
(2010) 08 PAT CK 0130
In the Patna High Court

Birendra Singh, Umesh Singh, Ramadhar Singh and Gauri
Shankar Singh

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 24-08-2010

Acts Referred:

Citation : (2010) 08 PAT CK 0130

Final Decision : Dismissed

Judgement

Gopal Prasad, J.—Both the Criminal Appeals are being heard together and being disposed off by common order as the same arise out of the same judgment, dated 19th March, 2004, passed by Shri B.K. Dikshit, Additional District and Sessions Judge, Fast Track Court, IV, Arrah, in Session's Trial No. 130 of 1997 by which the appellants of both the appeals have been convicted under Sections 302, 307 and 148 of the Penal Code and sentenced to undergo rigorous imprisonment for life for offence u/s 302 of the Penal Code. However, no separate punishment awarded for offence under Sections 148 and 307 of the Penal Code.

2. The prosecution case, as alleged in the fardbeyan of the informant Arun Singh (P.W. 10) is that on 15.10.1996 at about 09.00 a.m. he along with his brother Motilal Singh (deceased) went to see their field which they have purchased from Shobha Rani, Mohini Kuer and Shivjee Singh situated in village Ghoradei. When they reached in the said field they saw accused persons, namely, Ramadhar Singh, armed with farsa, Gaurishanker Singh, armed with bhala, Birendra Singh, armed with farsa, Umesh Singh, armed with garasa, Harendra Singh, armed with farsa, and Jhunnu Singh Singh, armed with lathi who were standing for ploughing the field by tractor which they had purchased. The informant and his brother protested that why they have come to illegally plough the land on which it is alleged that Ramadhar Singh abated to kill and he himself and gave farsa blow, Birendra Singh gave a farsa blow on the head of Motilal Singh followed with a farsa blow by Harendra by which Motilal Singh fell down on the land, thereafter, Gaurishanker Singh assaulted Motilal Singh by bhala on his arm and Umesh

Singh assaulted the informant by garasa on his head by which the informant fell down and, thereafter, Jhunnu Singh assaulted the informant by lathi. He has further stated that when the informant fell down he saw Umesh Singh and Jhunnu Singh are assaulting Motilal Singh. On hulla, Bhola Singh (P.W. 4), Sanjay Singh (P.W. 2), Tribhuan Yadav (P.W. 9), Manlal Singh (P.W. 3), Braj Kishore (not examined) and many others came on seeing the occurrence and, thereafter, the accused persons seeing the arrival of villagers, fled away towards the village. Further, case of the prosecution is that during the treatment Motilal Singh succumbed to injury. The motive for the occurrence is that the land has been given to Raj Raushan Singh, cousin brother of the informant, by power of attorney executed by four sons of late Devdhari Singh and the accused persons are trying to take possession of the land. The fardbeyan was recorded in Sadar Hospital, Arrah, at about 12.30 p.m. in an injured state. On the fardbeyan the first information report was lodged at about 03.00 p.m. and after investigation the charge sheet was submitted. Subsequently, the cognizance was taken and the case was committed to the Court of sessions.

3. After commitment the case was transferred to the Court of Additional Sessions Judge and charge was framed under Sections 148 and 307, 302 and 307 of the Penal Code against all the appellants. After framing of the charge the trial proceeded during trial fifteen witnesses have been examined on behalf of the prosecution, who are P.W. 1, Raj Roshan Singh, P.W. 2, Sanjay Singh, P.W. 3, Mamlal Singh, P.W. 4, Bhola Singh, P.W. 5, Padamdeo Singh, P.W. 6, Saehida Nand Singh, P.W. 7 Ramadhar Singh, P.W. 8, Triloki Singh, P.W. 9, Tribhuwan Yadav, P.W. 10, Arun Singh, P.W. 11, Hwaldar Gurusaran Yadav, P.W. 12, Srikant Upadhyaya, P.W. 13, Ganesh Paswan, P.W. 14, Pashupati Nath Upadhyaya, and P.W. 15, Tarkeshwar Prasad.

4. The documentary evidence adduced in the case are Exhibit 4, signature on fardbeyan, Exhibit 2 injury report, Exhibit 3, post mortem report, Exhibit 4, signature on inquest report, Exhibit 1/1, signature on fardbeyan, Exhibit 4/1, Signature on inquest report, Exhibit 5, fardbeyan, Exhibit formal first information report, Exhibit, inquest report, Exhibit 8, injury report, Exhibit 9, seizure list, material Exhibit (i) sickle, Exhibit 10, letter, dated 22.07.1998, Exhibit 11, certified copy of the sale deed.

5. After hearing the oral and documentary evidence and taking into consideration the submission made by the parties the learned trial Court convicted the appellants and sentenced as above.

