

CASE NO.:
Appeal (crl.) 231-234 of 2002

PETITIONER:
Mousam Singha Roy & Ors.

RESPONDENT:
Vs.
State of West Bengal

DATE OF JUDGMENT: 21/08/2003

BENCH:
N Santosh Hegde & B.P. Singh.

JUDGMENT:
J U D G M E N T

SANTOSH HEGDE, J.

The appellants in these appeals and one Deepak Rajak were tried in S.T. Case No.V(4) of 1999 by the Additional District and Sessions Judge for offences punishable under Section 120-B, 302 read with Section 34 IPC and Section 201 read with Section 34 IPC. Learned Sessions Judge as per his judgment dated 29.3.2000 while acquitting Deepak Rajak convicted the other accused under Section 302 read with Section 34 IPC, and sentenced them to undergo imprisonment for life with a fine of Rs.2,000; in default to undergo further RI for one year. He did not award separate sentences for offences punishable under Section 120-B and 201 read with 34 though he found them guilty of the said offences also. The appellants herein preferred appeals before the High Court at Calcutta while State preferred a separate appeal against the acquittal of Deepak Rajak. A Division Bench of the High Court as per its judgment dated 24.5.2001 dismissed the appeal of the appellants while it allowed the State appeal, and convicted Deepak Rajak also, for offences for which these appellants were sentenced.

Against the said judgment of the High Court the appellants have preferred the abovenoted criminal appeals. Deepak Rajak who was convicted by the judgment of the High Court did prefer an SLP before this Court but since he did not surrender, as required under the Supreme Court Rules, his appeals came to be dismissed for default. Therefore it is only accused Nos.1, 2, 4 and 5 who are before us in these appeals.

Brief facts necessary for disposal of these appeals are as follow :

One of the deceased Pritam Chakraborty who was aged about 16-17 years was a student of Vivekananda Institution, Howrah. He was staying with his widowed mother Purnima Chakraborty (PW-6) at Mouza 5/2/1, Katapukur 3rd bylane, Kadamtala, Howrah. The second deceased Rudra Parui who was of the same age as Pritam, was his classmate and a good friend. He was residing with his father Uttam Kumar Parui (PW-9) at Mouza 62, Tantipara Lane, P.S. Shibpur, Distt. Howrah. Apart from going to school together, they also used to go for tutorial classes together in the evening. It is the prosecution case that deceased Pritam was having a love affair

with one Reshma Gupta. It is stated that A-1 Mousam Singha Roy was also in love with said Reshma. Because of this twist of love triangle, the prosecution alleges that said accused Mousam was jealous or angry with deceased Pritam. It is because of this on 1.12.1998 appellant Mousam allegedly made a telephone call to Pritam at the residence of latter's maternal uncle Sibananda Bhattacharjee (PW-1) with whom Pritam and his mother PW-6 were residing. The telephone call in question was received by PW-1 at about 8 a.m. and the caller identified himself as Mousam, a friend of Pritam who desired to speak to Pritam. Thereupon PW-1 called Pritam and handed over the phone to him. During the conversation on the telephone, PW-1 found Pritam perturbed and shaky therefore after the conversation PW-1 asked Pritam what the matter was. Though Pritam did not say anything in the beginning, on being rebuked by PW-1, he replied that Mousam had asked him to come to Howrah Bridge later in the night for which PW-1 told him not to go there as desired by Mousam. Pritam then replied that since his friend Rudra (the other deceased) was going to accompany him there need be no apprehension. It is the further case of prosecution that in the evening Pritam did not come back to his house from the tutorial class even by about 8.45 p.m. which was the normal time for him to return home after the tutorial class so his mother PW-6 told PW-1 about the non-arrival of Pritam. PW-1 comforted his sister by saying that Pritam might have gone for xeroxing some of his papers. PW-1 waited till about 9.30 p.m., then went in search of Pritam to the tutorial school and on the way he met the father of Rudra, Uttam Kumar Parui (PW-9), and some others. They told PW-1 that even Rudra had not returned from coaching class and they were searching for him. So all of them together went to the coaching class where they were told by the Principal of the Coaching class, Mrinal Mukherjee (PW-14) that the boys had already left the class. Thereafter at about 11 p.m. PW-1 with PW-9 and other local people went to the Bantra Police Station and gave a verbal information about the missing of the boys to the Police Officer there. It is further stated that PWs.1, 9 and others went to the Howrah Station and searched for them on Howrah Bridge and even told the personnel of Government Railway Police Station (G.R.P.S.) about the missing boys and also gave them the description of the boys. PW-1, PW-9 and others continued the search for the boys even on 2.12.1998 morning and being unsuccessful in their efforts, went to Bantra Police Station and lodged a missing Diary. Thereafter, they went to their house. It is the case of the prosecution that on 2.12.1998 at about 10-11 a.m. Debasish Sarkar (PW-2) and Arun Polley (PW-3) came to the house of PW-9 and informed him that they had seen Pritam and Rudra in the company of accused near the Howrah Bridge on the night of 1.12.1998. After listening to PWs.2 and 3, PW-9 with his relatives went to PW-1's house and told him about the information he got from PWs.2 and 3. According to PW-1, after getting the information about PWs.2 and 3, he along with PW-9 and others searched for the boys and unable to trace them he went to Bantra P.S. and again reminded them of the missing boys but he was told by the Police since missing diary is recorded only in the morning, he will have to wait for some more time.

