
(2011) 09 PAT CK 0093

In the Patna High Court

Case No : Criminal Appeal (DB) No. 599 of 2006

Bhagwat Rai, Mannu Rai and Parmeshwar Rai

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 23-09-2011

Acts Referred:

Citation : (2011) 09 PAT CK 0093

Final Decision : Dismissed

Judgement

A.K. Trivedi, J.—Challenge in this appeal is the judgment dated 12th May, 2006 and sentence dated 16th May, 2006 passed by Additional Sessions Judge, Fast Track Court, IVth, Muzaffapur in Sessions Trial No. 434 of 1990 whereby and where under Appellant Bhagwat Rai has been found guilty for an offence punishable u/s 302 of the I.P.C. and 27 of the Arms Act and further been directed to undergo R.I. for life as well as fine of Rs. 10,000/- in default thereof to undergo further imprisonment of one year u/s 302 of the I.P.C., R.I. for three year u/s 27 of the Arms Act. While the remaining two Appellants, namely, Mannu Rai and Parmeshwar Rai have been found guilty for an offence punishable u/s 302/149 of the I.P.C. and been directed to undergo each of them R.I. for life as well as fine of Rs. 5000/- in default thereof to undergo further imprisonment for three months u/s 302/149 with a direction to run the sentences concurrently. There has been also a clause of set off as provided u/s 428 Code of Criminal Procedure.

2. Ram Pukar Rai, (P.W. 7) gave his fardbeyan (Exhibit 4) on 30.09.1989 at Referral Hospital, Sakra at 10 P.M. disclosing therein that he along with his other family members Sonelal Rai, Mahesh Rai, Sipahi Rai, Satendra Rai, Upendra Rai, Gaya Rai, Ram Chandra Rai, Ram Nath Rai and Ors. have come to Muzaffarpur to attend date of a 107 Code of Criminal Procedure. proceeding and during course of evidence, there was hot exchange of words in between them at one side with Bhagwat Rai and Ors. at other side. During course of the return to their home, they reached at Sabha Chowk at 06:00 P.M. From there they came to Baji Chowk

where they began to take tea, snacks at the refreshment shop of Rajendra Sah. Again Bhagwat Rai came and indulged in hot exchange. In midst thereof, Hawaldar has come and got the matter pacified. At that very time Parmeshwar Rai of village Lohargama came over motorcycle over which Bhagwat Rai rode and then proceeded towards their house. At about 06:30 P.M., they proceeded towards their village and as soon as reached near "Malang Ashtan", he saw 8/10 persons standing over which he flashed torch and identified Ram Lagan Rai, Bhagwat Rai, Channu Rai, Paras Rai, Jagannath Rai, Rajendra Rai, Lakhindra Rai, Jaddu Rai. Out of them Bhagwat Rai was armed with gun while remaining were armed with lathi and Bhala. No sooner than, on an order of Ram Lakhan Rai, Bhagwat Rai shot at Satan Rai as a result of which he sustained injury and fell down followed by another shot over Ram Chandra Rai who also sustained injury and fell down. He along with others ran away from there raising alarm. Then, thereafter, Bhagwat Rai and Mannu Rai escape there from over motorcycle of Parmeshwar Rai while remaining escaped taking benefit of darkness. Thereafter, he along with others returned back and found the injured under grief of pain. On query, the injured have had narrated the event. Both the injured were taken to hospital and in midst of way they both died. Motive for occurrence has been shown as land dispute as well as social divergence.

3. On the basis of the aforesaid fardbeyan, Sakra P.S. Case No. 173/1989 was registered u/s 147/148/149/302/109 of the I.P.C. and 27 of the Arms Act followed with investigation and submission of charge sheet where upon cognizance was taken and consequent thereto the case was committed to the Court of Session and ultimately met with the conclusion which happens to be put under challenge. Here it looks pertinent to mention that one of the accused, who has been found guilty, namely Ram Lakhan Rai stood dead and thereafter the proceeding against him extinguished vide order dated 06.05.2006. Accused, Lakhindra Rai, Rajendra Rai, Machu Rai, Paras Rai were acquitted by the judgment impugned.

4. The defence case as is evident from the mode of cross-examination as well as from the statement of the Appellant convict recorded u/s 313 of the Code of Criminal Procedure. is of innocence as well as of false implication. It has further been submitted that the deceased were done to death by unknown criminals in different manner of occurrence and to probablise the same D.W.s have also been examined. On behalf of Appellant-convict Bhagwat Rai, it has also been submitted that his gun became out of order therefore it was deposited at M/s Sushil Shastragar, Hajipur Vaishali since before occurrence and it was handed over on 17.08.2007 and to support the same, also examined D.W.

5. While assailing the judgment of conviction and sentence, it has been submitted on behalf of the Appellant convict that the judgment is cryptic, perverse and without application judicial mind. Then submitted that there happens to be exaggeration as well as material contradictions are visible in the evidence of the P.W.s which affect right from root of the prosecution case which,

