
(2013) 05 PAT CK 0025

In the Patna High Court

Case No : Criminal Appeal (DB) No. 221 of 1990

Bal Mukund Sharma@Balmukund Chaudhry

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 23-05-2013

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 164, 313

Penal Code, 1860 (IPC) — Section 134, 147, 148, 149, 302

Citation : (2013) 05 PAT CK 0025

Hon'ble Judges : Mihir Kumar Jha, J;Aditya Kumar Trivedi, J

Bench : Division Bench

Advocate : Ram Suresh Roy and Mr. Uma Kant Prasad, for the Appellant; Ajay Mishra, APP and Mr. Dilip Kumar Sinha, APP, for the Respondent

Final Decision : Dismissed

Judgement

Aditya Kumar Trivedi, JJ.—Appellants Brahamdeo Chaudhry, Babulal Chaudhry, Anil Chaudhry, Sunil Chaudhry, Bhavesh Chaudhry, Mani Chaudhry, Pankaj Chaudhry, Sanjay Chaudhry, Manoj Chaudhry, Sadanand Chaudhry, Bal Mukund Sharma@Balmukund Chaudhry, Mahendra Rai, Ashok Rai, Kishore Rai along with Kapildeo Chaudhry (since dead during pendency of instant appeal and on account thereof the appeal to the extent of his interest has been found abated) have assailed judgment of conviction dated 11.06.1990 and sentence dated 12.06.1990 by 7th Additional Sessions Judge, Bhagalpur whereby and whereunder appellant Brahamdeo Chaudhry has been found guilty for an offence punishable under Sections 302, 436/149, 148 IPC as well as 27 of the Arms Act and accordingly has been directed to undergo R.I. for life u/s 302 IPC, R.I. for five years for an offence punishable under Sections 436/149 IPC, R.I. for two years for an offence punishable u/s 148 of the IPC and R.I. for four years u/s 27 of the Arms Act respectively. In likewise manner appellant, Kapildeo Chaudhry (since dead) has been found guilty for an offence punishable under Sections 302/149, 436/149, 148 IPC as well as 27 of the Arms Act and accordingly has

been directed to undergo R.I. for life under Sections 302/149 IPC, R.I. for five years under Sections 436/149 IPC, R.I. for two years u/s 148 of the IPC, R.I. for four years u/s 27 of the Arms Act. Furthermore, both the above named appellants namely, Brahamdeo Chaudhry and Kapildeo Chaudhry have also been found guilty for an offence punishable under Sections 307/134 and were directed to undergo R.I. for seven years. Remaining appellants namely, Babulal Chaudhry, Anil Chaudhry, Sunil Chaudhry, Bhavesh Chaudhry, Mani Chaudhry, Pankaj Chaudhry, Sanjay Chaudhry, Manoj Chaudhry, Sadanand Chaudhry, Bal Mukund Sharma@Balmukund Chaudhry, Mahendra Rai, Ashok Rai, Kishore Rai have been found guilty for an offence punishable under Sections 302, 436/149, 148 IPC and further they have been directed undergo R.I. for life under Sections 302/149 of the IPC, R.I. for five years u/s 436/149 and R.I. for two years u/s 148 of the IPC. Furthermore, appellants Anil Chaudhry, Bhavesh Chaudhry, Babulal Chaudhry and Mahendra Rai have been found guilty for an offence punishable under Sections 323/34 of the IPC and have been directed to undergo R.I. for one year. All the sentences have been directed to run concurrently. The prosecution case in nut shell is that Meghu Pandit (PW-2) had given his Fardbeyan on 18.01.1986 at his Darwaza at about 11:15 a.m. alleging inter alia that on the same day at about 7:00 a.m. while he was carrying soil after digging from a Gairmajarua land lying north to his house for the purpose of manufacturing earthen pots, Brahamdeo Chaudhry armed with gun, Babulal Chaudhry armed with sword, Sanjay Chaudhry armed with Lathi, Pankaj Chaudhry armed with Lathi, Anil Chaudhry armed with Bhala, Sunil Chaudhry armed with Lathi, Mani Chaudhry armed with Bhala, Mahendra Chaudhry armed with Lathi, Ashok Rai armed with sword, Kishore Rai armed with Lathi, Kapildeo Chaudhry with pistol, Bhavesh Chaudhry with Bhala, son-in-law of Bal Mukund Sharma @ Balmukund Chaudhry armed with Bhala, Sadanand Chaudhry, servant of Brhamdeo Chaudhry armed with Lathi, Manoj Chaudhry armed with Bhala along with 10 to 15 others variously armed arrived over there at 9:00 a.m. and had tried to intercept PW-2 and thus he along with his wife out of fear had run away towards their house but he was still chased even up to his house where Brahamdeo Chaudhry had repeatedly fired three rounds and had also threatened the villagers challenging that whoever would come forward to rescue the informant would also be done to death.

2. The informant PW-2 had further stated that he (PW 2) along with his wife had hidden in their house and had also closed the door whereafter the aforesaid members of the unlawful assembly had put part of his house i.e. Baithka on fire and they also unsuccessfully tried to enter into his house after breaking open the door but could not succeed in their such efforts. It is claimed by the informant that thereafter, they all had caught hold of his nephew, Ambika Pandit who was working in his field and took him away dragging to another field lying east where Brahamdeo Chaudhry had shot at Ambika Pandit causing his instantaneous death at the spot. According to informant he had seen the occurrence after coming out from his house and when on hearing hue and cry the villagers had rushed,

Brahamdeo Chaudhry and Kapildeo Chaudhry had opened fire from their gun as well as pistol on account of which Shanti Devi, Subhash Sao, Wakil Yadav, Kokai Sao had also sustained injuries on their persons. It has also been alleged by the informant that PW 2 Brahamdeo Chaudhry with the help of other members of the aforesaid unlawful assembly had dragged the dead body of Ambika Pandit to his Basa (out house) and in order to make out a case they had also put their own Basa on fire as also had scattered bundle of paddy hither and thither.

3. According to informant Govind Pandit, Baidnath Pandit, Raghunath Pandit along with aforesaid injured persons as well as others had witnessed the aforesaid occurrence. The motive for such occurrence according to informant was taking of settlement of a pond by him from Fishermen's Co-operative Society.

4. On the basis of the aforesaid Fardbeyan Amarpur P.S. Case No. 10/1986 was registered u/s 147, 148, 149, 324, 323, 452, 436, 307, 302 IPC and 27 of the Arms Act whereupon the police having conducted investigation had submitted its charge-sheet leading to trial which ultimately concluded by convicting and sentencing the accused persons which is the subject matter of this appeal.

