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ANJAN DASGUPTA

v.

THE STATE OF WEST BENGAL & ORS.

(Criminal Appeal No. 298 of 2006)

B

NOVEMBER 25, 2016

[PINAKI CHANDRA GHOSE AND ASHOK BHUSHAN, JJ.]

Criminal Law:

C *Murder Case – Re-appreciation of evidence – Two possible views – Prosecution case that the victim was shot at, on the indication/instruction of appellants-accused – Trial court acquitted appellants – High Court after re-appreciating the evidence set aside the order of acquittal of appellants – On appeal, held: While entertaining an appeal against acquittal, if two views are possible on appreciation of evidence the view in favour of the accused has to be given*
D *importance – In case an order of acquittal has been made on improper and erroneous appreciation of evidence, it is always open to the court of appeal to make proper and reasonable appreciation of evidence and differ from the order of acquittal – On facts, discarding of evidence by the trial court was on flimsy grounds and*
E *based on surmises and conjectures which was correctly re-appreciated by the High Court – High Court after re-appreciating the evidence rightly came to the conclusion that the occurrence as well as participation of appellant was proved – Penal Code, 1860 – s.302 r/w s.34, s.212 – Arms Act – ss. 25, 27 – Code of Criminal Procedure, 1973 – s.164.*

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FIR – Ante-dated and ante-timed FIR – Allegations of – Held: On facts, PW-29, ASI proved the FIR and also his signature thereon – He denied the suggestion that the FIR was written subsequently – Thus, no case of ante-dating of the FIR – Further, no inconsistencies in the FIR so as to come to the conclusion that the FIR was ante-
G *timed.*

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FIR – Delay in dispatching FIR from Police Station to Magistrate – Effect of – Held: It is only extraordinary and unexplained delay, which may raise doubts regarding the authenticity of the FIR – In the present case, where recording of FIR itself has
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been proved and accepted by the trial court also, mere delay in dispatch of the FIR from the police station to the Magistrates' court has no bearing on the basis of which any adverse presumption can be drawn. A

Investigation – Criminal investigation – Held: Receipt and the recording of FIR is not a condition precedent for setting in motion of criminal investigation – On facts, when information was received that the victim was shot dead, police was duty bound to start investigation. B

Dismissing the appeal, the Court

HELD: 1.1 There is evidence of PW 1 (son of victim) that he went to the police station between 7.30/8.00 PM and the First Information Report was written by PW 5 on his dictation. Both the above facts have been proved by the statement of PW 1 and PW 5; both have signed the written complaint. Further, ASI PW 29 proved the recording of the FIR on the basis of written complaint given by son of victim-deceased. No suggestion was put to PW 29 regarding the date or time of recording of the FIR. PW 29 has proved the FIR, he further proved that he received the FIR on 16th June, 2000, he proved his signature on the FIR also. He denied the suggestion that FIR was written on subsequent to 16th June, 2000. Thus there is no case of ante-dating the FIR, even the trial court did not accept the submission that FIR was ante-dated. [Paras 12, 13] [97-F-H; 98-A] C D E

1.2. In the present case, the FIR was registered before the inquest report of dead body started. The evidence indicates that information of death was received by the police station before 17.15 hours and police officials arrived at the spot immediately and the I.O. arrived at the spot at 17.45 PM, by that time other police officials had already reached. The receipt and the recording of First Information Report is not a condition precedent for setting in motion of a criminal investigation. When the information was that the victim was shot dead, police was duty bound to start investigation. Though much emphasis has been laid down by the appellant on the fact that “time 17.35” was noted in the FIR, however, from the cross-examination of ASI, it does not appear that any question was asked regarding the recording time 17.35 F G

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A in the FIR. The possibility cannot be ruled out that while
 registering the FIR on the basis of written complaint, the ASI
 recorded the time when he received the information in the
 police station of the death of the victim. In any view of matter,
 the above in no manner diminishes the value or credibility of
 B the FIR. The mention of the time at 17.35 can be treated as the
 time of receipt of the information of the offence in the police
 station and there is no such inconsistencies in the FIR so as to
 come to the conclusion that FIR was ante-timed. [Paras 16, 17,
 18] [99-C-D, F-H; 100-A-C]