the learned Lower Court bypassed and failed to consider. Then submitted that there happens to be inconsistency amongst the evidence on each and every material point much less over genesis of occurrence as well as manner of occurrence and that happens to be sufficient to belie the prosecution case as has been flashed. Then submitted that the learned lower court failed to consider that the prosecution witnesses claimed identification on the basis of the torch which never been produced during course of investigation and that happens to be major deficiency on the factum of identification. Then submitted that the objective finding of the I.O. remains inconsistent with the version of the eye witness and the cumulative effect happens to be that none of the prosecution witness should be accepted as an eye witness to occurrence. Furthermore, it has been argued that the prosecution knowingly and deliberately did not produce the shopkeeper Rajendra Sah before the court and for his non-examination, no explanation has been on behalf of the prosecution. It has also been submitted that the fardbeyan only speaks with regard to assault by firing over the person of Satan Rai as well as Ram Chandra Rai but during course of examination, the witnesses also brought P.W. 8 Ram Swaroop Rai who claimed himself to be one of the injured who sustained firearm injury at the hands of accused but surprisingly enough, instead of examining him as material witness was tendered. In likewise manner, it has been submitted that P.W. 4 and P.W. 5 the brothers of informant have also been tendered whose name find in the fardbeyan. Also submitted that the prosecution was not satisfied over the materials whatever it has produced and to further strengthen the same, P.W. 6, Raj Kumar Choudhary, who happens to be on inimical term, has been brought up who apart from others, introduced a new theory over dying declaration which happens to be uncorroborated by the other witnesses. Also submitted that the postmortem report also rules out the manner of occurrence so flashed by the prosecution. It has also been submitted that in the background of aforesaid improbability, infirmity and deficiency persisting in the prosecution case, the defence narration appears to be more convincing with actually the deceased were done to death by other miscreants on account of their criminal activities jumping under fray amongst father and son, namely, Rajesh Agrawal @ Raju and his father Prahlad Agrawal on account of dispute over orchard followed with murder as well as on account of some sort of property dispute amongst one of the branches of forefather of the informant and deceased. To bring on fore, the defence had examined altogether 17 D.W.s whose evidence ought to have been considered by the learned lower court, wherein it failed. Last but not least it has been submitted that in the background of aforesaid unreliable evidence of interested, partisan and inimical witness, it cannot be said and held that the prosecution has been able to substantiate its case and consequent thereupon, the finding arrived at by the learned lower court is fit to be set aside.

6. At the other hand the learned P.P. while sticking with the finding, refuted and submitted that from the judgment impugned it is evident that the learned lower court had capsuled each and every points and minutely scrutinized the evidence

where from the innocence of others have been located whereas complicity of Appellants have been found to be sufficiently proved. Also submitted that there was no question of mistaken identity nor the defence had challenged nay it could be argued because of the fact that neither the time of occurrence has been challenged nor the Appellant had challenged to the effect that they are not known to the witnesses since before which cannot be, in the background of the fact that both the parties are co-villagers. Also submitted that enmity is a double edged sword. The Appellant raised voice of their false implication in the aforesaid background while the prosecution shown casualty in the aforesaid background for which witnesses were adduced and the learned lower court after minutely observing and scrutinizing the evidence, concluded in a manner which, in the facts and circumstances of the case does not require interference

7. To appreciate the rival contention, it looks better to recapitulate the evidence available on the record.

8. In order to substantiate its case the prosecution had examined altogether 16 P.W.s out of whom P.W. 1 is Mahesh Rai, P.W. 2 is Upendra Rai, P.W. 3 is Sipahi Rai, P.W. 4 is Gaya Rai, P.W. 5 is Sonelal Rai, P.W. 6 is Raj Kumar Choudhary, P.W. 7 is Rem Pukar Rai, P.W. 8 is Ram Swaroop Rai, P.W. 9 is Dr. Manoranjan Kumar Srivastava, P.W. 10 Bhupesh Kumar Singh, P.W. 11 is Pradeep Kumar Singh, P.W. 12 is Yogendra Jha, P.W. 13 is Dinanath Singh, P.W. 14 is Ram Nath Singh, P.W. 15 is Abhay Kant Jha, P.W. 16 is Laxmi Narayan Mahto. Side by side also exhibited Exhibit 1- signature of Raj Kumar Choudhary, Exhibit 2, Exhibit -3 is postmortem report, Exhibit 4 -fardbeyan, Exhibit 5 -formal FIR, Exhibit 6 -seizure list, Exhibit 7 -station diary entry No. 714, Exhibit 7/1 - the station diary entry No. 716, Exhibit 8, Exhibit 9 - inquest report, Exhibit 10 - signature of Ram Nath Singh over 164 statement, Exhibit 11 -164 statement of Ram Nath Singh, Exhibit 12 - signature of Ram Nath Singh over order sheet. Exhibit 13- order sheet. Side by side the defence had also examined D.W.1 Abdul Azij, D.W.2 Guru Nandan Singh, D.W.3 Kameshwar Jha, D.W.4 Rajendra Singh, D.W.5 Harendra Singh, D.W.6 Saryug Rai, D.W.7 Umesh Prasad Singh, D.W.8 Uma Shankar Prasad Singh, D.W.9 Nirsu Rai, D.W.10 bacchan Rai, D.W.11 Ganesh Rai, D.W.12 Ram Chandra Rai, D.W.13, Kishore Sah, D.W.14 Lal Bahadur Singh, D.W.15 Nand Kishore Thakur, D.W.16 Anjarul Haque, D.W. 17 Abdul Azij (reexamined formal) as well as exhibited Exhibit A - complaint petition of case No. 171/85, Exhibit B- receipt No. 119 dated 15-9-89, Exhibit C to C/4 - five sale deeds (certified copy), Exhibit D - Vakalatnama, Exhibit E - field book, Exhibit F, F/1 - Original as well as trace map, Exhibit G - Entry No. 117 of the register kept by arms dealer, Exhibit G/1 - endorsement over exhibit G, Exhibit G/2, G/B - verification dated 19-12-1987, 16-1-98 by the arms magistrate over the register, Exhibit H - plaint of title suit No. 29/89, Exhibit H/1 - plaint of partition suit No. 10/83, Exhibit I - C.C. of trial register (Sl. No. 13690), Exhibit J - C.C. of FIR of Town P.S. Case No. 262/88, Exhibit K - C.C. judgment of case No. 1375/85.