5. The defence case as is evident from mode of cross-examination as well as statement of the accused recorded u/s 313 of the Cr. P.C. is one of their innocence as well as complete denial of the occurrence. A plea of alibi was also taken on behalf of the appellant/accused, Bal Mukund Sharma @ Balmukund Chaudhry and to support the same two DWs have been examined. There has also been evasive plea of alibi on behalf of the appellant/accused, Mahendra Rai, Ashok Rai and Kishore Rai.

6. While assailing the judgment of conviction and sentence rendered by the trial court, Mr. Ram Suresh Roy, Senior Advocate followed by Mr. Uma Kant Prasad, Advocate the learned counsels for the appellants have made elaborate argument suggesting that the trial court had adopted a wholly mechanical approach while scrutinizing the evidence of PWs. Stressing furthermore on this very aspect it has been also argued that when the evidence of PWs is brought under judicious scrutiny, it gives a clear indication that none of the PWs including the injured ones are eyewitnesses to occurrence or they had actually sustained injury on their persons during course of commission of the occurrence as alleged rather they had sustained such injuries on their persons in a different manner and on that very score their testimonies are fit to be altogether rejected.

7. It has been submitted that all the witnesses are also interrelated, partisan as also interested and they also had a motive in falsely implicating the appellants in the background of admitted fact that for the murder of Pradeep Chaudhry, one of the brother of deceased, Ambika Pandit along with his father were accused.

8. It has further been submitted that apart from having inconsistency and contradiction persisting in the evidence of PWs on the factum of genesis as well as manner of occurrence, the same also happens to be wholly inconsistent with the medical evidence. To elaborate this aspect, it has been argued that medical

evidence in fact completely rules out the manner of occurrence as suggested by the ocular evidence. In the aforesaid background, it has further been argued that though there has been no counter case but then right from Fardbeyan there is an admission on the part of the prosecution itself that Baithka of Brahamdeo was burnt and though for the same they levelled allegation against the appellants the same cannot be believed in the facts and circumstance of the case.

9. Not only this, it has further been submitted that there happens to be also utter failure on the part of the I.O. to place his positive objective findings regarding the actual place of occurrence inasmuch as presence of blood stains at different places as found by the I.O. is itself suggestive of the fact that occurrence had not been committed in the manner as suggested by the prosecution. Last but not the least, it has also been argued that all the appellants are resident of different villages and from cross-examination of the PWs it is evident that there happens to be some sort of difference and suspicion over proper identification of appellants.

10. With regard to motive, it has further been submitted that there is not an iota of evidence to suggest that appellants had ever raised objection or claimed the pond which was claimed by the informant to have been taken on settlement for a period of three years from the Fishermen's Co-operative Society.

11. On these grounds, it has been submitted by both the learned counsels for the appellants that the prosecution has failed to substantiate its case beyond all reasonable doubt and on account thereof the judgment of conviction and sentence rendered by the trial court is unsustainable both on facts and in law.

12. Per contra, A.P.P has submitted that from the evidence it has come to light that the accused persons had committed the offence in hand due to vengeance arising out of the fact that father and brother of the deceased, Ambika Pandit had been exonerated in a murder trial which was conducted for causing death of Pradeep Chaudhry, the father of the main assailant of this case namely, Brahmadeo Choudhary. It has further been submitted that there happens to be consistent evidence on record with regard to presence of these appellants at the boundary of the land of prosecution party and so there was also no question of mistaken identification of the appellants. With regard to genesis of occurrence, it has been sought to be clarified by the learned A.P.P that the appellants were actually aiming to eliminate the informant who was engaged in digging the earth and bringing the soil to his place for manufacturing of earthen pot and has canvassed that the factum of occurrence as it took place on account of hiding of the informant in his house with the bolted doors and the appellants in retaliation picking up the deceased working in his field has been established from the evidence led by prosecution without any improvement or embellishment and the witnesses including those who had received injuries on their persons in the same occurrence in the hands of the appellants had given a true account of the entire manner of assault.

13. Learned counsel for the State in this regard has further submitted that the trial court had meticulously scrutinized the evidence of each and every PW and had arrived at its finding holding the appellants guilty which is fully supported with the materials available on the record. She has also submitted that there is no inconsistency amongst the evidence of the PWs nor there happens to be any sort of variance in between ocular as well as medical evidence and thus according to her, these appeals are fit to be dismissed.

14. Before scanning the evidence on record it has to be noted that prosecution had examined altogether 16 witnesses out of whom PW-1 is Gobind Pandit, PW-2 is Meghu Pandit, PW-3 is Shanti Devi, PW-4 is Kokai Sah, PW-5 is Subhas Sah, PW-6 is Wakil Yadav, PW-7 is Jugali Devi, PW-8 is Raghunath Pandit, PW-9 is Baijnath Pandit, PW-10 is Dasrath Tatwa, PW-11 is Dr. Kashi Nath Jha, PW-12 is Bishan Harijan, PW-13 is B.N.Z Haider, PW-14 is Mohammad Safique, PW-15 is Amar Nath Singh and PW-16 is Arvind Kumar Singh. Amongst them, PW-8, Raghunath Pandit and PW-12, Bishan Harijan have been tendered while PW-13, B.N.Z Haider and PW-15, Amar Nath Singh are formal in nature. PW-10, Dashrath Tatwa is the village Chaukidar who has supported the first part of occurrence as an eyewitness. PW-11, Dr. Kashi Nath Jha and 14, Mohammad Safique are the two doctors respectively while PW-3, PW-4, PW-5 and PW-6 are injured eyewitnesses in addition to the informant (PW-2) his wife, Jugali Devi PW-7 as also PW-9 Baijnath Pandit, the father of the deceased who have deposed as eyewitnesses. PW-16 Arvind Kumar Singh is the Investigating Officer.

15. The prosecution had also exhibited Ext-1, settlement receipt, Ext-2 series, injury report, Ext-3 postmortem report, Ext-4, Fardbeyan, Ext-5 series, endorsement made over Fardbeyan, Ext-6, inquest report, Ext-7 series, carbon copy of injury report, Ext-8 series, seizure list, Ext-9, statement of informant u/s 164 Cr. P.C. as well as had also exhibited material exhibit- (i)/iv, half burnt 5 pieces of bamboo (ii) ash, (iii) blood stained earth.

16. The defence had also examined DW-1, Shailendra Kr. Singh and DW-2 Chandra Shekhar Pd. Sinha but did not adduce any documentary evidence.

17. Before we would analyze the aforesaid ocular evidence, it is appropriate for us to examine medical evidence. Autopsy over dead body of deceased, Ambika Pandit was conducted by the then Deputy Superintendent of Banka, Amarpur namely, Dr. Shyam Nandan Prasad Singh and through evidence of B.N.Z Haider PW-13 the prosecution had brought on record the fact regarding death of aforesaid Dr. Shyam Nandan Prasad Singh and by such evidence had succeeded in bringing postmortem report as Ext-3 on the record. As per postmortem report (Ext-3) the following ante mortem injuries have been found over the dead body of deceased Ambika Pandit:-

1) Fire arm wound:- There was only wound of entrance and not exit.