C 1.3. The I.O. after receipt of the information of an offence
 by R.T. message had arrived at the scene on 17.40 hours, which
 clearly proves the prompt commencement of the investigation.
 FIR was dispatched on 22nd June, 2000 which has also been
 accepted by trial court. When no questions were put to I.O. in
 his cross-examination regarding the delay in dispatch, at the
 D time of hearing, the accused cannot make capital of the said
 delay in forwarding the FIR. The present is the case, where
 recording of the FIR on 16th June, 2000 itself has been proved,
 accepted by the trial court also, thus mere dispatch of the FIR
 on 22nd June, 2000 from the police station to the Magistrates'
 E Court has no bearing on the basis of which any adverse
 presumption can be drawn. It is thus clear that the FIR was
 genuine FIR and trial court committed an error in drawing
 adverse inference against the prosecution and refusing to attach
 value to the FIR. [Paras 20, 21] [100-F-H; 101-A-B]

F *Arren Joseph alias Current Kunjukunju and Ors. v. The
 State of Kerala* 1973 (3) SCC 114 : 1973 (2) SCR
 16; *Rabindra Mahto and Anr. v. State of Jharkhand*
 (2006) 10 SCC 432 : 2006 (1) SCR 248 – relied on.

Pala Singh v. State of Punjab (1972) 2 SCC 640 : 1973
 (1) SCR 964; – referred to.

G 2. In facts and circumstances of the case, the appreciation
 of evidence of eye-witnesses and discarding of the evidences
 by the Sessions Judge was on flimsy ground and based on
 surmises and conjectures which has been correctly re-
 appreciated by the High Court. The High Court after re-
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appreciating the evidence has rightly come to the conclusion that the occurrence as well as participation of the appellant was proved. The High Court was conscious that the case where acquittal has been made, while entertaining an appeal over an order of acquittal, if two views are possible on making proper appreciation of available evidence, the view going in favour of accused has to be given importance. It is well settled that in case where an order of acquittal has been made on improper and erroneous appreciation of evidence, it is always open to the court of appeal to make proper and reasonable appreciation evidence and differ from the order of acquittal and in such event, it shall never hesitate in reversing the same. The findings and conclusion recorded by the High Court are based on the correct appreciation of evidence and do not suffer from any error. The judgment of the High Court reversing the acquittal recorded by Sessions Judge needs no interference. [Paras 32, 35, 36 and 37] [103-E; 104-D, F-H; 105-B-C]

Case Law Reference

1973 (2) SCR 16	relied on	Para 16
1973 (1) SCR 964	referred to	Para 19
2006 (1) SCR 248	relied on	Para 20

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 298 of 2006.

From the Judgment and Order dated 16.02.2006 of the Division Bench of the High Court at Calcutta in Government Appeal No. 10 of 2002 and C. R. R. No. 2263 of 2003.

Kapil Sibal, Sr. Adv., D. N. Ray, Aamir Khan, Aadit Pujari, Sangram Singh, Ms. Pallavi Langar, Advs. for the Appellant.

Mrinal Kanti Mandal, Parijat Sinha, Rohit Dutta, Tara Chandra Sharma, Rajeev Sharma, Ms. Neelam Sharma, Rupesh Kumar, Advs. for the Respondent.

The Judgment of the Court was delivered by

ASHOK BHUSHAN, J. 1. This appeal has been filed against the judgment dated 16.02.2006 of Calcutta High Court, by which

A judgment, the High Court reversed the order of acquittal granted by Additional Sessions Judge. The High Court convicted the appellants Anjan Dasgupta and one Biswanath Paul under Section 302/34 of IPC by awarding life sentence and a fine of Rs. 2000.00.

