

Form No. J(1)

IN THE HIGH COURT AT CALCUTTA
CRIMINAL APPELLATE JURISDICTION

Present :

The Hon'ble Justice Rajasekhar Mantha

And

The Hon'ble Justice Ajay Kumar Gupta

C.R.A. 219 of 2018
With
CRAN 2 of 2019 (Old No: CRAN 4653 of 2019)
With
CRAN 4 of 2025

Sajal Kanti Roy @ Subrata @ Subho & Anr.

Versus

The State of West Bengal

For the Appellant:

Mr. Partha Sarathi Bhattacharyya
Mr. Bhaskar Seth
Mr. Avik Biswas
Ms. Sarnali Saha

For the State:

Mr. Madhusudan Sur, A.P.P
Mr. Manoranjan Mahata

Heard concluded on:

January 15, 2026.

Judgment on:

January 19, 2026.

Rajasekhar Mantha, J.:

1. The subject appeal is directed against the judgment of conviction and order of sentence dated April 26, 2018 and April 27 2018 respectively, passed by the Sessions Judge, Birbhum at Suri, in Sessions Trial No. 04(01) 2015 arising out of the Session Case No. 148 of 2014.

2. The appellants were sentenced to suffer rigorous imprisonment for life for the offence under Section 302/34 of the IPC. They were further directed to pay fine of Rs 1,00,000 (one lakh) each. In default thereof, they were to undergo a rigorous imprisonment for a period of 6 months.

3. The appellants were also sentenced to rigorous imprisonment for 1 year for the offence committed under Section 448 of the IPC. They were also directed to pay a fine of Rs 5000 (five thousand) each. In default thereof, they were to undergo imprisonment for a period of 1 month each.

4. The appellants were sentenced to rigorous imprisonment for 5 years for the offence committed under section 27 of the Arms Act. They were directed to pay a fine of Rs 50,000(fifty thousand) each. In default thereof, they were directed to suffer rigorous imprisonment for a period of 6 months.

5. The sentences were directed run concurrently. The Trial Court directed that if the aforesaid fine amount is realized from the appellants, the wife of the deceased Saraswati Ghosh shall be paid the said fine amount as compensation under section 357(1)/(b) of CRPC. The detention period already undergone by the appellants were directed to be set off against the aforesaid period of imprisonment.

THE PROSECUTION CASE AND EVIDENCE ON RECORD

6. The victim, one Sagar Ghosh, received bullet injuries at his house on the night of July 22, 2013. At that time, he was with his wife, **PW 14**, **Sarawati Ghosh** and daughter-in-law, **PW 15, Shibani Ghosh**. The polling day for the said Panchayat election was scheduled on next day, 23 July 2013. Thus, a substantial police force and central force were deployed in the area. A number of police personnel serving in various state and central forces thus came to the house of the victim upon being intimated by the local Police station Panrui PS. The son of the victim **Hriday Ghosh PW-19** was contesting as an independent candidate after being denied a ticket from the ruling political party of which he was a member.
7. The members of the ruling party based in the village of Bandhnabagram Panchayat were not comfortable and happy with PW 19 contesting as an independent candidate in the said Panchayat election. The appellants were the members of the said ruling party. They were canvassing for the candidate nominated by the said ruling party. PW 19 has deposed that he used to reside in the house of his sister away from home out of fear against the appellants and the ruling dispensation.
8. PW 14 and 15 have deposed that PW 14 and 15 and the victim retired to their rooms that night when some people knocked on the main door of the house, claiming to be the police. The house had one main door on the southern side followed by an open courtyard. After the courtyard

followed the dining area and kitchen which were covered and locked by an iron grill.

9. The investigating agency has failed to discover and rather has been rather utterly casual in ascertaining the design of the said grill gate. It has vacillated from its stand that the grill gate was covered with gunny bags to plastic.
10. However, any grill gate is designed with openings of sufficient width. This enables a person to insert their hand and fire bullets at the inmates of the house. This is evident from the bullets having been fired at the victim through the said grill gate. Both sides of the grill gate were open and visible from either side.

THE FIRING OF WEAPONS AND RECOVERY OF BULLET HEAD AND CARTRIDGES

11. PW 14 and 15 have deposed that the said main door of the victim's house was closed. On hearing the said knock at the door, the victim and PW 14 and 15 came to the grill covered and locked, dining area of the house. The victim enquired of the identity of the persons standing outside, without opening the door. The persons outside said that they are policemen. In this regard, PW 14 and PW 15 have deposed that the house of the victim was often raided by the police to search for the son of the victim, **PW 19, Hriday Ghosh**. The assailants of the victim waiting outside thus knew that the victim and his family will be obligated to open the door if they represented themselves as policemen.