It had hit the left eye ball and the whole eye ball was completely lacerated. On further dissection irregular fracture of frontal bone near the eye-brow and it had

pierced the brain matter even up to the base of brain causing much damage to the brain matter. Intra cerebral liquid blood and blood clots towards the vertebral column inspite of best effort the shot could not be found out and recovered as the same had taken circuitous course once it entered into the body.

The deceased died due to haemorrhage and shock from above mentioned injuries.

18. Thus it is beyond controversy that the cause of death of deceased Ambika Pandit was fire arm injury as is sought to be established in ocular evidence of the prosecution.

19. Dr. Kashi Nath Jha PW-11 had examined the injured PW-3, Shanti Devi, PW-6, Wakil Yadav and had in his deposition had stated about the following injuries on their person:-

1. On 18.01.1986 I was posted as Medical Officer, Amarpur Block. On that day at 12.40 P.M. I examined Srimati Shanti Devi W/O Suresh Pandit resident of village Kashpur, P.S. Amarpur within district Bhagalpur, and I found the following injury on the persons:

A lacerated wound 1/4" in diameter on the right thigh. It was simple in nature. It was caused by pellet of fire-arm. It was possible by gun-shot. The age of the injury was within 6 hours of the examination.

2. This injury report of Srimati Shanti Devi is in my pen and bears my signature. (This report is marked Exhibit 2).

3. On the same day at 12.30 P.M. I examined Sri Wakil Yadav S/O Sri Tarni Yadav, resident of village Kashpur. P.S. Amarpur within district Bhagalpur, and I found the following injuries on his person:-

1) Two lacerated wounds 1"x 1/2"x1/4" upon the back of the both right and left elbow joints. There was one lacerated wound on each elbow joint.

2) Lacerated wound 1"x1/2"x1/4" upon the back.

Both the injuries were simple in nature and were caused by fire-arm such as gun-shot or pistol shot. The age of the injuries were within 6 hours of the examination. This injury report is in my pen and bears my signature. (This report is marked exhibit 1/2).

20. Dr. Md. Safique PW-14, had examined the injured PW-5, Subhas Sah as well as PW-4 Kokai Sah, on being referred from Primary Health Center, Amarpur and had stated about them in his evidence in court in the following terms:-

1). On 18.01.1986 I was posted in Bhagalpur Medical College Hospital, Bhagalpur, as Surgical Registrar. On that day, Subhash Sao son of Kokai Sah resident of village Kashpur, P.S. Amarpur, Distt-Bhagalpur, was referred to me for examination and treatment by doctor of Primary Health Centre, Amarpur. On the same day at 3.05 PM. I examined said Subhash Sao in Bhagalpur Medical College Hospital. He was admitted in the unit of Dr. B. Jha and thereafter his examination

was done by me. He was discharged from the hospital on 23.1.1986. I had found the following injuries on the person of said Subhash Sao:-

- (1) One circular lacerated wound.5 centimeter in diameter on right lateral aspect of chest over anterior axillary line 5" above coastal margin with charring of margin. This was the wound of entry.
- (2) One circular and lacerated wound.05 centimeter in diameter on left lateral aspect of chest over mid axillary line above coastal margin. This was the wound of exit.
- (3) Incised wound 2"x2"x skin deep on back of left forearm middle part.
- (4) One circular lacerated wound.05 centimeter in diameter on medial aspect of left arm 5" above elbow. This was the wound of reentry.
- (5) One circular lacerated wound.05" centimeter in diameter on right gluteal region. This was wound of entry.
- (6) Swelling 4"x3" on front of right thigh middle part.
- (7) Abrasion 1/2"x1/4" on back of middle phalanx of right index finger.
- (8) One lacerated wound 1/4"x1/4"x skin deep on back of terminal phalanx of right middle finger.
- (9) Loss of distal part of nail of right ring finger with abrasion of nail bed 1/4"x1/4".

Above injury nos. 4 and 5 were x-rayed and evidence of metallic substance were found in the wounds. I gave my opinion in this regard after looking into the x-ray plate. Injury nos. 1, 2, 4 and 5 were caused by fire-arm, such as, gun or pistol. Injury no. 3 was caused by sharp weapon. This injury was possible by sword or bhala blow. Injury nos. 3 to 9 were caused by hard and blunt substance, such as, lathi. Injury nos. 1 and 2 were grievous in nature. Injury nos. 3 to 9 were simple in nature. The age of all the injuries was within six hours of the medical examination. This is the approximate age of the injuries.

2) This injury report is in my handwriting and bears my signature. It is the carbon copy. I had prepared it with the corresponding original report in the same process by placing a carbon. The carbon copy of the injury report is marked exhibit 2/2.

3) On 18.01.1986 Kokai Sao S/o Biranchi Sao resident of village Kashpur, P.S. Amarpur, Distt-Bhagalpur, was referred by Amarpur Primary Health Centre to Bhagalpur Medical College Hospital. He was admitted in the unit of Dr. S.D. Mishra in Bhagalpur Medical College Hospital and on the same day I examined him at about 3.20 P.M. and I found the following injuries on his person:-

- 1) Lacerated wound 1"x1/2"x skin deep on shin of right tibia in the middle part.

- 2) Lacerated wound 1"x1/4"x1/4" on front of right knee. This injury was X-rayed and report by radiologist showed evidence of fracture of right patella.
- (3) Lacerated wound 1/2"x1/4" skin deep on front of right thigh lower third.
- 4) Lacerated wound 1/2"x1/4"x skin deep on front of left leg middle third.
- 5) Lacerated wound 1"x1/2"x1/4" on back of left forearm upper third.
- 6) Two bruises, each 2"x1" on back of right shoulder.
- 7) Swelling 3"x3" on back of left shoulder.

All the injuries were caused by hard and blunt substance. These injuries were possible by both blunt portion of bhala, blunt portion of sword and butt of gun. The age of the injuries was within six hours of the examination. Injury no. 2 was grievous in nature and the remaining injuries were simple in nature. This carbon copy of the injury report is in my handwriting and bears my signature. I had prepared it with the corresponding original report in the same process by placing a carbon. The carbon copy of the injury report is marked exhibit 2/3.