9. P.W.1 happens to be Mahesh Rai. He had deposed that on 30-09-1989 he

along with 18 more persons have come to Muzaffarpur to appear before the SDM in a proceeding u/s 107 of the Code of Criminal Procedure. Thereafter, they return back and got down from bus at Sabha Chowk. From Sabha Chowk they all came to Bazi Ghat where he along with Ram Nath Singh, Ram Pukar Rai, Satan Rai, Ram Chandra Rai, Gaya Rai, Sarovar Rai, Sipahi Rai, Sonelal Rai, Upendra Rai stayed at the shop of Rajendra Sah for snack and tea. While they were staying there, Bhagwat came and indulged in hot exchange with Satan and Ram Chandra. One Hawaldar, Dinanath Singh came and got the matter pacified. Bhagwat left the place along with Dr. Parmeshwar Rai over motorcycle and at that very, time he had given alarm to all of them. Hawaldar had directed them to choose another way to go to their house but as no alternative way was available, therefore, they proceeded through the same path. When they came at "Malang Asthan" it was dusk, they have seen 8-9 persons standing there. Ram Pukar Rai flashed torch and in the aforesaid light he had seen Bhagwat Rai, Ram Lakhan Rai, Jagannath Rai, Paras Rai, Mannu Rai, Rajendra Rai, Mucchu Rai, Parmeshwar Rai. Parmeshwar Rai was sitting over his motorcycle after having parked it. At that very time, Bhagwat Rai was armed with doubled barrel gun, rest were armed with Lathi and Bhala. As soon as they have seen them, Ram Lakhan Rai ordered Bhagwat to fire on account of which Bhagwat Rai fired. The first firing struck Satan Rai who felled down. Second firing was made over Ram Chandra Rai who also sustained injury and felled down. He along with others escaped there from raising alarm attracting the villagers seeing whom Bhagwat Rai and Mannu Rai escaped along with Parmeshwar over motorcycle while remaining escaped hither and thither. He directed with others came near injured who were groaning. Hawaldar, Dina Nath also reached. He attracting to lift the injured to hospital and accordingly both the injured were lifted to hospital and in midst of way they both died. Further he disclosed the details of pendency of criminal case amongst the parties. Also identified the accused. During cross-examination from para 30 to 34 happens to be corroboration and contradiction. This witness has been cross-examined at length but the defence could not be able to extract anything adverse to the case of the prosecution. More particularly, there has not been cross-examination on the factum of occurrence. In para 63 and 64 had deposed that only nine persons have stayed at shop of Rajendra while remaining proceeded their home. From para -69 it relates with the means of identification and from para - 74 to 79, it happens to be with regard to location of both the deceased at the time of sustaining injury by them at the hands of Bhagwat. The prosecution had disclosed the motive as pendency of cases as well as property dispute which has been explained by this P.W. during course of cross-examination with certain variance as is evident from para - 50, 51, 52, 59 of his cross-examination.

10. P.W. 2 happens to be Upendra Rai who had also joined the deceased to Muzaffarpur from his village and returned back including deceased along with others. He deposed that on 30.09.89 he along with 19 others persons have gone to appear in a 107 Code of Criminal Procedure. proceeding at SDO Court,

Muzaffarpur. During return, they all got down at Sabha Chowk and proceeded towards their house. They reached at Baji Chowk where some of them stopped at the shop of Rajendra while remaining proceeded. After sometime Bhagwat came and had an altercation with deceased Ram Chandra and Satan. At that very moment Hawaldar came and got the matter pacified. Bhagwat then thereafter left the scene over motorcycle of Parmeshwar being driven by Parmeshwar giving a threat. After sometime, they all proceeded towards their house and as soon as they reached at "Malang Asthan", they saw 9-10 persons having blocked the road. At that very time it was dusk. In the torch light flashed by Ram Pukar, he identified Bhagwat Rai, Lalkhan Rai, Mannu Rai, Paras Rai, Jaganath Rai, Lakhinder Rai, Rajendra Rai, Macchu Rai, Parmeshwar Rai. Parmeshwar Rai was sitting over his motorcycle after having it parked. Bhagwat Rai was armed with double barrel gun while remaining were armed with lathi and Bhala. As soon as they arrived, Ram Lakhana Rai exhorted over which Bhagwat Rai shot at firstly over Satan Rai and then over Ram Chandra Rai @ Chandra Rai. Both of them sustained injury and fell down. He along with others flee there from raising alarm attracting the villagers Bhagwat and Mannu escaped along with Parmeshwar on motorcycle while remaining scattered. Then thereafter they all lifted both of injured to hospital but in midst of way they both succumb.

11. During cross-examination from para 21 to 27, the attention of the witness has been drawn towards contradiction. Para - 32 and 33 happens to be topography of P.O. Para -34 discloses strain relationship in between prosecution as well as defence party. Para - 39 and 40, 41 happens to be presence of another witness Ram Chandra Rai who had also sustained injury. In para -55 of his cross-examination had categorically stated regarding manner of occurrence.

12. P.W. 3 had deposed that occurrence is about 2 years 9-10 months ago it was Saturday. It was dusk. He along with others were returning from Muzaffarpur. When they reached at shop of Rajendra Sah situated at Baji chowk ten of them continued there journey while remaining stop to have tea and snacks. As soon as they sat at shop, Bhagwat Rai came and indulged with Sattan Rai and Ram Chandra Rai. They were intervene by Hawaldar Dinanath Singh. Thereafter, Bhagwat left along with Parmeshwar over his motorcycle after giving an alarm. He further named the persons who were along with him as Satan Rai, Ram Chandra Rai, Ramnath Singh, Ram Saravar Rai, Upendra Rai, Mahesh Rai, Gaya Rai, Sone Lal Rai, Ram Pukar Rai. After sometime they all proceeded and as soon as reached at "Malang Asthan" they found 8-10 persons staiding over the road. Ram Pukar Rai flashed torch wherein they all identified Lakhana Rai, Bhagwat Rai, Mannu Rai, Jagannath Rai, Paras Rai, Rajendra Rai, Lakhindra Rai, Machhu Rai, Parmeshwar Rai wherein Bhagwat was armed with gun while remaining armed with lathi and Bhala. Parmeshwar was sitting over his motorcycle. On an order of Lakhana Rai, Bhagwat Rai shot firstly, at Satan Rai followed by Chandra Rai. They both sustained injury and felled down. Then, thereafter, they ran raising alarm attracting the villagers as well as arrival of the Hawaldar Dinanath Singh. Both injured were lifted to hospital but unfortunately died in midst of way. Identified

the accused.

