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ITEM NO.1B COURT NO.12 SECTION IIB
(For Jt.)

S U P R E M E C O U R T O F I N D I A
RECORD OF PROCEEDINGS

CRIMINAL APPEAL NO(s). 2026 OF 2009

SURAJIT SARKAR Appellant (s)

VERSUS

STATE OF WEST BENGAL Respondent(s)

Date: 04/12/2012 This Appeal was called on for judgment today.

For Appellant(s)
Mr. Rauf Rahim,Adv.

For Respondent(s) Mr. Chanchal Kr. Ganguli,Adv.
Mr. Abhijit Sengupta,Adv.

Hon'ble Mr. Justice Madan B. Lokur pronounced the judgment of the Bench comprising Hon'ble Mr. Justice Swatanter Kumar and His Lordship.

The conviction of Surajit Sarkar is set aside for the offence of the murder of Gour Chandra Sarkar. However, we hold him guilty of an offence punishable under the second part of Section 304 of the IPC. He is sentenced to undergo rigorous imprisonment for a period of 10 (ten) years. The fine and default sentence awarded by the Trial Court are maintained.

The appeal is disposed of on the terms of the signed order placed on the file.

[SUMAN WADHWA] [S.S.R. KRISHNA]
COURT MASTER COURT MASTER

Signed Reportable judgment is placed on the file.

REPORTABLE

IN THE SUPREME COURT OF INDIA

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 2026 OF 2009

Surajit Sarkar .....Appellant

Versus

State of West Bengal .....Respondent

J U D G M E N T

Madan B. Lokur, J.

1. The principal issues before us are whether a cryptic telephonic intimation given to the police can be described as a First Information Report for the purposes of Section 154 of the Criminal Procedure; whether the testimony of PW-7 Sanatan Sarkar and PW-8 Achintya Sarkar can be accepted for upholding the conviction of Surajit Sarkar (the appellant); whether Surajit Sarkar can be convicted of murder even though his co-accused have been acquitted and finally whether Surajit Sarkar did commit the murder of Gour Chandra Sarkar.

2. In our view, the first issue must be answered in the negative. We also hold that the testimony of PW-7 Sanatan Sarkar cannot be accepted, but we do accept the testimony of PW-8 Achintya Sarkar. We find no reason to hold that merely because those accused with Surajit Sarkar have been acquitted, he too must be acquitted of the charge against him. However, we find, on the testimony of PW-8 Achintya Sarkar, that Surajit Sarkar is liable to be punished not for the murder of Gour Chandra Sarkar but for culpable homicide not amounting to murder punishable under Section 304 of the Indian Penal Code.

The facts:

3. On 21st March 1992, Susanta Sarkar's father Gour Chandra Sarkar had gone on his cycle to the Gobindapur bazaar in the evening. At about 9.00 pm while he (Susanta Sarkar) was in his house, he heard a cry from his mother. On inquiring from her, he learnt that Bishnu Sarkar informed her that Gour Chandra Sarkar had been murdered at about 8/8.30 pm apparently in front of Bimal Poddar's house.

4. Susanta Sarkar immediately rushed to the spot and found his father lying senseless on the ground with bloody injuries. On raising a noise, some villagers gathered there and advised him to lodge a complaint. Thereafter, he went to his uncle's house (Bishnu Sarkar's father) and wrote out a complaint.

5. Later, he came to know at about 10/10.30 pm that the police had reached the place of occurrence. Thereupon, he too went to the place of occurrence and met the police. In his presence, the police seized some items, including his father's wrist watch and cycle. After the seizure proceedings were over at about 11.55 pm he handed over to the police his complaint addressed to the officer-in-charge Police Station Santipur, District Nadia.

6. In his complaint, Susanta Sarkar stated the broad facts mentioned above, namely, that his father had gone to the Gobindapur bazaar in the evening; that he came to know his father had been murdered at about 8.30/9.00 pm in front of Bimal Poddar's house; that he went to the place of occurrence and found his father lying on the road with a bleeding injury.

