judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Alipore who convicted the accused appellants under Section 302 read with Section 34 of the Indian Penal Code.

**HELD:**

The FIR could not have been registered at 23.55 hours in view of the evidence of P.W. 3, who stated in his evidence that he had been to the police station with P.W.1 at 1.45 A.M. on the night of 20.11.1992. Although the case was registered on 20.11.1992, the same was received by the learned Magistrate on 27.11.1992, i.e. 7 days after registration of such FIR. No explanation was offered from the side of the prosecution regarding such delay thereby giving sufficient time and opportunity to the prosecution party, who are inimical to the accused, to setup a concocted and distorted version of the occurrence.

Para-14

The incident took place in 1992 and the witnesses deposed in Court in 1997 and as such it was quite natural that after a lapse of about five years there would be some minor contradiction in their evidence.

Para-30

Although inquest was held in presence of witnesses, who claimed themselves as eyewitnesses, names of the assailants were not disclosed before the Inquest Officer. On the contrary, it was stated before the Inquest Officer that the victim was assaulted by some unknown persons. Articles were seized by the police. But not a single item was produced in court. Weapon of assault, namely, the

iron pipe was allegedly recovered pursuant to confessional statement of one of the accused persons, but such statement was not signed by the accused. The iron pipe, which was seized as weapon of assault, was not produced in court. Some wearing apparels, which were claimed to be that of the deceased, were also seized by the police. But those wearing apparels were neither sent to FSL nor it was produced in court. Merely because of non-production of seized articles in court the prosecution case cannot be disbelieved. But, both oral and documentary evidence helps the court to come to a conclusion. When the articles were not produced in court, court can draw adverse presumption. Para-31

This is a case in which ocular version of the eyewitnesses does not fit in with the medical evidence. During cross-examination the eyewitnesses were confronted with their previous statements recorded by the police under Section 161 Code of Criminal Procedure to indicate that they did not make such statement as eyewitnesses while examined by the Investigating Officer. Though each of the said witnesses denied such suggestion, the Investigating Officer in his cross-examination had admitted that none of those witnesses had stated before him about seeing the assault or attack by the accused persons. The prosecution could not prove its case beyond reasonable doubt.

Para 32 to 34

**CASES CITED:**

- 1) Ramesh Baburao Devaskar Vs State of Maharashtra (2009) 1 SCC (Cri) 212
- 2) Bachhu Narain Singh Vs Naresh Yadav 2005 SCC (Cri) 805
- 3) Jagdish Murav v. State of U.P.
- 4) Motilal & Another Vs State of Rajasthan (2009) 3 SCC (Cri) 444

5) Balaka Singh & Others Vs The State of Punjab AIR 1975 SC 1962

6) Sri Niwas Vs Ram Bharosey & Others 1994 CRI L. J. 1985

7) Syed Ibrahim Vs The State of AP JT 2006(6) SC 597

8) Podda Narayana Vs State of AP AIR 1975 SC 1252

For the Appellants : Mr. Sekhar Basu,  
Mr. Biplab Mitra,  
Mr. Arindam Sen,  
Ms. Trina Mitra,

For the State : Mr. A. Goswami,  
Ms. Minoti Gomes,  
Mr. Pinaki Bhattacharya,

#### **THE COURT:**

1) This appeal is preferred against the judgment and order of conviction and sentence dated 27.07.1999 and 28.07.1999 respectively passed by the learned Additional Sessions Judge, Alipore in Sessions Trial No. 1 (6) of 1997 thereby convicting the accused appellants under Section 302 read with Section 34 of the Indian Penal Code and sentencing each of them to suffer rigorous imprisonment for life and to pay a fine of Rs.500/- each, in default, to suffer rigorous imprisonment for a further period of six months.

2) Charge was framed against the accused appellants under Section 302 read with Section 34 of the Indian Penal Code and on conclusion of trial, they were convicted as stated above.