Since even till 3.12.1998 morning no information was received about the missing boys PW-1 went again to Bantra P.S. and lodged a written complaint which was signed by him and marked as Ex.1. In the said complaint names of accused persons were mentioned. It is the prosecution case that on 4.12.1998 the dead body of Pritam was traced near Hooghly Dock which was identified by PW-1 and on 7.12.1998 the body of Rudra was found which was identified by PW-9. In the

course of postmortem the doctor found certain ante-mortem injuries on the body of Pritam, he noted that injuries suffered by said deceased were due to manual strangulation and smothering, He also recorded that Pritam's death was due to pre-mortem strangulation. On the body of Rudra the doctor found certain bruises and contusions which were ante-mortem in nature. The doctor opined that his death was due to the effect of asphyxia as a result of drowning which was ante-mortem and homicidal in nature.

During the course of investigation the accused persons were arrested and the Police recovered a letter allegedly written by A-1 from the house of appellant Bikash Jaiswal @ Vikky (A-5). Police also recovered an exercise book (Khata) from which pages were torn for the purpose of writing the letter which was found in the house of Mousam (A-1). During the course of investigation the Police came to know that on 1.12.1998 when PWs.2 and 3 were standing near the power house on the road leading to Howrah Bridge these witnesses had noticed the appellants and the deceased going towards the Howrah Bridge. It is during the course of this investigation on 5.12.1998, one Rajesh Tiwari PW-13 appeared in the Police Station and told the Investigating Officer that on 1.12.1998 at about 8.50 p.m. when he was returning from Bara Bazar, Calcutta to his house after making certain purchases, he had seen the accused persons engaged in a quarrel with 2 boys on the footpath of Howrah Bridge. On further investigation it was found on 1.12.1998 one Dibyendu Shee PW-15 while coming back from a game of cricket had found Mousam (A-1) and a tall boy walking ahead of him and he could overhear a conversation in which Mousam allegedly told the tall boy "together it could happen on that day". PW-15 further says that out of curiosity he asked the tall boy what would happen on that day to which the tall boy replied that the matter related to his friends Pritam and Mousam. At that point of time this tall boy also made a gesture of moving his right hand horizontally indicating the nature of act. On further investigation the Police came to know that PWs.23 and 24 who were Duty Constables on the Howrah Bridge had come to know from some passersby that 2 persons; either a boy and a girl or 2 boys had jumped into the Ganges from the bridge. This was at about 9 or 9.05 p.m. When these Constables proceeded to the place of incident they noticed about 200-300 persons there therefore PW-23 sent PW-25 to the Police Station to inform the duty Officer and he started clearing the crowd. This witness also witnessed a cycle near Post No.12 of Howrah Bridge and therefore he took possession of the same. This witness also says when he was there, 2 Constables from Post No.12 visited the place of incident. It is based on these facts the appellants were charged and found guilty of the offences, as stated above.

Mr. P.K. Ghosh, learned senior counsel appearing for the appellants, submitted that in the absence of any direct evidence the prosecution had to rely on circumstantial evidence to establish its case but in this process it has failed to establish beyond reasonable doubt all the necessary links found in the chain of circumstances. Therefore, the benefit of that failure ought to have gone to the appellants. He submitted that the evidences of so called witnesses who have spoken about seeing the deceased in the company of accused persons are so artificial that it is impossible for any prudent person to safely base a conviction on the said evidence. He further submitted that even the presence of these witnesses at the place mentioned by them at the relevant time apart from being a chance circumstance, it was also highly improbable. He submitted that the non-mentioning of the names of PWs.2 and 3 in the FIR even

though by then PW-1 had come to know of the seeing of the accused and the deceased by PWs.2 and 3 on 1.12.1998 throws substantial doubt as to their presence at the sweetmeat stall. Learned counsel also argued the non-mentioning of the receipt of telephone call by PW-1 on the night of 1.12.1998 to the Police or anybody else also creates a doubt as to the receipt of the said call. Learned counsel very seriously challenged the seizure of the letter as well as the exercise book, especially on the ground that the witnesses to the recovery Panchnama had not supported the recoveries. He also submitted that the judgments of the courts below are based purely on suspicion and are influenced by the tragic murders of 2 youngsters and are not based on legal evidence.