7. He also stated in his complaint that there was a dispute between the members of his family and that of Gour Sarkar and some people engaged by him. On 8th March 1992 there was a scuffle between the two parties and a case was pending in that regard. His brother Nimai Sarkar was in jail as a result of that incident. Gour Sarkar's party had also been in jail but had been released a day or two earlier. Susanta Sarkar stated in his complaint that he firmly believed that six members of Gour Sarkar's party murdered his father Gour Chandra Sarkar due to the grudge that they bore.

8. Based on the complaint given by Susanta Sarkar, a First Information Report (FIR) was registered in Police Station Santipur, District Nadia on 22nd March 1992 at about 00.45 am and formal investigations commenced into offences punishable under Section 302 read with Section 34 and Section 120-B of the Indian Penal Code (for short the IPC) against the six accused persons. On conclusion of the investigations, a charge sheet was filed against them. Charges were framed against the accused persons but they pleaded not guilty and claimed trial.

9. Although the prosecution produced fourteen witnesses, we are concerned with the evidence of only some of them.

10. PW-1 Susanta Sarkar confirmed what he had stated in his complaint. He added that his younger brother Achintya Sarkar (aged about 12/13 years when the incident took place) returned home that night at about 2/2.30 am and informed the witness that Surajit Sarkar, Adhir Sarkar and Sukumar

Sarkar had killed Gour Chandra Sarkar. When Achintya Sarkar opposed them, Bara Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar chased him and so he fled away. (These were the same persons named by Susanta Sarkar in his complaint). In his cross-examination, Susanta Sarkar stated that he did not ask Achintya Sarkar where he was till 2.30 am.

11. PW-2 Bishnu Sarkar stated that he had gone to the Gobindapur market that evening. When he was returning home, he saw 5/6 persons near the primary school. He could identify Surajit Sarkar in the torchlight. When he proceeded further, he saw Gour Chandra Sarkar lying senseless on the road with injuries on his chest, head and hand etc. He immediately went and narrated what he saw to Gour Chandra Sarkar's wife. Although this witness turned hostile, he stated that he was present when the inquest and seizure of articles took place later that night.

12. PW-3 Parash Biswas was a panchayat member of Gobindapur village. He was in a meeting when he learnt of the murder of Gour Chandra Sarkar. He went to the place of occurrence and saw the dead body. Thereafter, he telephonically informed the police station of the incident but did nothing further. From the deposition of PW-11 Krishnapada Mazumdar of Police Station Santipur, it appears that the telephone call was made around 9.35 pm when a General Diary entry was made by him to the effect that an unknown person gave information about the murder of an unknown person at Arpara, Police Station Santipur, District Nadia.

13. PW-7 Sanatan Sarkar was a neighbor of Gour Chandra Sarkar and an eyewitness to his murder. He testified that he was returning from Gobindapur to Arpara with Achintya Sarkar and Gour Chandra Sarkar at about 8.30 pm on 21st March 1992. On the way, near a primary school, 5/6 persons surrounded Gour Chandra Sarkar. He saw Surajit Sarkar from the light of his torch assaulting Gour Chandra Sarkar with a rod. He also identified Adhir Sarkar and Sukumar Sarkar at the place of occurrence and said that they chased him (Gour Chandra Sarkar). He did not say that Adhir Sarkar and Sukumar Sarkar assaulted Gour Chandra Sarkar and he did not identify anybody else at the place of occurrence. The witness said that he escaped from the place of occurrence and went home. He came to know the next morning that Gour Chandra Sarkar had died. It transpires from the evidence of the investigating officer PW-14 Pradyut Banerjee that even though Sanatan Sarkar was an eyewitness, he was examined only on 10th May 1995 about a month and an half after the incident.