13. During cross-examination at para -29 he has been cross-examined on the point of presence of one of the witness Ram Swaroop Rai. At para 31 had said that others were also present by the side of Chandar Rai and Sattan Rai. In para 32, 33, 34, he had categorically stated the location of accused Bhagwat Rai from the deceased at the time of firing. Paragraph 35 discloses location of Chandar Rai and Sattan Rai at the time of occurrence. In para 37 had said that Ram Swaroop had also sustained injury during aforesaid course of occurrence. At para - 38 had said that torch was flashed by Ram Pukar which was of three shell. In para 39, 40 had said that more than 200-250 persons have assembled whom had narrated the incident. In para 44 had said that torch which Ram Pukar Rai was carrying missed at the "Malang Asthan" In para - 49 had said that I.O. had demanded the torch over which Ram Pukar Rai had disclosed that it felled down. He also had disclosed like so. Para - 58 to 63 happens to be questionnaire which was put to him by way of contradiction.

14. P.W. 4 Gaya Rai has been tendered for cross-examination. In likewise manner P.W. 5 happens to be. But even then defence could not tried to explicit anything adverse to prosecution.

15. P.W. 6 happens to be Raj Kumar Choudhary. Admittedly, he does not happens to be an eye witness to occurrence. He deposed that on the alleged date and time of occurrence he was at Baji chowk. At that very time he had heard an altercation which was going on in between Bhagwat Rai at one side and Chandar Rai, Sattan Rai, Ram Pukar Rai, Gaya Rai at other side. The same was intervened by the Hawaldar who was deputed at Baji chowk. At the time of departure along with Parmeshwar Rai over motorcycle, Bhagwat Rai had threatened his adversary. After sometime, Chandar Rai along with others also proceeded. After sometime he heard two firing sound. He rushed towards the direction and in midst of way he found Parmeshwar Rai driving the motorcycle while B hagwat Rai armed with gun and Mannu Rai were pillion rider. When he reached at "Malang Asthan" he found injured Sattan Rai who was lying in middle road and Ram Chandra Rai who was lying at the juncture, in injured condition and were groaning. He first of all had gone to Satan Ran and inquired there from over which Satan Rai disclosed that on an order of Ram Lakhan Rai, Bhagwat Rai shot at. The same narration was also given by Ram Chandra Rai. Till then so many persons including Hawaldar and the persons who were along with Satan and Ram Chandra came and lifted both of injured to hospital in midst of way both succumb. Darogaji had come at hospital where he took fardbeyan of Ram Pukar Rai in his presence over which he also put signature (exhibited). Also exhibited his signature over inquest report. On the next day while he was at the place of occurrence, the I.O. had inspected the P.O. and seized blood stained earth for which seizure list was prepared in carbon process having his signature. In cross-examination at para 22 to 26, it appears that this witness is on inimical term with the accused. Then at para 29 had disclosed that his house lies just infront of

shop of Rajendra Sah. In para 35 had said that while he was proceeding towards place of occurrence, he had seen Parmeshwar Rai driving the motorcycle and Bhagwat Rai, Mannu Rai at back. In para 36 had said that so many persons have arrived at the place of occurrence after hearing sound of firing including Hawaldar but he arrived first of all. In para 38 he had disclosed that when he reached at the place of occurrence, he had not found anybody else. In para 39 had said that at the time of disclosure made by deceased Satan Rai and Ram Chandra on his query none others were present. In para 40 had said that he had not peneed it down. In para 41 had said that whatever disclosure was made by deceased Satan Rai and Ram Chandra Rai, he had already divulged the same to Hawaldar and others. He cannot say whether others have also inquired from Satan and Ram Chandra on account of assemblage of huge crowd. In para 47 had said that he had reached at the place of occurrence after 10 to 15 minute of hearing sound of firing. In para 49 had said that while he had seen Parmeshwar Rai, Bhagwat Rai and Mannu over motorcycle, at that very time motorcycle was in high speed.

16. P.W.7 happens to be the informant. He had deposed that on 30.09.89 he along with 19 others have come to Muzaffarpur to attend the case u/s 107 of the Code of Criminal Procedure. pending before SDM, wherein he was opposite party. They return from court at about 4 P.M. and reached at Sabha Chowk at about 6 P.M. From there they came to Baji Chowk, at the shop of Rajendra Sah within 10 minutes. He along with 10 others stayed at the shop of Rajendra Sah while remaining continued to proceed towards home. At that very moment an altercation took place in between Satan Rai, Ram Chandra Rai at one side and Bhagwat at other. Hawaldar came and intervene into the matter. Bhagwat took sit behind Parmeshwar"s motorcycle and left. However he threatened before his departure. After sometime, all of them proceeded towards their house. As soon as they reached at "Malang Asthan", he saw Parmeshwar sitting over motorcycle while others were also standing. Then he flashed torch and identified Lakhan Rai, Bhagwat Rai, Mannu Rai, Jagannath Rai, Paras Rai, Rajendra Rai, Lakhindra Rai, Mucchu Rai. During said course Bhagwat Rai was armed with gun while remaining were armed with lathi, bhala, farsa. On an order of Lakhan Rai, Bhagwat Rai shot at Satan who felled down sustaining injury followed by successive firing causing injury to Chandar who also felleds down. They all escape there from to save their life. They also raised alarm. During said course he had found accused Bhagwat Rai and Mannu Rai having over motorcycle driven by Parmeshwar Rai while remaining also escaped there from. So many persons of nearby including Hawaldar have arrived. First of all Raj Kumar Choudhary arrived at the P.O. Thereafter, they all took both the injured to hospital and in thereof both the injured died. Darogaji came at hospital took his fardbeyan in presence of witnesses. Then had detailed presence of 107 Code of Criminal Procedure. proceeding one launched by Ram Narayan Rai against them at the instance of accused and the other launched by one of witness Gaya Rai against accused. During cross-examination at para 22 had admitted that there was no dispute