Mr. Tapash Ray, learned senior counsel appearing for the State submitted both the courts below have considered the attack by the defence very minutely and have given good reasons for rejecting the said attack. He submitted though there are no eye witnesses to the actual assault on the deceased or throwing their bodies into the river from the bridge, the chain of circumstances relied upon by the prosecution starting from the morning of 1.12.1998 up to the arrest and recoveries made by the investigating agency clearly shows that it is the accused and the accused alone who are responsible for this dastardly crime. He submitted the factum of motive for A-1 to do away with Pritam is evident from the said accused's conduct as spoken to by PW-6, mother of deceased Pritam which is supported by her neighbour PW-7. He also pointed out that the contents of the letter recovered from the house of Vikky (A-5) showed the diabolical plan of Mousam (A-1) to eliminate Pritam with a view to prevent him from being a thorn in his life which fact is further supported by the evidence of PW-15 who overheard the conversation of Mousam with his tall friend who was subsequently identified as Vikky (A-5). He also argued that none of the witnesses who have supported the prosecution had any motive whatsoever to falsely implicate these accused persons. He also pointed out the two courts below after considering the material on record having come to the concurrent finding of guilt of the appellants there should be no reason why this Court should interfere with such a finding of the courts below.

In the course of his arguments, learned counsel for the appellants has also submitted that the courts below were more influenced by the poignant nature of the prosecution case than the legal nature of the evidence led by the prosecution. It is in this context, he relied on a judgment of this Court in the case of Hanumant Govind Nargundkar & Anr. v. State of M.P. [AIR 1952 SC 343] wherein this Court while dealing with cases of circumstantial evidence held :

"In dealing with circumstantial evidence the rules specially applicable to such evidence must be borne in mind. In such cases there is always the danger that conjecture or suspicion may take the place of legal proof. In cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they

should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused."

Apropos what was observed by this Court in the case of Hanumant Govind (supra), it will be useful to note the warning addressed by Baron Alderson to the jury in Reg. V. Hodge [1838 2 Lewin 227] which is also quoted with approval by this Court in the case of Hanumant Govind (supra) :

"The mind was apt to take a pleasure in adapting circumstances to one another, and even in straining them a little, if need be, to force them to form parts of one connected whole; and the more ingenious the mind of the individual, the more likely was it, considering such matters, to overreach and mislead itself, to supply some little link that is wanting, to take for granted some fact consistent with its previous theories and necessary to render them complete."

Bearing in mind the above caution delivered by this Court in appreciating circumstantial evidence as laid down in Hanumant's case (supra), and the cautious words of Baron Alderson in regard to the possibility of our mind getting swayed by the tragic facts of the case and our assessment of evidence being influenced by our preconceived notions, we will now analyse the prosecution case.

The prosecution has relied on the following circumstances to establish its case against the appellants :

(i) Appellant Mousam had made a telephone call on 1.12.1998 to deceased Pritam at the house of PW-1 and had asked the deceased to meet him at the Howrah Bridge later in the night at about 9 p.m. as spoken by PW-1;

(ii) Appellant Mousam was angry with Pritam because he was also friendly with Reshma Gupta which was considered as a hurdle by the said accused in the way of his love affair with said Reshma, as spoken to by PWs.1, 6 and 7.

(iii) PW-15 had overheard on 1.12.1998 the plan of A-1 and A-5 to eliminate Pritam;

(iv) Deceased and the accused persons were seen together at the power-house in the late evening of 1.12.1998 by PWs.2 and 3;

(v) Accused were seen having an altercation with 2 unknown boys at about 9 p.m. on the Howrah Bridge on 1.12.1998 by PW-13;

(vi) PWs-22 and 25 Constables came to know that either 2 boys or a boy and a girl had jumped from the Howrah Bridge into the river at about 9 p.m. on 1.12.1998 and a cycle belonging to deceased Rudra was recovered near about that place;

(vii) The deceased were missing since 1.12.1998 and their bodies were recovered on 4th and 7th December, 1998 and the medical reports showed that they had met with homicidal death;

(viii) A letter allegedly written by A-1 Mousam was recovered from the house of A-5 contents of which showed the intention of A-1 to eliminate deceased Pritam;

(ix) The above letter was written in pages torn from an exercise book recovered from the house of A-1.

To prove that deceased Pritam and Mousam A-1 were in love with the same girl Reshma because of which A-1 entertained an ill-will against Pritam, the prosecution relies on the evidence of PWs.1, 6 and 7. It also strongly relies on letter allegedly written by A-1 to A-5. So far as PW-1's evidence is concerned he merely says that he had come to know that there was a triangular affair between Pritam, Reshma and Mousam. The source of this information is not mentioned by him, therefore we do not place much importance on this evidence of PW-1 in regard to the relationship between Pritam, Reshma and Mousam. But PW-6 in her evidence states that about a week prior to 1.12.1998, she had seen a boy cycling in front of her house. When asked Pritam had told her that the boy's name was Mousam and he did not tolerate Pritam's friendship with Reshma for which PW-6 had advised her son not to mix with Reshma. Her evidence finds corroboration from the evidence of PW-7 who states that at the instance of PW-6 he did approach the parents of Reshma in regard to her involvement with accused Mousam. This part of their evidence would indicate that there was an ongoing affair between Reshma on one side and Pritam and Mousam on the other, due to which the relationship between Pritam and Mousam, at least from the side of Mousam was not cordial. To this extent, the prosecution case can be accepted.

