
(2002) 09 PAT CK 0116

In the Patna High Court

Case No : Criminal Appeal (DB) No. 303 of 1987

Bikau Pandey and Rabindra Pandey

APPELLANT

Vs

State of Bihar

RESPONDENT

Date of Decision : 03-09-2002

Acts Referred:

Citation : (2002) 09 PAT CK 0116

Final Decision : Dismissed

Judgement

B.N.P. Singh, J.—Though offences are committed with some motive which may be even stale matter, and instances are not very uncommon when atrocious crimes are committed ostensibly for no good reasons and even for fancied wrongs.

2. About 5-6 years preceding the incident, when Sri Sarjug Rai, who happened to be Sarpanch of Bishanpur Gram Panchayat, was killed, there had been a partition in the family and among the as sailants, Kamal Rai was none else but his nephew who nourished serious unstable grudge against his uncle for unequal partition of ancestral properties. The said Kamal Rai, strongly believed that construction of new house and purchase of tractor, subsequent to partition by his uncle was made from cash which had not been divided during partition by his uncle. Though motive appears to be trivial and also state but where direct evidences are available, motive admittedly pales into insignificance.

3. At the very outset, we may notice, some of the salient features of the prosecution case centering round the incident in question. The accusations appearing from the first information report of Ram Babu Rai (P.W. 14), son of the deceased, and also narrations made by the witnesses at trial are that on 17th August, 1983, while Sarjug Rai at about 8 a.m. had gone to temple after taking holy dip in a pond, adjacent to the temple, the Appellants holding weapons came down from the house of Kamal Rai and came to the temple, pursuant to which Kamal Rai while exhorting others to liquidate Sarjug Rai, dealt blows with hard and blunt substance on head of his uncle as the deceased had been unfair to him

in partitioning the ancestral properties. It was alleged that Dukha Das, the priest of the temple locked the northern gate of the temple to save Sarjug Rai. However, Sarjug Rai could not be saved as Deosaran Rai broke open the lock and dragged Sarjug Rai outside, pursuant to which on exhortation made by Kamal Rai, all dealt indiscriminate blows on him with lethal weapons which they held with them. It was alleged that when Shatrughan Pandey, Ram Chandra Raut, Nandlal Pandey and Sita Saran Rai came for rescue on alarms raised by the son of the deceased, they could not proceed for rescue of Sarjug Rai on being scared from the firing resorted to by Satya Narain Rai. Son of the deceased informed the Police who visited village Bishanpur and recorded his statement, pursuant to which investigation commenced. The Police during investigation, apart from recording statement of witnesses u/s 161 of the Code of Criminal Procedure, visited the place of occurrence which was a sahan below the temple, and also made seizure of some offending articles from the place of occurrence. The Investigating Officer noticed blood marks on the wall of the temple, lacerated field and also marks of violence on the lock that was broken and also the door planks, prepared inquest report, got autopsy held over the dead body of the deceased and on conclusion of investigation, laid charge sheet before the Court against all the 15 accused persons who were eventually put on trial. In the eventual trial, that commenced, the State examined 17 witnesses in all and though the defence had not outnumbered, examined not less than 16 witnesses to be at par with the State, ostensibly to counter the allegations attributed to the Appellants. Those examined by the State were the villagers of Bishunpur, some outsiders, who were either relations of the deceased or claimed to have visited the village for holding panchayati for resolution of the dispute pending between the two parties, the doctor, and also the Police Officer.

4. The defence of the Appellants was that of total innocence and their false implication due to keen animosity persisting between the parties. Some of the accused put on trial also pleaded alibi to improbabilise their physical possibility in the village which was the situs of the incident. While Bishambhar Rai and Hajari Rai pleaded to be in Maniari Hospital, Appellant Mahendra pleaded, to be in the territory of Nepal during the period of incident. The trial Judge having given credence to some of the defence witnesses and also some of the documents placed on record on behalf of the defence, however, acquitted Bishambhar Rai and Hazari Rai accepting their pleading of alibi and acquitted them of the charges leveled against them. As for the rest, the trial judge recorded verdict of guilt u/s 302/149 of the Indian Penal Code (IPC) and sentenced them to undergo imprisonment for life. Those convicted, except Kamal Rai, suffered conviction also u/s 148 IPC for which they were sentenced to suffer rigorous imprisonment for a term of three years. Kamal Rai, however, suffered conviction u/s 147 IPC and was sentenced to suffer rigorous imprisonment for a term of two years. Satya Narain Rai suffered conviction also u/s 27 of the Arms Act and was sentenced to undergo rigorous imprisonment for five years. In case of the convicts, who suffered conviction on two counts and were sentenced as such,

their sentences were directed to run concurrently. At this stage, it may be mentioned that Appellants Kamal Rai and Prabhu Rai died during the pendency of this appeal, hence appeal on their behalf stood abated.