14. PW-8 Achintya Sarkar, son of Gour Chandra Sarkar was also an eyewitness. He was about 12/13 years old when the incident took place. In his testimony he stated that he, his father and Sanatan Sarkar were returning to their village from Gobindapur at about 8/8.30 pm on 21st March 1992. When they were near a school, he saw from his torchlight that Surajit Sarkar was assaulting his father with a rod. Then Sukumar Sarkar followed by Adhir Sarkar assaulted his father with a rod. He tried to go to his father but was chased away by Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar. He was afraid that they might kill him. He stated that he returned home that night at about 2.00 a.m. When the police came to his house thereafter, he narrated the incident to them.

15. PW-9 Dr. Partha Sarathi Saha confirmed the injuries on Gour Chandra Sarkar and stated that a hard, blunt weapon could have caused them. The injuries were:

(1)1½" cut mark over the right front parietal region.

(2) ½" cut mark over the back of right parietal region.

16. There were some abrasion marks over the right ear and right knee. He also found that the right parietal bone was fractured. The membrane and brain matter were ruptured. There was a fracture of the right 6th & 7th ribs and a fracture of the lower end of right radius and dislocation of the right elbow joint. In his cross examination this witness stated that injury (1) and (2) above may be caused by contact with a hard and blunt weapon and even by a fall.

17. PW-14 Pradyut Banerjee the investigating officer confirmed the events as investigated by him. He also confirmed the seizures made and generally supported the case of the prosecution. In his cross-examination, he stated that he examined Achintya Sarkar at his residence at about 2.10 am on 22nd March 1992. At that time, Achintya Sarkar did not say that he was chased away by Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar. He had stated that Surajit Sarkar assaulted his father.

Decision of the Trial Court:

18. The principal contention of the defence before the Trial Court was

that the telephonic intimation given by PW-3 Parash Biswas must be treated as the FIR for the purposes of Section 154 of the Criminal Procedure Code (for short the Cr.P.C.). Consequently, the complaint lodged by PW-1 Susanta Sarkar would not be the FIR and the contents thereof would be hit by Section 162 of the Cr.P.C.

19. The Trial Judge rejected this contention holding that the ingredients of Section 154 of the Cr.P.C. were not made out and that the telephonic message given by an unknown person with regard to the death of another unknown person could not be treated as an FIR. In arriving at this conclusion the Trial Judge relied on Ramsinh Bavaji Jadeja v. State of Gujarat, (1994) 2 SCC 685.

20. On the merits of the prosecution case, the Trial Court was of the view that even though some of the witnesses were interested witnesses and had some enmity with the accused persons, their evidence could not be thrown out only for this reason. It was held that there was no dispute about the time and place of the incident. There was also no dispute that Gour Chandra Sarkar had met a homicidal death. The only question that remained under these circumstances was who had killed Gour Chandra Sarkar.

21. The Trial Judge held that there was insufficient evidence to implicate Bara Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar with the incident. They were not identified by PW-7 Sanatan Sarkar and even according to the testimony of PW-8 Achintya Sarkar they had not dealt any blows on Gour Chandra Sarkar and had only chased him away from the scene of the crime. Accordingly, the Trial Judge acquitted Bara Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar.

22. With regard to two other accused persons, namely, Sukumar Sarkar and Adhir Sarkar, the Trial Court held that even though PW-8 Achintya Sarkar had stated in his evidence that they had dealt blows on Gour Chandra Sarkar yet, since during the investigations, PW-8 Achintya Sarkar had informed the investigating officer that he saw only Surajit Sarkar giving blows to Gour Chandra Sarkar, the Trial Judge gave them the benefit of doubt and accordingly acquitted them.

23. The Trial Judge was of the view that there was sufficient evidence that Surajit Sarkar had assaulted Gour Chandra Sarkar with an iron rod and had caused severe injuries on his head. It was held that the prosecution had successfully proved beyond all reasonable doubt that Surajit Sarkar had murdered Gour Chandra Sarkar. Accordingly, he was held punishable for the offence of murder and sentenced to life imprisonment.

Decision of the High Court:

24. The State did not appeal against the acquittal of the five accused persons. However, Surajit Sarkar filed C.R.A. No. 17 of 1998 which was heard by the Calcutta High Court. By its judgment and order dated 24th April 2009, the High Court upheld the conviction of Surajit Sarkar and the sentence awarded to him.