21. From the cross-examination of Dr. Kashi Nath Jha PW-11, it is evident from para-5 that all the injuries found over the person of Wakil Yadav(PW 6) had blackening mark at the edge of entrance. From para-6 the Doctor had estimated distance in between the victim as well as appellant in between 5 to 10 feet. With regard to injury of Shanti Devi (PW 3) at para-9 the Doctor had opined that lacerated wound found on her person was also possible by pointed arrow or pointed weapon having diameter of 1/4".

22. With regard to injury of Subhas (PW 5) and Kokai (PW 4), it is evident from the evidence of Dr. Md. Shafique PW-14 that both the injured must have been examined by the Doctor B. Jha, the referring Doctor of Primary Health Center, Amarpur and in likewise manner had divulged that Kokai (PW 4) was admitted under the unit of Dr. S.D. Mishra who also must have examined Kokai Sah.

23. Thus from the medical evidence regarding injuries on PW-3, PW-4, PW-5 and PW-6 there is nothing to discredit the version of the two doctors that all of them had sustained fire arm injuries on their person. It however has to be recorded here that the learned counsel for the appellants have made elaborate submission to raise doubt over the medical evidence regarding injuries on Shanti Devi (PW-3), Subhas Sah (PW-5) and Kokai Sah (PW-4) and in this regard it has been emphasized that no foreign particle was ever found in the injuries of Shanti Devi (PW 3) and the Doctor according to his opinion had described it as a gun-shot injury only on the factum of measurement of the injury having 1/4" in diameter for its being held to be caused by gun-shot injury is not at all permissible and acceptable. It is on this premise that they have proceeded to submit that the evidence of PW-3 with regard to her presence at the place of occurrence has been doubted in the background of the fact that there also happens to be no evidence on record to suggest that Shanti Devi had sustained injury caused by

sharp cutting weapon. In likewise manner it has been submitted that neither Dr. B. Jha nor Dr. S.D. Mishra had been examined nor the injury report issued by them respectively have been brought on record which would amount to suppression of material evidence and in turn would adversely affect the prosecution version.

24. We however do not find any merit in such submissions. From the evidence of Shanti Devi (PW-3), Subhas Sah (PW-5) and Kokai Sah (PW-4) it is evident that they are consistent with regard to assault on their persons. Mere absence of foreign particle in the body of Shanti Devi (PW-3) can not ruin her entire testimony as eyewitness to the occurrence specially when the defence had not controverted or challenged her version with regard to sustaining of fire arm injury. In likewise manner, the defence had also failed to challenged the finding recorded by PW-14 with regard to injuries sustained by Subhas (PW-5) as well as Kokai (PW-4). The defence had also failed to cross-examine these two witnesses on this very point and in likewise manner also failed to cross-examine the I.O., PW-16 to extract anything from his end as with regard to issuance of injury reports by Dr. B. Jha or Dr. S.D. Mishra. Thus such hypothetical submissions of learned counsel for the appellants cannot be taken into consideration unless and until the same is supported with factual aspect. Therefore, on this score we do not see any infirmity in propriety/genuineness of respective injury reports of injured eye witnesses namely, PW-3, PW-4, PW-5 and PW-6.

25. Now stepping ahead towards the scrutiny of oral evidence, the first of all the evidence of informant Meghu Pandit (PW-2) along with his wife Jugali Devi (PW-7) needs be taken into consideration by us. PW-7, Jugali Devi had not named Kishore Rai, Ashok Rai, Bal Mukund Sharma @ Balmukund Chaudhry, Sadanand Chaudhry, Manoj Chaudhry as members of the unlawful assembly but then she had categorically stated that when the members of unlawful assembly had rushed towards her husband for assaulting him, she along with her husband had fled away from there while being chased by the member of unlawful assembly up to their house but they could save themselves from being assaulted as they had bolted the door from inside. She had also stated that accused persons unsuccessfully attempted to break the door but could not succeed, and thus they had put her Baithka (out house) on fire and from there they had gone to the field of Ambika Pandit. She has also stated, she along with her husband later on came out from her house and had seen the whole occurrence in which the deceased was done to death as well as Shanti Devi, Subhas Sah, Wakil Yadav, Kokai Sah were shot at/assaulted. Though she has been cross-examined at length on this score in para-21, 23, 24 but her aforesaid disclosure in the examination in chief had remained undisturbed and consequently proved her presence at the place of occurrence. While recording this Court is not unmindful that in paragraph 26 of her cross-examination she had disclosed that at the time when Shanti Devi, Subhas Sah, and Kokai Sah and Wakil Yadav had sustained injuries, they were at a distance of 4 to 5 hands away from her but her disclosure of such distance has to be viewed from the angle that she is a rustic

village lady who had by and large remained firm in supporting prosecution case.

26. PW-2, Meghu Pandit is the informant and had reiterated his earlier version whatever he had divulged in his Fardbeyan. He had also named all the accused persons being variously armed with full specification. He had also stated that the armed persons including the appellants had reached at the place where he was engaged in digging earth and seeing them he with his wife PW-7, Jugali Devi had run away to their house and were chased by the members of unlawful assembly up to their house. He has also stated that when he and his wife had taken shelter in their house by bolting the door from inside the members of unlawful assembly having failed to nab them had put his Baithka on fire and then had gone towards the field of Ambika where he was irrigating the crop and from there he was dragged by the accused persons to the field of Brahamdeo Chaudhry where he was given fatal gun shot injury on his person. He had also explained that the villagers were also attacked by appellant Brahamdeo Chaudhry as well as appellant Kapildeo Chaudhry with gun and pistol as well as had assaulted Kokai Sah with the butt portion of gun, sword, Bhala and Lathi. He had also disclosed that the accused persons took away the dead body of Ambika to their Basa and then had also put their own basa on fire. PW-2 the informant had further reiterated he had given his Fardbeyan before the police which had come to his place.

27. He had further disclosed that prior to settlement of pond in his favour by Fishermen's Co-operative Society, the accused persons were in its possession and were enjoying its usufruct. During cross-examination, he had however admitted under para-34 that there was no dispute amongst the parties relating to the aforesaid pond. In para-40 he had further explained that the villagers as a whole had made complaint against appellant Brahamdeo Chaudhry and his father Pradeep Chaudhary and his other henchmen as with regard to the fact that they had illegally encroached upon Gairmajarua land as well as pond and had got them amalgamated with their land. In para-50, he with regard to manner of occurrence had stated that when the accused persons from his house had proceeded towards eastern direction he came out from his house and then had gone towards the place of occurrence i.e. the field of the deceased. In para-62 and 63 of his cross-examination, he had given a detailed account of the accused persons taking away Ambika Pandit, the deceased from his field. In para-68, he had said that he had seen appellant Brahamdeo Chaudhry to have shot at Ambika Pandit the deceased and had specified that it was appellant Brahamdeo who had fired from eastern side on Ambika Pandit the deceased from a distance of 2 to 3 hands. He had further given a detailed version of the subsequent conduct of the accused persons in para-69 and 71 and in para-75, he had stated as to how the police force came to his place through the Basa of Brahamdeo Chaudhry.