5. Manifold contentions were raised at Bar to assail the findings recorded by the Court below but lest we do not lose sight of them firstly, we wish to critically analyse the testimony of the witnesses on the anvil of reliability, credibility and probability of their being good and competent witnesses. Though the narrations made by the witnesses have been fairly spelt out in the judgment of the Court below, which is under challenge in these appeals, we wish to discuss them with brevity. The witnesses who are neither ocular nor hearsay about killing of Sarjug Rai, the deceased, were Ram Bhajan Rai (P.W. 7), Ramji Singh (P.W. 9), Deo Narayana Rai (P.W. 11), Nagendra Prasad (P.W. 12), Dhyan Rai (P.W. 13), the doctor (P.W. 15) and the Investigating Officer (P.W. 16). Among them, Ram Bhajan Rai (P.W. 7) was the witness of preparation of the inquest report of the dead body of Sarjug Rai by the Police Officer. Ramji Singh (P.W. 9) stated to have accompanied the dead body to Sitamarhi hospital for autopsy. Though Gagan Rai (P.W. 8) Chowkidarot the Halka was not a witness to the killing of the deceased, he stated to have noticed the Appellants making good their escape with arms and when he proceeded towards the temple, he noticed the dead body of Sarjug Rai with multiple bleeding injuries on his person. The witness was, however, informed by Dukha Das (P.W. 6), the priest of the temple about the Appellants having executed killing of Sarjug Rai, preceding which he was dragged and brought below the temple and Satya Narain Rai, took recourse to firing to scare the witnesses to come close to them. As for the animosity, the witness states that Kamal Rai had turned hostile to his uncle, as he held belief that construction of house and purchase of tractor and tyre-cart was made by the deceased from the joint family fund which had not been equally divided during partition. The other factor which added to animosity between the deceased and Kamal Rai, the witness says, was about the deceased helping Nagendra Rai in Assembly Election against Ram Charitra Rai, supported by Kamal Rai. Yet another reason for hostility, which added to the animosity between the deceased and Kamal Rai, was that Kamal Rai was aspirant for the land which was purchased by the deceased from Mangli Pandey and yet other reason was about deceased being instrumental for withdrawing benefit of pension of freedom fighter which was available to Appellant Ram Saran Rai. Deo Narain Rai (P.W. 11) in his evidence has spelt out the motive which persuaded Kamal Rai for the killing of the deceased. The witness states at trial that as Sarjug Rai constructed a new house subsequent to the partition with Kamal Rai, and his tractor remained parked at the door of Sri Sarjug Rai, who happened to be his father in law, Kamal Rai had a wrong concept about these properties having been acquired by Sarjug Rai from the joint family fund which had not been equally divided during partition. That apart, since the deceased had helped Nagendra Rai in the Assembly election, when the latter fought election for being elected as MLA against Ram Charitra Rai, supported by Kamal Rai, the said Kamal Rai had been inimical to his uncle

on that count also. Yet the other reason for nourishing grudge by Kamal Rai was that since Appellant Ram Saran Rai had availed the benefit of getting pension of freedom fighter in place of his grandfather, namely, Ram Saran Rai, the deceased had put in a petition before the competent authority, pursuant to which the pension available to Appellant Ram Saran Rai had been withdrawn. Kamal Rai strongly believed that so long Sarjug Rai was alive, he would be cause of trouble for him. Deo Saran Rai (P.W. 11) was also a witness to the seizure of empty shells of cartridges and broken locks by the Police Officer from the place of occurrence. Nagendra Prasad (P.W. 12) also was a witness to the seizure of offending articles from the place of occurrence by the Police Officer. As Dhyani Rai (P.W. 13) was tendered by the State, there was nothing material in his evidence to merit consideration.

6. Dr. M.Z.S. Qureshi (D.W. 15) stated to have held autopsy over the dead body of the deceased and noticed that rigor mortis was present in inferior extremities. On examination of thorax and chest, multiple bruises were found on right and left side of back. Following ante mortem injuries were seen with full of blood and clots and oozing of brain matter:

(i) One incised injury on the cheek, parietal region and head and mandible in front of right auricle size 6" x 2" x 1- 1/2". On dissection, there was cutting of skin muscles, deep fascia nerve and blood vessels, bone of skull and mandible brain matter was oozing.

(ii) Lacerated injury of frontal bone on right side with oozing of brain matter with laceration of skin muscles, blood vessels and nerves.

(iii) Incised injury on right cheek size 3" x 2" x 1/2" extending from above downward.

(iv) Incised injury on the right side of neck size 4-1/2" x 2" x 1/2" cutting of skin muscles, nerves, blood vessels.

(v) Incised injury on occipital region on the back of skull size 2" x 1/2"

(vi) Compound fracture of right elbow. On dissection cutting of skin muscles, blood vessels and nerves. Fracture of lower end of humerus upper end of radius and ulna.

(vii) Incised injury on right side of neck size 2" x 1/2" x 1" depth.

(viii) Incised injury on front of neck size 2" x 1/2" x 1/4".

(ix) Incised injury on right axilla f 1 size 4" x 1" x 1".

(x) Little finger of left hand severed completely. Index finger of left hand bruised.

(xi) Multiple cut injuries on face.

In the opinion of the doctor, cause of death was due to haemorrhage and shock due to these injuries. In estimation of the doctor, while injury No. (ii) could have

been caused by lathi, other injuries were possible by sharp cutting weapon such as bhala, garassa and farsa and the injuries were sufficient in ordinary course of nature to cause death. Injury Nos. (i) and (ii) even separately, each one was sufficient to cause death.

7. Shri Maheshwari Prasad Singh (P.W. 16) Investigating Officer of the case, stated about recording statement of Ram Babu Rai, son of the deceased, which was the earliest version of the prosecution by Nagendra Mishra, Police Officer, pursuant to which investigation commenced. The place of occurrence was the temple in village Bishanpur with terrace in all the four sides. Southern and western corners of the terrace were fenced by brick wall and the space was used as kitchen. Adjacent east to the temple, there was a pond and there was plank in the northern gate of the temple. The Police Officer stated to have noticed hook and handle broken with marks of breaking at 8-10 places. In adjacent north to the temple, there was a thatched roofed room which was used for keeping fuel and hardly at a distance of 100 yards, towards west from this place, situated the house and baithka of Kamal Rai. The Police Officer noticed the dead body of Sarjug Rai in the Sahan of the temple at a distance of about 4 ft. from verandah of the temple. The earth was stained with blood and north to the temple and the open sahan, there were two empty shells of cartridges. From, the temple the, baithka of Kamal Rai was quite visible. However, in the adjacent vicinity of the temple, there were no residential houses. The Police Officer prepared inquest report, sent the dead body to mortuary for post mortem examination, effected seizure of broken lock, hook and empty shells of cartridges. The blood stained earth, grass and clothes were sent for chemical examination in the forensic laboratory.