25. Before the High Court, it was submitted that the complaint made by PW-1 Susanta Sarkar could not be treated as an FIR. This contention was rejected by the High Court holding that the telephonic message received from an unknown person in respect of the murder of another unknown person was cryptic and anonymous and the ingredients of Section 154 of the Cr.P.C. were not made out. As such, it could not be treated as an FIR. The High Court relied on Tapinder Singh v. State of Punjab, (1970) 2 SCC 113, Soma Bhai v. State of Gujarat, (1975) 4 SCC 257 and Ramsinh Bavaji Jadeja.

26. The second contention before the High Court was that the prosecution witnesses were interested witnesses and therefore their evidence was not credible. The High Court considered this contention and rejected it on the ground that there was no contradiction in the statements of the witnesses.

27. The next contention before the High Court was that there was an infirmity in the FIR since important facts affecting the probability of the case had been left out. The High Court rejected this contention and held that an FIR is not an encyclopedia of the events said to have taken place. The FIR only results in setting the investigative process in

motion and in this case the investigation was carried out satisfactorily. The failure of the complainant to mention from whom he got the information regarding the murder of Gour Chandra Sarkar was not material.
28. It was argued before the High Court that the investigation was shoddy inasmuch as the investigating officer did not seize the torches from which the eyewitnesses had seen the crime. The High Court held that this could not be treated as an omission to discredit the witnesses. For this purpose, reliance was placed on Balo Jadav v. State of Bihar, (1997) 5 SCC 360.
29. Continuing with the argument of a shoddy investigation, it was contended that there was considerable delay in the examination of an eyewitness (PW-7 Sanatan Sarkar). The High Court held that since no question was asked of the investigating officer regarding the delay in examination of the witness, the investigation cannot be faulted on this ground. It was held that if asked, the investigating officer could have given an explanation which might have been acceptable. Reliance in this regard was placed on Ranbir and Ors. v. State of Punjab, (1973) 2 SCC 444 and Bodhraj v. State of J & K, (2002) 8 SCC 45.
30. The last contention urged before the High Court was that since the co-accused had been acquitted after having been given the benefit of doubt, it would not be correct to hold Surajit Sarkar guilty of the offence of murder. This contention was also rejected in view of Komal v. State of U.P., (2002) 7 SCC 82 and Gangadhar Behera v. State of Orissa, (2002) 8 SCC 381.

Contentions:
31. Before us, it was contended that the telephonic message received by the Police Station at Santipur and which was noted in the General Diary should be treated as the FIR and not the complaint made by PW-1 Susanta Sarkar.
32. The second contention was that the presence of PW-7 Sanatan Sarkar and indeed of PW-8 Achintya Sarkar at the place of occurrence was doubtful. In this context, it was pointed out that PW-8 Achintya Sarkar did not mention the presence of PW-7 Sanatan Sarkar at the place of occurrence. As far as PW-8 Achintya Sarkar is concerned, he was not traceable till 2.00 am the next day which by itself casts a doubt on his whereabouts. Moreover, this witness stated that he returned home at 2.00 am on 22nd March 1992 but in his cross-examination he stated that after he fled from the place of occurrence he returned to the same place and saw his father lying dead with bloody injuries. In view of this contradiction, this witness could not be believed.
33. The third contention urged was that the prosecution case looks a little doubtful inasmuch as PW-8 Achintya Sarkar, a boy of 12/13 years did not reach home on the fateful evening till 2.00 am the next day and yet there was no complaint by anybody in the family about the missing child. This was said to be a little odd, and particularly since his father had been murdered, his family ought to have been a little worried about his safety and ought to have made a complaint to the police in this regard. It was submitted that this conduct of Gour Chandra Sarkar's family was inexplicable.
34. The final contention urged was that if five persons were given the benefit of doubt and found not guilty of the murder of Gour Chandra Sarkar, there was no reasonable basis for coming to the conclusion that Surajit Sarkar alone had committed the murder of Gour Chandra Sarkar.
Discussion:
1) Whether a telephonic intimation is an FIR:

35. As far the first contention is concerned that the telephonic call should be treated as the FIR and not the complaint made by PW-1 Susanta Sarkar, we find no merit in the submission.
36. Section 154 (1) of the Cr.P.C. which is relevant for our purpose reads as follows :-

1 "154. Information in cognizable cases.

