CRIMINAL APPEAL

PRESENT: The Hon'ble Chief Justice Mohit S. Shah
And
The Hon'ble Justice Sailendra Prasad Talukdar

Judgement on : 21.05.2010

C.R.A. No. 249 of 2006
With
C.R.A.N. No. 3049 of 2008

AMAL ARI & ANOTHER
Versus
STATE OF WEST BENGAL

POINTS

EVIDENCIARY VALUE– Discovery of a fact albeit a relevant fact –Whether single eyewitness when can be the basis for conviction–Marginal mistakes and minor discrepancies cannot demolish a prosecution case – Proof beyond reasonable doubt and not beyond all doubt – *ratio decidendi* and *obiter dictum* – Examination under Section 313 of Cr.P.C. Whether an important and integral part of a criminal trial – Indian Evidence Act, 1872 S 27 – Code Of Criminal Procedure, 1973 S 313.

FACTS

Both the appellants, were found guilty of the offences under Sections 364 / 302 / 201 / 34 of the Indian Penal Code and were convicted accordingly. They were sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/- each, in default, to suffer imprisonment for a further period of one year each for the offences under Section 302 of the Indian Penal Code. They were also sentenced to suffer rigorous imprisonment for 10 years each and to pay fine of Rs.1,000/-

each, in default, to suffer imprisonment for a further period of six months each. No separate sentence was passed for the offence under Section 201 of the Indian Penal Code. Being aggrieved by the said judgment , the appellants preferred the instant appeal praying for setting aside of the same. The case was started on the basis of a recorded statement made by one Smt. Krishna Das, de facto complainant . She alleged that Kamal (accused) and his associates forcibly took away her son He was assaulted with fists and blows before being so taken away by the accused and 3/4 boys within the age group of 25 / 30 years in a big white car, which was waiting in front of their Premises. As she resisted, they pushed her away and in response to her anxious query, they told her to approach the police station in order to know the whereabouts of her son, Swapan. Police authority after completion of investigation submitted charge sheet against the present appellants. They pleaded not guilty to the charges under Section 364 / 34 of Indian Penal Code, Section 302 / 34 of Indian Penal Code and Section 201 / 34 of Indian Penal Code.

HELD

There must be discovery of a fact albeit a relevant fact, in consequence of the information received from a person accused of an offence. The discovery of such fact must be deposed to. At the time of receipt of the information the accused must be in police custody and only so much of the information as it relates distinctly to the fact thereby discovered is admissible, but the rest of the information has to be excluded. Para 45

While submitting that testimony of a single eyewitness can very well be the basis for conviction, but the court has to be satisfied that the testimony of the solitary eyewitness is of such sterling quality that the court finds it safe to base a conviction solely on the testimony of that witness.

Para 52

Marginal mistakes and minor discrepancies cannot demolish a prosecution case. Credibility of testimony depends on judicial evaluation of the evidence in totality and not isolated scrutiny. It cannot be disputed that proof beyond reasonable doubt is the guideline and not a fetish. Truth may sometime suffer from infirmity when projected through human process. What is required is proof beyond reasonable doubt and not beyond all doubt. Para 62

It is, however, necessary to mention that it is not everything said by a judge when giving judgment that constitutes a precedent. This status is reserved for pronouncements on the law, and not disputed point of law is involved in the vast majority of cases. It is not everything said by a judge in the course of his judgment that constitutes a precedent. Only those which are considered necessary for arriving at a decision are said to form part of the *ratio decidendi* and thus to amount to more than an *obiter dictum.* But dicta are never of more than persuasive authority. Para 68

Examination under Section 313 of Cr.P.C. is an important and integral part of a criminal trial. It essentially gives the accused person an opportunity to explain the materials and circumstances, which transpire against him in the evidence. Para 72

The appellants along with others forcibly took away the victim in a vehicle and the dead body of the victim was subsequently recovered. No explanation has been offered by the appellants as to what happened to the victim after he was forcibly taken away from his house. The evidence of the doctor leaves no scope for any controversy with regard to the fact that the victim was murdered. There could be no possibility of involvement of any person other than the appellants and the charge-sheeted accused persons in between. Para 75

For the Appellants : Mr. Sekhar Basu,
Mr. Sudipto Moitra,
Mr. Joymalya Bagchi,
Mr. Navanil De,
Mr. Subhankar Chakraborty,

For the State : Mr. Sandipan Ganguly,

CASES CITED

1. Md. Inayatullah Vs S. AIR 1976 SC 483.

2. Sujoy Sen & State of West Bengal reported in (2007) 6 SCC 32.

3. (Observation of Lord Hulsbury in the case between) Quinn & Leathem – [1931] AC 459.