8. Yet another set of witnesses examined by the State, which were principally relied upon by the court below for drawing conclusion of guilt against the Appellants were Shatrughan Pandey (P.W. 1), Ramchandra Raut (P.W. 2), Motiur Rahman (P.W. 3), Nandlal Pandey (P.W. 4), Sita Sharan Rai, (P.W. 5), Dukha Das (P.W. 6), Bharat Sah (P.W. 10), and Ram Babu Rai (P.W. 14). Reiterating his earliest version which he rendered before the police, Ram Babu Rai (P.W. 14) would state at trial that while he had been to the field to Respond to the call of nature, he noticed his father coming to the temple after taking bath in the pond. He stated to have noticed a mob coming out from the house of Kamal Rai holding arms who proceeded towards temple. Along with him, he identified the Appellants and also those acquitted by the trial court. He stated to have noticed Dukha Das, priest of the temple locking north door of the temple, pursuant to which on exhortation made by Kamal Rai, Deo Saran Rai broke open the lock, dragged Sarjug Rai outside the temple and all of them except Satya Narain Rai, dealt indiscriminate blows on him with bhala, garassa and farsa and retired from the place of occurrence. Accusations attributed to Satya Narain Rai was that he had fired shots to scare the witnesses to come to the place of occurrence. The witness stated to have seen multiple bleeding injuries on his father who was till then dead. He asked the Chowkidar to guard the dead body and rushed to the

place of occurrence, pursuant to which his statement was recorded by the Police Officer. The motive assigned behind the gruesome killing of his father was that Kamal Rai was at loggerheads with his father suspecting unfairness on part of his father in partition of joint property and had believed that so long Sarjug Rai was alive, his family would not flourish. The witness states that Kamal Rai had nourished grudge against his father for a number of reasons.

9. More or less narrations in similar vein about witnessing the killing of Sarjug Rai was made also by Shatrughan Pandey (P.W. 1), Ram Chandra Raut (P.W. 2), Motiur Rahman (P.W. 3), Nandlal Pandey (P.W. 4), Sita Sharan Rai (P.W. 5), Dukha Das (P.W.6), and Bharat Sah (P.W. 10) about the Appellants emerging from the house of Kamal Rai proceeding to the temple, pursuant to which on exhortation made by Kamal Rai, it was Deo Saran Rai who broke open the lock in which Dukha Das, priest of the temple had kept Sarjug Rai inside the room and dragged him in the sahan in the temple following which indiscriminate blows were dealt on the deceased by all those who constituted unlawful assembly, with their weapons. However, two witnesses, namely, Ram Chaandra Raut (P.W.2) and Nand Lal Pandey (P.W.4) stated to have learnt from Dukha Das (P.W.6), about he locking the door of the temple to keep inside Sarjug Rai, pursuant to which the lock was broken by Deo Saran Rai and the deceased was dragged out to the sahan of the temple, following which indiscriminate blows were dealt on him.

10. As has been stated, evidence of Gagandeo Rai (P.W. 8) was confined to the fleeing of the Appellants and narration of the incident having been disclosed to him by Dukha Das (P.W. 6). Discussions about those witnesses who claimed seizure of the offending articles from the place of occurrence has also been made earlier which did not require repetition.

11. Now we may notice the salient features of the scathing comments made by the learned Counsel appearing for the Appellants which is under challenge in these appeals. Shri Tara Kant Jha, learned Counsel for the Appellants in Cr. Appeal No. 352 of 1987 would assail the bona fide of the prosecution case on premises that since only those witnesses were examined by State who were inimical and, interested in the affairs of the prosecution, entirely to the exclusion to those who could have been independent and competent witnesses, their evidences are required to be appreciated with utmost precaution and it is urged that both P. Ws. 1 and 4 were full brothers who were on litigating terms preceding the incident with the deceased and about Sitasaran Rai (P.W. 5) and Deo Narain Rai (P.W. 11), it is stated that while the former was brother-in-law, the latter was father-in-law of the deceased and their evidence did not bear the ring of truth to make them credible. Though the witnesses were stating at trial that the Appellants came running from the house of Kamal Rai for proceeding towards the temple, it is stated that since the paddy field lying east to the house of Kamal Rai, through which they are suggested to have proceeded to the temple, was steep low, the Appellants were not expected to have come to the temple in running posture without jumping from the higher level to the lower