3) The prosecution case, in short, is that Bishnupur P.S. Case No. 345 Dated 20.11.1992 was registered on the basis of a complaint lodged by P.W. 1, Dharendra Nath Mondal, the father of the deceased. In the First Information Report it was alleged that victim Debal and his friend, Sasadhar

Mondal (P.W. 4) were returning home by their respective bicycles at about 7 P.M. on 20.11.1992, when they were detained by six accused persons near a culvert. The accused persons dragged the victim Debal to a nearby paddy field and assaulted him with fists and blows. P.W. 4 immediately rushed to the house of P.W. 1 by his cycle and reported the incident. P.W. 1 thereafter along with Nemai Naskar (P.W.5), Sarat Chandra Mondal (P.W.7), Provash Naskar (P.W.8) and many others rushed to the paddy field. With the help of torch light of Nemai Naskar, the informant saw that accused Gunadhar and Madhab were pulling a rope in the opposite directions around the neck of Debal. Accused Rohit and Sankar assaulted the victim by iron rod and lathi while Suresh and Sunder caught hold of legs of the victim. When the people raised hue and cry, the accused persons fled away from the spot. P.W. 1 with the help of P.W. 4 untied the nylon rope from the neck of the deceased. He was taken to the hospital by an auto rickshaw where he died after sometime.

4)To prove its case the prosecution examined as many as 16 witnesses and none was examined on behalf of the defence. The defence was a plea of innocence and of false implication.

5)P.W. 1, Dharendra Nath Mondal stated in his evidence that at about 7 or 7.30 P.M. on 20.11.1992, when he was at home, he heard a hue and cry of Sasadhar and he along with other persons went to the paddy field of one Dhruva Bar and saw that the accused Madhab and Gunadhar were pulling a rope around the neck of his son while Sankar was assaulting by an iron rod and Rohit Hazra was assaulting with brick. He raised shout when other people came and then the accused persons fled away.

6)P.W. 2, Sudarsan Naskar stated in his evidence that at the time of incident he was at home and on hearing a hue and cry coming out from the side of a culvert he rushed towards the culvert. Victim's

father and one Sarat also went there and he found that Debal was being dragged in the paddy field by tying a rope around his neck by Gunadhar and Madhab. Accused Sankar and Rohit were assaulting him with iron rod and brick.

7)P.W. 3, Rati Kanta Naskar is not an eyewitness and he stated in his evidence that at 10 P.M. on 20.11.1992 he returned home and came to know about the murder of Debal by some persons by the side of a culvert near his house. He had been to the police station and scribed the complaint according to the instructions of the informant.

8)P.W. 6, Radharani Mondal was the wife of P.W. 1. She was not an eyewitness to the incident and she stated in her evidence that she found that her husband and Sasadhar were untying rope from the neck of Debal. Debal was lying in the paddy field and he was taken to the hospital. She stated that her husband, Sasadhar and Provash told her that the accused persons had assaulted Debal.

9)P.W. 7, Sarat Chandra Mondal stated in his evidence that in the evening at 7.30 P.M. on 20.11.1992 he was in the house of P.W. 1 and after hearing the hue and cry of P.W. 4, Sasadhar he came out and rushed to the culvert wherefrom the sound was coming. He found that the accused persons were assaulting Debal in the paddy field near the road. He could not exactly remember which of the accused persons was assaulting in which way.

10)P.W. 8, Provash Naskar stated in his evidence that he was in the house of P.W. 1 and was playing cards. Hearing the shout of Sasadhar he came out of the house and rushed to the culvert and he saw that the accused persons were assaulting Debal on the paddy field by the side of the road. He stated that by the torchlight of Nemai he saw the assault on Debal. When the other people came at the place, the accused persons fled away.

11)P.W. 9, Khagen Gayen could not say anything about the incident. P.W. 11, Subal Naskar heard about the incident on the next day. P.W. 12 was the A.S.I. of Police, who recorded the formal FIR. P.W. 13 was the Autopsy Surgeon, who held post mortem over the deadbody of the victim and on examination he found the following injuries :-

- “1. Abrasion over left chest wall anteriorly middle portion measuring 1” x ½” .**
- 2. Abrasion over left elbow 1 ½” x 1”.**
- 3. 10 (ten) small abrasions over front and lateral part of left leg upper portion of varying sizes an area of 6” x 4”.**
- 4. 5 small abrasions over left elbow and forearm of varying sizes from 1” x 1” to ½” x ½” covering an area of 5” x 3”.**
- 5. Obliquely placed small abrasions eight in number over the left side back middle portion of varying sizes from 1” x ½” x ½” x ½” covering an area of 8” x 4”.**
- 6. Multiple small abrasions six in number obliquely placed over the right scapular region of varying sizes from 3” x ½” to 1 ½” x 1 ½” covering an area of 10” x 6”.**
- 7. Abrasion over upper lip measuring 1” x ½”.**
- 8. Bruises over middle size of right elbow measuring 2” x 2”.**
- 9. Bruises over whole of the back.**
- 10. Bruises over left elbow measuring 4” x 4”.**
- 11. Bruises over right parietal region measuring 2 ½” x 1 ½”.**