4. State of UP & Jaggo @ Jagdish reported in AIR 1971 SC 1586.

5. Bhimapa Chandappa Hosamani & State of Karnataka reported in (2006) 11 SCC 323.

6. Sukhwant Singh & State of Punjab reported in 1995 SCC (Cri) 524.

7. Gajula Surya Prakasarao & State of Andhra Pradesh reported in 2010 (1) CLJ (SC) 47

8. Tamilselvan Vs State (Tamil Nadu) reported in (2008)2 C Cr. LR (SC) 476.

9. Pandurang Chandrakant Mhatre & Ors. And State of Maharashtra, as reported in (2010) 1 CCrLR (SC) 48.

10. Sahadevan @ Sagadevan And State Represented by Inspector of Police, Chennai, as reported in 2003 SCC (Cri) 382.

11. Sucha Singh & Anr. And State of Punjab, as reported in 2003 SCC (Cri) 1697.

12. K. Ashokan & Ors. And State of Kerala, as reported in 1998(3) Crimes 1 (SC).

Sailendra Prasad Talukdar, J. :

1.Both the appellants, Kamal Ari and Amal Ari, were found guilty of the offences under Sections 364 / 302 / 201 / 34 of the Indian Penal Code and were convicted accordingly. They were sentenced to suffer imprisonment for life and to pay fine of Rs.2,000/- each, in default, to suffer imprisonment for a further period of one year each for the offences under Section 302 of the Indian Penal Code. They were also sentenced to suffer rigorous imprisonment for 10 years each and to pay fine of Rs.1,000/- each, in default, to suffer imprisonment for a further period of six months each. No separate sentence was passed for the offence under Section 201 of the Indian Penal Code.

2.Being aggrieved by the said judgment dated 17th March, 2006 and order dated 18th March, 2006, the appellants preferred the instant appeal praying for setting aside of the same.

3.The case was started on the basis of a recorded statement made by one Smt. Krishna Das. She alleged that on 12.05.1998 at about 11.00 P.M. Kamal and his associates forcibly took away her son, Swapan. He was assaulted with fists and blows before being so taken away by Kamal and 3/4 boys within the age group of 25 / 30 years in a big white car, which was waiting in front of Premises No. 17, Dover Road. As she resisted, they pushed her away and in response to her anxious query, they told her to approach the police station in order to know the whereabouts of her son, Swapan.

4.Police authority after completion of investigation submitted charge sheet against the present appellants. They pleaded not guilty to the charges under Section 364 / 34 of Indian Penal Code, Section 302 / 34 of Indian Penal Code and Section 201 / 34 of Indian Penal Code.

5.The defence case, as it appears from the trend of cross-examination and the statements made during examination of the accused persons under Section 313 of the Code of Criminal Procedure, is the denial of the prosecution allegations and the plea of innocence.

6.Prosecution in order to establish the guilt of the accused persons examined as many as 26 witnesses. Of them, P.W. 1 and P.W. 2 are official photographers, who took photographs of the concerned premises and the victim, since deceased, respectively. The said photographs had been marked Mat Exhibits, after being duly proved.

7.P.W. 3 is the plan maker attached to the Detective Department of the Kolkata Police. The rough sketch map, as prepared, had been marked Ext. 1, after being proved by him.

8.P.W. 4 is the defacto-complainant, who in her evidence-in-chief supported the case as made out in the complaint, which had been treated as FIR. In her evidence-in-chief, she introduced herself as an Aiya (Attendant) attached to Sri Arobinda Balika Vidyalaya. She stated that her son, Swapan Das was murdered on 12th of May, 1998. She clarified that she was not a witness to the said murder. She deposed that on that date at about 11.00 P.M. someone called her son by knocking the window of the room. Swapan got up, switched on the light and went out. She woke up as well and came out of her room. She found Kamal Ari, Amal Ari and Ram dragging her son Swapan towards the main road. She appealed to those persons for release of her son. She started following them. Those three persons dragged her son to the main road near Premises No. 17 where she could find a white coloured Tata Sumo vehicle waiting. Swapan was forcibly pushed inside the said vehicle. When she tried to grab her son out of their grip, Kamal Ari pushed her down. The

said vehicle started moving towards Panditiya Road. She further deposed that the entire area was illuminated with electric light that evening on the occasion of 'Sitala Puja'. She mentioned that many people were present at the time of the said incident. She named Bishu Poley, Tapan, Laltu, Samar as some of them. She further deposed that Amit with a 'bhojali' in hand and Totan with a 'goopti' threatened the local boys, who were thus scared to move forward. She rushed to the Ballygunge Police Station along with her other son and para boys. A general diary was lodged. She identified her signatures in the two pages of the general diary, which have been marked Ext. 2/1 and Ext. 2/2. She was asked to wait in the police station for sometime. Sometime after their return to the house, police came and she was interrogated. Her statement was recorded by the Police Officer. She was asked to put her signature on the paper where her statement was recorded. The concerned Officer read over and explained the contents of the recorded statement to her and she being satisfied put her signature. The same had been marked Ext. 3/1. On 14th of May, 1998 the deadbody of her son was brought to her house after its post mortem. She for the first time came to know that her son had been murdered. She identified her house and the lane in the photograph marked Mat Ext. II. She further identified the photograph of the lane, which leads to Dover Road, marked Mat Ext. IV. She also identified the torn half pant and the ganjee of her son, since deceased, which had been marked Mat Ext. IX and IX /1. She further identified the photograph of the deadbody of her son, marked Mat Ext. VIII. She identified the accused persons, namely, Kamal Ari and Amal Ari in court and deposed that they dragged her son away on that night after he came out of the house.