1) Every information relating to the commission of a cognizable

offence, if given orally to an officer in charge of a police station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the State Government may prescribe in this behalf.

37. A bare reading of this section makes it clear that even though oral information given by an officer in charge of a police station can be treated as an FIR, yet some procedural formalities are required to be completed. They include reducing the information in writing and reading it over to the informant and obtaining his or her signature on the transcribed information.

38. In the case of a telephonic conversation received from an unknown person, the question of reading over that information to the anonymous informant does not arise nor does the appending of a signature to the information, as recorded, arise.

39. However, we are not going into any technicalities on the subject, keeping in mind technological advances made in communication systems. All we need say is that it is now well settled by a series of decisions rendered by this Court that a cryptic telephonic information cannot be treated as an FIR. In this case, the telephonic information is rather cryptic and was recorded in the General Diary as follows:

"Today in the marginally noted time I received an information over Telephone from an unknown person Gobindapur, P.S. Santipur, Nadia that today (21.03.1992) night one unknown person was murdered at Arpara, P.S. Santipur, Nadia.
Accordingly I noted the fact in G.D., and informed the matter to O.C. Santipur P.S. (N).

Sd/-

K.P.

Majumdar, S.I."

40. In Ramsing Bavaji Jadeja, this Court relied on Tapinder Singh and Soma Bhai and Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220 to hold that a cryptic message given on telephone cannot be treated as an FIR merely because that information was first in point of time and had been recorded in the Daily Diary of the police station. It was also held that the object and purpose of a telephonic message is not to lodge a first information report but a request to the officer in charge of the police station to reach the place of occurrence.

41. This view was reiterated in Mundrika Mahto v. State of Bihar, (2002) 9 SCC 183, State of Andhra Pradesh v. V.V. Panduranga Rao, (2009) 15 SCC 211 and Sidhartha Vashisht v. State (NCT of Delhi), (2010) 6 SCC 1. We see no reason to take a view different from the one consistently taken by this Court in all these cases.

42. We may only add that it is a matter of regret that despite the law on the subject being well-settled, such an argument is raised once again.

2) Presence of PW-7 at the place of occurrence:

43. The investigations into the crime do leave much to be desired as pointed out by learned counsel for Surajit Sarkar. The conduct of PW-7 Sanatan Sarkar was quite unnatural and a little odd and ought to have been looked into by the police. This witness was a neighbour of the victim and it appears from his testimony that after he witnessed the attack on Gour Chandra Sarkar, he did not bother to inform the victim's family, or anybody else and simply went home. This witness further deposed that he came to know of the death of Gour Chandra Sarkar only the next morning.

44. We also find it quite strange that the investigating officer examined PW-7 Sanatan Sarkar only on 10th May 1992 that is after a gap of more than a month and a half of the incident. One charitable explanation for this delay is that PW-8 Achintya Sarkar did not mention the presence of PW-7 Sanatan Sarkar at the place of occurrence. This possibility gave rise to another submission by learned counsel for the Surajit Sarkar that perhaps PW-7 Sanatan Sarkar was not present at the place of occurrence.

45. Learned counsel for Surajit Sarkar relied upon Ganesh Bhavan Patel v. State of Maharashtra, (1978) 4 SCC 371 to contend that the delayed examination of PW-7 Sanatan Sarkar throws some doubt on his presence at the place of occurrence. In that case, there was a delay of a few hours by the investigating officer in examining the eyewitnesses and it was observed:

> "Delay of a few hours, simpliciter, in recording the statements of eyewitnesses may not, by itself, amount to a serious infirmity in the prosecution case. But it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking time with a view to decide about the shape to be given to the case and the eyewitnesses to be introduced."