We will now proceed to examine the other evidence led by the prosecution keeping in mind that the prosecution has established a not so cordial relationship between Pritam and Mousam but the question then is : would this in any manner indicate that Mousam entertained an intention to eliminate Pritam ? In this regard, the prosecution as a link in its chain of circumstances has tried to establish this intention of Mousam by referring to a telephone call allegedly made by him to PW-1's house on 1.12.1998 at about 8 a.m. PW-1 states because of this telephone call he came to know that Pritam was asked by Mousam to come to Howrah Bridge at about 9 p.m. and Pritam had become nervous after receiving this call. Seeing this PW-1 advised Pritam not to go to Howrah Bridge but Pritam told him that since he was going in the company of Rudra (the other deceased) there need be no apprehension. This part of the evidence if proved would establish that A-1 had called Pritam to meet him at the Howrah Bridge which circumstance will be a relevant circumstance in the chain of prosecution case. Therefore, we will now examine whether this part of PW-1's evidence can be accepted as has been done by the two courts below. In the night of 1.12.1998, PW-1 came to know at about 8.45 p.m. from his sister PW-6 that Pritam had not come home from the tutorial class as was the usual practice. At this point of time this witness instead of telling his sister that Pritam had gone to meet A-1 at Howrah Bridge, told her that he may be late because Pritam might have gone to get some papers xeroxed. No explanation is given by this witness while in witness box why he gave such incorrect excuse to his sister. It is then seen that this witness after waiting for some more time, went in search of Pritam. On the way he met PW-9 father of Rudra with some local people. PW-9 told PW-1 even his son

Rudra who accompanied Pritam had not come back therefore both of them went to Bantra Police Station and orally told the Police about the missing boys but this information was not reduced to writing by the Police. Here it is to be noticed that PW-1 did not tell the Police about the telephone call received by his nephew earlier in the day nor did he tell either PW-9 or the Police that Pritam and Rudra could be in the company of A-1 on the Howrah Bridge.

If we can accept the evidence of PW-1 that he in fact received a telephone call on the morning of 1.12.1998 from Mousam, A-1, wanting to talk to deceased Pritam and after the telephonic conversation Pritam had told PW-1 that he was going to meet A-1 and his friends on the Howrah Bridge at 9 p.m. in the company of Rudra then this would be a material piece of evidence connecting the accused to the crime. Though the courts below have accepted this part of the evidence of PW-1 we find it difficult to accept it, primarily because PW-1 did not tell anybody about the receipt of this telephone call until he lodged the complaint on 3.12.1998. In this background, if we peruse the evidence of this witness then it is seen on the night of 1.12.1998 when he went out in search of Pritam he met PW-9 father of deceased Rudra who told him that his son was also missing and together they go to the tutorial school then to Howrah Station, Howrah Bridge, they meet the personnel of the GRPS, they thereafter lodged an oral complaint with the Police about the missing boys but at no point of time PW-1 mentioned the receipt of the telephone call to anybody. This looks strange to us because if actually PW-1 had the knowledge that the deceased were going to meet the accused on the Howrah Bridge then the first thing any reasonable man would have done is to share this information with PW-9 or the Police and search for the known accused instead of going on a wild-goose chase. Absence to do so without any proper explanation makes the statement of PW-1 as to the receipt of the telephone call suspect. Then on 2.12.1998 when again PW-1 and PW-9 in the company of locals went to search the deceased at various places and went to Bantra Police Station to lodge a Police Diary of the missing persons even then PW-1 does not mention about the receipt of telephone call. For the first time we notice PW-1 comes out with this case of telephone call on 3.12.1998 when he lodged a complaint Ex. P-1 with the Police as to the missing of the deceased. As noted above, there is absolutely no explanation why he did not inform anyone between 1.12.1998 and 3.12.1998 about the receipt of telephone call. This omission coupled with the fact that the investigating agency has not made any efforts to verify whether any such telephone call was received by PW-1 on his telephone on 1.12.1998 makes us think that this part of PW-1's evidence cannot be relied upon to link the other evidence led by the prosecution to prove its case against the accused persons. Apart from the receipt of telephone call in the evidence of PW-1, nothing material connecting the accused to the murder is found. He of course says that the deceased were missing from the night of 1.12.1998 and he joined PW-9 and others in search of them and PW-9 told him that PWs.2 and 3 had seen the deceased in the company of the accused but this fact he did not mention in his complaint Ex. P-1. Even then the courts below have chosen to accept the evidence of PW-1 in regard to the receipt of telephone call on its face value without seeking even minimal corroboration. Taking into consideration the fact that PW-1 had repeated opportunities of disclosing the receipt of telephone call to others, as stated above, his failure to do so makes this part of his evidence unacceptable to us in spite of the fact that the same has been accepted by two courts below because findings of the courts below in this regard are contrary to all probabilities and

reasonableness.