12. PW 14 and PW 15 have deposed that they did not open the main door. They have deposed that upon being denied entry through the main door,

several persons jumped the boundary wall of the victim's house and came near the grill gate at the dining space. They carried firearms. They fired bullets at the victim from the said grill gate. The victim did not die immediately. He was seriously injured. The appellants were therefore the first few persons, to jump above the main boundary wall of the house and reach the grill gate.

13. PW 14 and PW 15 & PW 16-19 have deposed that they were told by PW 14 and PW 15 that the first bullet was fired at the navel and/or lower abdomen area of the victim. As a result, the victim retracted and caught the dining table a crouched.

14. **PW 27, was Dr Debasish Sarkar**, who conducted Post Mortem on the victim. He found injuries at the right occipital area of the skull and a bruise on the middle of the vault of the skull of the victim. He thus found injuries on the back of the neck and at the top centre of the head of the victim. Notably, PW 27 opined that the said injuries are often caused to a person who as a result of receiving bullets falls and encounters a wall or the edge of a table. PW 27 opined that the cause of death is homicidal. He opined that the injuries found on the person of the victim have been caused by bullets.

15. PW 14 and PW 15 have deposed that the second bullet was fired at victim's left thumb. PW 27 did not find any injury in any of the two hands and fingers of the victim. PW 27 did not find any bullet in the abdomen of the victim. PW 27 however pointed out that the bullet may have been lodged at the sacrum region of the victim.

16. The sacrum region is the point which connects the spine with the pelvis. The area is situated immediately above the tail bone. The sacrum region is thus at the immediate back of lower abdomen. The first bullet was indeed fired at the lower abdomen of the victim. PW 27 found injuries, caused by a bullet, at the lower abdomen area of the victim. PW 27 has opined that the trace of bullet in the sacrum region can only be detected by the X-ray. No X-ray was conducted during the post mortem. Thus, it is possible that physical trace of the bullet was not found during post mortem since it may have been lodged at the sacrum region of the victim.

17. PW-14 and 15 deposed that 2 bullets were initially fired at the victim. The effect of the first has been discussed above. The second bullet hit the thumb of the victim's left hand. PW 24, was Dr Sanatunu Sarkar, who conducted surgery on the victim. He found the victim's left hand's thumb was bandaged. PW 27, the post mortem doctor, however did not find any injury in any of the hands of the victim. PW 14 and PW 15 have deposed that the second bullet had just grazed the left finger, thus causing no substantial injury.

18. PW 14 and PW 15 have deposed that two more bullets were also fired by the assailants. They hit the walls. PW 14-18 have stated that the police have recovered cartridges of two bullets from the PO. **PW 16, Tanmoy Ghosh**, considered the victim as his grandfather and **PW 17, was Suman Ghosh** was the victim's grandson. **PW 18, Buddhadev Pal**, was a co-villager. PW 16 and 17 confirmed that 2 cartridges were recovered by the PO at the PO. **PW 38 was Dr. Sampa Dhabal**, the

Assistant Director, Forensic Laboratory has examined the said bullets. She opined that bullets were used. The bullets have been fired from a 9mm pistol.

THE IDENTIFICATION OF THE APPELLANTS/ ASSAILANTS

19. PW 14 and 15 have deposed that after having received the first bullet, the victim has shouted out the names of the appellant Nos. 1 and 2 herein, that is Subrata and Bhagirath. PW 14 and PW 15 have further deposed that they have clearly recognized the appellants after the victim shouted out their names by pointing his face towards the grill gate.
20. PW 14 has deposed that she has recognized the appellant no.2, Bhagirath, by his voice. The appellant no.2 is stated to have modulated his voice and asked the inmates of the house that the police are waiting outside and they should open the door.
21. PW 15 has deposed that the victim instructed her to go upstairs and see who have surrounded their house. PW 15 is stated to have seen the appellants after reaching thereat.
22. PW 14 and 15 have deposed that the victim further pleaded with the appellants not to fire any more bullets as the victim had already suffered many. The victim, therefore, had a clear view of the place from which the assailants fired bullets at him since he pointedly made the said statement to his assailants. He thus clearly recognized his assailants.
23. PW 14 and 15 have stated that the victim went to the kitchen after being shot at. He was taken to the bedroom by PW 14 and 15. The victim is stated to have instructed PW 14 and PW 15 to inform the local people. The latter informed the panchayat Pradhan of the village. Police arrived

1(one) hour and 30(thirty) minutes thereafter. PW 5, PWs 8-13 and PW 31-32 also reached the house of the victim. They were personnel drawn from various forces of the State and Centre to ensure law and order in the then ensuing Panchayat elections, present in the village Bandnabagram. The prosecution has examined them with a view to establish a chain of witnesses having seen one person suffering from bullet wounds at the house of the victim Sagar Das. The injured person was the victim himself.