46. We are concerned with a case where there is a delay of a month and a half in examining an eyewitness. Perhaps what can charitably be said in defence of the investigating officer in the present case, unlike in Ganesh Bhavan Patel, is that it was not mentioned to him that PW-7 Sanatan Sarkar was an eyewitness. Even so, it reflects very poorly on the investigations.

47. Learned counsel for the State relied upon a passage from Banti v. State of M.P., (2004) 1 SCC 414. This passage reiterates a principle earlier laid down that the investigating officer must be specifically asked to furnish an explanation for the delay in examination of a witness. The passage is as follows:

> "As regards the delayed examination of certain witnesses, this Court in several decisions has held that unless the investigating officer is categorically asked as to why there was delay in examination of the witnesses the defence cannot gain any advantage therefrom. It cannot be laid down as a rule of universal application that if there is any delay in examination of a particular witness, the prosecution version becomes suspect. It would depend upon several factors. If the explanation offered for the delayed examination is plausible and acceptable and the court accepts the same as plausible, there is no reason to interfere with the conclusion (See Ranbir v. State of Punjab [(1973) 2 SCC 444] and Bodhraj v. State of J&K [(2002) 8 SCC 45])."

48. In Banti the delay in examining the eyewitnesses was two days, while in Ranbir Singh the delay was apparently of four days and in Bodhraj it was apparently about one week. In none of these decisions was the investigating officer asked to give an explanation for the delay in examination of a witness.

49. In State of U.P. v. Satish, (2005) 3 SCC 114 relied on by learned counsel for the State, the reason for the delay in examination of the witnesses is not quite clear. But, this Court reiterated the two principles earlier recognized, namely, that mere delay in examination of a witness does not make the prosecution version suspect and that the investigating officer must be asked the reason for the delay in examination of the witness. Ganesh Bhavan Patel was explained by observing that delay in examination of the witnesses was not the only determinative factor - in fact, there were several factors taken together along with the delayed examination of witnesses that provided the basis for acquittal.

50. Finally, reference was made by learned counsel for the State to Shyamal Ghosh v. State of W.B., (2012) 7 SCC 646 to contend that the delayed examination of a witness will not vitiate the prosecution case. We agree that delay per se may not be a clinching factor but when there is a whole range of facts that need to be explained but cannot, then the cumulative effect of all the facts could have an impact on the case of the prosecution.

51. If the evidence on record is looked at in perspective, namely, that PW-7 Sanatan Sarkar an eyewitness to the incident did not bother to inform anybody in the family of Gour Chandra Sarkar about the assault on his neighbour; that this eyewitness was examined by the investigating officer more than a month and a half after the occurrence; that the presence of this witness was not mentioned by PW-8 Achintya Sarkar also an eyewitness to the incident, leads us to have some doubt about the presence of PW-7 Sanatan Sarkar at the place of occurrence.

52. Learned counsel for the State submitted while relying on Visveswaran v. State, (2003) 6 SCC 73, C. Muniappan v. State of Tamil Nadu, (2010) 9 SCC 567 and Sheo Shankar Singh v. State of Jharkhand, (2011) 3 SCC 654 that a defective investigation need not necessarily result in the acquittal of an accused person.

53. In Visveswaran all that this Court observed was that:

> "In defective investigation, the only requirement is of extra caution by courts while evaluating evidence. It would not be just to acquit the accused solely as a result of defective investigation. Any deficiency or irregularity in investigation need not necessarily lead to rejection of the case of prosecution when it is otherwise proved."

Similarly, in Muniappan this Court held:

> "The law on this issue is well settled that the defect in the investigation by itself cannot be a ground for acquittal. If primacy is given to such designed or negligent investigations or to the omissions or lapses by perfunctory investigation, the faith and confidence of the people in the criminal justice administration would be eroded. Where there has been negligence on the part of the investigating agency or omissions, etc. which resulted in defective investigation, there is a legal obligation on the part of the court to examine the prosecution evidence dehors such lapses, carefully, to find out whether the said evidence is reliable or not and to what extent it is reliable and as to whether such lapses affected the object of finding out the truth."