Prosecution has relied on the evidence of PW-9 father of Rudra to show that his son was missing since the night of 1.12.1998 and he was told by PWs.2 and 3 that they had seen his son in the company of Pritam and other accused persons on the Howrah Bridge on 1.12.1998 at about 9 p.m. and that he in the company of PW-1 and other locals had searched these 2 missing boys but did not succeed in that quest. He also supports PW-1 to the extent that they went to Bantra Police Station to lodge a missing persons report for the first time orally and for the second time in writing and that the dead body of his son was recovered on 7.12.1998 and he also took possession of the cycle belonging to his son from the Port Police. While discussing the evidence of PW-1 we have noticed that the fact that PWs.2 and 3 had told PW-9 about the missing persons is not mentioned in the FIR and PW-1 had not told him about the receipt of telephone call on 1.12.1998 in the morning.

This witness states that on 2.12.1998 when he came to know from PWs.2 and 3 about the missing boys being in the company of the accused persons, he went to the house of PW-1 and told him what was told to him by PWs.2 and 3. He also states that he gave the addresses of A-2 to A-5 to PW-1 and further states that together they searched for these accused persons but could not trace them. PW-1 does not corroborate this part of the statement as to the mentioning of the names of the accused persons as also searching for them on 2.12.1998 in the company of PW-1. We further notice this part of PW-9's evidence is not even supported by PW-43, the investigating officer, who in his evidence states that PW-9 did not tell him at the time of recording his statement that he went to the house of the accused persons and they were not traceable. Thus, there is an attempt on the part of PW-9 to improve his evidence given in the court. Be that as it may, we do not think the evidence of PW-9 takes the prosecution case any further than proving the fact that his son along with Pritam went missing on 1.12.1998 and their search for them proved futile on 1st and 2nd December, 1998 and that PWs.2 and 3 told him that they had seen the missing boys in the company of the accused on 1.12.1998. Suffice it to state here that this evidence of PW-9 could, at the most, corroborate the prosecution case in regard to the links in the circumstantial chain provided such links have been independently established.

Prosecution to establish its case connected with motive has relied on the evidence of PW-15 Dibyendu Shee. His evidence in our opinion makes a very interesting reading though devoid of any merit. He claims to be a cricketer playing in Tikiapara Railway quarters' ground. He is also a student of Vivekananda Institution where the deceased were studying. On 1.12.1998 afternoon after the game he was going out of the cricket ground on his cycle when he found accused Mousam whom he knew, going ahead of him in the company of a tall boy whose identity obviously this witness did not know at that time. This witness then says that he overheard a conversation between accused Mousam and the tall boy to the effect "together it could happen on that day". So this witness got curious and asked the tall boy what will happen on that day, to which the tall boy is supposed to have answered : "Your friend Pritam and Mousam are related to this matter". On further questioning by this witness the tall boy replied by showing his right hand horizontally (across). This tall boy was identified by this witness in jail for the first time. This piece of evidence has been construed by the two courts below as a piece of evidence for establishing the intention of Mousam to eliminate the

deceased Pritam in the company of A-5. A reading of this evidence to our mind shows this evidence is ex facie artificial. This witness though he knew A-1 did not know Vikky till he identified him in jail on 6.12.1998 for the first time. He was examined by the Police for the first time on 6.12.1998. There is nothing on record to show how the I.O. came to know that this witness had seen accused Mousam and Vikky together on 1.12.1998. In such circumstances bearing in mind the fact that if really the 2 accused persons were discussing a plan to eliminate Pritam it is impossible to believe that the accused would share this information with a stranger in the manner as stated by this witness so as to provide some evidence against their involvement in the crime. But the courts below proceeded to accept the evidence of this witness and rejected the argument of the defence that this evidence is incongruous, unusual and contrary to the course of human conduct solely on the ground that he had identified A-5 in a test identification parade, relevance of which for the purpose of rejecting the defence challenge to PW-15's evidence we fail to understand. At any rate we agree with the argument addressed on behalf of the appellants that the evidence of PW-15 is highly artificial and opposed to normal human conduct and unworthy of acceptance by any standard.

We will now consider the prosecution case in regard to the accused and the deceased being seen together on the night of 1.12.1998. For this purpose the prosecution has firstly relied upon the evidence of PWs.2 and 3. The evidence of these two witnesses will be considered by us together. They stated that both of them resided in Thakur Ramkrishna Lane, Howrah. PWs-2 and 3 say that they knew the accused persons and the deceased. They knew deceased Rudra because he was a local boy of their locality. PW-1 states that he knew Pritam because he used to visit Rudra, he states that he knew the accused persons because they use to play cricket in Dumurjola ground which place this witness used to visit to watch cricket matches, though they were not of the same locality as that of this witness. Both these witnesses PWs.2 and 3 state that on 1.12.1998 at about 8.30 p.m. they were purchasing sweetmeat at a stall opposite the power-house at Kadamtala, at that time PW-2 saw accused persons going towards Howrah Bridge with Rudra and he asked Rudra where he was going in the night, to which Rudra supposedly replied that he was going with his friend towards Howrah. PW-2 also says that he identified the accused persons because he had seen them play cricket. In his evidence he further states on 2.12.1998 he informed PW-9 and some other people of the locality that on 1.12.1998 at 8.30 p.m. he had seen the deceased, the accused and some others proceeding towards Howrah. This witness was cross examined at length suggesting among other things that they could not have been present at that place at that time. Defence also challenged the identification of the accused by this witness. He was also pointedly cross examined in regard to the location of the sweetmeat stall with reference to the road leading from the tutorial coaching class to Howrah Bridge. It was suggested by the defence that if one has to go from the tutorial class to Howrah Bridge the road via the power-house is a longer route and nobody would normally take such a route to reach the Howrah Bridge. Of course this witness has denied the same. In regard to the possibility of this witness identifying the accused at the cricket ground, the defence has put searching questions and this witness has admitted that he was not able to say the names of other boys including those from his locality who played cricket in that stadium. He has not given any specific reason for having given the names of only the accused out of