level. About the probable presence of the witnesses at the situs of the incident on the material time of occurrence, it is stated that P.W. 3 resides at a distance of about 4 Kms. He states to have come to village Bishanpura for holding a panchayati, a fact which has not been substantiated, as even Hardeo Rai, one of the parties to the dispute, had emphatically denied to have ever invited Motiur Rahman (P.W. 3) for holding a panchayati in the matter. While commenting on the objective finding of the Investigating Officer, it is urged that the Police Officer did not find evidence of there being any deity in the temple to suggest that it was place of worship which is the genesis of a temple and there was no evidence about Dukha Das (P.W.6) residing in the temple and cooking his meal inside it, and on these premises it is urged that the projection of the place where Sarjug Rai was shot dead, as a temple was only a myth to project Dukha Das as an ocular witness. The Police Officer did not notice marks of violence or trampling marks in the paddy field through which the Appellants were suggested to have proceeded towards the temple and even the Investigating Officer in his evidence admits antedating in the Police case diary which evidentially suggests that the Police case diary was not maintained properly by the Investigating Officer. Similar arguments about irregularity in the transmission of carbon copy of the Police case diary, containing progress in the investigation, to the office of the Superintendent of Police, were canvassed also by Sri Mihir Kumar Jha, learned Counsel for the Appellants in Cr. Appeal No. 364 of 1987. True it is that P. Ws. 5 and 11 were keenly related to the deceased but their evidence did not require outright rejection on that score alone and we may profitably quote the authority of the Apex Court of the land reported in AIR 1999 SC 1777 (State of Rajasthan v. Tejaram) in which observations were made by the court that only because the witnesses happened to be close relations, their evidence instead of rejection, requires meticulous consideration. Secondly, though good number of questions were put to the Investigating Officer, much of them related to the irregularity in transmission of the copy of the Police case diary to the office of the Superintendent of Police and even if it is accepted to be true, the argument is not meritorious for the simple reason that only irregular receipt of the copy of the Police case diary in the office of the Superintendent of Police would not discredit the reliability of the investigating agency unless some vital infirmity has crept therein to suspect the bona fide of the investigating agency.

12. As for the evidence of Maheshwari Prasad Singh (P.W.16), who happened to be Investigating Officer, he noticed a temple which was the place of occurrence around which there was a verandah on all the four sides and on the southern and eastern side of the verandah, there was brick wall which was being used as a kitchen, and adjacent east to the temple, there is a pond and in the northern wall of the temple, the door planks were found fitted and there was also provision for locking the room. The Investigating Officer had noticed hook, handle and lock of the door planks broken and door planks bore evidence of violence as there were several marks on it. Towards north of the temple, there was a thatched roofed house which was used for keeping fuel and about 100

yards in the west, from this place lies the house of Kamal Rai and the space between the two places is Sahan. At the place where the dead body of Sarjug Rai was noticed, the blood had dropped on the ground and at a distance of about 8 yards north to the temple, empty shells of cartridges were also found in the open sahan by the Investigating Officer and once the objective finding of the Police Officer is taken notice of no attribution about failure of the investigating agency to notice offending articles or marks of violence, can possibly be made, and his fairness, can be questioned, and that apart, it is now well settled principle that any irregularity or even illegality during investigation ought to be rejected as a ground to reject the prosecution case and we do not dilute on this issue except referring to a decision of the Apex Court reported in State of Rajasthan Vs. Kishore,

13. While commenting on the credibility of Shatrughan Pandey (P.W. 1), the learned Counsel says that since he claimed to have noticed the mob from a distance of about 50 yards, while he was going to watch the working of the labourers in the field, regard being had to the distance, identification of the Appellants could not have been possible. This argument too was meritless for the reason that no such presumption about invisibility of the mob can possibly be raised unless it is shown that the person claiming visibility had a weak vision, and at a latter stage while dropping the previous argument, learned Counsel would urge that in a melee identification of the persons constituting a mob was a remote possibility. However, since the persons constituting the mob were not strangers and many of them hail from the same village, their identification from such distance cannot be said to be a remote possibility. While commenting on the credibility of Ramchandra Raut (P.W. 2), the learned Counsel submits that he was at his house and he had not claimed to have witnessed first part of the incident which was allegedly narrated to him by Dukha Das (P.W. 6) and since there are banana plants intervening the space between the house of this witness and that of Kamal Rai, in that view of the matter, identification of the Appellants was not probable. This witness was however very much explicit as he claims to have witnessed the Appellants only when he came near the pond and once this situation is accepted, the Appellants must be quite visible to him While commenting on the credibility of Dukha Das (P.W. 6), similar arguments were canvassed that since there was no evidence about this witness residing in the temple, he cannot be an ocular witness to the incident.

14. More or less arguments in similar terms were advanced also by Shri Ganesh Prasad Singh, learned Counsel for the Appellants in Cr. Appeal No. 303 of 1987 who apart from other grounds submits that since there were two factions in the village, one led by deceased Sarjug Rai and the other led by Kamal Rai, false implication of the Appellants was not an impossibility. About reliability of the witnesses, it is stated that they have contradicted each other on material particulars of the case and are neither intrinsically reliable nor evidentially probable. The other limb of the argument canvassed at Bar by Shri Singh was that though 15 persons were shown to have assaulted the deceased giving