9.P.W. 5 is the son of P.W. 4, who in his evidence-in-chief corroborated the evidence of P.W. 4 on all material points. He stated that on the relevant night when he was in the puja mandap

along with Bishu Poley, Laltu, Rudal Bhai, he noticed a white coloured Tata Sumo car stopping in front of Premises No. 17, Dover Road. He stated that Amal Ari, Kamal Ari, Ram, Totan, Amit and others got down from the said car and went to his house. The area was decorated with light on the occasion of "Sitala Puja". He heard a hue and cry and as he, being accompanied by others, approached towards the source of such hue and cry, they could find Amit and Totan were there in front of the lane being armed with 'goopti' and 'bhojali'. They threatened to kill them in the event they dared to proceed further. He found Amal Ari, Kamal Ari and Totan coming through the lane with his eldest brother Swapan Das, who was being dragged by them. He found his mother (refers to P.W.4) following them. His brother was subjected to assaults while being so dragged. He was forcibly taken to the Tata Sumo car. In response to his mother's query, Kamal Ari told her to go to Ballygunge Police Station to get further information. She was pushed by Kamal Ari and as a result, she fell down. Those persons left the place with his brother in the car. P.W. 5 also stated that he accompanied his mother to Ballygunge Police Station. They reported the incident, but the Police Officer on-duty did not give much importance and asked them to wait. They, however, recorded a G.D. Entry after hearing his mother about the incident. P.W. 5 further deposed that his mother (P.W. 4) reported the entire incident to the Police Officer, but the latter did not care to record the same accordingly. They returned home and sometime after the Police Officer came to their house. They interrogated his mother and recorded her statement. In the morning of 13th May, 1998 they received an information from the Ballygunge Police Station that a deadbody was found lying in an area within Kasba Police Station. P.W. 5 rushed to the said place, but did not find any deadbody. It was on 14.5.1998 he could see the deadbody of his brother, Swapan Das at Kanta Pukur morgue. After post mortem examination, the deadbody was brought to their house and his mother could see

the deadbody of her son, Swapan Das. He further deposed that he was not interrogated by the police over such death of his elder brother Swapan.

10.P.W. 6 in his evidence-in-chief just stated that Swapan Das was murdered but he could not say as to where such murder took place and how. He clarified that he did not see any incident. He was declared hostile by the prosecution. In his cross-examination by the prosecution, he stated that he did not like to get involved in any disputed matter as he was a painter by profession.

11.P.W. 7 was just tendered for cross-examination.

12.P.W. 8 in his evidence-in-chief stated that he had a business of building construction. He identified two accused persons and submitted that they used to supply building materials like bricks, sand to him in connection with the said business. He stated that he purchased a white coloured Tata Sumo car bearing registration no. WB-02E/9308 in the year 1997. In his evidence-in-chief, he stated that about 2 and ½ years back from the date of his giving evidence, police came to his office and seized the said Tata Sumo car in connection with a case. A seizure list was prepared and the contents of the same were read over and explained to him. Thereafter, under direction of the Police Officer, his son produced the car in Ballygunge Police Station. Such P.W. 8 identified the signatures in the seizure list being marked Exhibits 4/1 and 4/2. He got custody of the car on executing a bond before the learned S.D.J.M., Alipore. He identified his signature in the bond, marked Ext. 5/1. He also identified the jimma bond with his signature, marked Ext. 6. He then stated that this car was never taken away by any person for driving. At this stage, he was declared hostile by the prosecution.

13.P.W. 9 in his evidence-in-chief stated that police seized one empty chest on proper seizure list from his factory. He identified his signature in the seizure list, marked Ext. 9/1. He, however, stated that it was difficult for him to identify the said chest. He was also declared hostile

by the prosecution. There is nothing worth-mentioning in the evidence of P.W. 10, P.W. 11, P.W. 12, P.W. 13, P.W. 14 and P.W. 15.

14.P.W. 16 in his evidence-in-chief stated in details about seizure of one torn-out kambol (blanket), tea petty and so on and so forth.

15.P.W. 17 just stated about his finding of a deadbody presumably under a babla tree about 3 / 4 years before.

16.Evidence of P.W. 18 is virtually the same as that of his earlier witness.

17.P.W. 19 is an Officer of the Calcutta Electric Supply Corporation. He stated that in response to a requisition, which was sent by D.C.D.D., Lalbazar, a report was submitted by CESC. This is with regard to the query as to whether there had been any power cut between 22.00 Hours on 12.5.1998 and 6.00 Hours on 13.5.1998 in and around the Premises Nos. 7B, Dover Road and 17, Dover Road. The report being proved by him had been marked Ext. 12.

18.Evidence of P.W. 20 is of formal nature.

19.P.W. 21 just proved his signature in the inquest report, which had been marked Ext. 11/3.

20.P.W. 22 is the police personnel, who as per instruction of Sub Inspector, Debasis Chakraborty carried the deadbody of a person to Mominpur morgue under challan. He identified his signature as well as that of the said Sub Inspector. He identified the deadbody to the post mortem Doctor.

21.P.W. 23 is the Doctor, who held post mortem examination on the deadbody of an unknown person, who was later identified as Swapan Das. He described in details as to the various injuries found and recorded by him. He opined that such death was due to the effects of the injuries

as recorded by him – ante mortem and homicidal in nature. He further submitted that such injuries were sufficient to cause death in ordinary course of nature.