Finally in Sheo Shankar Singh it was held as follows:

> "Deficiencies in investigation by way of omissions and lapses on the part of investigating agency cannot in themselves justify a total rejection of the prosecution case."

54. We are not prepared to accept as a broad proposition of law that in no case can defective or shoddy investigations lead to an acquittal. It would eventually depend on the defects pointed out. If the investigation results in the real culprit of an offence not being identified, then acquittal of the accused must follow. It would not be permissible to ignore the defects in an investigation and hold an innocent person guilty of an offence which he has not committed. The investigation must be precise and focused and must lead to the inevitable conclusion that the accused has committed the crime. If the investigating officer leaves glaring loopholes in the investigation, the defence would be fully entitled to exploit the lacunae. In such a situation, it would not be correct for the prosecution to argue that the Court should gloss over the gaps and find the accused person guilty. If this were permitted in law, the prosecution could have an innocent person put behind bars on trumped up charges. Clearly, this is impermissible and this is not what this Court has said.

55. It is clear from the record that the investigation has left unanswered several questions regarding PW-7 Sanatan Sarkar. Under the circumstances, it is difficult to accept that PW-7 Sanatan Sarkar was present at the place and at the time when Gour Chandra Sarkar was attacked.

3) Evidence of PW-8 Achintya Sarkar:

56. We are now left only with the evidence of PW-8 Achintya Sarkar. In the case of this witness also the facts are a little odd in as much as when the crime took place he was about 12/13 years old. When he was chased away by Gopal Sarkar, Jamai Gopal Sarkar and Bhebesh Sarkar, he naturally feared for his life and went into hiding. It is not clear what his movements were thereafter.

57. In his deposition, PW-8 Achintya Sarkar stated that he came back to the place of occurrence and saw the dead body of his father. This could have been only around midnight on 21st March 1992 after the inquest proceedings were over and the seizure of some items at the place of occurrence was concluded by the police. Assuming this to be so, it is not clear where PW-8 Achintya Sarkar hid himself after that and why. In

any event, he came back home only at 2.00 am on 22nd March 1992 when he told his brother PW-1 Susanta Sarkar about the incident and soon thereafter narrated the events to the investigating officer.

58. While the reaction of PW-8 Achintya Sarkar is understandable, what is not understandable is the conduct of his family. The members of his family seem to have not taken any action to find out the whereabouts of PW-8 Achintya Sarkar after they came to know about the murder of Gour Chandra Sarkar. We would imagine that on coming to know of the murder, the primary concern of the family would have been the safety of PW-8 Achintya Sarkar. However, no efforts appear to have been made to locate his whereabouts or to search for him or even to inform the police about his disappearance.

59. However, merely because PW-8 Achintya Sarkar and his family acted a little strangely would not necessarily lead to the conclusion that this witness should not be believed. There is nothing on record to suggest that he was not at the place of occurrence when his father Gour Chandra Sarkar was attacked. There is also nothing on record which could lead to any inference or conclusion that PW-8 Achintya Sarkar made up a story about the attack on his father by Surajit Sarkar.

60. It is true that there is some discrepancy or some gap in the whereabouts of PW-8 Achintya Sarkar between the time of the attack and his returning home at 2.00 a.m. on 22nd March 1992 but that by itself is not enough to discredit this witness, more so when he was not asked any question on his whereabouts.

61. Also, this discrepancy does not destroy the substratum of the case of the prosecution and therefore there is no reason to throw it out on this ground. What is a minor discrepancy has recently been dealt with in Syed Ahmed v. State of Karnataka, (2012) 8 SCC 527 (authored by one of us, Lokur, J.) and the view expressed therein need not be repeated.