6. It is submitted that P.Ws. 1 to 5 claims to be the eye witness and P.W. 6 is the doctor, P.W. 7 is the uncle of the informant, who is not an eye witness, P.W. 9 is not an eye witness, P.W. 10 is the informant, P.Ws. 11, 14 and 15 are formal witnesses and P.Ws. 12 and 13 are investigating officers. The learned Counsel for the appellants contends that the inquest report was prepared prior to recording of the fardbeyan and inquest report was signed by the informant, P.Ws. 8 and 10, but, it does not mention the name of the accused persons. He has, further,

contended that at the time when police reached at the place of occurrence the witnesses did not give any statement and the witnesses deposed after long delay of 5 to 10 days and even more since the statement of the witnesses were taken after long delay these are not worthy of reliance. It has, further, been contended that the investigating officer did not find any objective evidence like the blood and trampling mark at the place of occurrence and there is allegation that three blow were given by farsa, but, there is only two corresponding injuries by farsa and, hence, the manner of occurrence is not being corroborated and the explanation given that the two assault by farsa may be overlapping is not acceptable and further the statement u/s 313 of the Criminal Procedure Code recorded is not well defined that each part of the occurrence in evidence has not been asked separately, i.e., every part of the evidence has not been asked to the accused and the investigation is defective.

7. Learned Counsel for the State, however, contended that the prosecution case has proved the charge sheet beyond reasonable doubt and defective investigation is not fatal to the prosecution when ocular evidence found credible and cogent and, hence, the accused can not be acquitted on account of defective investigation, hence, on the respective submissions of the parties the question for consideration whether the prosecution has proved the charge sheet beyond reasonable doubt.

8. Now I proceed to consider the evidence in the light of the submissions of the parties.

9. Prosecution case, as stated in nut shell, is that the informant (P.W. 10) along with deceased, Motilal Singh, went to see their field at village Ghoradei, which they have purchased then saw Ramadhar, armed with farsa, Garu Shankar, armed with bhala, Birnedra, armed with farsa, Umesh Singh, armed with garasa, Harendra armed with farsa and Jhunnu Singh, armed with lathi were standing with tractor to plough their land and on protest Ramadhar commanded and gave a farsa blow on the head of Motilal Singh and Birendra also gave a farsa blow on the head of Motilal and Harendra also gave a farsa blow on the head of Motilal Singh by which Motilal Singh fell down and, thereafter, it is alleged that Gauri Shankar gave a bhala blow on arm of Motilal Singh. It is further alleged that Umesh Singh gave garasa blow on the head and hand of the informant by which informant fell down, one Jhunnu Singh assaulted him by lathi and then he saw after having fallen that Umesh Singh and Jhunnu Singh are assaulting Motilal, hence, the assault by Umesh Singh and Jhunnu Singh on Motilal Singh is omni bus and neither mentioned that by what weapon and on which party they assaulted Motilal Singh. Thereafter, on hulla, Bhola Singh, Padamdeo Triloki, Sanjay, Tribhuvan, P.Ws. 4, 5, 8, 2, 9 and 3 respectively came.

10. P.W. 10 is the informant. He has stated in his evidence that he went near the land, along with his cousin brother, to cut the grass and when they reached near the field then saw Ramadhar Singh, armed with farsa, Harendra and Birendra armed with farsa, Gauri Shankar, armed with bhala, Umesh Singh, armed with

garasa and Jhunnu Singh, armed with lathi were preparing for ploughing the land which they have purchased from Sohni Kuer and Shivjee Singh. Motilal Singh protested the accused persons that they are trying for ploughing the land in illegal manner on which Ramadhar abated and gave a farsa blow on the head of Motilal Singh and, thereafter, Birendra and Harendra gave farsa blow on the head of Motilal on which Motilal Singh fell down and, thereafter, Gauri Shankar assaulted Motilal Singh by bhala on his right arm, thereafter, Umesh Singh assaulted the informant by garasa on his head and right arm on the middle finger and Jhunnu Singh assaulted by lathi on the shoulder of the informant then he fell down and when he fell down then he saw Umesh Singh and Jhunnu Singh are assaulting Motilal with lathi, however, the informant supported the prosecution case, but, with minor variation attributing the role on Umesh Singh and Jhunnu Singh of assaulting Motilal Singh by lathi whereas Gauri Shankar Singh has been attributed the role of assault by bhala and Umesh Singh has been attributed to have been armed with garasa, but, no corresponding injury by bhala on it's stamp edge and no garasa injury on deceased by it's blunt edge.

11. However, this witness has stated that after the occurrence the witness came and the accused persons fled away and the deceased, Motilal Singh, was taken to hospital and he died during the treatment. The police came in hospital, recorded the fardbeyan which was read over and singed. He has proved the signature on the fardbeyan Exhibit 1/1. He has, further, stated that while the fardbeyan was being read over by the informant, witness Manlal Singh was present there and he al igned on the fardbeyan before him and has proved the signature of Manlal Singh as Exhibit 1. He has also proved his signature on the inquest report prepared by the police marked as Exhibit 4/1. He has, further, stated that when they had gone to cut the grass at that time there was hasua in the hand of Motilal Singh. He has, further, stated that proceeding u/s 107 of the Criminal Procedure Code was going on between them and the accused persons with regard to that land. However, in the cross examination it has been pointed out by the defence mentioning the boundary of disputed land which has been purchased by him and has stated that there is a ridge in between the land of the accused persons and the land which he has purchased and the said ridge is north-south direction. However, he has, further, stated that the land of the accused persons is in north and the land which he has purchased is in south and in between it there is no ridge and he has not filed any petition for mutation and he has paid the rent in the name of Shobha Rai. However, he has stated that the power of attorney was executed about a year back and the land for which the sale deed executed was in the share of Deodhari Rai. He has, further, stated that they had been to cut the grass, but, he has not taken anything, however, stated that he and Motilal used to cut grass in rotation, one-by-one and on that day whey were going to cut the grass and has stated that they had been to cut the grass and brought the grass by tying it in towel and has stated that before reaching the field they have not cut any grass. However, regarding the manner of occurrence he has stated that Ramadhar firstly assaulted Motilal by farsa, thereafter,