22.P.W. 24 is the Sub Inspector of Police, who in his evidence-in-chief stated as to the various steps taken by him in course of investigation. He was posted as S.I. of Police at Kasba Police Station. On 13th of May, 1998 he found a deadbody was lying by the side of E.M. Bypass. The head of the said deadbody was inside the box and the remaining part of the body was covered with a blanket. He received a written complaint from one Biren Sarkar at the place of occurrence and he forwarded the same to Kasba Police Station through constable. The said complaint had been marked Ext. 13. He identified the three photographs of the deadbody being Mat Exhibits VI, VII and VIII. He held inquest of the deadbody in presence of witnesses and being proved by him, the inquest report had been marked Ext. 11. Thereafter, he sent the deadbody for its post mortem examination.

23.P.W. 25 is the Police Officer, who recorded the statement of P.W. 4 in the general diary and being proved by him, the said G.D. Entry No. 1065 had been marked Ext. 2. He also referred to the signatures of the witnesses in it.

24.He then stated that after receiving such general diary, he being accompanied by others went on raid for ascertaining the facts. They claimed to have examined local people and recorded their statements. The mother of the victim was examined and her statement was recorded as well. They searched for the suspects but to no avail. After returning to the Police Station, on the basis of the recorded statement of Smt. Krishna Das, they started a case. He identified the said recorded statement, which was again read over and explained to P.W. 4. On its basis, he filled up the formal FIR and started Ballygunge Police Station Case No. 53 Dated 13.5.1998 under Sections 365 / 120B of the Indian Penal Code. The said case was endorsed to him for investigation. He claimed to

have received a message from Kasba Police Station that an unknown male deadbody was found lying at the E.M. Bypass between Kalikapur and Purba inside a wooden tea chest wrapped with a black blanket. It was the deadbody of a male person aged about 30 / 35 years. Naturally this led to starting of Kasba Police Station Case No. 185 Dated 13.5.1998. P.W. 25 deposed in details as to the various steps taken by him in course of investigation. The case was thereafter taken up for further investigation by P.W. 26. He after completion of investigation submitted charge sheet. He made a prayer before the learned Court for clubbing the kidnapping case of Ballygunge Police Station and the murder case of Kasba Police Station and such prayer was allowed. P.W. 26 claimed that in pursuant to the statement of accused Amal Ari, a Tata Sumo car bearing registration no. WB-02E/9308 was recovered.

25.This is all about the evidence-on-record on behalf of the prosecution. The accused persons were examined under Section 313 of Cr. P.C. and their statements were duly recorded. They just took the plea that the alleged incident is false and that they knew nothing about it.

26.Mr. Sekhar Bose, appearing as learned Counsel for the appellants, assailed the impugned judgment and order of conviction and sentence on various grounds. He first submitted that the mother of the alleged victim being P.W. 4 stated in her evidence that she went to the police station with her other sons and local boys soon after her son, Swapan, was forcibly taken away. She referred to her signatures in the two pages of the general diary, which had been marked Ext. 2. She was there in the police station for about half an hour to 45 minutes. She claimed that she had talks with the Police Officer. The circumstances of the case point out that such P.W. 4 knew the miscreants from their boyhood. Mr. Bose, in such circumstances, submitted that why then the general diary does not relate to the essential facts about the assailants and their identity.

27.It was further submitted that the purported general diary in the backdrop of the present case ought to have been treated as FIR. He then submitted that the attempt on the part of P.W. 5, being the son of P.W. 4 and brother of the victim, to cover up the lacuna, appears to be quite strange. P.W. 5 deposed that the Police Officer on-duty did not give proper importance to the information conveyed and asked them to wait till arrival of other officers. It was submitted that if P.W. 5 reported the incident to the Police Officer, how could his name be missing in Ext. 2 ?

28.Mr. Bose further submitted that it is difficult to accept that the Police Officers of the concerned police station were consistent in their indifference to the complaint of P.W. 4. Referring to the evidence of P.W. 5, it was submitted that his evidence, that his mother stated everything before the concerned Police Officer, does not appear to be convincing at all since he admittedly had no talks with his mother during their return from the police station nor did he enquire as to what was specifically stated by his mother before the concerned police authority. Though he claimed that on way to the police station he had discussion with his mother about the incident and the miscreants, no name appeared in the general diary.

29.Referring to the evidence of P.W. 4, it was submitted that the complaint recorded on interrogation is consciously concocted and fabricated version. She did not state even on interrogation as to how the assailants were armed or that the abductors left towards Panditiya Road. She did not mention about her first visit to the police station and Ext. 2 nor did she mention about the presence of P.W. 5 at home or at the place of occurrence. She also did not mention the name of Amal Ari. If the abductors were known, what prevented P.W. 4 from disclosing their names in stead of stating that she could identify them, if shown ?

30.Mr. Bose then submitted that certain facts are conspicuous by their absence in the complaint to the police, which relates to the celebration of Sitala Puja or presence of the local boys

including her son, P.W. 5, in the puja pandal or that the abductors were armed and they threatened the local boys and they were found moving towards Panditiya Road. There is no mention of the wearing apparels of P.W. 5 either.