since before amongst the parties more particularly no case was pending. Gaya Rai had instituted a case u/s 107 of the Code of Criminal Procedure. 15 days prior to the occurrence. From para -27 to para 36 the accused has brought up Rajesh Agrawal @ Raju his father S.D. Agrawal and his younger brother. Pappu coupled with fact that the aforesaid persons were on litigating term. Furthermore, there has been murder of Pappu wherein Rajesh and Ors. are an accused. At para 41, 42, 43, there happens to be disclosure with regard to an altercation which had taken place in between Bhagwat Rai and Satan at the shop of Rajendra and further having been incorporated in the fardbeyan. At para 45 had clearly disclosed that Bhagwat Rai was carrying licensee gun at the time of occurrence. Para 47 to 51 there happens to be disclosure regarding location of both the deceased from him. Para 56, 57, 58, 59 happens to be connecting with the physical feature of both the deceased. He has further disclosed presence of 107 Code of Criminal Procedure. proceeding in between the parties as is evident from para 62, 63, 64, Para 65. Also disclosed presence of further supportive material with regard to previous animosity. Then from para 66 presence of Murat Rai one of the Patidar of informant has been brought into existence who had no male issue and in the aforesaid background there was fiction amongst the family members.

17. P.W.8 happens to be Ram Swaroop Rai, the witness who had sustained injury during course of occurrence. He was tendered by the prosecution. During course of cross-examination he had clearly deposed under para 4 that he was also physically present in the court on 30.9.89. In para 6 had also disclosed that he had sustained gunshot injury during course of occurrence.

18. P.W. 10 happens to be the I.O. As per his evidence para 8 it is evident that while he along with Dy.S.P. was engaged in supervision of case No. 171/89, they received information with regard to occurrence over which they promptly arrived at the place of occurrence where Hawaldar and Chowkidar along with others were present who disclosed that injured were taken to hospital and so after instructing them, come to P.S. where the recorded fardbeyan, inquest report prepared by S.I. Pradeep Kumar was available and accordingly after registering case, investigation was taken up. He had gone to hospital and took further statement of informant. Then proceeded towards place of occurrence and during midst thereof. On getting information regarding presence of doctor Parmeshwar Rai apprehended him from village Lohargama. Challenges also seized motorcycle. Then under para 17 had given details of place of occurrence as well as seized blood stain earth in presence of witnesses. Recorded statement of other witnesses. Obtained P.M. report. Also exhibited station diary entry No. 714 and 716. During cross-examination from para 28 to 48 happens to be the contradiction of the witnesses. In para 52 had disclosed that there was distance of 37 feet in between place where both the deceased had fallen. At para 57 had said that when he had gone to hospital first time, he had not recorded statement of any of the witnesses. In para 64 had given details of distance. Para 65 had said that he had taken statement of 8 witnesses. In para 68 had said that he had

not found trail of blood in between the places where copious blood were found. In para 70 had said that he had not found torch. In para 71 had said that none had produced torch. In para 72 had said that he had not sent the seized cloth and blood stain earth for chemical examination. In para 77 had said that Mayanandani Devi, W/o Bhagwat Rai had produced receipt relating to

19. deposit of gun. Again para -80, 81 happens to be contradiction of witnesses. P.W. 11 happens to be P.K. Singh who was posted as one of the S.I. at Sakra P.S. on 30.9.89. He had recorded the fardbeyan of informant Ram Pukar Rai as well as had prepared inquest report in presence of inquest witnesses. In para 8 and 9 had disclosed that the wound of injured was covered by towel. In para 10 had said that no case number is incorporated over inquest report. P.W. 12 happens to be one Yogendra Jha, A.S.I. who had disclosed that while he was patrolling on 30.9.1989 at 07:15 P.M., he had received information with regard to commission of an occurrence. He met with Deputy S.P. and Officer-in-Charge, Sakra P.S. whom he had informed regarding commission of occurrence. Then thereafter he along with Deputy S.P. and Officer-in-charge had gone to place of occurrence, found blood at the place of occurrence. Chowkidar and the Hawaldar were present. In para 11 had reiterated the fact that he had received information that Bhagwat Rai and Ram Lakhan Singh along with others have committed murder of two persons. Aforesaid information was received from Dinanath Singh at 7:15 P.M. and immediately he rushed to inform the Dy.S.P.