Birendra and Harendra gave farsa blow simultaneously and then Gauri Shankar assaulted by bhala. He has, further, stated that bhala blow was given from the sharp portion and used as a lathi, but, it did not hit from the pointed portion of bhala rather the injury was from the lathi portion and up till that time he fell down. Further, he got injury while saving him. He has, further stated that he got injury during saving himself and injury was on his finger, head and right shoulder and the accused persons were assaulting and the assault was being given to Motilal Singh from the back portion of the garasa and a lathi portion of bhala. It has, further, been stated that head of Motilal Singh was tied with towel, but, the blood was oozing. However, this witness has stated that it is not a fact that Deodhari was in possession of the land and he was not married with intention to grab the land of Deodhari, the paper has forged and fabricated and no occurrence, as alleged has occurred. However, from the evidence of this witness it is apparent that he along with Motilal Singh went with sickle and reached at the place of occurrence. However, so far the manner of occurrence is concerned, this witness stated that the assault by Umesh Singh by bhala has not been specifically stated, however, in cross examination he has stated that he remained saved at the time of assault on Motilal Singh and he only got injury while saving Motilal from assault.

12. P.W. 6 is the doctor, who has examined the informant, Arun Singh and has found abrasion on the vertex skull and nature of injury was shown to be simple by hard and blunt substance may be from the blunt side of farsa. Injury No. (ii) is incised wound of lateral sharp of right middle finger terminal phalanx size 1(1/2)? long 1/6? wide skin deep nature of injury simple caused by sharp cutting weapon may be by farsa, injury No. (iii) abrasion on the frontal skull size ?? x ?? the nature of injury shown to be simple by hard and blunt substance, injury No. (iv) two lineal bruises on right shoulder each measuring 4? long and ?? wide nature simple, the time of injury within six hours. However, the informant, Arun Kumar Singh, was examined by the doctor at 12.25 p.m. and, hence, from the injury report it is apparent that the injury is found within six hours whereas the allegation of the occurrence is at 09.00 a.m. well fall within six hours from the time of examination. However, this witness stated in examination-in-chief that Umesh Singh assaulted him by garasa on his head and finger and Jhunnu Singh assaulted him by lathi on his shoulder, but, in cross examination has stated that he received injury while he was attempting to save Motilal Singh though he has stated that he was assaulted by garasa from the back portion.

13. The learned Counsel for the accused persons, however, contended that if the witnesses alleged that he was assaulted by garasa and Gauri Shankar assaulted the deceased by bhala then it shall deem that the injury caused by bhala and garasa was made by sharp portion and any explanation about the assault by blunt portion is not acceptable and it touches the credibility of the witness. However, though the injury had been found, but, sharp cutting on the finger as well as both the bruises and sharp cutting on the head of the informant which are though of sharp cutting, but, of minor nature as only skin deep injury on the

middle finger and other injuries have been found as bruises on shoulder and abrasion on the skull found by the hard and blunt substance by lathi and there is no injury by the farsa or sharp cutting weapon on the skull whereas in the fardbeyan the informant has alleged that he was assaulted by garasa on head and hand, but, there is no sharp cutting injury on the head and the injuries found on the informant are all simple or superficial and none of the injuries either single or cumulative effect of all the injuries taken together can not be said to have been inflicted with intention to kill.

14. P.W. 6, has also conducted the autopsy on the person of the deceased, Motilal Singh, and has stated that on 15.10.1996 at 02.00 p.m. he conducted the post mortem report examination on the body of the deceased, Motilal Singh, aged about 35 years, identified by Havildar, Guru Sharan Yadav and Chowkidar, Ram Ishwar Yadav, and found the following injuries on external examination:

(i) On head - two sharp cut injury on left parietal scalp of head measuring both separately as 3? long 1/5? wide up to bone deep caused by sharp cutting instrument, may be by farsa (in three strokes if two strokes over-lapped)

(ii) Right upper limb - swelling of right arm and elbow joint, swelling encircling the limb and spread over 4?-5? caused by hard and blunt weapon, may be by lathi.

(iii) Five or six linear bruises each 5? long and 1? wide n lateral aspect of chest, right side cause by hard and blunt substance may be by lathi etc.

15. In cross examination he has stated that over lapping means two blows of one size. He has, further, stated that he can not say which of the injuries is over lapping injury. The size of both the injuries is same. He has not given the side and the size of the broken parietal bone which was found fractured though he has not mentioned the position of the rib which was found fractured. However, from the injury report it is apparent that there is no injury of bhala or a sharp cutting weapon on the person of the deceased on his arm as alleged to have been given by Umesh Singh. However, an explanation has been given by the informant (P.W. 10) that though bhala injury was inflicted, but, which does not hit by the pointed portion of bhala, but, it was hit by blunt portion.