indiscriminate blows with their respective weapons, the doctor who held autopsy over the dead body of the deceased had noticed only 11 injuries including some scratches which evidently show that the narrations made by the witnesses were not in conformity with the positive findings recorded by the doctor. The narrations made by the doctor would admittedly show that about 11 number of injuries were noticed on the person of the deceased which were ante mortem in nature. But as for injury No. 11, the doctor held the view that there were multiple cut injuries on the face which would frustrate the argument canvassed at Bar about number of injuries to be not in conformity with the narrations made by the witnesses, and that apart, we are of the view that the corroboration of evidence of the ocular witnesses with mathematical niceties cannot be accepted in criminal cases. Firing of one shot or two shots is immaterial in the matter of assessing the culpability of the accused and the practice of counting the nature of injuries with the shots/ blows attributed to the assailants, would in our opinion be a mere hairsplitting exercise and it is the totality of the Situation which ought to be reviewed by the Court, and reliance on this score can be placed on the decision of the Apex Court of the land reported in 2001 (1) PLJR 19 (SC) (Leela Ram v. State of Haryana and Ors). On the same analogy, we may say that number of injuries noticed on the person of the deceased ought not be correlated with the number of assailants, as it is not unlikely that the blows dealt by some assailants might have missed the target. True it is that explicit accusations about the assailant having dealt blows on a particular part of the organ of the deceased had not been appearing in the evidence of the witnesses, but since the first information report contains graphic details about the assailants, deceased and also the place where he was killed, omission for such explicit attribution would not be a ground for rejecting the prosecution case and we may profitably quote a decision of the Apex Court reported in AIR 1975 SC 1212 (Poddar Narain and Ors. v. State of Andhra Pradesh) in which observations were made by their Lordships that when first information report was lodged very soon after the sudden murderous assault on the deceased, which reveals names of the accused, the deceased and also the place where the occurrence had taken place, and the first information report gives all essential details, the fact that the First Information Report did not contain the acts attributed to each of the accused, which had to be narrated and proved at the trial could not be a ground for rejecting the prosecution case based upon the FIR, as wholly untenable in law.

15. Shri Mihir Kumar Jha, learned Counsel for the Appellants would further urge that original first information report was not brought on the record for which suggestions were also given to the Investigating Officer, and while commenting on the admissibility of the first information report, which is shown to be the sheet anchor of the prosecution case, it is sought to be urged that none else but Ram Babu Rai (P.W. 14) says that there is only his signature on Exhibit 4 on the statement which was scribed by the Police Officer and in that backdrop conclusion which can be drawn is that the author of the document had not proved exhibit 4, who happens to be Nagendra Mishra. This argument too was

devoid of merit and did not introduce any legal infirmity in the document in question, as the person proving the document happened to be none else but the Police Officer who was quite conversant with the writing of Nagendra Mishra and again while commenting on the document in question, the learned Counsel would urge that wrong person was selected to lodge the first information report as chowkidar could have been the best person to take recourse to the public authority and on this score too we find that the discretion lies with the aggrieved person for selection a person to take recourse to public authority and no uniform rule can be prescribed about eligibility of a person who alone can be the first informant of an incident, even if it is an atrocious crime.

16. Arguments were sought to be made by Shri Mihir Kumar Jha, learned Counsel for the Appellants that the prosecution has been guilty also for introducing distorted version about the place of occurrence, as the witnesses were not unanimous about the place of occurrence where Sarjug Rai was killed. While commenting on the credibility of the witnesses, learned Counsel would urge that though they had been narrating chorus like statements at trial about Deo Saran Rai having dragged the deceased below the temple, pursuant to which the assailants allegedly executed his killing, the doctor who held autopsy over the dead body had not noticed marks of dragging, over the deceased. About the genesis of the incident, which is said to be persisting animosity between the parties, the learned Counsel would urge that if narratives made by Nandlal Pandey (P.W. 4) was to be given credence, preceding the incident, there had been no dispute between the parties and on these premises, it is strongly urged that even animosity between the parties which is shown to be the genesis and also the offshoot of the incident had not been satisfactorily established by the State. Our attention has also been drawn to the testimony of Gagandeo Rai (P.W. 8), who happened to be chowkidar, on this score, who does not say about the incident of abusing between the parties, preceding the incident.

17. Now we may briefly refer to the evidence of the witnesses and also the documents brought on the record to suggest some sort of animosity of the Appellants either with the deceased Sarjug Rai or the witnesses who had appeared at the trial. Volume of suggestions were given to the witnesses either about they appearing as a witness in some cases against, the Appellants or being somewhat interested in the affairs of the deceased, which were stoutly refuted by the witnesses. Suggesting interestedness of Motiur Rahman (P.W. 3), it was suggested to P.W. 14 that 6 or 7 years preceding the incident, when Sarjug Rai was arrested in a criminal case, the said Motiur Rahman happened to be his bailor for which the Appellants had brought on the record Exhibit H. Suggestion was given to Ram Babu Rai (P.W. 14) that much preceding the incident, Appellant Indrajit Rai had filed an informatory Petition on 23rd February, 1983, against deceased Sarjug Rai and also witness Gagan Rai, for which the Appellants had brought on the record Exhibit D/2. Suggestions were given to Bharat Sah (P.W. 10) that Ram Saran Pandey, father of Shatrughan Pandey and Munilal Pandey had executed a deed of sale in favour of Sarjug Rai, the deceased, in which