24. PW 14 and 15 were petrified and hence they did not immediately open the door on the arrival of the police. PW 16 came to the house of the victim upon being intimated by PW 15 and assured them that the persons at the door are indeed police.

25. PW 14-18 have stated that the police enquired with the victim and the victim told the police that he had been shot at by the appellant nos. 1 and 2 and other accused persons. It is stated that the police reduced the said statement of the victim in writing. PW 17 has deposed that the victim put his signature on the said statement. PW 18, however, has deposed that the victim did not sign the said statement. The statement has not been produced in Court.

26. The PW 14-18 have deposed that the victim was conscious but was in immense pain. **PW 22 was Dr Kaushik Mandal, and PW 24 was Dr Sanatunu Sarkar.** They conducted surgery on the victim when the latter was referred to Burdwan Medical College and Hospital (BMCH), by the Bolpur Sian Hospital. They stated that the victim was disoriented but conscious. The postmortem doctor, PW 27, explained the mental position

of a disoriented person. A disorientated person, lacks the ability to recognise the place, time and persons around him or her.

27. **PW 29 was Dr Parvej Sultam**, who treated the victim at Sian Hospital, Bolpur. He deposed that the victim was anxious by which he meant that the victim was in pain. **PW 36 was Dr Rama Prasad Basu**, another doctor at the Sian hospital who treated the victim. He deposed that the victim was in pain. **PW 37 was Dr Avidip Dey**, the Gastrointestinal Surgeon posted at BHMC. He treated the victim thereat. He has also deposed that the victim was conscious but in pain and restless.

28. The police were initially unable to take the victim to the hospital due to insufficient fuel. The DSP of the Birbhum District posted thereat for the Panchayat election in the village offered his vehicle to take the victim to the hospital. PW 17 and 18 have deposed that they accompanied the victim in the police vehicle, along with constables to Sian Hospital Bolpur. They have deposed that victim named the appellants and other accused persons as his assailants.

29. At Sian Hospital, Bolpur. the victim was treated by the PW 29 and 36. The said hospital lacked the infrastructure to carry out surgery. The victim was thus referred to BMHC. PW 24 and 25 unsuccessfully carried surgery on the victim thereat. He died thereat.

THE REGISTRATION OF THE FIR

30. FIR No. 79 of 2013 was initially registered under Sections 448/326/307/34 and Sections 25 and 27 of the Arms Act, 1959 by the Panrui PS based on the written complaint of the PW 14 dated July 22,

2013. Later Sec.302 was added after the death of victim. The said complaint was scribed by PW 15.

31. PW 14 and 15 have deposed they were coerced to make the said complaint by the police personnel of the Panrui PS. They have also stated this before the Magistrate, under Sec 164, CRPC. They have deposed that the police personnel of Panrui PS have forced them to sign on some blank papers and documents.

32. PW 15 on the next day sent a complaint to the Superintendent of Police, Birbhum. She named as many as 41 accused persons in the said complaint. She narrated the said coercion meted out by the Panrui PS. The Appellants were arrested on that fateful night. The statements of PWs. 14,15,16,17,18 were recorded by the Magistrate under Section 164 of the CrPC, about 6 months after the incident. The delay was probably due the writ petition and appeal and SLP filed by the family of the victim regarding the signature on blank and other documents obtained by the Panrui PS inter alia at gun-point, from PW 15.

33. The Appellants and other accused persons moved the writ petition WP 33233(W) of 2013, inter alia, alleging that the said FIR is result of aforesaid coercion. The order dated February 14, 2014, was passed in the said writ petition WP 33233(W) of 2013, directing the constitution of a Special Investigation Team (SIT). Meanwhile, PW 15, filed the writ petition W.P. No. 19538(W) of 2014 praying for transfer of investigation to Central Bureau Investigation (CBI).

34. Order dated September 24, 2014 was passed in the aforesaid two writ petitions directing the transfer of the investigation to the CBI. The State of West Bengal filed the intra court appeal AST 407 of 2014. The order directing transfer of investigation to the CBI was set aside by judgment and order dated December 3, 2014 passed by a co-ordinate bench. The Special Investigation Team was directed to conclude the investigation.