16. P.W. 1 is Raj Raushan Singh and he has stated that at the time of occurrence he was sitting on the boring of Barbansh Singh as he has got a land by the side of the said boring which he has got by power of attorney and his cousin brother, Arun Kumar Singh, has taken on sale deed and then the accused persons have come armed with weapons as stated in the fardbeyan to plough the land with tractor and on protest Ramadhar gave a farsa blow on Motilal on his head and, thereafter, Harendra and Birendra simultaneously gave farsa blow on the head of Motilal by which he fell down and when Motilal fell down then Gauri Shanker Singh assaulted Motilal from lathi portion of bhala and, thereafter, Jhunnu Singh and Umesh Singh assaulted Motilal by lathi and garsa on his chest and back. However, in his cross examination he has stated that Brindra and Harendra

assaulted the deceased only once and has stated that blood was oozing from the head of Motilal Singh and from the finger of Arun Kumar Singh. However, it is stated that he went along with Motilal to hospital, but, thereafter, he went to Court. He claims to be an Advocate and has stated that he remained in Court till 04.00 p.m. and, thereafter, he came to hospital, but, he did not meet the police there and has stated that he did not disclose about the occurrence in Court and at the time of occurrence the tractor was in the field, hence, he supported the prosecution case about assault by bhala by Gauri Shanker Singh who has stated that it was an assault by lathi portion of bhala by Gauri Shanker Singh.

17. The learned Counsel for the appellants, however, contended that in the first information report the informant has stated the assault by bhala, there is no mention of lathi portion of bhala and now this witness changed the stand regarding the assault by lathi portion of bhala, however, six witness in examination-in-chief has stated that Umesh Singh Singh assaulted Arun Kumar Singh by garasa on his head and while Arun Kumar Singh was trying to managed the said assault by hand then he got injury of his finger and, thereafter, Umesh Singh Singh gave a blow by garasa from its back side. Hence, the witness has supported the prosecution case, but, there is some variation about assault by bhala and explanation for variation is that it was blunt portion and further assault by farsa by Umesh Singh on head resisted on hand, but injury is as wound at hand which is skin deep and does not indicate a corresponding injury by assault.

18. P.W. 2, Sanjay Singh, also supported the prosecution case as alleged in the fardbeyan about the assault by farsa and then by lathi portion of bhala on the person of Motilal Singh and, thereafter, assault by farsa and danda by Umesh Singh and Jhunnu Singh on the chest of the deceased. However, in the cross examination he has stated that the tractor came from the west where he was cutting the grass and the accused persons were coming ahead of the tractor, however, stated that accused persons after coming in the field were preparing for ploughing the land and were filling the diesel in the tractor and, in the meantime, the prosecution party, Arun Kumar Singh and Motilal Singh reached there. However, there is no mention about the filling of the diesel in tractor in preparation in the fardbeyan, however, this variation is a minor thing of minute details. However, there is nothing in the evidence of this witness to disbelieve the prosecution case about the occurrence. However, this witness has stated that his statement was recorded by Daroga after 10-15 days.

19. P.W. 3 is Sanjay Singh. He has also supported the prosecution case about the occurrence and assault by farsa by Ramadhar followed with Birendra and Harendra and assault by Umesh Singh Singh by farsa on Arun causing injury on his head and assault by Gauri Shanker Singh on Motilal causing injury by blunt portion of bhala. However, it is stated in his cross examination that at the time when Arun and Motilal reached near the field by that time diesel had been filled in the tractor and at the time of occurrence the driver was there, but, after the occurrence the driver fled away along with the tractor. However, it is stated that

he does not know the number of the tractor or the make of the tractor nor can disclose that where is the container from which the diesel was being filled in the tractor and what is the capacity of the container. However, he stated that at the time of the diesel was being filling up the accused persons were standing to the east of the tractor. He has further stated in his cross examination that when he reached hospital, Daroga has completed the recording of the statement of Arun Singh and after 2-3 minutes he signed as witness, by that time Daroga -has read over the contents of the fardbeyan. However, it is stated that he did not make any statement before Daroga about the occurrence at that time as his statement was not recorded at the hospital, but, at the village after 10-12 days of the occurrence.

20. P.W. 4, Bhola Singh, also supported the prosecution case being the eye witness and has stated that his statement was recorded after 4-5 days of the occurrence when he met to the police though he has supported the prosecution case about the occurrence, assault by accused persons, as mentioned in the fardbeyan, and also submitted that Gauri Shankar assaulted by lathi portion of bhala.

21. P.W. 5 is Padamdeo Singh, who also supported the prosecution case about the assault by Ramadhar, Harendra and Birendra by farsa and assault by Gauri Shanker Singh by lathi portion of bhala on the right arm and assault by Umesh Singh and Jhunnu Singh on the chest and back and, further, assault by Umesh Singh on Arun Singh, the informant, by garasa and Arun got injury on his hand while obstructing the assault on head. However, this witness stated that he saw Triloki, P.W. 8, P.W. 2, P.W. 1, and P.W. 4 taking Motilal Singh, but, he does not know whether Motilal has been brought on foot or cot. However, this witness has stated that at the place of occurrence he become senseless and unable to see how he has gone to hospital. This witness, further, stated that he does not remember whether he gave statement before police or not. It has been asserted by the prosecution that this witness was never examined before police, however, there is nothing in his evidence to/disbelieve his testimony in cross examination.