28. From a bare reading of his evidence it would become clear that tough he had been cross-examined at length by the defence but could not be shaken in any

manner to disbelieve him as an eyewitness to the occurrence. In fact his conduct of running away from the field to his house with his wife PW-7 with a view to save their life and the accused persons" retaliation on account of their failure to nab informant by grabbing the deceased in his field and killing him after dragging him to their own field is full established by him. Thus there is no reason for us to accept the submission of learned counsel for the appellants that PW-2 informant is not a reliable eyewitness.

29. PW-3, Shanti Devi an injured witness had said that after hearing hulla she had gone towards north of her house, and had also reached at the Darwaja of Ambika Pandit and since Darwaja of Meghu Pandit (PW-2) was by the side of Ambika Pandit the deceased, she could also see that 15 to 20 persons having assembled at the Darwaja of Meghu Pandit had already put the Baithka of Meghu Pandit on fire. According to her the members of unlawful assembly were variously armed out of whom she had claimed identification of only two persons, namely appellant Brahamdeo Chaudhry and Kapo Chaudhry @ Kapildeo Chaudhry. She had also stated that the accused persons had gone towards east from the Baithka of Meghu Pandit (PW-2) informant to the field of Ambika Pandit the deceased where they had caught hold of Ambika and had dragged him to the adjacent field of Brahamdeo Chaudhry where they had thrown Ambika Pandit on the ground and thereafter appellant Brahamdeo Chaudhry had fired from his gun on the person of the deceased causing his instantaneous death at the spot. She had further stated that on hearing the sound of firing of gun the villagers had assembled there and appellant Brahamdeo Chaudhry and Kapo Chaudhry had also fired on the villagers in which she had also sustained gun-shot injury which was fired by Brahamdeo Chaudhry and Wakil (PW-6) and Subhas (PW-5) also became injured by such indiscriminate firing. She had claimed that immediately after receiving gun-shot injury, she had fled away from there and was subsequently taken for her treatment at Amarpur State Dispensary. She had identified only appellant Brahamdeo Chaudhry and Kapo Chaudhry (since dead) in the court.

30. During her cross-examination in para-10, she had categorically stated that she had not seen that who had put the Baithka of Meghu Pandit on fire. She had further narrated in para-13 that she had seen the occurrence from the field of Ambika Pandit wherein plants of Dhania, Maize and Radish had been sown. In para-13, she had also said that firstly when she had seen Ambika Pandit, he was irrigating his maize crop in his field and soon thereafter 4 to 5 persons took him to the field of Brahamdeo Chaudhry. She has further disclosed that she could not remember whether Ambika Pandit had sustained gun-shot injury in standing position or while lying on ground. In para-17, she had said that as soon as accused appellant Brahamdeo Chaudhry and Kapo Chaudhry (since dead) began to fire at villagers, they started running away and during this course she had sustained fire arm injury on her person.

31. Thus from her evidence, it is evident that she had confined herself as an

eyewitness to the extent of causing murder of Ambika Pandit as well as sustaining of injury on her own person as well as on Wakil (PW-6) and Subhas (PW-5) because of the fact that she had arrived at the place of occurrence after Baithaka of Meghu Pandit was already put on fire. There is however nothing to impeach her evidence as an eyewitness to the main part of the occurrence.

32. PW-4, Kokai Sah is another injured witness. He had deposed that on the alleged date and time of occurrence while he was doing agricultural work, he heard sound of firing from eastern side over which he rushed to the place of occurrence and had seen the villagers coming from north side who were saying that his son Subhas Sah (PW-5) has been shot at. On this, he rushed near the house of Ambika and from there he saw people dragging one dead body nearly 50 hands east to the house of Ambika Pandit. He thought it to be dead body of his son and accordingly, he rushed towards the dead body and begged the accused persons to leave the dead body. On this appellant Brahamdeo Chaudhry had fired at him but fortunately, for him, the same did not hit him but in the meantime appellant Anil Chaudhry gave Bhala blow, appellant Babulal Chaudhry gave a blow by sword, appellant Bhavesh Chaudhry gave a Bhala blow, appellant Mahendra Rai gave Lathi blow on his person. Apart from these persons, he also claimed identification of Kapildeo Chaudhry (since dead) armed with pistol, appellant Ashok Rai armed with sword, appellant Bal Mukund Sharma @ Balmukund Chaudhry armed with Bhala and appellant Kishore Rai armed with Lathi, appellant Sanjay Chaudhry armed with Lathi, appellant Pankaj Chaudhry armed with Lathi, and appellant Sadanand Chaudhry armed with Lathi. He however had not named appellant Mani Chaudhry.

33. He had also disclosed that the dead body being dragged by the accused persons was not that of his son Subhas (PW-5) but of Ambika Pandit, the deceased. According to him all the accused persons took away the dead body of Ambika Pandit, the deceased, to the Basa of Brahamdeo Chaudhry and thereafter, Brahamdeo Chaudhry had put his Basa on fire as also had scattered bundles of paddy in between house of Ambika Pandit and Basa of Brahamdeo Chaudhry. He further claimed that he had got his injuries treated. During cross-examination at para-17, he had disclosed that he could not remember whether he had sustained any gun-shot injury. In para-18 he had said that sword blow on him was given from its blunt side. In para-23, he had said that he could not remember whether he had identified the accused persons who were dragging the dead body of Ambika Pandit.

34. Thus from this evidence of PW-4 Kokai Sah, it is evident that he is not a witness of the main occurrence relating to causing injury on the deceased and in fact he had confined himself to be the witness to the later part of the occurrence wherein he had sustained injuries on his own person in the hands of accused. None the less he has remained firm on his version to the later part of the occurrence which is corroborated from the evidence of PW3 the other injured eyewitness.