35. PW 15 and PW 19 filed Special Leave petition SLP(Crl) No. 1018 of 2015 against the order setting aside transfer of investigation to the CBI. The said SLP was subsequently allowed to be withdrawn by order dated September 24, 2015.

36. **PW 40**, was **SI Sushil Kumar Maji**. He conducted the inquest. He recorded the injuries found at the naval area and left hand finger of the victim. **PW 35**, was **SI Sampat Mukherjee**, who drew up the said FIR dated July 22, 2013. **PW 39** was **SI Dwijaraj Sahana**, he was investigating officer of the case.

37. **PW 41**, was **Biswajit Chatterjee**, the IO of the SIT, constituted by the High Court. PW 41 has deposed that PW 14 during examination has told him that she has seen the appellant no.1, Subrata, and the appellant no.2, Bhagirath, in the PO.

38. Investigation was completed. Charge sheet was filed. Charges were framed under section 148, 448, 302 read with Section 149 and Section 25 and 27 of the Arms Act, 1878 against the appellants and 3 other persons. The trial commenced and the prosecution examined 45

witnesses and the relevant portions of the evidence have been referred to hereinabove.

39. The appellants were examined under section 313 of the CRPC. They took the plea of false implication.

ANALYSIS OF THIS COURT.

40. PW 14 and 15 are clearly the eyewitnesses to the presence of the appellant nos. 1 and 2 at the PO on the fateful night. PW 14 has heard the voice of the appellant no.2. PW 15 has, inter alia, seen the appellants surrounding the house of the victim. Thus, it was incumbent on the appellants to either explain why they were present in the house of the victim on the fateful day or to prove their alibi on that day. The appellants have denied their presence. They, however, have not shown any alibi.

41. PW 14 and PW 15 did not, however, exactly see the appellants firing bullets at the victim. They, however, heard the victim, after being shot at, spontaneously shouting out the names of the two appellants. The evidence of the PW 14 and PW 15 that the victim took the names of the appellants after he was shot falls under the exception to the hearsay evidence, provided under Sections 6 and 7 of the Indian Evidence Act, 1872.

42. The exception to hearsay evidence does not convert indirect evidence to direct evidence. The exception only removes the road block of admissibility which an indirect or hearsay evidence faces. Sections 6 and 7 of the Evidence Act are set out below:-

Section 6. Relevancy of facts forming part of same transaction.—Facts which, though not in issue, are so connected with a fact in issue as to form part of the same transaction, are relevant whether they occurred at the same time and place or at different times and places.

Illustrations

(a) A is accused of the murder of B by beating him. **Whatever was said or done** by A or B or the bystanders at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact."

Section 7 . Facts which are the occasion, cause or effect of facts in issue. Facts which are the occasion, **cause** or effect, immediate or otherwise, of relevant facts, or facts in issue, or **which constitute the state of things under which they happened, or which afforded an opportunity for their occurrence or transaction, are relevant.**

Emphasis applied

43. The naming by the victim of the appellants is a natural response given by a person who has suffered bullets from persons he *knows*. The said formed part of the same set of events, in terms of Sec.6 of the Evidence Act. PW 14 and 15 having heard and witnessed the naming of the appellants and having deposed as such, renders the said portion of their evidence admissible under Section 6 of the Evidence Act.

44. The deposition of PW 14 and 15 that the victim told the appellants not to fire any more bullets since he had already suffered two bullet injuries is admissible in terms of Section 7 of the Evidence Act. The said statement by the victim is a plea for mercy from the appellants, saying the victim has suffered enough that he will eventually die. The appellants thus need not fire any further to confirm the death of the appellant. The said statement indicates the environment prevalent on that fateful night. PW 14 and 15 have deposed about the said environment. The said state of environment, as deposed, is admissible in terms of Section. 7 of the Evidence Act.

45. PW 17 and 18 in this regard have deposed the victim on his way to the Sian Hospital, Bolpur told them that the appellants herein have shot bullets at him. PW 14, 15,17 and 18 have deposed that the victim did

take the name of the appellants to the police when the police entered the house of the victim.

46. The victim did not have any time to conjure up the names of the appellants or reason to falsely implicate them. The medical evidence has established that the victim was in pain but was mentally conscious. The doctors of two hospitals where the victim was taken for treatment have deposed that he was fully conscious. He was, however, suffering from immense pain. Thus, the victim at that time was not in a mental state to think and falsely implicate the appellants. He said what he saw. In fact, the victim had not taken the full name of the appellant when he was shot at. He took the short version of the name of the appellants, namely by saying Subho and Bhaghi have fired bullets at him. This indicates that the appellants were very well known to the victim. Thus, it was natural for the victim to immediately recognize the appellants.