22 P.W. 7 is Ramadhar Singh. He is the father of deceased, Motilal Singh, and has stated that his cousin brother, Arun Singh went there and on hulla he rushed and saw Motilal Singh has fallen in injured condition and several people of the village had collected and he saw the accused persons, Ramadhar, Gauri Shanker Singh, Harendra, Birendra and Jhunnu Singh fleeing away towards the village with weapons. He has, further, stated that when he asked informant, Arun Singh, then he disclosed that Ramadhar, Birendra and Harendra have assaulted Motilal by farsa on his head and Gauri Shanker Singh assaulted, Motilal Singh, by lathi portion of bhala on his arms and Arun Singh, further, stated that he tried to save then Umesh Singh assaulted him by garasa and this witness has, further, stated that in way to hospital he asked Motilal then he disclosed that first Ramadhar assaulted him by farsa and, thereafter, Birendra and Harendra assaulted by farsa, Gauri Shanker Singh by lathi portion of bhala. He has, further, stated in his

cross examination that he had talked with Motilal in way to the hospital. He has, further stated that he had brought the dead body of Motilal, but, had no blood stain on his clothes and within 10-15 minutes after reaching to hospital Motilal died. He has also stated that his statement was recorded by Daroga and, hence, there is nothing to disbelieve his testimony though this witness does not claim to be the eye witness, but, learnt when reached at the place of occurrence just after the occurrence and then Arun Singh disclosed about the name of the accused persons and others, hence, the evidence may be corroborative as Arun Singh disclosed. However, this witness has stated that Gauri Shanker Singh, accused, has filed a criminal case against him and his son, in which he has been sent to jail and, hence, enmity has been established between this witness and Gauri Shanker Singh.

23. P.W. 8, Triloki Singh, also supported the prosecution case about the occurrence and as stated that at the time of occurrence he had also gone to see the field and has supported the prosecution case as alleged in the fardbeyan and in cross examination he has stated that he reached along with Arun Singh and Motilal Singh almost at the same time to the hospital when Arun Singh and Motilal Singh reached hospital simultaneously along with Ramadhar Singh and after 10-15 minutes to their reaching Daroga came to hospital and he first made the inquest report and at the time of he reached hospital, Motilal Singh was already dead. Further, he has stated that the tractor was there at the distance of 4-5 steps from Motilal Singh and Arun Singh. The blood has not oozed out prior to the occurrence, but, after the occurrence the blood has oozed out. Further, there is nothing in the cross examination to disbelieve the witness.

24. P.W. 9 is a witness and he has specifically stated in his evidence that he has not seen the occurrence, but, had heard and has given the statement after 19-20 days of the occurrence and his evidence is of not much relevance.

25. P.Ws. 11, 14 and 15 are only formal witnesses, hence, their evidence is of no consequence, who have proved the sanha as well as proved the letter and power of attorney formally and, hence, their evidence is not of much importance.

26. PW. 12 is the investigating officer and has stated in his evidence that he got the rumour about the assault with regard to land dispute and the deceased has come to Sadar Hospital, Arrah, then he recorded sanha No. 269, dated 15.10.1996 and proceeded to hospital and reached there at 12.30 p.m. and recorded the fardbeyan of Arun Singh, which was read over before Manlal Singh and Arun Singh put his signature on the fardbeyan. He has proved the fardbeyan, which has been marked as Exhibit 5 and on the basis of said fardbeyan the formal first information report was recorded. He has also proved the formal first information report in the writing of Garun Kumar, Sub Inspector of Police, which also bears his signature and marked as Exhibit 6, thereafter, he prepared the inquest report in carbon process before Arun Singh and Triloki Singh and has proved the inquest report in his writing, which has been marked as Annexure 7. Thereafter, he sent the dead body of Motilal Singh, deceased for

post mortem and issued injury report of the injured Arun Singh, which is prepared by Ramchhabila Pandey on his instruction and proved the injury report as Exhibit 8 and has stated that he brought the fardbeyan to the Police Station. He has, further, stated that on 15.10.1996 at 03.30 p.m. he proceeded for the place of occurrence at village Ghoradei and has stated that the disputed land of khata No. 20 is in the north eastern portion of the village known as Katayator Badhar and the grasses were in two plots and both the plots is north to south in length and east to west in width and to the west of this plot, southern-western corner, there is boring of Harbansh Singh and in the east is of the land of Ramjee Singh and in the west is the land of deceased, Motilal Singh and Arun Singh and in the south there is field of Harbansh Singh and in this plot the half southern part was purchased by the prosecution. He has, further, stated that he found the diesel fallen in the field where tractor was taken to stand for ploughing the land. He has, further, stated that at the place of occurrence sickle was found and he seized the sickle and proved the seizure list prepared, which has been marked as Exhibit 9 and sickle which was seized is marked as material Exhibit. He has stated that though he made to search of witness, but, none were found there as all had gone to the hospital. He made out a search for the accused, but, the accused Umesh Singh and Jhunnu Singh were also not at the house and other accused persons were not found. He has, further, stated that again on 18.10.1996 at 02.00 p.m. he proceeded for Ghoradei for investigation and on that day recorded the statement of Bhola Singh, Padamdeo Singh, Triloki Singh, Ramadhar Singh and has, further, stated that on 31.10.1996 in view of his transfer he handed over the charge of investigation to Ganesh Paswan. However, he has stated that Bhola Singh has stated that the tractor was standing in the field of Arun Singh and, thereafter, stated that Bhola Singh has not stated before him that Ramadhar, Harendra and Birendra were armed with farsa. However, he did not state what really witness has stated before him u/s 161 of the Criminal Procedure Code, hence, the attention drawn has got no consequence as when he says that the witness has not stated before him anything unless there is some previous statement proved and attention be drawn to tht prior statement of the witness u/s 162 read with 145 of the Evidence Act unless brought in evidence what witness stated before the Court in his evidence and what he had stated in statement u/s 161 of the Criminal Procedure Code to find contradiction or omission. Further, this witness has not stated in the trial that who showed him the place of occurrence. He has, further, stated that he has not mentioned that he found diesel fallen in which part of the field and what was the area in which the diesel had found fallen or the colour. He has, further, stated that he did not find blood at the place of occurrence and also did not find any trampling mark or the sign of tractor and he did not try to find out the driver of the tractor nor asked to produce the power of attorney or sale deed.