35. PW-5, Subhas Sah is son of Kokai Sah PW-4. He had deposed that on the alleged date and time of occurrence while he was at his house, he heard the sound of firing over which he came to the Darwaja of Ambika Pandit. He saw Baithka of Meghu Pandit under flame. Then thereafter, 22-25 persons had gone to the field of Ambika Pandit where they apprehended Ambika Pandit and took him away towards east direction. He had identified Brahamdeo Chaudhry armed with gun, Kapo Chaudhry (since dead) armed with pistol, Babulal Chaudhry, Sanjay Chaudhry, Pankaj Chaudhry, Manoj Chaudhry, Sadanand Chaudhry, Anil Chaudhry, Sunil Chaudhry, Mahendra Rai, Ashok Rai, Mani Chaudhry and Bhavesh Chaudhry. He had also said that the accused persons had thrown Ambika Pandit in the field of appellant Brahamdeo Chaudhry and then thereafter appellant Brahamdeo Chaudhry had shot at Ambika Chaudhry causing his instantaneous death at the spot. According to him when the villagers had assembled there appellant Brahamdeo Chaudhry and Kapo Chaudhry had fired on them in which he (PW-5) also had sustained injury at his left ribcage (Panjra) and left hand while Wakil Yadav (PW-6) and Shanti Devi (PW-3) had also sustained injury. He had also stated that when he fell down after sustaining injury it was his father who came to save him but he was also assaulted by appellant Brahamdeo Chaudhry as well as other members of unlawful assembly. Thereafter appellants namely, Babulal Chaudhry, Sanjay Chaudhry, Mani Chaudhry and Mahendra Rai along with others had dragged the dead body of Ambika Pandit to the Basa of Brahamdeo Chaudhry and Brahamdeo Chaudhry had his Basa on fire as also had scattered bundle of paddy in between house of Ambika Pandit and Basa of Brahamdeo Chaudhry.

36. During his cross-examination in para-8 PW-5 had said that at the time of sustaining of gun-shot injury, he was standing in the Dhania field of Ambika Pandit and firing on him was made from eastern side and after sustaining injury he had tried to escape but fell down. In Para-14, he had said that for the first time when he saw Ambika Pandit the deceased, he was engaged in irrigating maize crop in his field. In para-16, he had said that the member of the unlawful assembly dragged Ambika and threw him in the field of Brahamdeo Chaudhry after covering a distance of 50 yards whereafter the members of the mob having thrown Ambika Pandit on the ground had withdrawn themselves and only thereafter firing was made on the person of Ambika Pandit on which the villagers had made a protest. In para-19, he had disclosed that the dead body of Ambika Pandit was thereafter dragged from the field of Brahamdeo Chaudhry to his Basa.

37. From the evidence of PW 5 also it is clear that he too is not any eyewitness to the entire occurrence but then he has proved two important things namely the manner of assault on the deceased and sustaining his injuries on his own person as well as on PW-3, PW-4 and PW-6. It is true that he had not named Bal Mukund Sharma @ Balmukund Chaudhry, Kishore Rai as well as had not mentioned any kind of weapon possessed by member of mob save and except Brahamdeo Chaudhry and Kapo Chaudhry but then his being an injured eyewitness also lends support to the prosecution case.

38. PW-6, Wakil Yadav, is another injured witness who had deposed that on the alleged date and time of occurrence, he was engaged in agricultural works. He heard sound of firing coming from eastern side over which he had gone to the field lying east to the house of Ambika Pandit. At that very time, Brahamdeo Chaudhry and Kapo Chaudhry were engaged in firing over the villagers by means of gun as well as pistol respectively he (PW-6) had sustained injury at the hands of both of them and apart from him Subhas Sah (PW-5) and Shanti Devi (PW-3) who were standing by his side had also sustained injuries on their persons. He also claimed identification of Babulal Chaudhry, Sanjay Chaudhry, Pankaj Chaudhry, Manoj Chaudhry, Sadanand Chaudhry, Mani Chaudhry, Bal Mukund Sharma @ Balmukund Chaudhry, Anil Chaudhry, Sunil Chaudhry, Mahendra Rai, Kishore Rai, Ashok Rai, apart from Brahamdeo Choudhary and Kapo Chaudhry and had also stated that they were armed with deadly weapon. PW-6 had also explained that after sustaining injury on his person he had returned back to his house. During cross-examination at para-14 he had categorically stated that he had sustained injury in his hand and back while he was near about 50 yards away from the accused persons. In para-20 he had given detailed account of the manner in which he had received injuries on his own person.

39. On a close perusal of evidence of PW-6 this much becomes clear that his version as an eyewitness is confined to sustaining injuries on his own person because he did not speak with regard to having seen the Baithka of Meghu Pandit put on fire as well as any subsequent event. Thus his evidence for his own injuries may be that of an eyewitness giving support only to the later part of prosecution case specially when he had not named appellant Bhavesh Chaudhry as well as had not specified the weapon in the hands each of the accused whom he identified.

40. From the perusal of evidence of aforesaid four injured witnesses, it is however crystal clear that they have not tried to give any sort of embellishment in their evidence by way of claiming themselves to be eyewitnesses to main occurrence rather they have deposed to that extent only which they had witnessed or suffered at the hands of the accused persons. As stated above, save and except the inconsistency amongst the evidence of injured Shanti Devi with the evidence of Doctor who too had found injury over her person in a diameter of 1/4" and on account of absence of any foreign material during cross-examination had accepted the suggestion of defence the injury to be caused by sharp pointed weapon, the rest of her ocular evidence with regard to other injured witnesses is found to be fully corroborated from the medical evidence. In fact there is a minor variation only in the case of PW-3 Shanti Devi but then that would not in any manner weaken the prosecution case much less make it doubtful. Reference in this connection may usefully be made to the judgment of Apex Court in the case of Gajoo Vs. State of Uttarakhand, wherein it has been held as follows:-

We have also noticed that there is not variation between the medical evidence and the ocular evidence, and once they are conjointly read, it does not falsify

either the statement of the witnesses, PW 2 and PW 3 or the post-mortem report, Ext. Ka-10. In fact, both of them must be read as complementary to each other. Even if for the sake of argument we assume that there is some variation, still, it would be so immaterial and inconsequential that it would not give any benefit to the accused. It is a settled principle by a series of decisions of this Court that while appreciating the variation between the medical evidence and ocular evidence, primacy is given to the oral evidence of the witnesses. Reference can be made to the judgments of this Court in *Kapildeo Mandal v. State of Bihar*, *State of U.P. v. Krishna Gopal* and *Bhajan Singh v. State of Haryana*.

41. It has also been repeatedly held by the Hon'ble Supreme Court that the evidence of injured witnesses should not be discarded in haphazard way or in a light manner because of the fact that sustaining of injury at the place of occurrence in a manner suggested by the injured witnesses is indicative of the fact that the witnesses were present at the place of occurrence during course of commission of occurrence. The nature of evidence as discussed above in its true spirit, not only suggest the genuine conduct of the injured witnesses rather they are truthful to such extent that they did not want to bring any sort of contradiction or embellishment in their evidence to support the part of prosecution case which they had not witnessed. This conduct of the injured witnesses namely, PW-3, PW-4, PW-5 and PW-6 would furnish an additional inspiring ground for its acceptance by this Court.