31.The attention of the court was invited to the evidence of P.W. 4 that she was satisfied with the writing of the complaint by the Police Officer and thereafter, she put her signature in it. Mr. Bose submitted that evidence of P.W. 4 does not indicate that P.W. 5 was at home on that night or that he used to live with her and other family members. Question was also raised as to how the grandsons of P.W. 4, who reportedly lived with her, could be left out by the police since they were not interrogated. The said grandsons, being 18 years and 14 years of age, could have thrown light on the exact incident. P.W. 4 claimed to have interacted with the local people, but there is no evidentiary support in the record, at least from the evidence of the local witnesses, who had been examined as P.Ws.

32.Mr. Bose further submitted that the evidence of P.W. 5 suffers from inherent hollowness and cannot inspire confidence. P.W. 5 stated in his evidence that his wife used to stay in the same family at the time of the incident, but this was not stated by P.W. 4. It was then submitted that if wife of P.W. 5 was at home, how is it that she was also not examined by police. Mr. Bose laid particular emphasis on the statement of P.W. 5 that he was not interrogated by police. Referring to the suggestion, it was further submitted that it is extremely plausible that P.W. 5 was staying at Sonarpur along with his wife and children and were not there in the house of P.W. 4 at the time / date of the incident. It was again submitted that if P.W. 5 was with his mother even at the time of lodging of the general diary (Ext. 2), how could the name of Amal be missing ? On behalf of the defence, it was then submitted that the evidence-on-record does not indicate that P.W. 5 after returning from the police station took any steps for search of his brother, the victim. The evidence-

on-record that he remained at the puja pandal was found to be quite strange to the learned Counsel for the defence. Though P.W. 4 stated that she had good relations with her neighbours, the fact remains that none of the said neighbours had corroborated the evidence of either P.W. 4 or P.W. 5. It was then submitted that P.W. 6, who is a neighbour of P.W. 4 and reportedly accompanied her and P.W. 5 to the police station, did not lend any support to the prosecution case. It was claimed on behalf of the prosecution that P.W. 7, Dulal Yadav was an eyewitness as well as a companion of P.W. 4 and P.W. 5 to the police station. The fact that he was merely tendered, according to the learned Counsel, Mr. Bose, would adversely affect the prosecution case.

33.On behalf of the appellants it was then submitted that there is evidence-on-record to the effect that the concerned area was illuminated on the occasion of 'Sitala Puja', but none could see the number of the vehicle in which the victim was allegedly taken away. In that event, how could the Investigating Authority reach P.W. 8, Gopinath Biswas ? In order to fix up the identity of the vehicle, there had been no T. I. Parade either. There is no wonder, according to the learned Counsel for the appellants, that P.W. 8 turned hostile. Attention of the court was invited to the fact that P.W. 9 could not identify the chest shown to him as the one manufactured in his factory. It was also brought to the notice of the court that none of the two witnesses with first name being 'Tapan' i.e. P.W. 11 and P.W. 14 could be of any support to the prosecution case. It was then submitted that P.W. 12 and P.W. 13 are the employees of P.W. 9, who is the chest manufacturer. Since evidence of P.W. 12 had been accepted by the prosecution without a demur, it has to accept the evidence of P.W. 9 though he had been declared hostile. According to the prosecution, P.W. 15, P.W. 16, P.W. 17, P.W. 18 and P.W. 20 saw the deadbody lying along side of E. M. Bypass. The photographs were not shown to P.W. 15. P.W. 16 could not identify the deadbody in the

photographs or the tea chest. No photograph was shown to P.W. 17 and P.W. 18. None of the witnesses could identify the tea chest. No photograph was shown to P.W. 20.

34.Referring to the evidence of P.W. 25, it was submitted by Mr. Sekhar Basu that in the G.D. Entry it was recorded that two persons called Swapan at 11.00 P.M. and this is contrary to the evidence of P.W. 4 and P.W. 5 in court. Accused Amal was arrested six months after the incident. The claim that his statement led to the recovery and seizure of the Tata Sumo car could be of little assistance. It was also mentioned that such recovery of the vehicle in pursuant to the statement made by accused Amal does not perhaps pass the test of legal scrutiny. In this context, reference was made to Section 27 of the Evidence Act.

35.It was emphatically submitted that the prosecution could not establish that the appellants could have had any motive for committing murder of the victim, Swapan.

36.In response to this, Mr. Ganguly, appearing as learned Counsel for the State/Respondent, submitted that the entire evidence-on-record need to be appreciated in proper perspective. The socio-economic background of the family of P.W. 4 also does not deserve to be lost sight of. He urged that the court cannot also afford to be indifferent to the events around and may very well take into consideration the realities. He then submitted that when P.W. 4 rushed to the police station, she could not perhaps conceive that her son would be murdered. The kind of response P.W. 4 got from the persons, who forcibly took away her son, could even very well give her an impression that he was taken away by plain-clothed policemen. Mr. Ganguly thus contended that there could be no scope for treating the General Diary Entry, Ext. 2, as FIR. He then referred to Ext. 3, which again mentions about Kamal and his associates. Mr. Ganguly thus submitted that there could be nothing wrong in treating the said Ext. 3 as FIR. It was then submitted that the omission to name Amal in Ext. 3 cannot be of much importance since it just an omission. He referred to the

evidence-on-record showing that there has been enmity between the two families / groups. It was highly improbable for a mother to falsely implicate a person when her topmost priority was to find out her son. There could be false implication only after “death“ when there would have been a situation where such P.W. 4 could have had nothing to lose or nothing to get. It was thus emphatically submitted that Ext. 2 could not be treated as FIR nor Ext. 3 could be said to be suffering from any deficiency. It is well settled that the First Information Report need not be an encyclopedia.