27. P.W. 13 is the investigating officer who had conducted the part of the investigation and has stated that he took over the investigation of the case from Srikant Upadhyaya as he was transferred and recorded the statement of some of

the witnesses and, thereafter, submitted the charge sheet.

28. Taking into consideration the entire evidence though it has emphatically been argued by the learned defence counsel that the time in the inquest report has mentioned as 11.20 a.m. that there is over writing and it has been contended that the inquest report is prior to the recording of the fardbeyan. However, it has been asserted that the inquest report was recorded at 11.20 a.m., but, there is no mention of the name of accused persons in the inquest report and further there is some over writing in the first column regarding the time. It has, further, been contended that P.W 10, the informant, and P.W. 8 are the witnesses on the inquest report, but, there was no mention about the name of the accused persons in the inquest report. It is true that P.W. 12, the investigating officer, has stated that he came to hospital on rumour and, thereafter, he recorded the fardbeyan and then the inquest report was prepared, however, the fardbeyan recorded at 12.30 p.m., but, so far the inquest report is concerned, there is some over writing on the first column of the inquest report as apparent on the face of it and P.W. 12, the investigating officer, in his evidence, in paragraph 14 has specifically stated that in column 3 of the inquest report he has mentioned about the inspection of the dead body at about 11.20 a.m. and there is over writing in column 1 whereas the inquest report has been prepared in carbon process and, hence, it is apparent that the dead body was inspected by the investigating officer prior to the recording of the fardbeyan. However, in the case diary it has been mentioned that the investigating officer recorded the fardbeyan of the informant at 12.30 p.m., however, the investigating officer, in his evidence, stated that he prepared the inquest report before Arun Singh and Triloki Singh which is in his writing and proved the inquest report as Exhibit 7. He has recorded the fardbeyan at 12.30 p.m. in the same stretch while in the hospital, itself, and in the fardbeyan the name of all the accused persons have been mentioned and there is no column in the inquest report regarding the name of the accused persons.

29. The learned Counsel for the appellants, however, relied upon decision reported in 1990 (1) B.L.J. 555 (The State of Bihar v. Mithilesh Rai) and has contended that if the name of the accused persons is not recorded in the inquest report then it casts a doubt on the prosecution case about the implication of the accused. However, under the facts and circumstances of that case an argument was advanced that the investigating officer has first recorded the fardbeyan and then the inquest report. However, the facts remained that investigating officer himself had stated that when he reached the village at 04.00 p.m. he prepared the inquest report and, thereafter, recorded the fardbeyan. However, here under the facts and circumstances of the case, present at hand, the investigating officer, in his deposition, has specifically stated that he recorded the fardbeyan and, thereafter, he prepared the inquest report and, further, the witness in this case have supported the prosecution case in their evidence and there is nothing in their evidence in the cross examination to disbelieve their testimony in material particulars though some minor variation about the assault by bhala with

explanation, but, that not hit from the pointed part and except this variation there is nothing in the evidence of the witness to disbelieve their testimony and, hence, when the prosecution story has been found to be supported by the prosecution witnesses and there is nothing in their evidence to disbelieve their testimony and, hence, mere name of the accused persons having not been mentioned in the inquest report is no ground to reject the testimony of the witness.

30. The learned Counsel for the State, however, relied on the decision reported in (2000) 3 S.C.C. 1163 (Mundrika Mahto and Ors. v. The State of Bihar) and here in this case the inquest report having been recorded at 11.15 p.m. and the statement/fardbeyan had recorded at 11.30 a.m. and it was contended under these facts the inquest report may be treated as first information report and not the first information report registered on the basis of fardbeyan and, thereafter, the mention of the name of the appellants deserved to be ignored and in this fact the Court of sessions noticed that on perusal of the case diary it appears that the investigating officer first recorded the fardbeyan and, thereafter, hold the inquest on the dead body of the deceased, but, he recorded in the case diary the time of recording of the fardbeyan at 11.30 p.m. and that of holding the inquest at 11.15 p.m. in the reverse order to help the accused, in fact, the case diary shows that the fardbeyan was recorded earlier and the inquest report later and, hence, held that inquest report not to be treated as first information report.