42. The other important witness on material point is PW-9, Baijnath Pandit who happens to be the father of deceased Ambika Pandit. PW-9 had categorically stated that he was cousin of informant Madhu Pandit and his house was towards south to the house of Meghu Pandit and his land was east to his house some 8 to 10 hands away from there. He had also stated that on the alleged date and time of occurrence while he was along with his son Ambika Pandit was irrigating his field Meghu Pandit was engaged in digging earth from pond while his wife was carrying the same. All of a sudden, a mob consisting of 20 to 25 persons variously armed with came and seeing them Meghu Pandit and his wife ran away towards their house and got themselves confined therein. He had claimed identification of Brahamdeo Chaudhry who was armed with gun, Babulal Chaudhry armed with sword, Sunil Chaudhry, Sanjay Chaudhry, Pankaj Chaudhry armed with Lathi, Kapo Chaudhry armed with pistol, Anil Chaudhry armed with Bhala, Mahendra Rai armed with Lathi, Kishore Rai armed with Lathi, Ashok Rai armed with sword, Bhavesh Chaudhry armed with bhala, Manoj Chaudhry armed with Lathi, Sadanand Chaudhry armed with Lathi, Mani Chaudhry armed with Lathi. Members of the unlawful assembly followed Meghu Pandit and his wife and came at his house and further tried to break open his door.

43. He had further stated that on being frustrated, they set ablaze Baithka of Meghu and during said course Brahamdeo Chaudhry fired. Then the members of the unlawful assembly came to his field and caught hold his son Ambika Pandit

and dragged him to the field of Brahamdeo Chaudhry where they threw Ambika Pandit to the ground and then Brahamdeo Chaudhry shot at him on account of which he died instantaneously. The villagers who had assembled were shot at by Brahamdeo Chaudhry and Kapo Choudhar as a result of which Subhas Sah, Shanti Devi and Kokai Sah sustained injury. Kokai Sah under wrong impression rushed to the accused persons who was also assaulted. Then thereafter, Brahamdeo Chaudhry, Babulal Chaudhry, Sanjay Chaudhry, Mahendra Rai, Pankaj Chaudhry, Mani Chaudhry along with others dragged the dead body of his son to the Basa of Brahamdeo Chaudhry. Thereafter, Brahamdeo Chaudhry lit fire in his own Basa. The accused persons scattered bundle of paddy in between the Basa and his house. He had given his statement before the police. He was cross-examined at length but it is found that the appellants could not be able to impair his testimony more particularly after taking into account para-20 of his cross-examination which reads as follows:-

44. Thus PW-9 alike the informant PW-2 is another eyewitness who has given full account of the entire occurrence and there is nothing to discredit his evidence specially when he had narrated the manner in which his young son was done to death in front of his own eyes.

45. PW-10, Dasrath Tatwa is a Chaukidar who after seeing the member of the unlawful assembly proceeding towards Mahashay Pokhar had gone to police station and informed the police official on the basis of which the police officials rushed to the place of occurrence for maintaining law and order but till then the substantive offence, wherein Ambika Pandit was done to death, was already committed. He therefore is fully responsible for getting the police on the spot and his evidence to that extent gives support to the arrival of police soon after the occurrence ruling out the probability of false implication of anyone.

46. PW-15, Amar Nath Singh is formal in nature in the background of the fact that he had only exhibited Sanha No. 308 dated 18.01.1986.

47. PW-16, Arvind Kumar Singh is the I.O. who had conducted investigation after recording the FIR of informant, Meghu Pandit (PW-2) after arriving at the P.O. on the basis of information conveyed by Chaukidar (PW-10) leading to entry of Sanha no. 308 dated 18.01.1986. He had inspected the place of occurrence and from his examination-in-chief it is evident that he had given detailed of all the three places of occurrence separately and independently, that means to say, the first place of occurrence was at Mahashay Pokhar, the second place of occurrence was house as well as Baithka of Meghu Pandit and the third one was the land belonging to the deceased from-where he was dragged to the land of appellant, Brahamdeo Chaudhry and from there to the Basa of appellant, Brahamdeo Chaudhry where dead deceased was dragged. He had also seized remnant of burnt Baithka from the second place of occurrence as also seized blood stained earth and sent the dead body for postmortem. He also took statement of the witnesses as well as got the statement of witnesses recorded u/s 164 of the Cr. P.C. He (PW-16) received injury report of the injured and then submitted the

charge-sheet. During cross-examination, it is evident that the defence could not be able to discredit his testimony with regard to objective finding relating to respective place of occurrence.

48. Learned counsel for the appellants had however assailed testimony of this PW 16, I.O., on two counts. The first one relating to non entry of Sanha No. 308 in verbatim in the case diary during course of investigation as well as on account of non recording of trampling mark, if any, present at the field belonging to the PW-9 as well as deceased. It was also argued that his objective finding is not at all found to be authentic one because of the fact that he had not mentioned whether the crops which were standing in the field of Brahamdeo Chaudhry where, as alleged, deceased was done to death but in absence of trampling mark, the said theory would be completely falsified. Therefore, the submission is that in the background of the deficiency in the objective finding as is evident from para 45, 46, 48 and further absence of seizure of any wads (para-15), makes the whole prosecution case doubtful to have been committed in a manner as suggested by the prosecution.

49. It has further been submitted that there happens to be no counter-case nor the defence had ever suggested to any of the PW or trend of the cross-examination also did not divulge the plea of alibi, and thus in that event, the story of the prosecution has got no basis at all. In likewise it has also been pointed out that manner of occurrence also becomes doubtful because prosecution had come out with a case that the dead body of deceased was lifted and dragged from the field belonging to Brahamdeo Chaudhry to the Basa of Brahamdeo Chaudhry and then Brahamdeo Chaudhry himself put his Basa on fire and further also scattered bundle of paddy in between house of PW-9 and Basa of Brahamdeo Chaudhry. This imaginary story, though, according to learned counsel for the appellants is corroborated with objective finding of the I.O. but would speak a lot with regard to the so called genuineness of the prosecution version over commission of the occurrence in a manner as suggested by the prosecution. It has thus been submitted that in view of the aforesaid materials before the Court an inference could be drawn to the extent of prosecution party being itself an aggressor and during course thereof deceased was done to death on its own fault of prosecution party. In this regard it has also been sought to be highlighted that filing of counter case is not a condition precedent rather an inference could be drawn from the evidence of prosecution itself.

50. In the considered opinion of this Court these hypothetical submissions at the appellate stage would amount to making a third case which was never placed before the trial court. It is well settled that the Courts are forbidden to make out a third case. There is version and counter version or version with an explanation or version with complete denial. So far present case is concerned, the evidence suggest the mode of cross-examination that there happens to be complete denial of occurrence. When there is mob frenzy, in what manner the mob will react is unknown or beyond expectation of others. Therefore, when there happens to be

positive assertion by the prosecution to that extent, it was incumbent upon the appellants/accused to establish that the same was incorrect but in doing so they have failed. Therefore, only one option is left and that is with regard to the acceptance/rejection of the prosecution version.