2. The prosecution case in brief is that, at 4.50 PM of 16th June, 2000 Debol Kumar Ghosh, the deceased was sitting inside the Party Office of CPI(M) at R.B.C. Road, Naihati, North 24-Paraganas at which time a maruti gypsy car stopped, from which the appellants got down. At the same time, four persons on two bicycles came from the direction of the Mitra Bagan Road and stopped right in front of CPI(M) Party Office. The appellant by hand indicated Debol Kumar Ghosh to four persons who had arrived there on two bicycles, and one of them fired from pipe gun on Debol Kumar Ghosh. Leaving two cycles, all four persons got in the Maruti Gypsi which speed up towards Gauripur. Sandip Ghosh, the son of Debol Kumar Ghosh who was sitting inside his medicine shop, namely, "Ma Medical Stores" at R.B.C. Road, Naihati, North 24-Parganas situated at 5 cubits from CPI(M) Office saw the above incident and rushed to CPI(M) Party Office and found his father Debol Kumar Ghosh had sustained bullet injuries on his chest and was lying on the floor. The elder brother of Sandip Ghosh, upon hearing the sound, also came to the Party Office. The victim, Debol Kumar Ghosh was thereafter taken to Green View Nursing Home where he was declared dead by the doctors at 5.00 PM.

3. The information of murder of Debol Kumar Ghosh was received by the Police Officials of the Naihati Police Station, who immediately rushed to the scene of occurrence. After receiving an R.T. message at 17.15 hours, the Sub Inspector Tapan Kumar also arrived at the scene at 17.40 hrs and remained at the scene till 21.05 hours. Sandip Ghosh went to the police station at about 7.30-8.00 PM alongwith one Arun Dey. Arun Dey wrote the complaint at dictation of Sandip Ghosh and a written complaint was submitted to the police station. The FIR No. 99 of 2000 was registered under Section 302/34 of the IPC and Section 25/27 Arms Act, naming accused Anjan Dasgupta, Biswanath Paul, Sintu alias Saroj Roy and Bhola Kundu.

4. Tapan Kumar, Sub Inspector received the FIR while he was still at the scene of occurrence. Sub Inspector Manick Chakraborty, on dictation of Tapan Kumar with a Constable prepared the inquest report of the dead body at Green View Nursing Home at 22.35 hours. After

the inquest report was prepared late in the evening, the dead body was sent for postmortem. After completion of the investigation, accused Anjan Dasgupta, Bhola Kundu, Sintu alias Saroj Roy and Biswanath Paul were charged for the commission of the offence under Section 302 read with Section 34 of the IPC and Basudev Paul was charged for offence under Section 212 of the IPC. A

5. Prosecution examined thirty one witnesses in support of its case; prosecution also produced documentary evidences, namely, statements recorded under Section 164 Cr. P.C. and certain other documentary evidences. Accused persons adduced no oral evidences. Accused were examined under Section 313 Cr. P.C. B

6. The learned Additional Sessions Judge acquitted accused Biswanath Paul for offence under Section 212 and all other accused from charge of Section 302/34. State filed an appeal against the acquittal order. The complainant also filed a Revisional Application CRR No. 2263 of 2002, challenging the order of the acquittal. The High Court vide its judgment dated 16.02.2006 set aside the order of the acquittal as regards to Anjan Dasgupta and Biswanath Paul. It, however, confirmed the acquittal with regard to the Sintu alias Saroj Roy and Bhola Kundu. Acquittal of Basudev Paul was also affirmed. Appellant Anjan Dasgupta was sentenced to undergo life imprisonment with a fine of Rs. 2000.00/-. Anjan Dasgupta has filed this appeal challenging his conviction and sentence. C D E

7. We have heard Shri Kapil Sibal learned senior counsel appearing for the appellant, Shri Rupesh Kumar learned senior counsel appearing for the Respondent No. 2 and Parijat Sinha learned counsel for the State of West Bengal. F