the large number of boys playing in the stadium. But what is important to notice in regard to the evidence of PW-2 is that though he did mention to PW-9 on 2.12.1998 that he had seen the accused and the deceased together on 1.12.1998, and the said information was conveyed to PW-1 in their presence, the same was not recorded in the FIR which is a glaring omission creating doubt as to this witness having told PW-9 about they having seen and identified the accused and deceased at the time and date mentioned by them.

Similar is the evidence of PW-3. He in his examination in chief had stated that while he was paying the price of the sweetmeat, he saw PW-2 talking to Rudra, Vikky, Tikky, Rabindra, Deepak and Mousam. He also stated that Rudra had his cycle with him and thereafter these boys proceeded towards Howrah maidan and when PW-2 questioned Rudra, he told him that he was going with his friends to that side. He also states on 2.12.1998 he informed PW-9 what he had seen on 1.12.1998. This witness also has been cross examined by the defence as to their chance presence at the place of incident and their possibility of having seen and identifying the accused persons at that point of time. This witness has admitted that there were a large number of people moving on the road at that point of time and he has not given any specific reasons for recognising these accused persons on that date. Apart from the fact that names of PWs.2 and 3 are not mentioned in the FIR, they have also not told the I.O. in their statement recorded under Section 161 Cr.P.C. that they had gone to the sweetmeat shop on that day. So far as PW-3 is concerned it is seen from the evidence of PW-43 Rupak Sarkar, the I.O. that this witness had not even stated in his statement to the Police that he had known the accused persons from before. Therefore the evidence of these witnesses in the court in regard to their presence at the sweetmeat stall becomes an improvement. In regard to PW-3, there is also an improvement in regard to the identification of accused by him. Thus, in the background of the fact that they are chance witnesses, in our opinion we think it not safe to rely on the evidence of these witnesses because their names are not mentioned in the FIR, they did not tell the I.O. about their presence at the sweetmeat stall and PW-3 improved his statement in regard to the identification of the accused. The courts below while accepting the evidence of all these witnesses rejected the plea of defence to discard their evidence solely because they were independent witnesses. The High Court also observed that the omission of their names in the FIR is not fatal because all details need not be mentioned in the FIR. Thus certain glaring contradictions/omissions in the evidence of PWs.2 and 3 and the absence of their names in the FIR has been very lightly discarded by the courts below.

The next witness relied by the prosecution to show the presence of the accused and the deceased near Howrah Bridge is PW-13 Rajesh Tiwari. This witness in his evidence states he is a resident of M.S.P.C. Lane, Howrah. He had gone to Bara Bazar in Calcutta to purchase 2 mirrors and while returning by foot he purchased a windsheeter on the way and ate some Singharas. At about 8.50 p.m. he was proceeding on the right side footpath of the Howrah Bridge when he noticed the accused persons having an altercation with 2 boys whose names he did not know inspite of knowing the identity, he did not intervene in the altercation. He submits when he came to know 2 boys had been murdered on the Howrah Bridge on 1.12.1998, he went to the Police Station on 5.12.1998 to inform them voluntarily about he having witnessed the accused and the deceased on the Howrah Bridge on 1.12.1998. This witness has

admitted that his brother was involved in a murder case registered in Bantra Police Station which was investigating the case of the murders of Pritam and Rudra also. To a question asked by the defence as to the involvement of his brother in a murder case as stated above, this witness answered thus :

"XXmn. for accd. Ramkrishna.

x x x Jitendra Tiwari is my elder brother. I do not know whether my elder brother is an accd. of murder case or not in Bantra P.S. Case No.78/1998 dated 2.10.1998. In this case my elder brother was arrested."

Suggestion put to this witness was that at the instance of the Police, because his brother was seeking bail in the said murder case, he had deposed falsely. This witness of course has denied that fact but the fact remains his brother was accused in the murder case. Therefore, we will consider the evidence of this witness PW-13 in the background of the fact that his brother was arrested on a charge of murder by the Bantra Police Station. Admittedly, he has no known source of income, he is a resident of Howrah, still he goes all the way to Bara Bazar, Calcutta, to purchase two mirrors, and coincidentally, he happens to be present at the right spot and at the right time to see the altercation among these boys. The fact that he had gone to Bara Bazar to purchase mirrors, was not mentioned to the Police at the time when his statement was recorded itself is an elaborate improvement in his evidence before the court. In this background, if we examine his evidence we notice the timing of his presence on the Howrah Bridge is too far-fetched a coincidence to accept coupled with the fact that his brother was involved in a pending murder case and of all the witnesses, this witness volunteered to go to the Police Station after 4 days to inform them of what he noticed on 1.12.1998 would make his evidence highly artificial for acceptance by any reasonable person.