47. The Supreme Court in ***Dhal Singh Dewangan v. State of Chhattisgarh, reported in (2016) 16 SCC 701*** has explained the role of Section 6 of the Evidence Act as follows:-

24. The general rule of evidence is that hearsay evidence is not admissible. However, Section 6 of the Evidence Act embodies a principle, usually known as the rule of res gestae in English law, as an exception to hearsay rule. **The rationale behind this section is the spontaneity and immediacy of the statement in question which rules out any time for concoction. For a statement to be admissible under Section 6, it must be contemporaneous with the acts which constitute the offence or at least immediately thereafter. The key expressions in the section are "... so connected ... as to form part of the same transaction".** In the latter case, it was accepted that the words sought to be proved by hearsay, if not absolutely contemporary with the action or event, **at least should be so clearly associated with it that they are part of such action or event. This requirement is apparent from the first illustration below Section 6 which states "whatever was said or**

done ... at the beating, or so shortly before or after it as to form part of the transaction, is a relevant fact".

23. In Krishan Kumar Malik v. State of Haryana [Krishan Kumar Malik v. State of Haryana, (2011) 7 SCC 130 : (2011) 3 SCC (Cri) 61] , while testing the veracity of the version of the prosecutrix that she was subjected to rape, the fact that she had ample opportunity and occasion to disclose to her mother and sister soon after the criminal act, in which case their statements could have lent assurance, was taken into account. This Court observed as under: (SCC pp. 138 & 139, paras 33 & 37)

"33. As per the FIR lodged by the prosecutrix, she first met her mother Narayani and sister at the bus-stop at Kurukshetra but they have also not been examined, even though their evidence would have been vital as contemplated under Section 6 of the Evidence Act, 1872 (for short "the Act") as they would have been res gestae witnesses. The purpose of incorporating Section 6 in the Act is to complete the missing links in the chain of evidence of the solitary witness.....In that narrative, it is amply clear that Bimla Devi and Ritu were stated to be at the scene of alleged abduction. Even though Bimla Devi may have later turned hostile, Ritu could still have been examined, or at the very least, her statement recorded.

Emphasis Applied

48. In **Krishan Kumar Malik's decision (supra)** referred to in **Dhal Singh Dewangan decision(supra)** , it was held that the statement given by the rape victim to his mother and sister when the former met the latter at the bus stand just after the rape committed on her was a relevant fact and thus admissible under Section 6 of the Evidence Act. On similar lines, the deposition of PW 14 and PW 15 regarding the shouts outs of the victim and the state of the environment in the house of the victim on that fateful night establishes the role of the appellants. It clearly proves that the appellants were present in the house of the victim. They fired bullets at the victim at that time.

49. The victim, after receiving the first bullet injury, shouted out the names of the appellants and identified them as having fired the bullets at

him. PW 14 and 15 have deposed that the victim took the names of Subrata and Bhagirath, the two appellants. This spontaneous utterance occurred before the remaining three bullets were fired and after one more after the 2nd bullet was fired. The said shout out and identification of the appellants as the assailants of the victim amounts to the victim indicating the cause of his death and persons responsible therefor. This is one of the circumstances of the entire transaction/circumstances which resulted in his death, in terms of Section 32 of the Evidence Act. The circumstances being the appellants firing bullets at the victim.

50. Mr Bhattacharya, Learned counsel for the Appellants, has argued that the victim was not in a position to clearly see his assailants. He argues that there is no evidence on record to suggest that there was sufficient light in the house of the victim.

51. The said argument cuts both ways. The medical evidence has established that the victim suffered bullet injuries. The rough sketch has indicated that the house of the victim had a locked grill gate after the courtyard where the dining area and thereafter the kitchen was located. The main door of the victim's house was closed at the time of the incident. Thus, none could have fired bullets from the main door. The grill gate clearly was the only route through which bullets could have been fired.

52. When the assailants could zero down on the victim and fire bullets at him, it follows that the victim and his assailants could equally see each other. The victim has thus clearly seen the appellants.

53. The victim has indicated the names of his assailants to the police. The police are stated to have reduced the same in writing. The police, however,

chose not to produce it before the Court. The victim indicated the names of the appellants and other accused persons, who have been acquitted by the court below, to PWs 17 and 18 and the police constables, in the police vehicle on the way to the Sian Hospital, Bolpur.