20. P.W.13 happens to be Dinanath Singh, Hawaldar who had said that on the alleged date of he was on "Andheria Patrolling". He had gone to the shop of Rajendra Sao after getting the persons assembled there and found two groups indulged in an altercation. Then thereafter he forbidden both the groups. After sometime one person came with motorcycle over which Bhagwat Rai sat and left the place. Further have identified the driver as Parmeshwar Rai. Though he has subsequently been declared as hostile but the part of his statement whatever been made before the I.O. u/s 161 of the Code of Criminal Procedure. has been admitted by him as is evident from para 6, para 8, para 10, para-11, para 12, para 13, para 14, para 15. From para 18 it is evident that he had identified three accused only confining Parmeshwar Rai, Bhagwat Rai and Ram Lakhan Rai. In para 19 of his cross-examination had said that he had made statement before the I.O. at "Malang Ashthan". In para 24 had said that when the Dy.S.P. and OC had come to place of occurrence at first instance then also he had stated regarding the occurrence. Whatever he had stated during examination-in-chief as is evident from para 23 of the cross. In para 25 it is evident that he was the person who had informed the Jamadar who along with Dy.S.P. and OC latter on visited the place of occurrence. Then also at para 32 and 33 he had said that he had got no opportunity to have conversation with the accused. P.W. 14 happens to be Ram Nath Singh the witness, who had turned hostile. Regarding his conduct nothing more could be said save and except that prosecution was suspicious and that happens to be reason behind that he was examined u/s 164 of the Code of Criminal Procedure. during course of investigation and after being

declared hostile, his attention was drawn though he had exhibited his signature over his statement. As accepted, during course of cross-examination he had supported the defence version. P.W. 15 happens to be Abhay Kant Jha the Judicial Magistrate who had recorded 164 statement of P.W. 14 Ram Nath Singh and accordingly exhibited. P.W. 16 happens to be Panchayat Sewak who had come to say that P.W. 14 worked under accused Ram Lakhan Rai Mukhiyha and got payment. P.W. 9 happens to be doctor Manoranjan Kumar Srivastava, the doctor who had conducted postmortem over the person of deceased and found following injuries, so far deceased Ram Chandra Rai is only:

I. One oval wound 1/2" diameter with inverted margin found the left flank of the abdomen on the mid axillary line just below 11th rib with blood clot. Intestinal loop was protruded out with extensive laceration.

On dis-section whole loop of intestine was punctured. Spleen was also found punctured. Half pint of blood was present on abdominal cavity.

Three pillets were found on the mnsentric and two were found on the spleen. Pillets were taken out. Caused of death was shocked and hemorrhage due to the above injury caused by some fire arm.

With regard to Satan Rai:

One oval wound 1/2" in diameter with inverted margine has been found on the back of chest just below inferior angle of scapula with blood clot.

On dissection of the chest, left lung was found punctured and collapsed with extensive laceration of tissues. On further trace of the track of the wound, five pillets scattered on the left side of the chest of the chest cavity were taken out. Half pint of the blood was present in the thorasic cavity. The doctor had opined that the injury was sufficient in ordinary course of nature to cause death and have been identified as firearms injury and he prepared the post-mortem report in his writing and bears his signature (Exbt.3).

21. During cross-examination he had said that no food particle was present in the stomach of both the deceased. Under para 3 had said that the deceased had not taken any food materials within 4 to 6 hours prior to their death. At para - 7 had said that injury of both the deceased was such that they would have gone in Comma instantaneously and they would not have been in a position to speak. So, after crystallizing the evidence of the ocular witness it is evident that the prosecution party along with others have had gone to Muzaffarpur to have their physical presence in (a) proceeding u/s 107 of the Code of Criminal Procedure. b) during course of return, some of them have stayed at the shop of Rajendra Sah at Baji Chowk (c) the ten persons have come to "Malang Asthan" while proceeding ahead towards their home and during course thereof, the Satan and Ram Chandra have sustained fatal gun shot injury at the hand of Bhagwat Rai. Bhagwat Rai happens to be the author for which he was instigated by Ram Lakhan Rai. Ram Pukar though tendered but categorically stated during course of

cross-examination that he had also sustained injury during aforesaid occurrence.

22. The postmortem report also reveals presence of ante mortem firearm injury responsible for causing death of both the deceased. The cross-examination of doctor has not adversely affected ocular evidence because the fact that none of the witness had deposed that deceased had taken snacks at the shop of Rajendra. So far after presence of cross-examination on other score did not grandiose for the genuineness of the prosecution version. Apart from other aspects, which are going to be separately and independently dealt with, from the cross-examination of the witnesses it is crystal clear that the defence could not dare to cross-examine the witnesses on the point of place of occurrence as well as on the point of assault by firearm at the hands of Bhagwat Rai. The view gets further strengthen from the decision reported in AIR 1961 page 359, Calcutta. The relevant para happens to be para -10, para- 11, para-12, para-13, para-14

(10) The law is clear on the subject. Wherever the opponent has declined to avail himself of the opportunity to put his essential and material case in cross-examination, it must follow that he believed that the testimony given could not be disputed at all. It is wrong to think that this is merely a technical rule of evidence. It is a rule of essential justice. It serves to prevent surprise at trial and miscarriage of justice, because it gives notice to the other side of the actual case that is going to be made when the turn of the party on whose behalf the cross-examination is being made comes to give and lead evidence by producing witnesses. It has been stated on high authority of the House of Lords that this much a counsel is bound to do when cross-examining that he must put to each of his opponent's witnesses in turn, so much of his own case as concerns that particular witness or in which that witness had any share. If he asks no question with regard to this, then he must be taken to accept the Plaintiff's account in its entirety. Such failure leads to miscarriage of justice, first by springing surprise upon the party when he has finished the evidence of his witnesses and when he has no further chance to meet the new case made which was never put and secondly, because such subsequent testimony has no chance of being tested and corroborated.

(11) On this point the most important and decisive authority is *Browne v. Dunn*, reported in (1893) 6 Rule 67. It is a decision of the house of Lords where Lord Herschell, L.C., Lord Halsbury, Lord Morris and Lord Bowen were all unanimous on this particular point. Lord Chancellor Herschell, at page 70 of the report observed.