8. Shri Kapil Sibal learned senior counsel for the appellant, in support of the appeal contends that learned Sessions Judge after considering entire evidence on record had rightly come to the conclusion that evidence led by prosecution contradicts the prosecution story, as to the genesis of occurrence, hence did not commit any error in acquitting the appellant. It is contended that FIR was ante-dated and ante-timed as rightly held by the trial court. He submitted that from the evidence of PW 1 who gave the written complaint for lodging an FIR, it is clear that he went to the police station after 7.30 PM, hence the FIR could not have been lodged before 7.30-8.00 PM and mention of time of receiving G H

A the information in the FIR as 17.35 hour clearly proves that it was ante-timed.

9. Shri Kapil Sibal further submits that FIR, in fact was lodged after inquest report and inquest report according to the evidence was prepared after the 22.35 hours. It is submitted that ante-timing and ante-dating of the FIR was with object to falsely implicate the accused since by that time prosecution story was still in vacuum. Shri Sibal referred to various contradictions in the statement of witnesses as noticed by trial court. He submits that High Court committed error in reversing the order of acquittal. It is well settled that if on an evidence two views are possible and the trial court exercises its discretion in having acquitted the accused, High Court ought not to interfere with the acquittal order. The FIR was dispatched from the police station with great delay, which could be placed before the Magistrate only on 22nd July, 2000, which also clearly proves that FIR was not registered at the time and the date when it is claimed. Mention of U.D. Case No. 43/2000, in FIR causes suspicion and serious doubts with regard to the authenticity of the FIR and subsequent inquest report. Prosecution failed to prove any motive for the murder and in absence of any motive, appellants could not have been convicted.

10. Learned counsel appearing for the State as well as complainant have refuted submissions of learned counsel for the appellants. High Court, while reversing the acquittal order has properly reappraised the evidence and finding the guilt of the accused, conviction has been recorded. There are more than one eyewitnesses who have proved by their evidence, place of occurrence, death by bullet injury, presence and participation of the appellants in the crime, which has been established beyond any reasonable doubt. There was no delay or discrepancy in the FIR. FIR, being a genuine document, trial court committed error in holding that FIR is ante-timed and anti-dated. The High Court after correctly appreciating the entire evidence on record has rightly reversed the acquittal order. With regard to the delay in sending the copy of the FIR to the Magistrate, nothing was asked in the cross-examination of the I.O. Further, although much argument was raised before the trial court regarding ante-timing and ante-dating of FIR but no questions were put before the I.O. and the sub-inspector who recorded the FIR, when they appeared before the court.

H 11. First, we proceed to consider the submissions of the learned

counsel for the appellant regarding ante-timing and ante-dating of the FIR. The trial court had formulated point No. 3 as 'was the real FIR suppressed and the FIR proved as ante-dated'. Trial court had observed that PW 1 went to the police station at about 7.30/8.00 PM but in the formal FIR Exh. 9, it is recorded that information of the commission of offence was received at 17.35 hours on 16th June, 2000. This entry in Exh. 9 contradicts the aforesaid evidence of the PW 1 as regard to the time of lodging of complaint to the police station. Argument was raised before the trial court that FIR was, not only ante-timed but also ante-dated, as such no reliance should be placed on the Exh. 3. Magistrate had perused both the written complaint and the FIR, which bore the endorsement "seen" dated 22nd July 2000. Trial court held that FIR was dispatched from the police station on 22nd June, 2000 and was received at the Magistrate Court on 23rd June, 2000. The trial court had recorded its conclusion in following words at Page No. 107:

"As the FIR was antetimed and there was abnormal unexplained delay in dispatching the FIR to the office of the learned Magistrate as well as putting up the same before the learned Magistrate, adverse inference should be drawn against the prosecution. The FIR cannot be attached with much value."