54. The oral dying declaration of the victim, which he made just after he suffered the first bullet, is more reliable than any other declarations where the victim added the names of the other accused persons. The reason is that the victim took the names of Bhagirath and Subrata *spontaneously* after suffering the first bullet. Thus, he had no time to exaggerate or embellish at that moment.

55. Let us now examine the admissibility of an oral declaration made by the victim in relation to the cause of his death. The said dying declaration has not been produced in written form. Further, the aforesaid dying declaration was made before his wife, PW 14, and daughter-in-law of the victim, PW 15.

56. The PW 14 and 15 are not interested witnesses. They were natural witnesses in view of their relation with the victim; their presence in the house of the victim was normal. They, having heard the shout out of the victim was also normal. They did not have any motive to implicate the appellants. If PW 14 and 15 had a motive to falsely implicate the appellants, PW 15 would not have added to the names of the assailants of the victim.

57. Section 32 of the Indian Evidence Act, 1972, inter alia, provides for two kinds of dying declarations. A dying declaration has two facets. First, it may distinctly indicate the cause of the death of the person making the declaration. Second, it may indicate the circumstances surrounding the

death of its maker. The circumstances covered under Section 32 are those which have led to the death. The first kind of dying declaration is an oral one, i.e which was not been reduced in writing by anyone. It has only been heard and witnessed. The second kind is a dying declaration which is either been written by the deceased himself or recorded by a witness to the said dying declaration.

58. The recording of a dying declaration stands elevated in its authenticity when it is recorded by a Judicial Magistrate or by an independent, uninterested and respected officer of the State. Significantly, Section 32 does not prescribe any format for recording a dying declaration. The legislature, therefore, has kept the form in which a dying declaration may be brought before the Court *flexible*. The State has also not prescribed any format in which a dying declaration should be made. Therefore, the admissibility of a dying declaration is not dependent on in what form and who has heard or recorded the same.

59. Indeed, the form in which a dying declaration is recorded and the official status of the person who has recorded or heard the dying declaration adds to the authenticity and reliability of the same. The authenticity and reliability of a document is, however, distinct and different from its admissibility. Admissibility determines whether a document can at all be received by the Court. Reliability indicates whether the contents of the document can be believed to be true.

60. The Supreme Court in **Sudhakar v. State of Maharashtra, reported in (2000) 6 SCC 671**, has held that when the written copy of the dying declaration is not available, secondary evidence can be adduced by the

prosecution. The person before whom the oral declaration is made can also be examined to prove it. In **Sudhakar decision (supra)** under paragraph nos. 5, it was held as follows:-

5. Section 32 of the Evidence Act is an exception to the general rule of exclusion of the hearsay evidence.....Such statements are admitted in evidence on the principle of necessity.....To make such statement as substantive evidence, the person or the agency relying upon it is under a legal obligation to prove the making of the statement as a fact. If it is in writing, the scribe must be produced in the court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement.However, in cases where the original recorded dying declaration is proved to have been lost and not available, the prosecution is entitled to give secondary evidence thereof.

Emphasis Applied

61. A dying declaration made before a person who is not Magistrate or an officer is also admissible in evidence. Reference in this regard may also be made to the decision in **Arvind Singh v. State of Bihar, reported in (2001) 6 SCC 407:-**

17. Be it noted that the dying declaration herein has not been effected before any doctor or any independent witness but to the mother who is said to have arrived at the place only in the morning — the mother admittedly is an interested witness; though that by itself would not discredit the evidence tendered in court but the fact remains that the doctor's evidence considering the nature of the burns posed a considerable doubt as to whether such a statement could be made half-an-hour before the death of the accused.

Emphasis Applied

62. The dying declaration of the victim is the direct result of the first bullet fired at him since the victim spontaneously took the names of the appellants after having been shot. The dying declaration came at the very inception when the crime unfolded.

63. Learned Counsel for the Appellants has argued that the victim was not in a fit mental condition to identify on that night that who fired the bullets at him. The medical evidence has established that the victim, though in pain, was fully conscious. The pain did not, however, wipe out his memory. The victim was aware after being shot, from which direction the bullets were fired at him and who fired the same.

64. Further, the first dying declaration was made just after he was shot. The effects of bullet injuries thus were yet to arrest mind and health the victim. The victim, therefore, was yet to be mentally and physically arrested by the bullet injuries. He thus could identify his assailants. Despite suffering from pain, the victim was mentally agile and alert. This is evident from the fact that the victim was awake till the time of the surgery. The doctors found him fit to undergo surgery. The victim did not die immediately.