In such circumstances we think the High Court ought to have been more cautious in accepting the evidence of this witness.

For all the above reasons, the evidence of PWs.2, 3, 13 and 15 to which we have referred to hereinabove in our opinion does not inspire confidence in us so as to accept the same for the purpose of basing a conviction.

The prosecution then relies on the evidence of PWs.22 and 25 to establish the fact that on 1.12.1998 at about 9 p.m. an incident had taken place on the Howrah Bridge in which 2 youngsters allegedly jumped into the river. These two witnesses were the Beat Constables on duty at the Howrah Bridge on that day. PW-22 in his evidence states on 1.12.1998 he was posted at North Port Police Station as a Constable and he was on duty on the North side of Howrah Bridge from 8 to 12 p.m. along with another Constable Hari Sankar Roy, PW-25. While on duty at about 9 p.m. and when they were proceeding towards Howrah side from Calcutta on foot and they heard a cry of someone that a boy and a girl had jumped into the Ganges. Somebody else told them that 2 boys had jumped into the Ganges so they proceeded to the place of the incident and they found 200 to 300 persons present there. Out of the assembled persons some were saying that a boy and a girl had jumped and some others were saying 2 boys had jumped into the river. He then sent his partner to the Police station to inform the Duty Officer and he started dispersing the crowd. He found a cycle

by the side of Post No.12 of Howrah Bridge. He took the cycle to the Police Station. He had identified the said cycle which was later found to be that of deceased Rudra. This evidence of PW-22 does not take the prosecution case any further than the fact that on 1.12.1998 at about 9 p.m. he heard that 2 persons had jumped from the Howrah Bridge. But something material comes out of his cross examination during which he states there are Police Goomties in the Howrah Bridge. In each Goomti one Constable and one Officer remains posted round-the-clock. There are policemen in civil dress guarding the bridge and occasionally officers also check the bridge on mobile duty. He further states that the traffic department controls the traffic on Howrah Bridge and the incident in question would have taken place about 20-25 cubits from Post or Goomty No.12. He also stated that at the time of the incident there were a large number of people either present at the place of incident or were travelling on the bridge. He also stated that on being informed the officers came to the spot and he was asked to take the cycle to the Police Station. From his evidence it is clear that at all given times or at least at 9 p.m. on 1.12.1998 on the Howrah Bridge there were a large number of pedestrians and traffic. It is also clear from his evidence nearly 200 to 300 persons were present when or at about the time the incident took place.

From the evidence of this witness, it is also seen that at any given point of time, there are a number of policemen guarding the Howrah Bridge; some are stationed in the Goomties, some patrolling the bridge in civilian clothes, apart from occasional supervision by the higher officers. It is also clear from the evidence of this witness that at the time of the alleged incident, there were hundreds of people present on the bridge. In this background, if really an incident as stated by the prosecution has taken place near Goomty No.12 which is hardly 20 to 30 cubits from the place of the incident, could these accused persons have escaped the said place after the murder of the deceased without being either noticed or chased by the Police at least ? The incident as described by the prosecution shows that 5 accused persons assaulted at least one of the deceased and physically threw both of them over the bridge. If it is really true, it does not appeal to ordinary commonsense that neither the Police nor anyone out of the onlookers in the crowd either tried to prevent the incident in question or prevent the accused from fleeing the place of incident or at least would not have raised an alarm which would have attracted the otherwise complacent policemen on duty on the bridge. These are not circumstances which could be easily discarded on the specious plea that of late independent witnesses do not get involved in preventing crime or becoming witnesses to such crime. How then did they get PWs.2, 3, 13 and 15 to give evidence ? To this extent, we think the explanation of the prosecution as to the non-availability of an independent witness is contradictory. There is another major doubt as to the place of incident as projected by the prosecution which has alleged that the incident took place at about 9 p.m. on the Howrah Bridge at a time, according to PWs.3, 13, 22 and 25, there were hundreds of pedestrians and vehicular traffic, according to PW-22, there were many police personnel also present on the bridge. Then will it be reasonable for the court to accept that these accused chose such a busy place to commit the crime ? We think not. In our opinion, even this part of the prosecution case is totally opposed to ordinary human conduct.