Following observations were made by trial court at Page No. 106:

"Even if the FIR was lodged after 7-30/8 p.m. as stated by the P.W.1 it would not lose it's value in it's entirety because it is not established that the FIR proved at the trial was a subsequent one or that it was written on any date after 16.6.2000"

12. Now, coming to the evidence on record, there is evidence of PW 1 that he went to the police station between 7.30/8.00 PM and the First Information Report was written by Arun Dey on his dictation. Both the above facts have been proved by statement of PW 1 Sandip Ghosh and PW 5 Arun Dey; both have signed the written complaint. Shri Sunil Giri ASI PW 29 proved the recording of the FIR on the basis of written complaint given by Sandip Ghosh. No suggestion was put to PW 29 regarding the date or time of recording of the FIR.

13. Shri Sunil Giri has proved the FIR, he further proved that he received the FIR on 16th June, 2000, he proved his signature on the FIR

A also. He denied the suggestion that FIR was written on subsequent to 16th June, 2000. Thus there is no case of ante-dating the FIR, even the trial court did not accept the submission that FIR was ante-dated.

14. Now we come to the main submissions, that is, ante-timing of the FIR and delayed dispatch of the FIR to the court of the Magistrate.

B The sequence of the events, as it emerges from the evidence brought before the court, i.e. the evidence of PW 1 and PW 30, there is no doubt that PW 1 went to the police station at about 7.30 PM. The statement of PW 30, in this context, is very relevant. PW 30 in his statement has stated that on 16th June, 2000, when he was posted at Police Station, Naihati, he was at village Shibdaspur, in connection with another case, when at 17.15 hours he received an RT Message that at Mitra Bagan Crossing one Debol Kumar Ghosh had been shot dead. He arrived at the spot at about 17.40 hours and remained there till 21.05 hours. He further stated that he prepared the sketch map on the spot and seized the certain articles including two bicycles from the entrance of the party office room. The statement in his examination-in-chief following was stated by I.O.:

"While I was at village Shibdaspur under P. S. Naihaati in connection with another case at 17.15hrs. I received an R. T. message that at Mitrabagan crossing one Debal Kr. Ghosh had been shot dead. I then directly rushed to Mitrabagan More. I arrived there at 17-40 hrs. There was law and order problem over the murder. There was blockage of road. I received the FIR from the Police Station at the said Mitrabagan crossing. I had been engaged with law and order maintaing job upto 21.05 hrs. I went to the C.P.I.M party office at Mitrabagan crossing and prepared a sketch map thereof with index."

15. In the cross-examination, he has stated that ASI Sunil Giri had send him the R.T. message. Sunil Giri ASI thus had received the information of the murder of Debol Kumar Ghosh before 17.15 hours, arrival of Sub Inspector Tapan Kumar Mishra I.O. on the scene at the time as claimed is proved; I.O. also went to the Green View Nursing Home, accompanied by S.I. Manick Chakraborty where dead body of the deceased, Debol Kumar Ghosh was laid. Under the dictation of the I.O., the inquest report was prepared by Manick Chakraborty Sub Inspector of Police, which has started on 22.35 hours. The inquest report

which has been proved by witnesses and I.O. clearly records the following: A

“Investigation report over the dead body of Deceased Debol Kumar Ghosh (48) years son of late Kiran Chandra Ghosh of 212/1 R.B.C. Road P.S. Naihati District North 24-Paraganas (Illegible)in C/W Naihati P.S. U.D. Case No. 43/2000 dt. 16.6.2000 and Naihati P.S. Case No. 99 of 16.6.2000 under Section 302/34 I.P.C. & 25/27 Arms Act.” B

16. The inquest report thus mentioned both unnatural death case (U.D. No. 43/2000) dated 16th June, 2000 and P.S. Case No. 99 of 16th June, 2000 under Section 302/34 of IPC and 25/27 Arms Act. From the above, there can be no doubt that FIR was registered before the inquest report of dead body started. The evidence indicates that information of death was received by the police station before 17.15 hours and police officials arrived at the spot immediately and the I.O. arrived at the spot at 17.45 PM, by that time other police officials had already reached. The receipt and the recording of First Information Report is not a condition precedent for setting in motion of a criminal investigation. When the information that Debol Kumar Ghosh is shot dead, police was duty bound to start investigation. This Court in **APREN JOSEPH ALIAS CURRENT KUNJUKUNJU AND OTHERS VERSUS THE STATE OF KERALA 1973 (3) SCC 114** stated following in paragraph 11: C D E

“As observed by the Privy Council in K. E. v. Khwaja, the receipt and recording of information report by the police is not a condition precedent to the setting in motion of a criminal investigation.”