65. PW 14, 15, 17 and 18 thus have duly proved the dying declaration of the victim. The same clearly implicates the appellants. A dying declaration is admitted based on the doctrine of necessity. The necessity is that the culprits must not escape justice because their victim had died.

66. Therefore the point of admissibility of a dying declaration must be decided based on the facts and circumstances of each case. This case is a reflection of an investigative casualty. The same, however, has not negated the prosecution's case in view of the deposition of PW 14-18.

67. The post-mortem report has established that the victim died as a result of bullet injuries. The post-mortem doctor has opined that the nature of injury found in the middle of the back of the neck and the

centre of the head of the victim is often found in a person who has collided with a table as a result of shock, caused by bullet injuries. This corroborates the oral testimony of PW 14 and PW 15. The latter has deposed that the victim held on the dining table near him after receiving the first bullet injury.

68. The aforesaid corroboration of the evidence of PW 14 and PW 15 by the medical evidence elevates the reliability of former's oral evidence. PW 14 and 15 thus have truthfully detailed the last movements of the victim that night. The fact that the PW 14 and PW 15 have been able to see the object against which the victim collided after having suffered the first bullet indicates that the courtyard of the victim had sufficient light for a person to have a clear view of what was happening inside the house. The argument that the victim, PW 14 and PW 15, did not have good visibility inside and outside the house on that night cannot be accepted.

69. Had there been insufficient visibility at the grill gate from where the bullets were fired, the assailants could not have arrived thereat by jumping over a boundary wall.

70. Mr Bhattacharya, for the appellants, has argued that the evidence of PW 14 and 15 has been rendered unbelievable in view of that they have subsequently stated to the police that they wrote the complaint against the appellants out of coercion by Panrui PS. He has argued that PW 15 in fact moved a writ petition praying for the transfer of the investigation to the CBI. PW 14 and 15 have stated before the Magistrate that they were coerced into writing the complaint against the appellants.

71. This Court finds that PW 14 and PW 15 have not denied the role of the appellants in their statement under Section 164 CRPC. They have not denied the aforesaid dying declaration of the victim. PW 15 added to the names of the assailants of the victim. The same may be discounted in view of decision in **Leela Ram v. State of Haryana State of Haryana, reported in (1999) 9 SCC 525** wherein it was held ad follows:-

“12. It is indeed necessary to note that one hardly comes across a witness there could whose evidence does not contain some exaggeration or embellishment — sometimes even be a deliberate attempt to offer embellishment and sometimes in their over anxiety they may give a slightly exaggerated account. The court can sift the chaff from the grain and find out the truth from the testimony of the witnesses. Total repulsion of the evidence is unnecessary. The evidence is to be considered from the point of view of trustworthiness. If this element is satisfied, it ought to inspire confidence in the mind of the court to accept the stated evidence though not however in the absence of the same.”

Emphasis Applied

72. The deposition given before the court is a substantive piece of evidence. A statement under Section 164 CrPC is a corroborative piece of evidence only. The safety net weaved by a statement under section 164, CRPC is that it prevents the witness from retracting therefrom. The existence of Section 164 statement of a witness however does not prevent him or her to tell the truth before the Court which may be opposite to what has been stated by him in his statement under Section 164 CRPC. The Court has to assess the trustworthiness of the contradiction.

73. In the present case, the Sec. 164, CRPC statements of PW 14 and 15 have not diluted their evidence before the Court. The implication of the other accused persons should not be acted upon in view of the inconsistency between the first dying declaration of the victim and

subsequent statement where the victim has added to the number of his assailants. The spontaneity with which the victim took the name of the appellants when he was first shot at and the role of the appellants found in the evidence of PW 14, 15, 17 and 18 lend strong credence to the guilt of the appellant. Reference in this regard may be made to the decision in reported in **R. Shaji vs. State of Kerala reported in (2013) 14 SCC 266** wherein it was held as follows:-

27. So far as the statement of witnesses recorded under Section 164 is concerned, the object is twofold; in the first place, to deter the witness from changing his stand by denying the contents of his previously recorded statement; and secondly, to tide over immunity from prosecution by the witness under Section 164. **A proposition to the effect that if a statement of a witness is recorded under Section 164, his evidence in court should be discarded, is not at all warranted.**

Emphasis applied

74. Mr. Bhattacharya next argued that the sketch map prepared by the first IO of the Panrui PS does not indicate the dining area of the PO surrounding the grill. This has been indicated by the Sketch map prepared by the SIT. This Court however notes that the evidence of PW-14 and 15 has clearly established the design of the ground and first floor of the house of the victim. The defense has not put any suggestion that the description of dinning area and grill gate as deposed by PW 14 and 15 was inaccurate. Further, the rough sketch is not a substantive piece of evidence. Thus, the mere absence of an indication regarding the dinning area and grill gate in the first rough sketch does not come to the aid of the appellant. Hence the said argument cannot be accepted.