Now, my Lords, I cannot help saying that it seems to me to be absolutely essential to the proper conduct of a cause where it is intended to suggest that a witness, is not speaking the truth on a particular point, to direct his attention to the fact, by some questions put in cross-examination showing that that imputation is intended to be made, and not to take his evidence and pass it by as a matter altogether unchallenged and then, when it is impossible for him to explain, as perhaps he might have been able to do if such questions had been

put to him, the circumstances which it is suggested indicate that the story he tells ought not to be believed, to argue that he is a witness unworthy of credit. My Lords, I have always understood that if you intend to impeach a witness you are bound, whilst he is in the box, to give him an opportunity of making any explanation which is open to him; and, as it seems to me, that is not only a rule of professional practice in the conduct of a case, but is essential to fair play and fair dealing with witnesses.

(12) Lord Halsbury, the other member of the House of Lords, at page 76 of the same report said:

23. My Lords, with regard to the manner in which the evidence was given in this case, I cannot too heartily express my concurrence with the Lord chancellor as to the mode in which a trial should be conducted. To my mind nothing would be more absolutely unjust than not to cross-examine witnesses upon evidence which they have given, so as to give them notice, and to give them an opportunity of explanation, and an opportunity very often to defend their own character, and, not having given them such an opportunity, to ask the jury afterwards to disbelieve what they have said, although not one question has been directed either to their credit or to the accuracy of the facts they have deposed to.

24. (13) In fact Lord Halsbury described the situation as a perfect outrage at page 77 of the said report. After quoting the evidence the learned Lord said:

25. My Lords, it seems to me that it would be a perfect outrage and violation of the proper conduct of a case at Nisi Prius if, after the Learned Counsel had declined to cross-examine the witness upon that evidence, it is not to be taken as a fact that that witness did complain of the Plaintiff's proceedings, that he did receive advice, that he went round to Mr. Dunn as a solicitor, and that he did sign that retainer, the whole case on the other side being that the retainer was a mere counterfeit proceeding and not a genuine retainer at all.

(14) The same view is expressed in the 13th Edition of Odger On Pleading and Practice at page 261 and the 9th Edition of Phipson On Evidence at page 497-98.

26. Now coming to the status of witness, it is admitted one that the witnesses are interrelated and so in the aforesaid background how their evidences are to be taken for that. The guidelines laid down by the Hon"ble Apex Court reported in 2011(3) P.L.J.R.209 has to be taken into consideration:, Wherein at para-15 it has been incorporated:

Now coming to the question of reliance by the prosecution on witnesses who are related to the deceased, we find that the law is well-settled that merely because the witnesses are related is not a ground to discard their evidence. On the other hand, the court has held that in many cases, the relations are only available for giving evidence, having regard to the trend in our present society, where other than relations, witnesses are not available. It is of course true that the evidence

of the interested witnesses have to be carefully scrutinized

27. The same view is further find supported with Waman and Others Vs. State of Maharashtra, wherein after discussing the various decisions on this scope in para-20 it has been held that: merely because the witnesses are related to complainant or the deceased, there evidence cannot be thrown out. If their evidence is found to be consistent and true, the fact of being a relative cannot by itself discredit their evidence. In other words, the relationship is not a factor to affect the credibility of a witness and courts have to scrutinize their evidence meticulously, with a little care.

28. Therefore, the evidence of the witnesses on this score cannot be brushed aside.

The defence has vehemently argued and brought to our notice that the manner of identification happens to be absurd and it is fit to be rejected, more particularly, in the background that there has been specific assertion regarding source of identification by means of torch which was never produced during course of investigation before the I.O. nor it was seized by the I.O. In this regard, the evidence brought up on record and further is admitted one to the extent that both the parties are co-villager and are known to each other apart from the fact that are litigating one. Further there happens to be consistent evidence that it was even

29. dusk and so far time is concerned, the defence could not be able to demolish the same. In a decision reported in AIR 2008 SCW 5914 at para-8 it has been held:

even otherwise if a person is well known to the other, then the probability of identification of said person even from a far away place is much higher

30. In the case of State of Andhra Pradesh Vs. Dr. M.V. Ramana Reddy and others, it was held that by this Court that where the identity of the accused is well known to the eye witness the same could be recognized even in the faint light.

31. In another decision reported in AIR 1981 SC 273 at para-2 it has been held:

In coming to this finding the High Court completely overlooked the fact that all the accused were known persons belonging to the same village and bore animus against the deceased. The High Court further failed to consider that two of the eye-witnesses were injured and had the opportunity of seeing the accused persons from a very close distance and even if there was no sufficient light, they could have been identified by voice, by gait and by their features. The occurrence had taken place towards the end of February in an open field at about 5-30 p.m. when it would not be so dark as to make identification impossible

32. Here in this case, the occurrence is dated 30.09.1989 that means to say of September and the time is in between 6.30 p.m. to 7.00 p.m. and the P.O.

happens to be an open place known as "Malang Asthan" situated at the road going to the village from Baji Chowk. The another decision on this score happens to be 2002 SCC (Cri.) 1128 wherein at para-20 it has been held:

Regarding non-seizure of the torchlight, used by the witness to see the occurrence, it was held in *Balo Yadav v. State of Bihar*⁶ that such an omission cannot be considered as a lapse on the part of an investigating officer and as such it was not a ground for impairing the testimony of the witness concerned. Even if there was failure on part of investigating agency to take steps for the seizure of torchlight, such an omission cannot be treated as a ground to reject the prosecution case

33. Then it has been submitted that there happens to be contradiction in the statement of the witnesses and so their evidence are fit to be discarded. The aforesaid question has been answered in a decision reported in 2011 (7) SCC 435 wherein at para-48 it has been held:

It is a settled legal proposition that while appreciating the evidence of a witness, minor discrepancies on trivial matters, which do not affect the core of the prosecution's case, may not prompt the court to reject the evidence in its entirety. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labeled as omissions or contradictions." Difference in some minor details, which does not otherwise affect the core of the prosecution case, even if present, would not itself prompt the court to reject the evidence on minor variations and discrepancies. After exercising care and caution and sifting through the evidence to separate the truth from untruth, exaggeration and improvements, the court comes to a conclusion as to whether the residuary evidence is sufficient to convict the accused. Thus, an undue importance should not be attached to omissions, contradictions and discrepancies which do not go to the heart of the matter and shake the basic version of the prosecution witness. As the mental capabilities of a human being cannot be expected to be attuned to absorb all the details, minor discrepancies are bound to occur in the statements of witnesses.