However, under the present facts and circumstances, the investigating officer has stated, in his evidence that he recorded the fardbeyan first and then he prepared the inquest report, however, in the inquest report, Exhibit 7, the time is mentioned as 11.20 a.m. in column 3 as the time when he inspected the dead body, hence, appears some irregularity in investigation. However, for the said irregularity in investigation by the investigating officer and even if this defect in investigation when the ocular testimony is found to be credible, cogent the defective investigation the Court has to be circumspect in evaluating the evidence, but, it is not proper in acquitting the accused persons on account of defect would amount to playing into the hands of the investigating officer and this view has been supported in decision reported in Dhanaj Singh @ Shera and Others Vs. State of Punjab,

31. The leaned counsel for the appellants, further, contended that the fardbeyan was lodged on 15.10.1996, but, the statement of the witnesses has been recorded after 10 to 15 days of the occurrence and, hence, contended that when the evidence of the witness recorded after such a long delay then the evidence of the witnesses is not reliable as they must have been tutored. However, from the record it is apparent that the occurrence took place at 09.00 a.m. on 15.10.1996. the deceased was taken to hospital and after reaching hospital died and within hour the police reached at the hospital on rumour and even fardbeyan was recorded at 12.30 p.m. and the formal first information report was drawn at 03.00 p.m. and even the formal first information report was received by the

Chief Judicial Magistrate on 16.10.1996 just the next day of the occurrence and the evidence of the investigating officer is that he went to place of occurrence on 15.10.1996, but, he could not meet the witnesses and it was learnt that the witnesses have gone to the hospital and, thereafter, the investigating officer proceeded on 18.10.1996 to village Ghoradei and has stated in his evidence in examination-in-chief, itself, at paragraph 5 of his deposition as P.W. 12 that he reached the village Ghoradei and recorded the statement of Bhola Singh (P.W. 4), Padamdeo Singh (P.W. 5), Triloki Singh (P.W. 8) and Ramadhar Singh (P.W. 7). However, in the case when the name of the witness also find place in the fardbeyan then merely because of the delay in recording the evidence of the witness is no ground to reject their evidence outright on this ground along, if no infirmities found in their evidence and if they have stood the test of cross examination.

32. The learned Counsel for the appellants, however, contended that the blood and trampling mark were not found by the investigating officer and investigating officer has not found the sign of the tractor, however, it is pertinent to mention that investigating officer has found the diesel having been fallen at the field. However, if the blood has not been found or collected or the sign of triangulating or tractor not found at the place of occurrence, it is the defective investigation and the prosecution case can not be rejected on the ground of defect in investigation when the evidence of the witnesses have found to be reliable and trustworthy. The learned Counsel for the appellants, however, contended that though there is allegation that there is assault by bhala and when the witnesses have stated about the assault by bhala then it means that the injury was inflicted by bhala by the sharp part of the weapon, however, the witness in their evidence has given explanation and asserted that though the assault was made by bhala, but, the injury inflicted was not from the pointed part, but, from the blunt part. However, it is true that with regard to the assault by Gauri Shankar there is allegation that the assault was made by bhala in the fardbeyan, however, the informant, in his evidence, has stated that though the allegation has been made that assault made by bhala, but, it was the blunt portion which hit the deceased. The corresponding injury has also been found not by the sharp edge, but, by the blunt part. However, the witnesses have, thereafter, come to divert the prosecution story that the bhala was used as a lathi for assault by Gauri Shankar and only one injury has been inflicted by Gauri Shankar and, further, there is allegation that Ramadhar, Umesh Singh, Birendra assaulted the deceased by farsa and there is allegation of three blows by farsa, but, only two corresponding farsa injuries have been found on the head. However, the explanation has been given that two blows have been given as per the evidence of the doctor that if there is overlapping of two strokes then the two injuries may be caused in three strokes and, further, explanation in cross examination that there is over lapping of two strokes at one side though he stated that he can not say that which of the injury is over lapping as size of both the injuries is same. However, the participation of the accused having been established by the evidence, but, the

corresponding injury by bhala and farsa and one of the farsa blows is missing and the explanation given is the farsa injury may have been over lapping and explanation given that the bhala injury is not from the pointed part, but, blunt part.

33. The learned Counsel for the appellants, however, contended that Section 313 of the Criminal Procedure Code has not been complied and other part of the evidence has not been separately dealt, however, the law provides u/s 313 of the Criminal Procedure Code to explain any circumstance appearing in the evidence and the circumstance has well been explained in statement about the murder of Motilal and it is not required that each part of the evidence is to be asked whether he admitted or denied, however, nothing has been shown which has caused prejudice to the accused persons and nothing has been placed before the Court that which part of the evidence or circumstance he claims not have been brought to the notice of the accused so that he could not explain causing prejudice to him which has been taken into consideration as a circumstance for conviction against him and, hence, there is no merit in the submission. However, the law is well settled that if a circumstance not placed before him then that circumstance may not be taken against him as evidence and it is well settled that prejudice has been caused, but, neither has it been brought to the notices causing prejudice and which circumstance has been considered has not been brought to the notice of the accused and, hence, there is no merit in the submission of benefit of Section 313 of the Criminal Procedure Code.