12. **Bruises over left temporal region measuring 1 ½” x 1 ½”.**
13. **Bruises over whole of the neck anteriorly placed side by side measuring 6” x 3”.**
14. **One continuous ligature mark around the neck at the level of thyroid cartilage having measurement of 14” x 1 ½” with no gap.“**

12)P.W. 14 was the Police Officer, who held inquest over the deadbody. P.W. 15 was the Investigating Officer of the case. He visited the place of occurrence, recorded the statements of witnesses, seized articles and ultimately on completion of investigation submitted charge sheet. From the evidence of this witness it appears that neither the articles seized by him were sent to FSL for examination nor those articles were produced in court.

13)P.W. 16 was Dr. Biswadip Ghosh. He attended the victim Debal Mondal immediately after the incident when he was taken to the hospital. This witness stated that the patient was unconscious at that time and he got smell of alcohol from the breath of the victim. As stated by P.W. 1, this witness recorded that the victim was assaulted by Gunadhar, Madhab and Rohit.

14)Mr. Bose, learned Advocate of the appellants submitted that in the present case FIR was allegedly registered at 23.55 hours on 20.11.1992 on the basis of a complaint lodged by P.W. 1, Dharendra Nath Mondal. The scribe of the FIR was P.W. 3. But such FIR, as it was pointed out by Mr. Bose, could not have been registered at 23.55 hours in view of the evidence of P.W. 3, Ratikanta, who stated in his evidence that he had been to the police station with Dhiren Babu (P.W.1) at 1.45 A.M. on the night of 20.11.1992. It was the further contention of Mr. Bose that although the case was registered on 20.11.1992, the same was received by the learned Magistrate on 27.11.1992, i.e. 7 days after registration of such FIR. No explanation was offered from the side



of the prosecution regarding such delay. In such circumstances, it was the contention of Mr. Bose, there was sufficient reason to accept the defence version that such FIR was registered much later than the given date and hour thereby giving sufficient time and opportunity to the prosecution party, who are inimical to the accused, to setup a concocted and distorted version of the occurrence.

15) It was the further contention of Mr. Bose, learned Advocate that Inquest was held in presence of the relatives and eyewitnesses, but surprisingly names of assailants were not mentioned before the Inquest Officer of the case. P.W. 7, who claimed himself to be an eyewitness, did not disclose any name of assailant before the Officer, who held inquest over the deadbody. Two other witnesses to the inquest, namely, Panchu Sardar and Shyamal Sardar, were not examined. According to Mr. Bose, this casts a serious doubt about the presence of the eyewitnesses at the place of occurrence.

16) Mr. Bose, learned Advocate relied upon a judgment of the Hon'ble Supreme Court reported in **(2009) 1 SCC (Cri) 212 (Ramesh Baburao Devaskar Vs State of Maharashtra)**. In paragraph 20 of the said judgment it was held by the Hon'ble Apex Court as follows :

**“20. The Code of Criminal Procedure provides for certain internal and external checks, one of them being the receipt of a copy of the first information report by the Magistrate concerned. It is not in dispute that in a grave case of this nature, the copy of the first information report was received by the magistrate four days later. No explanation has been offered therefor. Section 157 of the Code of Criminal Procedure mandates that the first information report should be sent to the nearest Magistrate within a period of 24 hours. It has not been disputed that the occurrence took place near the district headquarters. There cannot be any reason whatsoever as to why the first information report was sent after four days. (See Jagdish Murav v. State of U.P.<sup>3</sup>)”.**

17)Mr. Bose also relied upon a judgment reported in **2005 SCC (Cri) 805 (Bachhu Narain Singh Vs Naresh Yadav)**. From a reading of the said judgment, we find that challenging an order of acquittal by the High Court an appeal was preferred before the Apex Court. In the said case eyewitnesses were ten in number. Though the Investigating Officer prepared inquest report at the spot for more than one hour, nobody came forward before him claiming to be an eyewitness. In such circumstances, it was held by the Apex Court that presence of the alleged eyewitnesses at the time of occurrence was doubtful and their evidence did not inspire confidence.