Ramagya Sah, brother of the witness was identified and for which the Appellants had brought on the record Exhibit C. Suggestion was given to Sita Sharan Rai (P.W. 5) that in case of murder of Daroga Rai, in which father and grandfather of Mahendra Rai were accused, he along with Sarjug Rai had deposed against them. Suggestion was given to Nandlal Pandey (P.W. 4) that his father Ram Saran Pandey had executed a benami deed in respect of survey of plot No. 1998 on 6th February, 1979 in favour of deceased Sarjug Rai for which the Appellants had brought on the record Exhibit C/1. But there had been no evidence that said transaction was a benami transaction Suggestion was given to this witness that Bikau Pandey had filed an informatory petition in the year 1980 against his father and also the deceased Sarjug Rai, for which the Appellants had brought on the record Exhibit D and again suggestion was given to the witness about said Bikau Pandey having instituted a criminal case in the year 1980 against him and his brother Shatrughan Pandey, for which the Appellants had brought on the record Exhibit O. Similar suggestion had been given to the witnesses that in the year 1980, Bikau Pandey had filed an informatory petition in the Court of the ACJM against him, his father and also the deceased and for which the Appellants had brought on the record Exhibit D. Though suggestion was refuted by the witness about Hazari Rai having filed an informatory petition against his four brothers and also father in the year 1883, the Appellants had brought on the record Exhibit D/3. Suggestion was given to Ramchandra Raut (P.W. 2) that Faguni had instituted a case against his father and also deceased Sarjug Rai for which the Appellants had brought on the record, Exhibit J/1 and for suggestion given to Shatrughan Pandey (P.W. 1), about Appellant Indrajit Rai having filed an informatory petition in the year 1983 against him, Nandlal Pandey and deceased Sarjug Rai, the Appellant had brought Exhibit D/2. Though admittedly these documents were Sought to be brought on the record to show that some witnesses were inimical to some of the Appellants at some point of time, but enmity, as usual, is a double edged weapon providing material both for offence as well as false implication. The evidence in such cases has, therefore, to be scrutinised with care so that neither the quality party wrongly escapes on the plea of enmity nor the innocent person is strongly convicted on that basis. We have critically analysed the testimony of the witnesses and reasons for their reliability rejection shall follow hereinafter.

18. Learned Counsel while referring to the testimony of D.W. 13 would urge that if Exhibits K and K/1 which are reports of which he happens to be author, are to be given a credence, these two reports deal a death blow to the prosecution case and while highlighting the significance of these two reports, the learned Counsel would urge that even the trial court placing reliance on Exhibit K series had acquitted two of the accused persons on the plea of their ali bi. Firstly, we may notice the arguments of the learned Counsel about disparity in the evidence of the prosecution witnesses about the place of occurrence and we have noticed these witnesses making most coherent statements at trial about Sarjug Rai having been killed by the assailant after he was dragged by Deo Saran Rai from

the temple in the sahan, and we are afraid that the prosecution can be saddled with the allegation of introducing distorted version about the place of occurrence.

19. The genesis of the incident, recital of which occurs also in the first information report, was that though partition took place about 5-6 years ago preceding the incident, Kamal Rai nourished a serious grudge about the alleged unfairness committed by deceased Sarjug Rai in partition of ancestral properties of the family which was the subject matter of partition and for which Sita Saran (P.W. 5) would state that since the partition, there had been differences between Sarjug Rai and Kamal Rai, as the latter was of the view that his uncle was unfair to him in the division of the ancestral property. There, had been evidence of Deo Narain Rai (P.W. 11) also who says about view of Kamal Rai with regard to unfairness allegedly committed by deceased Sarjug Rai in partitioning the ancestral properties of the family. Since new house was constructed and also a tractor was purchased after partition, Kamal Rai was under wrong notion that these properties were acquired from the joint fund which had not been partitioned to him and there has been evidence of Ram Babu Rai (P.W. 14) too on this score. Though some of the documents were placed on the record to suggest some sort of enmity between the Appellants and even the witnesses of the case, we see no good reason that for such stale matter, the son of the deceased would falsely implicate the Appellants and that apart, simoly appearance of a person as a witness in a proceeding would not saddle the said witness to be inimical or interested, as there may be possibility that the person appearing as a witness in a proceeding has some sort of knowledge about the incident and hence the probative value of these witnesses cannot be extinguished only for the reason that for some time in the past either they had appeared as a witness against some of the Appellants or in cases instituted against them either the Appellants or their family members had appeared as witness. The prosecution had alleged varied reasons behind the gruesome killing of Sarjug Rai and apart from the alleged unfairness on part of Sarjug Rai in partitioning ancestral property, as has been stated, Deo Narain Rai (P.W. 11) says that as Ram Saran Rai, the Appellant was availing the benefits of freedom fighter, for which his grandfather was eligible, these benefits were withdrawn from Appellant Ram Saran Rai on a petition filed by the deceased which offended the Appellants. The other witness says that for the land purchased by the deceased from Mangli Pandey, Kamal Rai too was aspirant. Though motive assumes a principal role in criminal cases but instances are not very uncommon that murder can be actuated by much lesser motive in view, of vast variation in human nature and that apart, once prosecution has led direct and unimpeachable evidence, element of motive pales into insignificance and remains a matter of only academic interest.

20. Most immediate cause suggested by the prosecution for gruesome killing of Sarjug Rai in broad day light by the assail-t ants was the wrong notion held by Kamal Rai about the deceased being unfair to him in partitioning the joint family property. Other contentions raised on behalf of the Appellants were that lapses, omissions and contradictions in the prosecution case were either condoned or

likely brushed aside or were supported without any justification against improbabilities appearing in the prosecution case by the trial court and hence trial judge failed to objectively assess and analyse the evidence and circumstances, and the approach of the trial court as such was manifestly erroneous and contrary to the weight of mass of evidence. Some contradictions omissions appearing in the testimony of witnesses were also highlighted at Bar and having given due consideration to these aspects" of the matter, we hold the view that if there are mere seemingly inconsistencies, they = are not contradictions and contradictions: omissions on some trivial matters will affect the substratum of the prosecution case.