37.Attention of the court was further drawn to the fact that contents of Ext. 2 were not read over to P.W. 4. She does not know English, but Ext. 3 was recorded in English. It is in the evidence-on-record that P.W. 4 was pushed down and directed to go to the police station to find out her son, which could only reflect the desperate nature of the accused persons. P.W. 4 had been to the police station and this was followed by Police Officers visiting the spot in order to ascertain the facts. The case was started thereafter on the basis of the recorded statement.

38.It is true that there is no mention of the name of accused Amal in the FIR. It cannot also be disputed that the said accused was known to the defacto-complainant and her family, but we do not think that an attempt should be made to read much more into it. There is mention of the name of Kamal and there is elasticity so as to accommodate others as well.

39.Having regard to the factual backdrop of the present case, there could really be no question of treating Ext. 2 as the FIR. In the backdrop of what usually happens around, it cannot be said to be absurd that a lady of the stature of P.W. 4 could hardly attract the care and attention of the police authority and that too, practically in the midnight. Significantly enough, police authority visited the spot and this was to work out on the information received. Quite expectedly the

statement of the defacto-complainant was recorded at that time and very rightly, the said statement, Ext. 3, was treated as FIR.

40.Thus, this court finds it difficult to appreciate the grievance raised on behalf of the appellants regarding not treating Ext. 2 as FIR and not mentioning of the name of accused, Amal Ari in the FIR.

41.Mr. Sekhar Basu, in course of his submission, invited particular attention of the court to the evidence of P.W. 5 that he was not interrogated by the police. Mr. Sudipto Moitra, while replying to the argument advanced on behalf of the State / Respondent, submitted that in view of the admitted position that P.W. 5 was not examined by the Investigating Officer nor his statement was recorded, the court perhaps cannot place any reliance upon his evidence-on-record.

42.Significantly enough, P.W. 25 in his cross-examination stated that "I recorded the statements of informants, Smt. Krishna Das, Dulal Yadav, Samar Das, Rupen Kumar Maity, Tapan Chowdhury, Bishu Poley and others." Since such a statement was made by the Police Officer in cross-examination, we do not find any sufficient justification for reading much into the evidence of P.W. 5, Samar Das that he was not interrogated by the police over the death of his brother.

43.It appears that the said witness failed to appreciate the question put to him and thus, the answer only referred to the incident of death of his brother. Mr. Ganguly submitted that such statement of Samar Das (P.W. 5) was forwarded to the Court of Magistrate as per Section 173 (5) of the Code of Criminal Procedure and the court can very well look into the materials in the case diary. Though serious objection was raised by Mr. Moitra in response to such submission, we think that Mr. Ganguly only referred to the fact that there is a statement of such P.W. 5 recorded under Section 161 of Cr. P.C. in the case diary. Certainly such a statement cannot be looked into by the

court while appreciating the evidence-on-record, but as pointed out earlier, the evidence of P.W. 25 in cross-examination does not leave any scope for further confusion or controversy in this regard.

44.Learned Counsel, Mr. Ganguly, referred to Section 27 of the Evidence Act while submitting that the Tata Sumo car, in which the victim was abducted, was recovered in pursuant to the statement of accused, Amal.

Section 27 of the Evidence Act reads :-

"27. How much of information received from accused may be proved – Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such information, whether it amounts to a confession or not, as relates distinctly to the fact thereby discovered, may be proved. "

The essential ingredients of Section 27 are three-folds :-

(1) The information given by the accused must lead to the discovery of the fact which is the direct outcome of such information.

(2) Only such portion of the information given as is distinctly connected with the said recovery is admissible against the accused.

(3) The discovery of the facts must relate to the commission of such offence.

45.It can thus be said that there must be discovery of a fact albeit a relevant fact, in consequence of the information received from a person accused of an offence. The discovery of such fact must be deposed to. At the time of receipt of the information the accused must be in police custody and only so much of the information as it relates distinctly to the fact thereby discovered is admissible, but the rest of the information has to be excluded.

46.In this context, reference may be made to the decision of the Apex Court in the case between Md. Inayatullah Vs S. **AIR 1976 SC 483.** Section 3 of the Evidence Act defines fact as follows :

"Fact means and includes –

(1) Anything, state of things, or relation of things capable of being perceived by the senses.

(2) Any mental condition of which any person is conscious."

47.The fact that such vehicle was recovered long after starting of the case does not bring about any change in complexion since accused, Amal, was apprehended quite after sometime. The portion of such statement, which led to the discovery of the fact as to the existence of the concerned vehicle, can very well be taken into consideration.

48.Mr. Bose, relying upon the decision of the Hon'ble Apex Court in the case between Sujoy Sen & State of West Bengal reported in **(2007) 6 SCC 32** submitted that if there is a major discrepancy or lapse in the FIR, it would be fatal to the prosecution case. It cannot be, however, disputed that the said case was based on circumstantial evidence whereas the prosecution in this case sought to rely upon direct evidence, particularly of P.W. 4 and P.W. 5. Mr. Ganguly, in this context, submitted that every decision is to be considered in the context of the particular factual backdrop of the case.