34. Therefore, in the background of the aforesaid settled principles initiated by the Hon'ble Apex Court, when the evidence of the P.W.s have been minutely gone through, because of the fact that having faced lethargic cross-examination, on account thereof certain variance in their testimony have visualized, but those have not adversely affected upon the case of the prosecution. Then coming to motive, it has been pleaded that the prosecution has not been able to substantiate the scene. After going through the evidence of all the material witnesses it is evident that the parties are at logger heads. Further, instead of diminishing the fact, it has been magnified during course of cross-examination. Coming to the point of dying declaration over which Appellant/convict has put much stress, it is found from the fardbeyan that the deceased have made their statement though none save and except P.W. 6 has deposed on this score. However, the aforesaid deposition has not been found to be

exaggerated one. Even taking into account evidence of P.W.s, the doctor and evidence of other witnesses, and even discarding the theme dying declaration being uncorroborated one, there happens to be consistent version of prosecution witness on this score. The version of prosecution in consonance with the evidence of P.W. 10, I.O. negating the distance in between dead body found at the P.O. is not going to affect the prosecution case, as the same is not perversely affect consistent version of prosecution over manner of occurrence.

35. By adducing D.W., the defence tried to propagate that in light of dispute having amongst own family of prosecution party as well as having dispute in the family of one P.D. Agrawal wherein the prosecution party favour his son Rajo Agrawal, might have led murder of deceased is no way found to be substantiated to such extent to discredit the testimony of prosecution witnesses. Another fact has been brought up with regard to non-possessing of licensee gun by main accused Bhagwat Rai on account of getting it deposited at the arm shop lying at Hajipur, Vaishali and to support the same D.W. has been examined along with exhibit of relevant registers. After going through the evidence of D.W. 2 and the exhibit made by him, it is evident that both are fit to be rejected because of the fact that the register on its face lost its genuineness as not being properly maintained and verified by the authority concerned and secondly whether the arms license was granted for outside district, or not. The occurrence is of Muzaffarpur district and the double barrel gun was deposited at Hajipur, Vaishali. Apart from this the arm license has not been exhibited to enable the court to see its

36. jurisdiction which happens to be in possession of accused and been not produced during course of investigation before I.O. At the last I would like to refer the view of the Hon''ble Court as reported in 2011(3) PLJR SC page 205, wherein para13 and 14 it has been held:

37.It is true that the prosecution is required to establish its case beyond a reasonable doubt, but that does not mean that the degree of proof must be beyond a shadow of doubt. The principle as to what degree of proof is required is stated by Lord Denning in his inimitable style in Miller v. Minister of Pensions, (1947) 2 ALL.E.R. 272:

That degree is well settled. It need not reach certainty, but it must carry a high degree of probability. Proof beyond reasonable doubt does not mean proof beyond a shadow of a doubt. The law would fail to protect the community if it permitted fanciful possibilities to deflect the course of justice. If the evidence is so strong against a man as to leave only a remote possibility in his favour which can be dismissed with sentence "of course, it is possible but not in the least probable,? the case is proved beyond reasonable doubt It is true that under our existing jurisprudence in a criminal matter, we have to proceed with presumption of innocence, but at the same time, that presumption is to be judged on the basis of conceptions of a reasonable prudent man. Smelling doubts for the sake of giving benefit of doubt is not the law of the land.

38. Reference may also be made to the decision of this Court in Sucha Singh and Another Vs. State of Punjab, where this Court has reiterated the principle in the following words:

Exaggerated devotion to the rule of benefit of doubt must not nurture fanciful doubts or lingering suspicion and thereby destroy social defence. Justice cannot be made sterile on the plea that it is better to let a hundred guilty escape than punish an innocent. Letting the guilty escape is not doing justice according to law. (See Gurbachan Singh Vs. Satpal Singh and others, Prosecution is not required to meet any and every hypothesis put forward by the accused. A reasonable doubt is not an imaginary, trivial or merely possible doubt, but a fair doubt based upon reason and common sense. It must grow out of the evidence in the case. If a case is proved perfectly, it is argued that it is artificial; if a case has some flaws inevitable because human beings are prone to err, it is argued that it is too imperfect. One wonders whether in the meticulous hypersensitivity to eliminate a rare innocent from being punished, many guilty persons must be allowed to escape. Proof beyond reasonable doubt is a guideline, not a fetish.

39. Thus after analyzing and crystallizing the evidence available on the record it is found and held that this appeal is devoid of merit and is accordingly dismissed.

40. Appellant-convict Bhagwat Rai is already under custody, hence he will serve out the sentence. While Appellant-convict Munna Rai & Parmeshwar Rai are on bail hence their bail bond are cancelled and are directed to surrender before the learned lower court within a week to serve out sentence failing which the learned lower court will take proper action in accordance with law. The period undergone will be set of as per Section 428 Code of Criminal Procedure.

Shyam Kishore sharma, J.

I agree