21. We are not oblivious of the principle pie of law which is now well settled that testimony of eye witnesses cannot be rejected on account of discrepancy, if they did not materially affect the edifice of the prosecution case and only when discrepancies are so incompatible, that can effect the credibility of a person that the Court| would be justified in jettisoning his evidence. With much stress, it is sought to be urged that though no accusation had ever been attributed to Kamal Rai in FIR about he giving blow with hard and blunt substance on the scalp of the deceased, such narrations were made by Ram Babu Rai the son of the deceased who was maker of the first information report. Attention of Nandlal Pandey (P.W. 4) and Ram Babu Rai (P.W. 14) had been drawn by the defence to discredit credibility of these witnesses which is also confirmed by the Investigating Officer about these witnesses having not made parallel statement before the Police about Kamal Rai too giving blows with lathi on the head of the deceased, and on this score it is urged that since the witnesses had over pitched their case, their evidence should be taken with a pinch of salt and should not be believed. However, we are of the view that while appreciating the evidence of witnesses in criminal trial specially in cases of eye witnesses, the maxim falsus in uno, falsus in omnibus cannot apply and Court is rather required to sift grain from the chaff. It is not the isolated statement made by the witnesses at trial which is to count his reliability but the entire narration made by him has to be taken into consideration and on this score since we have found the witness credible, they cannot be discredited for such omission on their part in not making parallel statement before the Police The other witnesses had made coherent statement about Kamal Rai dealing a blow with lathi on the head of the deceased after he was dragged below the temple by Deo Saran Rai. True it is that the first information report was not a sub-stantive piece of evidence, it is important as conveying the earliest information about the occurrence. It is not the last say of the prosecution and that apart if at all any one can be contradicted by the first information report, it can be only its maker and not others, and that apart, scope of controversy has been narrowed down by the positive findings recorded by the doctor who too noticed a lacerated injury on the frontal bone of right side with oozing of brain matters with laceration of skin, muscles, blood vessels and nerves on the body of the deceased, and in this view of the matter, narrations made by the witnesses about Kamal Rai dealing with lathi on the head of the

deceased cannot be said to be beyond the frame of the prosecution case. The statement of Ram Babu Rai, son of the deceased was recorded by the Police Officer at 10 a.m. on 17th August, 1983. The incident took place at 8 a.m on 17th August, 1983 and the statement of the son of the deceased was recorded by the Police Officer only after two hours of the incident. This fact cannot be lost sight that the Police Station was at a distance of about 4 kms from village Bishanpur and the son of the deceased rendered his statement before the Police on negotiating this distance on foot. The investigation commenced only after half an hour of recording the statement of the son of the deceased leaving no good reason either for fabrication of evidence or introducing embellishment in the prosecution case and hence argument on this score that the first information report was suppressed for fabrication of the prosecution case, was untenable.

22. Contentions were raised that though a good number of persons, were shown to have flocked to the place of occurrence at the time of incident, it is most unlikely that none of them would take recourse to public authority. This argument too was unmeritted as apathy of even law abiding citizens in reporting the outrage to which they are witnesses, is too notorious to merit consideration, and merely that these witnesses had not reported the matter to the Police, it cannot follow that they were not stating the truth before the Court.

23. Much stress was laid on the evidence of Subhash Chandra Singh (D.W. 13), Deputy Superintendent of Police posted in the Criminal Investigation Department (CID). The witness says that an inquiry in Parihar P.S. Case No. 41 of 1983 was entrusted to him by the Superintendent of Police, CID and in pursuance of the order, he had visited the place of occurrence on 8/9th October, 1983. He states to have visited also Maniari Hospital and perused the register and some documents and eventually prepared two reports which are Exhibits K and K/1. However, the said Police Officer would admit in most candid and explicit terms that Parihar Rs. Case No. 41/1983 was neither a case controlled by the CID nor investigated by the said investigating agency and he was entrusted by the Superintendent of Police to submit his report on certain issues only, for which he submitted reports vide Exhibit K and K/ 1. Though the witness would amend the narration made by him about date of his visit to the place of occurrence after his attention was drawn, since the incident took place on 17th August, 1983 there was no occasion for him to visit the P.O. preceding incident. The other ancillary fact too cannot remain unnoticed. The suggestion was given to the Police Officer by the State Counsel that by the time he submitted his report, the Police had already submitted charge sheet in the case and even cognizance of the offence had been taken by the Court on 27th September, 1983 and if that be so, though the statutory body to investigate a crime is Police, no Police Officer was expected to make probe into an incident after submission of charge sheet without leave of the Court and on these premises we hold the view that the finding recorded by D.W. 13 was manifestly without jurisdiction.

24. Now let us critically examine the reliability of the witnesses and also the

probability of their witnessing the incident. Shatrughan Pandey (P.W.1) was going to watch the work of labourer in the field and when he happened to reach the northern and western corner of the pond, he noticed the incident. The house of this witness lies at a distance of about 200 yards only from the pond and that apart the house of the deceased lies only at a distance of 20-25 laggas from the house of Kamal Rai. He seems to be quite natural and probable witness and trustworthy too. Ram Chandra Raut (P.W. 2) noticed the mob proceeding towards the temple from the door of his house and the only suggestion given to the witness to discredit him was that he had worked as a labourer with the deceased and the witness while refuting the suggestion, states that only for a day he had worked with the deceased. He cannot be levelled as interested witness and he too appears to be quite truthful and his probable presence at the place of occurrence, cannot be questioned. Nandlal Pandey (P.W. 4) was coming from his field and shortly after he reached the pond, he noticed the incident. There is nothing in his evidence to discredit him who appeared as probable and natural witness. Though Sita Sharan Rai (P.W. 5) was the brother-in-law of the deceased, he states to have come to the village preceding the incident and while he was washing his hands on the northern ghat of the pond, he noticed the incident and nothing was elicited from this witness to improbabilise his presence. Dukha Das (P.W. 6) was a priest in the temple. He resides in the temple and also cooks his meal for which the Police Officer: had found good evidence. He was a competent witness and there is all probability of this witness witnessing the incident who also narrated part of the incident to others. Gagandeo Rai (P.W. 8) was Chowkidar and while he was going on the bandh, he heard the sound of firing and only then he could notice the Appellants making good their escape and about rest part of the incident he came to know from Dukha Das (P.W. 6). Bharat Sah (P.W. 10) was going to school when he noticed the Appellants emerging from the house of Kamal Rai and proceeded towards the temple, pursuant to which the incident happened. The house of Kamal Rai from the house of this witness is at a distance of 50 laggas in the north. Nothing was asked from this witness to improbabilise his presence except that on the day of incident he had not filed application for grant of leave and for which except bald suggestion, no document was placed on the record to discredit the witness. Ram Babu Rai (P.W. 14) was the maker of the fardbeyan and no good reason can possibly be assigned to reject reliability. The criticism made by the learned Counsel that these witnesses were not witnesses is wholly unmerited as they come from the same village and while someone had been going to respond to the call of the nature, someone was going to the field and some one was going to the school. They are most probable and competent witnesses deserving all credence and that apart, when an occurrence takes place in open space or public place, passers by would be the best witnesses.