75. It is next argued that the recording of the statements of the PW-14,15,16,17,18 after 6 months of the incident should render them incapable of any credence. It must be noted that the investigation was itself delayed due the writ petitions filed by the family and the appellants before single benches of this Court and the Appeal and the SLP. The final result of the writ petitions was transfer of investigation to the SIT comprising of officers of the CID West Bengal. This was the reason for the delay in recording of such statements. The same would not ipso facto render the statements to be disbelieved. The deponents of the statements are unlikely to have made up the events leading to the crime. Some exaggerations and embellishments in the statements are liable to be ignored and the substance of the same has been considered by this Court.

76. It is next argued that the purported collecting of blood-samples of the victim in the PO and on his clothes are ridiculous after 6 months of the incident and more so after the place was cleaned up at the instance of the Panuri PS. The blood stained clothes of the victim were also washed by the family at the instructions of the Panrui PS. This court notes that these are serious irregularities on the part of both the State police and CID WB. The same cannot negate the conviction of the appellants in view of the overwhelming evidence against them as already discussed hereinabove.

77. It is next argued by Ld Counsel for the appellants that the Bed Head tickets of the Bolpur SD Hospital and the BMCH do not record the names of the appellants as assailants. PW 16,17, and 18 have

deposed in the Trial and before the the Magistrate under Section 164 of the CrPC that the victim named all his assailants before the police taking him to the Bolpur SD Hospital and the BMCH. Such statements have been proved by the makers and exhibited in Court. The non mention of the history of the incident by the treating doctors cannot be taken advantage of by the appellants. A bed ticket is not equivalent to an FIR. The bed ticket, thus, need not meticulously mention the names of the assailants of the victim, which is expected in an FIR.

78. This Court cannot ignore the fact that the appellants in their examination under Section 313 of the CrPC have not taken any alibi or plea that they were not present at the PO on the date and time of the occurrence.

CONCLUSIONS:-

79. In view of the discussions, CRA 219 of 2018 and all connected applications stand dismissed. The aforesaid judgment of conviction and order of sentence of the learned Trial Court is upheld.

80. Consequently, the appellant shall undergo the imprisonment as imposed by the Trial Court and upheld by us. The appellants shall pay the fine amount, as imposed by the Trial Court as stated above. They shall pay the fine within one month from to date.

81. The said fine amount shall be paid to the wife of the victim and the daughter-in-law of the victim. The total fine amount shall be equally divided between PW 14 and PW 15. To this extent, the order of the trial

Court, which directed the fine amount to be paid only to the wife of the victim, stands modified as indicated above.

82. The appellants shall surrender before the jurisdictional Trial Court, if on bail. The jurisdictional police shall otherwise take the custody of the appellants, and produce them before the Jurisdictional Trial Court. The Trial court shall ensure that the appellants serve the remainder of their jail imprisonment, as stated above.
83. The Trial Court shall ensure that the appellants pay the fine as stated above within 30 days from the date of the judgment. If the appellants are not willing to pay or fail to pay the fine within the said 30 days, the State is directed to pay a sum of Rs 5 lakhs (five lakhs) as compensation to the wife of the victim, PW 14 and the daughter-in-law of the victim, PW 15, who endured the shock, pain and fear on that fateful night.
84. The said 5 lakhs shall be equally divided between them. In the absence of either of the two due to death or otherwise, full Rs 5 lakhs(five lakhs) shall be paid to the survivor. The jurisdiction Trial Court is directed apply before the concerned authority of the State upon the failure of the appellants to pay the fine for the State to process the payment of the said Rs 5 Lakhs.
85. The state shall take recourse to the applicable jail rules and laws to recover the fine amount from the appellants, if they do not pay the fine as stated above. The State shall only recover the amount of money from the appellant imposed as a fine.
86. There shall be no order as to costs.

87. Parties may act on the server copy of this order duly downloaded from the official website of this Court.

88. Let the Trial Court Records be sent back.

(Rajasekhar Mantha, J)

I agree

(Ajay Kumar Gupta, J)