49.In this context, we would like to refer to the observation of Lord Hulsbury in the case between Quinn & Leathem – [1931] AC 459.

50.It was observed :-

"A case is only authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to flow logically from it."

His Lordship said :-

"Every judgment must be read as applicable to the particular facts proved or assumed to be proved since the generality of the expressions, which may be found there, are not intended to be expositions of the whole law, but governed and are qualified by the particular facts of the case in which such expressions are to be found. "

51.Deriving support from the decision of the Apex Court in the case between the State of UP & Jaggo @ Jagdish reported in **AIR 1971 SC 1586,** Mr. Bose submitted that P.W. 5 was introduced to shape the prosecution case.

52.Once again the factual backdrop of the said case is significantly different from that of the present case. It was further submitted on behalf of the appellants that the present case virtually rests on the evidence of the solitary evidence, P.W. 4. While submitting that testimony of a single eyewitness can very well be the basis for conviction, but the court has to be satisfied that the testimony of the solitary eyewitness is of such sterling quality that the court finds it safe to base a conviction solely on the testimony of that witness. The Apex Court in the case between Bhimapa Chandappa Hosamani & State of Karnataka reported in **(2006) 11 SCC 323** held that the court must test the credibility of the witness by reference to the quality of his evidence.

53.So far the present case is concerned, it cannot be said that the prosecution case is merely based on the evidence of P.W. 4, i.e., the mother of the victim. Her evidence had been effectively corroborated by P.W. 5, the brother of the victim.

54.According to Mr. Bose, learned Counsel for the appellants, tendering of a witness for cross-examination without there being any examination-in-chief is not permissible. He referred to the Apex Court decision in the case between Sukhwant Singh & State of Punjab reported in **1995 SCC (Cri) 524.** Mr. Ganguly quite rightly submitted in response thereto that every judgment is to

be read in the context of the factual backdrop of a case. Observation of the Apex Court that there is no meaning in tendering a witness for cross-examination only was in the context of the said case.

55.While tendering of a prosecution witness for cross examination may not be a practice, which deserves to be encouraged especially in a murder case, but this by itself cannot wipe out the other evidence-on-record. While referring to the decision in the case between Gajula Surya Prakasarao & State of Andhra Pradesh reported in **2010 (1) CLJ (SC) 47,** Mr. Bose submitted that in view of the admitted enmity between another son of P.W. 4 and the group of the present appellants, omission in mentioning the name of Amal assumes a very significant role and such an accused certainly is entitled to an order of acquittal. But, as rightly mentioned by Mr. Ganguly, the factual backdrop of the present case is quite different. In the case of Tamilselvan Vs State (Tamil Nadu) reported in **(2008)2 C Cr. LR (SC) 476,** there has been a delay of eight hours in lodging the FIR and as such, the Apex Court held that there was opportunity of subsequent improvement in the prosecution case. We, however, do not think that the said decision can be of much assistance to the appellants in the present case.

56.Mr. Ganguly, referring to the decision in the case between **Pandurang Chandrakant Mhatre & Ors. And State of Maharashtra, as reported in (2010) 1 CCrLR (SC) 486**, submitted that the information incorporated in the general diary, Exhibit-2, only led the police to rush to the place of incident for an on the spot study and there could be no reason for taking it as FIR.

57.It was submitted that benefit of an act or omission of the Investigating Agency should not necessarily go to the accused in the interest of justice. Mr. Ganguly, in this context, referred to the decision in the case between **Sahadevan @ Sagadevan And State Represented by Inspector of Police, Chennai, as reported in 2003 SCC (Cri) 382**. The Apex Court in the said case held that if the prosecution on the basis of reliable evidence establishes that the missing person was last seen

in the company of the accused and was never seen thereafter, it is obligatory on the accused to explain the circumstances in which the missing person and the accused parted company. Mr. Ganguly, in this context, referred to Section 106 of the Evidence Act and further submitted that the appellants herein could not give any satisfactory explanation either by examining defence witness or during recording of their statements under Section 313 of Cr.P.C.

58.We, however, do not find the aforesaid stand applicable in toto in the present case since there could be no question of the appellants' accepting the prosecution version that they were seen with the victim at all.

59.Deriving inspiration from the decision of the Apex Court in the case between **Sucha Singh & Anr. And State of Punjab, as reported in 2003 SCC (Cri) 1697**, it was submitted by Mr. Ganguly that prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. The Apex Court in the said case observed that law cannot afford any favourite other than truth.

60.It is well settled that exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law.

61.So far the present case is concerned, evidence of two eye witnesses, P.W. 4 and P.W. 5, seem to have harmoniously combined with the other evidence on record including that relating to discovery of the dead body of the victim and its identification, recovery of the Tata Sumo Car in pursuant to the statement of accused, Amal and the evidence of the doctor who conducted post mortem examination over the dead body of the victim.