18)Next judgment relied upon by Mr. Bose is reported in **(2009) 3 SCC (Cri) 444 (Motilal & Another Vs State of Rajasthan)**. In the said case FIR was received by the Magistrate after four days and such delay was not explained although it was required to be explained by the Investigating Officer by plausible evidence on record. In paragraph 9 of the said judgment, it was held by the Apex Court as follows :

**“9. It is true as observed by the High Court that if the FIR is timely lodged and investigation is undertaken immediately, in a given case, the delayed receipt of the report by the Ilaqa Magistrate would not be fatal to the prosecution. It would depend upon the facts of each case. There cannot be any generalisation. There is a purpose behind the enactment of Section 157 of the Code of Criminal Procedure, 1973 (in short “the Code”). The statutory requirement that the report has to be sent forthwith that itself shows the urgency attached to the sending of the report. In a given case it is open to the prosecution to indicate reasons for the delayed dispatch or delayed receipt. This has to be established by evidence.”**

19)The learned Advocate of the appellants also relied upon a judgment of the Hon’ble Apex Court reported in **AIR 1975 SC 1962 (Balaka Singh & Others Vs The State of Punjab)**. From a

reading of the said judgment it appears that challenging an order of conviction and sentence appeal was preferred by nine accused persons and the High Court acquitted four of the accused persons because of the omission of their names in the body of the Inquest report. In the said case delay in sending copy of the FIR to the Magistrate also remained unexplained. The prosecution party was also inimical to the accused. FIR was found to have been registered after the Inquest report was prepared by the police. On appeal by the five convicted accused persons, out of nine, it was held by the Hon'ble Apex Court as follows :

**“5. We may now refer to the reasons given by the High Court for acquitting the four accused mentioned above. The first and foremost reasons given by the High Court was that although the inquest report was prepared by the A.S.I. at about 2-30 A.M. in the morning yet the names of the four accused did not find place in the body of the inquest report which was made on the basis of report made to the police by the informant Banta Singh. It is true that the names of all the nine accused were mentioned at the top of the inquest report but the High Court found that this appears to have been an addition made by the Assistant Sub-Inspector to help the prosecution and to bring the inquest report in conformity with the F.I.R.”**

**“7.....The High Court has also derived support from another important circumstance to come to the conclusion that the F.I.R. was not written at 10 P.M. as alleged by the prosecution but after the preparation of the inquest report at about 2-30 A.M. The High Court points out that according to the prosecution the special report reached the Ilaqa Magistrate at 11 A.M. on September 2, 1966, i.e. more than 12 hours after the F.I.R. was lodged at the police station, whereas it should have been delivered to the Ilaqa Magistrate during the night or at least in the early morning. Counsel appearing for the appellants submitted that under the High Court Circulars and the Police Rules it was incumbent upon the Inspector who recorded the F.I.R. to send a copy of the F.I.R. to the Ilaqa Magistrate immediately without any loss of time and the**

**delay in sending the F.I.R. has not been properly explained by the prosecution as rightly held by the High Court. It is, therefore, clear that the F.I.R. itself was a belated document and came into existence during the small hours of September 2, 1966. Indeed if this was so, then there was sufficient time for the prosecution party who are undoubtedly inimical to the accused to deliberate and prepare a false case not only against the four accused who have been acquitted, but against the other five appellants also. The High Court also found that the best person to explain the delay in sending the special report to the Ilaqa Magistrate was the Police Constable who had carried the F.I.R. to the Ilaqa Magistrate but the Constable has not been examined by the prosecution.”**

20)The learned Advocate of the appellants next argued that the alleged incident took place on 20.11.1992 at about 7.00 P.M. and it was in the evidence on record that there was no light at the place of occurrence and the only source of recognition was a torch light of one Nimai Naskar, as it was stated in the FIR. But in the evidence of P.W. 1, Nimai Naskar was replaced by one Benoy Naskar. The learned Advocate further submitted that P.W. 1 (informant) was never examined by the police after the case was registered. The nylon rope, which was allegedly used in strangulating the victim, was not seized by the police. Although P.W. 1 collected the said rope he did not hand over the same to the police.