34. The learned Counsel for the appellants, however, submits that the investigation is defective.

35. The learned Counsel for the State, however, contended that the defective investigation is not vital to the prosecution where the ocular evidence is found to be credible and cogent and the Court has to circumspect while evaluating the evidence in the case of such type. Thus, the accused can not be acquitted solely on the ground of defects in investigation and has relied upon decision reported in Dhanaj Singh @ Shera and Others Vs. State of Punjab, where it has been held that in sending blood stained earth for chemical examination and weapon of assault and pellet for ballistic examination held not fatal and, hence, I do not find any merit in the submission advanced by the learned Counsel for the appellants.

36. Hence, taking into consideration the entire evidence and the submissions of the parties the prosecution case, in nut shell, is that Ramadhar abated to kill and gave farsa blow on the head of Motilal Singh, thereafter, Birendra assaulted by farsa followed with a farsa blow by Harendra by which Motilal Singh fell down and Gauri Shanker Singh assaulted him by bhala on his arm and Umesh Singh Singh assaulted the informant on his hand by garasa by which he also fell down and Jhunnu Singh assaulted with lathi on the informant and when he fell down then saw Umesh Singh and Jhunnu Singh are assaulting Motilal Singh and the witnesses have supported the case of the prosecution in the fardbeyan. However, the injury report on the person of the informant suggests that the injuries are

simple and superficial though there is allegation of assault by garasa on informant which he claims to have resisted by his hand but the injury on the hand, itself, superficial as it is only a skin deep and the other injuries are only abrasion and bruises which are all simple in nature and though there is allegation of assault by garasa, but, the injuries are bruises only simple and superficial and even taking into consideration the injuries, none of the injuries either signally or cumulative effect of all the injuries even if taken together does not suggests than the injuries were inflicted with intention to kill. More than five persons are alleged to be at the place of occurrence and had there been intention to kill there could have been injuries, however, two injuries found on the person of the informant was assaulted with intention to kill and, hence, the offence u/s 307 of the Penal Code does not made out against the persons, however, there is allegation of assault and having regard to the fact that the none of the injuries were grievous and all the injuries are simple and offence u/s 323 of the Penal Code is made out. So far the allegation regarding the assault on the person of the deceased, Motilal Singh, it is alleged that Ramadhar Singh abated and gave a farsa blow on the head of Motilal Singh followed with assault by Birendra one blow, Harendra one blow and followed with Gauri Shanker Singh assaulted by bhala on the arm of the informant and, thereafter, omnibus allegation while the informant fell down saw Umesh Singh and Jhunnu Singh assaulting by garasa and lathi. However, there is allegation of three assault by garasa though only two corresponding injuries of garasa found on the person of the deceased and explanation has been advanced that there is over lapping of two strokes and the doctor has opined that it may be, if there is exact over lapping and, further, the allegation that Gauri Shanker Singh gave a bhala blow, but, no corresponding bhala injury or a sharp penetrating wound found and then explanation has been given that the bhala injury hit from the blunt portion. However, there is no such explanation in the fardbeyan, but, the explanation has been given at the subsequent stage of the investigation. However, having regard to the fact that since no corresponding injury of bhala has been found a benefit of doubt accrued in favour of Gauri Shanker Singh as there is no allegation of giving bhala injury and no corresponding bhala injury had been found and, hence, a benefit of doubt accrue in favour of Gauri Shanker Singh. However, there is allegation that Umesh Singh and Jhunnu Singh were assaulting the deceased when the deceased fell down, however, the allegation against them is omni bus and there is no allegation that they assaulted on which part of the body of the deceased and the doctor found two sharp cut injuries on head, swelling in right upper arm and elbow joint by h ard and blunt substance and 5 to 6 bruises 5? x 1? long on a lateral aspect of chest, the right side caused by log substance of lathi and blunt portion of garasa and though the allegation of assault by lathi and garasa by Umesh Singh and Jhunnu Singh, which has been submitted by the witnesses and, hence, I find and hold that the appellant, Ramadhar Singh, Birendra Singh and Umesh Singh assaulted the deceased with intention to kill Motilal Singh. However, with regard to Gauri Shanker Singh, since, there is allegation of assault of one bhala blow, having no bhala injury found on the person of the deceased

and instead of penetrating injury by hard and blunt substance, hence, I give benefit of doubt regarding participation of Gauri Shankar Singh and, hence, I acquit Gauri Shanker Singh (Cr. Appeal (D.B.) No. 365 of 2004). However, having regard to the fact that the injury found on the informant is simple and superficial and since the injury not suggests to have been inflicted with intention to kill, hence, offence u/s 307 of the Penal Code not made out and I find and hold that the prosecution has been able to prove the charges for offence u/s 302 of the Penal Code against Ramdhar, Birendra and Umesh Singh.

37. Hence, the conviction and sentence recorded against Gauri Shanker Singh is set aside and conviction and sentence against the other appellants u/s 302 of the Penal Code is maintained. The conviction and sentence u/s 307 of the Penal Code is converted into Section 323 of the Penal Code, but, no separate sentence u/s 323 of the Penal Code. Cr. Appeal (D.B.) No. 365 of 2004 is allowed in part with above modification and Criminal Appeal (D.B.) No. 344 of 2004 is dismissed.

Shyam Kishore Sharma, J.

I agree.