17. Much emphasis has been laid down by the learned counsel for the appellant on the fact that, FIR notes in Column C, ‘time 17.35’. The time 17.35 hours, we have already noted that Sunil Giri Sub Inspector of Police has recorded in the First Information Report. He had already received the information before 17.15 hours since he had sent the R.T. message to the I.O. Information of cognizable offence having been received by the ASI, with regard to the mention of time at 17.35 in the FIR, which was recorded after 17.30 PM could have been explained if any questions were put to ASI Sunil Giri. From the cross-examination of ASI Sunil Giri, it does not appear that any question was asked regarding the recording time 17.35 in the FIR. The possibility cannot be ruled out F G H

A that while registering the FIR on the basis of written complaint, the ASI recorded the time when he received the information in the police station of the death of Debol Kumar Ghosh. In any view of matter, the above in no manner diminishes the value or credibility of the FIR.

B 18. The information of murder was received before 17.35 hours at the police station which is fully proved by arrival of the police officers much before 17.40 hours as proved by I.O. Hence mention of the time at 17.35 can be treated as the time of receipt of the information of the offence in the police station and there is no such inconsistencies in the FIR so as to come to the conclusion that FIR was ante-timed.

C 19. FIR as well as the inquest report both mentioned the accused Anjan Dasgupta. The inquest report has not been questioned on any account. The offence, having been committed at around 4-5 PM, registration of the FIR at the police station between 7.30 to 8.00 PM does not cause any reason to draw any adverse inference, more so, when after the occurrence, the deceased was taken to the nearby nursing home where he was declared dead and body remained there till the inquest was over. The another circumstance, which have been heavily relied by trial court and reiterated before us by learned counsel for the appellant is dispatch of the FIR to the Magistrate with delay. This Court in *Pala Singh v. State of Punjab 1972 (2) SCC 640* has held that delay in forwarding the FIR to court is not fatal in a case in which investigation has commenced promptly on its basis.

F 20. The I.O. after receipt of the information of an offence by R.T. message had arrived at the scene on 17.40 hours, which clearly proves the prompt commencement of the investigation. FIR was dispatched on 22nd June, 2000 which has also been accepted by trial court. When no questions were put to I.O. in his cross-examination regarding the delay in dispatch, at the time of hearing, the accused cannot make capital of the said delay in forwarding the FIR. This Court in *Rabindra Mahto and Another v. State of Jharkhand 2006 (10) SCC 432* has held that in every case from the mere delay in sending the FIR to the Magistrate, the Court would not conclude that the FIR has been recorded much later in time than shown. It is only extraordinary and unexplained delay, which may raise doubts regarding the authenticity of the FIR.

H 21. The present is the case, where recording of the FIR on 16th

June, 2000 itself has been proved, accepted by the trial court also, thus mere dispatch of the FIR on 22nd June, 2000 from the police station to the Magistrates' Court has no bearing on the basis of which any adverse presumption can be drawn. From the above discussion, we are of the clear view that the FIR was genuine FIR and trial court committed an error in drawing adverse inference against the prosecution and refusing to attach value to the FIR.

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22. The conclusion of the learned Sessions Judge that the FIR was manipulated is thus found to be erroneous. FIR has been proved by the evidence as noted above. Thus, one of the basis of the decision of the Sessions Judge for discarding the prosecution case is knocked out.