21)Mr. Bose further pointed out that prosecution case was that the victim Debal was attacked and assaulted by the accused appellants while he was coming with one Sasadhar (P.W.4) on his bicycle. So, Sasadhar (P.W.4) could have been the best witness in this case. But he was declared hostile. Although a bicycle was seized, it was not produced before the court. Some wearing apparels were seized, but those were not sent to FSL for examination and alamats were also not produced in court.

The Investigating Officer (P.W.15) himself stated in his evidence that seized articles were not sent to FSL for examination and not a single article was produced in court.

22) Pursuant to confessional statement made by accused Sankar Mondal one iron pipe was recovered from a banana garden. But such statement was not signed by the accused. The iron pipe, which was allegedly recovered from a banana garden, was not produced in court.

23) Mr. Bose further submitted that at the time of alleged incident P.W. 1 was at his home and was playing cards with Sudarsan (P.W.2) and Provash Naskar (P.W.8). But P.W. 2 stated in his evidence that he was not playing cards with Dhiren Babu (P.W. 1) and he was at his home. P.W. 8, who claimed himself to be an eyewitness, also did not state before the Investigating Officer that at the time of alleged incident, he (P.W.8) was playing cards with P.W. 1 in his house. He also did not state before the police that on hearing the hue and cry he along with others rushed to the culvert or that he (P.W.8) saw the accused persons assaulting Debal in the paddy field with the help of torch light of Nemaï. Rather, he stated to the Investigating Officer that he (P.W.8) learnt from Sarat Mondal (P.W.7) and Ratikanta (P.W.3) that the accused persons murdered Debal. So, what P.W. 8 stated in court was nothing but embellishment and he cannot be said to be an eyewitness to the incident.

24) Referring to the medical evidence it was argued by Mr. Bose, learned Advocate that although P.W. 13, the Autopsy Surgeon, stated about one ligature mark around the neck, P.W. 16, Biswadip Ghosh, who examined the victim immediately after the incident, did not mention about any ligature mark. Mr. Bose pointed out that number of injuries were found by P.W. 13 on the backside of the deadbody. From the manner of assault, as depicted by the alleged eyewitnesses, such number of

injuries on the back was highly improbable. It was submitted by the learned Advocate that in view of the glaring inconsistency between the ocular and medical evidence, it would be extremely unsafe to maintain the conviction of the appellants on such evidence. The learned Advocate relied upon a judgment reported in **1994 CRI L. J. 1985 (Sri Niwas Vs Ram Bharosey & Others)**. In the said judgment oral testimony of witnesses was in conflict with the medical evidence. It was held by the Hon'ble Apex Court that true picture of occurrence was not placed by the prosecution and hence the accused was entitled to benefit of doubt.

25) It was also argued by Mr. Bose, learned Advocate that there was a doubt about the actual place of occurrence. Although P.W. 1 stated in his evidence that hearing the hue and cry he rushed to the paddy field of Dhruba Bar (not examined), other eyewitnesses namely, P.Ws. 7 and 8 stated in their evidence that on hearing the hue and cry, which was coming from the side of culvert, they rushed to the culvert along with other witnesses. Mr. Bose further pointed out that no bloodstained earth or controlled earth was seized from the place of occurrence by the Investigating Officer. The Investigating Officer did not try to ascertain from the witnesses as to the exact location of the place where the incident took place. Referring to the judgment of the Hon'ble Supreme Court reported in **JT 2006(6) SC 597 (Syed Ibrahim Vs The State of AP)**, it was submitted by Mr. Bose that when the place of occurrence itself could not be established, it would not be proper to accept the prosecution version.

26) Mr. Goswami, learned Public Prosecutor submitted that the timing mentioned in the FIR must prevail over what was stated in the evidence. P.W. 3 (scribe) might have committed a mistake in mentioning time when he left for the police station, that cannot make the FIR not acceptable. P.W.

1 stated in his evidence that he went to the Police Station at 11.00 P.M. on that night and narrated the incident, which was scribed by P.W. 3. So, there cannot be any doubt about the registration of FIR.

27)Referring to the judgment of the Hon'ble Apex Court reported in **AIR 1975 SC 1252 (Podda Narayana Vs State of AP)** it was submitted by the learned Public Prosecutor that it was not necessary for the Inquest Officer to record the details or names of assailants in the inquest report. Only for non-mentioning the names of assailants before the Inquest Officer by P.W. 7, the prosecution case cannot be disbelieved.