62.Marginal mistakes and minor discrepancies cannot demolish a prosecution case. Credibility of testimony depends on judicial evaluation of the evidence in totality and not isolated scrutiny. It cannot be disputed that proof beyond reasonable doubt is the guideline and not a fetish. Truth may sometime suffer from infirmity when projected through human process. What is required is proof beyond reasonable doubt and not beyond all doubt.

63.Though in course of submission, learned Counsel for both parties have referred to many citations, it may be mentioned that a lawyer, and a Judge as well, should take his precedents and from them build principles.

64.In the words of Lord Denning, "the law must be certain. Yes, as certain as may be. But it must be just too."

65.Talking about precedent he said :

"If lawyers hold to their precedents too closely, forgetful of the fundamental principles of truth and justice which they should serve, they may find the whole edifice comes tumbling down about them. They will be lost in 'The codeless myriad of precedent. That wilderness of single instances.' The common law will cease to grow. Like a coral reef it will become a structure of fossils."

66.Professor T. B. Smith of Edinburgh University said :

"Why should a court, which in the past clearly refused to be strictly bound by precedent (and has subsequently tied its own hands) not resume the earlier and more equitable practice? It is astonishing to observe the most eminent legal minds of the country reacting to the prison of precedents (of precedents which they recognize as unjust) like a child who has shut himself in a room and screams to be let out – presumably by the legislature."

67.Lord Denning's attitude to precedent can be best summed up in his own words :

"All that I am against is its too strict application, a rigidity which insists that a bad precedent must necessarily be followed. I would treat it as you would a path through the woods. You must follow it certainly, so as to reach your end. But you must not let the path become too overgrown. You must cut out the dead wood and trim off the side branches, else you find yourself lost in the thickets and the brambles. My plea is simply to keep the path to justice clear of obstructions which impede it."

68.The materials on record as well as the facts and circumstances of the case have, thus, been analyzed in the context of the well settled principles of law. It is, however, necessary to mention that it is not everything said by a judge when giving judgment that constitutes a precedent. This status is reserved for pronouncements on the law, and not disputed point of law is involved in the vast majority of cases. It is not everything said by a judge in the course of his judgment that constitutes a precedent. Only those which are considered necessary for arriving at a decision are said to form part of the *ratio decidendi* and thus to amount to more than an *obiter dictum.* But dicta are never of more than persuasive authority.

69.According to Mr. Bose, the prosecution case suffers from inherent improbability. He wondered as to how is it that the victim, or his brother (P.W. 5) or his mother (P.W. 4) did not raise any hue and cry when the victim was being forcibly taken away.

70.Having regard to the background of the victim's family and the fact that there had been previous enmity, it cannot be said that there could be anything absurd in it. It has become practically an accepted position in our society these days that not many persons raise their voice against crimes. Generally speaking, people think twice before getting involved and they choose to be indifferent. This is, no doubt, a fallout of the present dehumanized society.

71.It was contended that the accused persons were not asked at the time of their respective examination under Section 313 of Cr.P.C. that the Police did not choose to record the names of the accused persons in the General Diary, Exhibit-2.

72.Examination under Section 313 of Cr.P.C. is an important and integral part of a criminal trial. It essentially gives the accused person an opportunity to explain the materials and circumstances, which transpire against him in the evidence. Such explanation, as offered by P.W. 5, could not be said to be of such nature that it was required to be placed before the accused persons.

73.On careful scrutiny of the evidence on record, it can be easily found that none of the two material witnesses could be shaken in their respective cross-examination.

74.Mr. Bose referred to the decision of the Apex Court in the case between **K. Ashokan & Ors. And State of Kerala, as reported in 1998(3) Crimes 1 (SC)**. He contended that disclosure of names or identities of the offenders in the FIR, if known, by a person who figures as an eyewitness is one of the most material facts. In this case, name of Kamal was disclosed and having regard to the social background of P.W. 4 and the trauma she was undergoing we do not think that much can be read into the fact that names of other persons did not find mention in it.

75.The appellants along with others forcibly took away the victim in a vehicle and the dead body of the victim was subsequently recovered. No explanation has been offered by the appellants as to what happened to the victim after he was forcibly taken away from his house. The evidence of the doctor leaves no scope for any controversy with regard to the fact that the victim was murdered. There could be no possibility of involvement of any person other than the appellants and the charge-sheeted accused persons in between.

76.So, to sum up, grievances as ventilated on behalf of the appellants in this case, in the backdrop of the discussion as made above, do not seem to have much rational basis. In our considered opinion, learned Trial Court on the basis of the evidence on record was justified to find the present appellants guilty of the offences under Sections 364/302/201/34 of IPC. The impugned judgment and order of conviction and sentence do not deserve any manner of interference. The instant appeal being C.R.A. No. 249 of 2006 fails and be dismissed.

77.The judgment and order dated 17th March, 2006 and 18th March, 2006 passed by the learned 3rd Court of Additional Sessions Judge, Alipore, 24-Parganas (South) in Sessions Trial No. 1(1) 2000 stand affirmed.

78.This consequently disposes of C.R.A.N. No. 3049 of 2008.

Send a copy of this judgment along with the LCR to the learned Trial Court for information and necessary action.

79.Criminal department is directed to supply certified copy of this judgment, if applied for, to the learned Counsel for both parties as expeditiously as possible.

(S. P. Talukdar, J.)

I agree,

(Mohit S. Shah, Chief Justice)