51. As stated above, it is beyond controversy that majority of the witnesses so examined are related to each other and in the aforesaid background as to in what manner their evidence is to be adjudged, reference can be made to a judgment of Apex Court in the case of State of A.P. Vs. S. Rayappa and Others, wherein it has been held as follows:-

6 By now it is a well-established principle of law that testimony of a witness otherwise inspiring confidence cannot be discarded on the ground that he being a relation of the deceased is an interested witness. A close relative who is a very natural witness cannot be termed as interested witness. The term interested postulates that the person concerned must have some direct interest in seeing the accused person being convicted somehow or the other either because of animosity or for some other reasons.

52. It is true that there happens to be some sort of discrepancy amongst the PWs with regard to involvement of appellants inconsonance with weapons having in their hands although, they are consistent with regard to manner of occurrence and on that very score their testimonies are found truthful. The aforesaid theme has also been considered by the Apex Court in the case of Kuria and Another Vs. State of Rajasthan, where in it has been held as follows:-

The testimony of an eyewitness, if found truthful, cannot be discarded merely because the eyewitness was a relative of the deceased. Where the witness is wholly unreliable, the court may discard the statement of such witness, but where the witness is wholly reliable or neither wholly reliable nor wholly unreliable (if his statement is fully corroborated and supported by other ocular and documentary evidence), the court may base its judgment on the statement of such witness. Of course, in the latter category of witnesses, the court has to be more cautious and see if the statement of the witness is corroborated. Reference in this regard can be made to Sunil Kumar, Brathi v. State of Punjab and Alagupandi v. State T.N.

53. A plea has also been raised that the injuries sustained by deceased Ambika Pandit was not at all possible in a manner as suggested by the prosecution because of the fact that the scene posed by the prosecution on this score is that just after throwing Ambika Pandit on the ground, he was shot from a close range. In such circumstances, the nature of injury and the direction of cartridge should have been in vertical way but no such injury has been found over the dead body of deceased. In likewise manner when there happens to be firing from close range, the injury must contain charring, tattooing and blackening which again is absent in the postmortem report.

54. In the considered opinion of this Court the aforesaid contention appears to be

fallacious in the background of the fact that none of the prosecution witnesses has been cross-examined on this score save and except PW-9 who in para-20 had disclosed that firing was made from a distance of 7-8 hands that means to say, near about 12 feet and this distance is sufficient to undo the contention raised on behalf of the appellants. With regard to nature of injury, it also rules out the grievance of appellants to be genuine one because of the fact that injury was sustained by the injured on the left eye-brow having no exit.

55. It is well settled that the discrepancy, if any, in between ocular as well as medical evidence, the ocular evidence has got primacy. In a decision of the Apex Court in the case of Kuria and Another Vs. State of Rajasthan, , this issue has been elaborately dealt with in para 19, 20, 21 which are quoted herein below:-

19. This Court has consistently taken the view that except where it is totally irreconcilable with the medical evidence, oral evidence has primacy. In Abdul Sayeed Vs. State of Madhya Pradesh, this Court held as under: (SCC p. 274, paras 38-40)

38. In State of U.P. Vs. Hari Chand, this Court reiterated the aforementioned position of law and stated that: (SCC p. 545, para 13)

13.... In any event unless the oral evidence is totally irreconcilable with the medical evidence, it has primacy.

39.... Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value vis-?-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may disbelieved.

40. In the instant case as referred to hereinabove, a very large number of assailants attacked one person, thus the witnesses cannot be able to state as how many injuries and in what manner the same had been caused by the accused. In such a fact situation, discrepancy in medical evidence and ocular evidence is bound to occur. However, it cannot tilt the balance in favour of the appellants.

20. A similar view was taken by this Court in Baso Prasad and Others Vs. State of Bihar, wherein this Court held as under:(SCC p. 74 paras 27-28)

27. In some cases, medical evidence may corroborate the prosecution witnesses; in some it may not. The court, however, cannot apply any universal rule whether ocular evidence would be relied upon or the medical evidence, as the same will depend upon the facts and circumstances of each case. No hard-and-fast rule can be laid down therefor.

28. It is axiomatic, however, that when some discrepancies are found in the ocular evidence vis-?-vis medical evidence, the defence should seek for an explanation from the doctor. He should be confronted with the charge that he has committed a mistake. Instances are not unknown where the doctor has rectified the mistake committed by him while writing the post-mortem report.

21. In *Krishnan and Another Vs. State Rep. by Inspector of Police*, this Court held as under: (SCC pp. 62-63, paras 18 & 20-21)

18. The evidence of Dr. Muthuswami (PW 7) and Dr. Abbas Ali (PW 8) do not run in any way contrary to the ocular evidence. In any event, the ocular evidence being cogent, credible and trustworthy, minor variance, if any, with the medical evidence is not of any consequence.

*** 20. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

21. It is trite that where the eyewitnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice. Hence the importance and primacy of the quality of the trial process. Eyewitnesses' account would require a careful independent assessment and evaluation for its credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation, etc. Then, the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation.

56. It has to be also noted here that two DWs have been examined on behalf of one of the appellants, namely, Bal Mukund Sharma @ Balmukund Chaudhry on the plea of the alibi. DW-1 Shailendra Kumar Singh had disclosed that appellant Bal Mukund Sharma @ Balmukund Chaudhry was directed to bring records, forms etc from the office of District Education Superintendent, Bhagalpur on 17.01.1986 and accordingly, he was present in the office of the latter on 18.01.1986. But from the evidence of DW-1 in his examination-in-chief itself, it is evident that his plea of alibi appears to be doubtful apart from lacking of basic ingredients that he was not in a position to be present at the place of occurrence at the relevant time. Similarly DW-2 is Chandra Shekhar Prasad Singh, a retired Deputy Superintendent of Education who was practicing as a lawyer on the date of his examination in Court and he too got exposed in cross-examination that he had never inspected the school of the appellant Bal Mukund Sharma. Moreover

he had himself admitted that the stationery and materials to the school were supplied from the office of District Superintendent of Education and not from the office of Deputy Superintendent and thus the very plea of alibi was belied.

57. Thus, after analyzing and scrutinizing the evidence available on the record as discussed above, we do not see any infirmity persisting in the impugned judgment of conviction and sentence rendered by the trial court. Consequently, the same is upheld. All the three appeals are, accordingly, dismissed. Appellants are on bail. Hence, their bail bonds are accordingly cancelled with a direction to them to surrender before the trial court to serve their sentences awarded by the trial court, failing which the trial court will proceed in accordance with law to procure the attendance of the appellants to serve their sentences.