25. The case of Motiur Rahman (P.W. 3) was, however on a different footing. Though he claimed to have visited village Bishanpur on his nomination as Punch made by Hardeo Rai and Ramjini Rai, between whom there had been some sort

of dispute, said Hardeo Rai, who was examined as D.W. 1 had emphatically belied the assertions made by this witness for nomination as punch by him and the witness ever visiting village for panchayati for resolution of any dispute pending with Ramjinis Rai. This witness could not say the name of any person of village Bishanpur. He was not Sarpanch of Bishanpur Gram Panchayat. None of the persons stated by him to be nominated as punches was examined at trial and since a number of infirmities was crept in his evidence this witness did not appear to be credible and his evidence has to be kept out of consideration. Deo Narain Rai (P.W. 11) was son-in-law of the deceased. This witness would state about motive which mobilised the assailants to execute the killing of the deceased and he was a witness also to seizure of some incriminating articles. Though this witness was not examined by the Police during investigation, in view of nature of his evidence, that was not of much significance. As has been objective finding of the Investigating Officer, house of Kamal Rai was quite visible from the temple. The Police Officer has not found any object on the bhind of the pond which would make situs of incident invisible to the witness who claimed to have witnessed the killing of Sarjug Rai from short distance.

26. The fact that the deceased died homicidal death cannot possibly be disputed in view of ocular evidence and also the post mortem report. The State has examined a number of ocular witnesses and even the doctor who held autopsy over the dead body of the deceased had noticed corresponding injuries on his person. The Police Officer had noticed incriminating objects at the place of occurrence though there is no finding of the serologist about origin of blood but we may again reiterate that the criminal justice should not be made a casualty for omission of the part of the Investigating Officer for which we may profitably refer to a decision of the Apex Court reported in 2001 (1) PLJR 42 (SC) (State of Karnataka v. K. Yarappa Reddy) and all these incriminating evidences are pointer to the guilt of the Appellants which has been satisfactorily established at trial.

27. Other incidental aspect which falls for consideration is the plea of ali bi taken by some of the Appellants. The ali bi of Bishambar Rai and Hajari Rai who have been acquitted by the trial Court was that after Bishambhar Rai had fallen sick while returning from Baidyanath Dham, he was admitted in Maniari Hospital and during the period of incident Hajari Rai was looking after him. We refrain to make any comment on the ten ability of the plea of these two accused persons who have been acquitted by the trial Court. However, we may confine to the plea of ali bi of Mahendra Rai who pleaded before the trial Court that at the material time of incident, he was employed as a night guard in a school at Nepal. The register of the school has been brought on the record to show his attendance in the school and also a certificate Exhibit Q granted by the headmaster of the institution. The plea of ali bi postulates improbabilities of a person to be present at a place and onus heavily lies on a person pleading ali bi to satisfactorily prove impossibility of his presence at the place on a given point of time. Though the witness pleaded to be in Nepal at the material time of incident, but evidences on which reliance is sought to be placed by the Appellant do not, however, inspire

confidence. On mere grant of certificate by the Headmaster and admission of register in evidence! which does not appear to be a document of unimpeachable character, no reliance can be given and the plea of Mahendra Rai for all bi has to be rejected as such. Though a good number of witnesses were examined by the defence but narrations made by them do not dispel broad probabilities of the prosecution case about complicity of Mahendra Rai.

28. With all persuasiveness, it is stated at Bar that in estimation of the doctor, injury Nos. (i) and (ii) were sufficient to cause death and though Kamal Rai was shown to be author of injury No. (ii), there was no explicit accusation against the rest Appellants about they being author of particular injury, and mere fact that all the Appellants came together, was not sufficient to indicate that they had come having shared common intention to commit murder. However, we are of the view that it is easy to visualise that they would have come together sharing common intention to liquidate the victim and could not have come there just for sake of socialization and all of them as such, were vicariously liable by virtue of legal fiction as enjoined u/s 149 IPC.

29. Having critically analyzed the evidences placed on the record and also attending circumstances of the case and due regard being had to the contentions raised at Bar, to which we have given our anxious and deepest considerations, we find that the findings recorded by the Court below do not call for any interference and all the three appeals are accordingly dismissed. Since the Appellants are on bail, their bail bonds are cancelled and trial Court is directed to take coercive steps for apprehension of the Appellants and to consign them to custody to serve out the sentence awarded to them.

R.N. Prasad, J.

30. I agree.