28)Mr. Goswami next argued that merely because there was delay in despatch and receipt of FIR by the Magistrate, that cannot throw any doubt on the credibility of the prosecution case. Supporting the judgment and order of conviction and sentence, it was submitted by Mr. Goswami, learned Public Prosecutor that even if there was deficiency in the investigation that could not be a ground for demolishing the entire prosecution case. But we are unable to accept such contention keeping in view the judgment of the Hon'ble Apex Court in the case of Ramesh Baburao Devaskar (supra), which we have already discussed above.

29)Mr. Goswami next argued that only for non-production of articles seized by police in court, the prosecution case cannot be disbelieved. But we are unable to accept such contention. Both oral and documentary evidence helps the court to come to a conclusion. Where none of the articles was produced in court, the court can draw an adverse presumption. From the evidence on record, we

find that none of the articles was sent to FSL for examination and none of those articles was produced in court, which cast a serious doubt on the reliability of the prosecution case.

30)It was admitted by the Public Prosecutor that the role of the Investigating Officer in the present case was not satisfactory, but there was no reason to disbelieve the evidence of P.W. 1, who was the father of the victim. P.W. 4, Sasadhar, who could have been the best witness in this case, as he was with the victim at the time of incident, was declared hostile, but there is evidence of other witnesses to justify the order of conviction and sentence. The incident took place in 1992 and the witnesses deposed in court in 1997 and as such it was quite natural that after a lapse of about five years there would be some minor contradiction in their evidence.

31)We have heard the learned Advocates of the respective parties. We have also perused the judgments of the Hon'ble Apex Court relied upon by the learned Advocates of the respective parties. After scrutinizing the entire evidence on record we find sufficient merit in the submission made by the learned Advocate of the appellants. Although inquest was held in presence of witnesses, who claimed themselves as eyewitnesses, names of the assailants were not disclosed before the Inquest Officer. On the contrary, it was stated before the Inquest Officer that the victim was assaulted by some unknown persons. In the present case, there was a delay of 7 days in receipt of FIR by the Magistrate. FIR was registered on 20.11.1992, but the same was received by the Magistrate on 27.11.1992 and there was no explanation for such delay of seven days in reaching the FIR to the Magistrate. In the present case articles were seized by the police. But not a single item was produced in court. Weapon of assault, namely, the iron pipe was allegedly recovered pursuant to confessional statement of one of the accused persons, but such statement.



was not signed by the accused. The iron pipe, which was seized as weapon of assault, was not produced in court. Some wearing apparels, which were claimed to be that of the deceased, were also seized by the police. But surprisingly those wearing apparels were neither sent to FSL nor it was produced in court. It was the submission of the learned Public Prosecutor that merely because of non-production of seized articles in court the prosecution case cannot be disbelieved. But such an argument does not appeal to us. Both oral and documentary evidence helps the court to come to a conclusion. When the articles were not produced in court, court can draw adverse presumption

32) This is a case in which ocular version of the eyewitnesses does not fit in with the medical evidence. As regards the inconsistency between the ocular evidence and medical evidence we find sufficient merit in the submission of the learned Advocate of the appellants.

33) During cross-examination the eyewitnesses were confronted with their previous statements recorded by the police under Section 161 Cr. P.C. to indicate that they did not make such statement as eyewitnesses while examined by the Investigating Officer. Though each of the said witnesses denied such suggestion, the Investigating Officer in his cross-examination had admitted that none of those witnesses had stated before him about seeing the assault or attack by the accused persons.

34) In view of the discussion made above, we find sufficient merit in the submissions made by Mr. Bose, learned Advocate of the appellants. We are clearly of the opinion that the prosecution could not prove its case beyond reasonable doubt.

35) The appeal is accordingly allowed. The impugned judgment and order of conviction and sentence passed by the learned Additional Sessions Judge, Alipore in Sessions Trial No. 1 (6) of

1997 is hereby set aside. The appellants are acquitted of the charge framed against them. The appellants, who are on bail, shall be discharged from their respective bail bonds.

36)A copy of this judgement along with LCR may be sent down to the court below immediately.

37)Urgent Xerox certified copy of this judgment and order may be supplied to the learned Advocates of the respective parties, if the same is applied for.

**(DEBIPRASAD SENGUPTA, J.)**

38)I agree,

**(PRABHAT KUMAR DEY, J.)**