At this stage, it will be relevant to discuss the recoveries of a letter and a book by the prosecution which according to

the prosecution establishes the further motive for murder. In this regard, the prosecution relies on the evidence of PW-35 Barun Polley and PW-36 Subhro Sen to establish the fact that letter Ex. V allegedly written by accused Mousam to accused Vikky was recovered from the house of Vikky, while PW-16 Sukamal Dutta and PW-17 Chiranjib Das were examined for the purpose of proving the recovery of exercise book (khata) from the house of accused Mousam. Prosecution has also relied upon the evidence of handwriting experts and the forensic laboratory personnel to establish the fact that the letter was in the handwriting of the accused and the pages on which the said letter was written were removed from the exercise book belonging to Mousam. The defence has seriously challenged the recovery contending that the recoveries were not proved as required in law. That apart, the learned counsel for the appellants also attacked the prosecution case as to the handwriting of A-1 in the letter as also the legality of obtaining specimen handwriting by the Police during the investigation. We do not think it is necessary for us to go into all these arguments because after examining the evidence of Panch witnesses to the recoveries, we think the prosecution has not established the recovery of the exercise book from the house of Mousam, A-1 as also the letter from the house of Vikky, A-5. A perusal of the evidence of PWs.16 and 17 who were the Panch witnesses for the recovery of the exercise book shows that they have not really seen the place from where this book was recovered by the I.O.. From their evidence it is noticed that in the case of the book, the I.O. went inside the house of A-1 and came out with the book. Admittedly, these Panch witnesses have not seen where exactly from the house this book was recovered. They have only spoken about the fact that the I.O. came out of the house with the book and told them that he recovered it from the room of Mousam, A-1. Almost similar is the evidence of PWs.35 and 36 who were the Panch witnesses for the recovery of the letter from the house of Vikky, A-5. These witnesses have also not seen the actual recovery of the letter. They had only seen the I.O. who told them that the letter was recovered from the house of A-5 and signed the seizure memo. In our opinion this evidence is insufficient to prove the recovery. The very purpose of requiring a Panch to witness the recovery is to see that independent witnesses vouchsafe for the fact that a particular thing was recovered from a place where the prosecution alleges it was found. It is absolutely necessary for these Panch witnesses to see and observe from where exactly these articles were recovered. It is not sufficient if the I.O. produced certain articles and informed the Panch witnesses that he has recovered it from a particular place, unless the actual place of recovery from where the article was recovered is seen by the Panch witnesses. In the absence of the same, their signatures on the recovery Panchnama become useless in proving the recoveries. In the instant case we have noticed that the Panch witnesses who signed the Panchnama for the recovery of the letter and the exercise book, have specifically in their evidence under oath, stated that the I.O. went inside the respective room/house and came out with the articles and told the Panch witnesses that he had recovered them. None of the Panch witnesses had seen the actual recoveries therefore, as contended by the defence, the prosecution has failed to establish the recoveries as required in law. The fact that the mother of Mousam, A-1 had signed the recovery Panchnama in regard to the exercise book or mother of A-3 had signed the Panchnama for the recovery of letter from the house of A-5 is of no consequence. They are not the Panch witnesses, their evidence is not before the court. In such a situation we agree with the learned counsel for the appellants that the recoveries are not

established in accordance with law hence the same has to be ignored.

Before we conclude, we must place on record the fact that we are not unaware of the degree of agony and frustration that may be caused to the society in general and the families of the victims in particular, by the fact that a heinous crime like this goes unpunished, but then the law does not permit the courts to punish the accused on the basis of moral conviction or on suspicion alone. The burden of proof in a criminal trial never shifts, and it is always the burden of the prosecution to prove its case beyond reasonable doubt on the basis of acceptable evidence. In a similar circumstance this Court in the case of Sarwan Singh Rattan Singh v. State of Punjab [AIR 1957 SC 637] stated thus :

"It is no doubt a matter of regret that a foul cold-blooded and cruel murder should go unpunished. There may also be an element of truth in the prosecution story against the accused. Considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted."

It is also a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof, since a higher degree of assurance is required to convict the accused.

We are also aware that this Court does not disturb the concurrent findings of the courts below if the same are based on legal evidence merely because another view is possible. Thus, keeping in mind the caution expressed by Baron Alderson (supra) as also the need to respect the concurrent findings of two courts below, we have assessed the evidence in this case very carefully, but in spite of the same we are unable to concur with the findings of the courts below. In our opinion, both the courts below have departed from the rule of prudence while appreciating the evidence led by the prosecution. On the above basis, we notice that :

(a) the prosecution has not satisfactorily established the receipt of telephone call on 1.12.1998 from Mousam to deceased Pritam as spoken to by PW-1,

(b) the evidence of PWs.2, 3, 13 and 15 are not creditworthy hence not safe to be relied upon;

(c) the recoveries of the letter from the house of A-5 and the exercise book from the house of A-1 are not proved as required in law;

Therefore, in our opinion the circumstances relied on by the prosecution in this case are neither fully established nor are consistent with the hypothesis of the guilt of the accused. These circumstances do not exclude the hypothesis of innocence of the accused, therefore, the appellants are entitled to the benefit of reasonable doubt. Accordingly, we allow these appeals, set aside the judgments of the courts below and acquit the appellants of the charges framed against them.

The appeals stand allowed. The appellants, if in custody, shall be released forthwith, if not required in any other case.

JUDIS