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23. Now, we came to the consideration of oral evidence by Sessions Judge. Both the deceased and accused belong to the same locality. The occurrence was witnessed by several persons, including the eye-witnesses who appeared before the court and proved the prosecution case, PW.1 Sandip Ghosh, PW.2 Vijay Das, PW.3 Kamal Nath, PW.4 Manabendra Nag, PW.6 Prasanta Ghosh, PW.10 Shashanka Nath and PW 1 Shankar Ghosh.

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24. PW.1 Sandip Ghosh, the son of the deceased was in his medical shop "Maa Medical Stores" which is at the distance of about 5 cubits from CPI(M) office. In his eye-witness account, he stated that at 04:50 PM when he was at his shop, he found a motor vehicle, a Maruti Gypsy to come from side of Naihati Station and got itself parked on R.B.C. Road after crossing Mitrapara and R.B.C. Road Crossing. He saw Biswanath Paul and Anjan Dasgupta got down from the said motor vehicle and at that very moment, four boys about age 22/23 years came in front of aforesaid party office from side of Mitra Bagan by two Bicycle. He further saw Anjan Dasgupta and Biswanath Paul to point out his father sitting inside the party office. One of the said boys took out a pipe gun and shoot Debol Ghosh. Anjan Dasgupta further observed that "Hay Gechi Tara Tari Chale Aiy". Thereafter, the said vehicle left. In the cross-examination, the witness stood firm with his eye-witness account and could not be shaken.

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25. PW 2 Vijay Das on the fateful day was standing at the gate of the party office inside of which Debol Ghosh was sitting. Debol Ghosh after taking the tea asked him to bring the beetle leave. He went to the beetle shop in front of the party's office on the other side of road, where

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A he saw Anjan Dasgupta and Biswanath Paul to get down from Maruti Gypsy at the crossing of R.B.C. Road. At that time four persons by two bicycles came from the Mitrapara side. One of the said four boys brought a shooter machine and fired Debal Ghosh. Thereafter, all left towards Gouripur.

B 26. PW 3 Kamal Nath, who has a shop on the footpath in front of the CPI(M) party office, stated in his evidence that in the afternoon of 16th June at 03:00 PM to 04:00 PM, he was sitting inside the party office and he went out of the office room and was standing outside smoking a 'cigarette'. At that time, a red Gypsy came and stationed at the distance of 3 cubits from him, from which Anjan Dasgupta and Biswanath Paul
C got down. At that very time, 4 persons came by 2 Bicycles from the side of Mitra Bagan. Two of the said persons fired from outside the party office and shot Debol Ghosh. They left the bicycles and left the place by Gypsy towards Gouripur.

D 27. The almost similar eye-witness account has been narrated by other eye-witness who were examined by Prosecution.

E 28. Learned Sessions Judge pointing out certain discrepancy/contradiction in the statement held that the evidence by eye-witnesses does not inspire confidence. Learned Sessions Judge had also made observation that no explanation had been offered by the prosecution as to why statement of witnesses under Section 164 Cr. P.C. was recorded with delay. The statement given by the eye-witness in the court cannot be discarded merely on the grounds that statement which got recorded under Section 164 Cr.P.C. by the prosecution was not immediately recorded.

F 29. The cross-examination of I.O. PW.31 does not indicates that the any explanation was asked from him regarding delayed recording of the statement under Section 164 Cr.P.C.

G 30. The High Court has also re-appraised the entire oral evidence and had observed that eye-witnesses stick to their earlier statements except one or two witnesses who attempted to add something during the statements. Following had been recorded by the High Court at Page 22:

"...We have carefully examined the statement of the witnesses and also their statement recorded under Section 164 Cr.P.C. and we find that there was attempt

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on the part of one or two witnesses to add something more during their statement recorded before the learned Magistrate, but, as a whole all the eye-witnesses stuck to their earlier statements given before the I.O. and they made the same statement before the trial Court during their examination...