62. We find that PW-8 Achintya Sarkar successfully withstood his cross-examination and we agree with the Trial Court and the High Court that he was a credible witness who ought to be believed when he says that he was at the place of occurrence and that he saw his father Gour Chandra Sarkar being attacked by the Surajit Sarkar.

4) Acquittal of co-accused:

63. The final contention of learned counsel for Surajit Sarkar was that since five of the accused persons were given the benefit of doubt there is no reason why he should not be given the benefit of doubt.

64. In Gurcharan Singh v. State of Punjab, AIR 1956 SC 460 this Court held, in a case where some accused persons were acquitted and some others were convicted, as follows:

> "The highest that can be or has been said on behalf of the appellants in this case is that two of the four accused have been acquitted, though the evidence against them, so far as the direct testimony went, was the same as against the appellants also; but it does not follow as a necessary corollary that because the other two accused have been acquitted by the High Court the appellants also must be similarly acquitted."

65. Learned counsel for the State drew our attention to Komal in which it was held that merely because some of the accused persons have been acquitted by being given the benefit of doubt does not necessarily mean that all the accused persons must be given the benefit of doubt. It was observed that:

> "....the complicity of two accused persons who were armed with guns having been doubted by the High Court itself, they have already been acquitted which cannot in any manner affect the prosecution case so far as the appellants are concerned against whom the witnesses have consistently deposed and their evidence has been found to be credible."

66. Similarly, in Gangadhar Behera reliance was placed on Gurcharan Singh and it was held:

> "Merely because some of the accused persons have been acquitted, though evidence against all of them, so far as direct testimony went, was the same does not lead as a necessary corollary that those who have been convicted must also be acquitted. It is always open to a

court to differentiate the accused who had been acquitted from those who were convicted."

67. Gangadhar Behera was cited with approval somewhat recently in Prathap v. State of Kerala, (2010) 12 SCC 79.

68. We agree that Surajit Sarkar cannot be absolved of his involvement in the death of Gour Chandra Sarkar merely because the other accused persons were either not identified by the eyewitnesses or had no role to play in the attack on Gour Chandra Sarkar. There is the cogent and reliable evidence of PW-8 Achintya Sarkar to hold that Surajit Sarkar attacked Gour Chandra Sarkar which ultimately resulted in his death. The contention of learned counsel for Surajit Sarkar is rejected.

69. We may mention that learned counsel for Surajit Sarkar submitted that there was a delay in forwarding the FIR to the concerned Magistrate. Since no foundation has been laid for this contention nor was this contention urged either before the Trial Court or before the High Court we see no reason to entertain it at this stage.

Is it a case of murder:

70. What now remains to be considered is whether Surajit Sarkar intended to murder Gour Chandra Sarkar or is it a case of culpable homicide not amounting to murder?

71. Given the nature of injuries, it is difficult to accept the view that Surajit Sarkar intended to cause the death of Gour Chandra Sarkar or that the injuries were so imminently dangerous that they would, in all probability, cause death. The murder of Gour Chandra Sarkar would, therefore, be ruled out. Nevertheless, the injuries were quite serious and inflicted by Surajit Sarkar on Gour Chandra Sarkar’s head with an iron rod, as stated by PW-8 Achintya Sarkar. We can surely credit Surajit Sarkar with the knowledge that if a person is hit with an iron rod on the head, then the act is likely to cause the death of the victim. That being so, in our opinion, it would be more appropriate to hold Surajit Sarkar guilty of an offence of culpable homicide not amounting to murder. Since we attribute to him the knowledge of his actions, he should be punished under the second part of Section 304 of the IPC.

Conclusion:

72. Accordingly, we set aside the conviction of Surajit Sarkar for the offence of the murder of Gour Chandra Sarkar. However, we hold him guilty of an offence punishable under the second part of Section 304 of the IPC. He is sentenced to undergo rigorous imprisonment for a period of 10 (ten) years. The fine and default sentence awarded by the Trial Court are maintained.

73. The appeal is disposed of on the above terms.

..... J.
(Swatanter Kumar)

..... J.
(Madan B. Lokur)

New Delhi;
December 4, 2012