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31. After looking to the evidence of eye-witnesses, High Court has observed that all of them had deposed of arrival of Maruti Gypsy Vehicle, Presence of Anjan Dasgupta and Biswanath Paul on the place of occurrence and about giving instructions to shoot Debol Ghosh and subsequently helping the persons to flee from the place of occurrence by getting inside the Maruti Gypsy Vehicle. Following are the findings recorded by the High Court:

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“...From the statements of PW.1, PW.2, PW.3, PW.4, PW.6, PW.10 and also from PW.21 we find that all of them deposed about arrival of a maruti gypsy vehicle, presence of Anjan Dasgupta and Biswanath Paul on the place of occurrence and also about giving of instruction to shot at Debal Ghosh and subsequently for helping the persons to flee from the place of occurrence by getting inside the maruti gypsy vehicle...”

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32. The appreciation of evidence of eye-witnesses and discarding the aforesaid evidences by the learned Sessions Judge was on flimsy ground and based on surmises and conjectures which has been correctly re-appreciated by the High Court. For instance, with regard to eye-witness PW 2 Vijay Das, learned Sessions Judge discard the evidence of PW 2 by giving following reasons:

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“...In the statement recorded under Section 164 Cr.P.C. marked Exhibit 1 this gentleman told that on hearing sound of firing he rushed and found that Debal Ghosh was shot and one was going to pick up the bicycle. At that time he tried to catch the said man and Anjan said “be quickly the pigs”. In the statement recorded under Section 164 Cr.P.C. which was made more than two months after the alleged date of occurrence did not name the person whom he tried to catch. So this omission contradicts the aforesaid evidence of the PW.2. The

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A *PW2's evidence being contradicted by his earlier belated statement under Section 164 Cr.P.C as well as suffers from improbability cannot be relied on...*"

33. The mere fact that the witness did not name the person whom he tried to catch does not lead to any contradiction since all eye-witness
B have stated that four persons came by 2 bicycles one of whom shoot Debol Ghosh.

34. PW 2 stated that he tried to catch one person of the aforesaid and omission not to name the person does not lead to any contradiction nor can result in discarding the evidence. The observation of learned
C Sessions Judge that the evidence suffers from the improbability and cannot be relied is also not based on any valid reason.

35. Some minor contradiction has been pointed out by learned Session Judge in the evidence of other eye-witnesses which have rightly been discarded by the High Court and the High Court after re-
D appreciating the evidence has rightly come to the conclusion that the occurrence as well as participation of Anjan Dasgupta, the appellant was proved. Following conclusion has been recorded by the High Court:

E *"...Thus from the evidence on record we get that several witnesses of the locality who were present on the place of occurrence had noticed Anjan Dasgupta and Biswanath Paul on the place of occurrence and also noticed their active participation in the matter of murder of Debal Ghosh and in this context we want to record that the learned trial Court totally misdirected itself in the matter of appreciation of the evidence of the eye-*
F *witness."*

36. High Court was conscious that the case where acquittal has been made, while entertaining an appeal over an order of acquittal if two views are possible on making proper appreciation of available evidence the view going in favour of accused have to given importance. It is well
G settled that in case where an order of acquittal has been made on improper and erroneous appreciation of evidence, it is always open to the court of appeal to make proper and reasonable appreciation evidence and differ from the order of acquittal and in such event, it shall never hesitate in reversing the same. Ultimately, the High Court concluded:

H *"...From scanning of the entire prosecution evidence and*

having regard to submission of the respective parties, we are constrained to hold that the learned trial Court was totally wrong both in law and, in fact, in making its observation that the FIR was antedated and anti timed and a manipulated one. The trial Court also erred in law by discarding the FIR for delay in dispatching the same in the Court of the Magistrate.”

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37. We are of the opinion that the findings and conclusion recorded by the High Court are based on the correct appreciation of evidence and do not suffer from any error. The judgment of the High Court reversing the acquittal recorded by learned Sessions Judge needs no interference. There are no merits in this appeal. The appeal is dismissed. The appellant is on bail his bail bonds are cancelled and the appellant is directed to be taken into custody forthwith.

C