

(2012) 09 PAT CK 0052

In the Patna High Court

Case No : Criminal Appeal (DB) No. 474 of 1990

Jangal Chaurasia and Others

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 25-09-2012

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 107, 161, 313

Penal Code, 1860 (IPC) — Section 302, 34, 342

Citation : (2012) 09 PAT CK 0052

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

Bench : Division Bench

Advocate : N.K. Agarwal, Mr. J.P. Bhagat and Mr. D.N. Tiwari, in CR. app DB No. 474 of 1990 and Mr. Krishna Prasad Singh, Mr. Jharkhandi Upadhyay, Mrs. Meena Singh and Mr. Rakesh Singh, in CR. app DB No. 483 of 1990, for the Appellant; Shashi Bala Verma, Assistant Public Prosecutor For the State in CR. APP (DB) No. 474 of 1990 and Mrs. Shashi Bala Verma, Assistant Public Prosecutor For the State in CR. APP (DB) No. 483 of 1990, for the Respondent

Final Decision : Allowed

Judgement

Honourable Mr. Justice Aditya Kumar Trivedi

1. Appellant Sachidanand Sah has been found guilty for an offence punishable u/s 302, 342 IPC and 27 of the Arms Act and been directed to undergo R.I. for life u/s 302 of the IPC, RI for one year u/s 342 of the IPC as well as R.I. for five years u/s 27 of the Arms Act while appellants Jangal Chaurasia, Ram Padarath Chauraisa @ Sukan Chaurasia and Bishun Narayan Sah have been found guilty for an offence punishable u/s 302/34, 342 of the IPC and been directed to undergo R.I. for life u/s 302/34 of the IPC and R.I. for one year u/s 342 of the IPC, Appellant Ram Padarath Chauraisa @ Sukan Chaurasia has further been found guilty for an offences punishable u/s 27 of the Arms Act and been directed to undergo R.I. for five years, with a direction to run the aforesaid sentences concurrently by the impugned judgment of conviction and sentence dated

20.09.1990 passed by First Additional Sessions Judge, Begusarai in Sessions Trial No. 110 of 1988/11 of 1988 have preferred these two appeals, which have been heard together and are being disposed of by this common judgment. Shorn of unnecessary details the prosecution case in brief is that the, informant Sadhu Saran Mahto (P.W. 4) had given his fardbeyan (Ext. 2) on 31.01.1986 at 08:30 P.M. at Bhagwanpur P.S. in presence of Ramudgar Sharma, Phulena Rai, Brijdeo Rai and Dinesh Chaurasia, alleging inter alia that on the same day at about 04:30 P.M. while he along with Brijdeo Rai and Ram Padarath Poddar was preparing tobacco at crossing near library lying east to his village, he saw his son Raja Ram Mahto aged about 15 years coming from eastern side from his field to his house. It is alleged that as soon as his son reached at road near Chandadih School, appellants Sachidanand Sah @ Kaila Sah, Ram Padarath Chaurasia @ Sukan Chaurasia, Bishun Narain Sah, Jangal Chaurasia came running to his son Raja Ram, caught hold him and then appellant Sachidanand Sah, who was armed with pistol, shot at him from point blank range and his son fell down. It has also been alleged that appellant Sukan Chaurasia also fired from his pistol at the son of informant and he after hearing sound of firing rushed raising alarm that his son has been shot at. He has claimed that at that very moment, his another son Daya Ram Mahto was coming through the road passing by the side of school whereas his co-villager Dhani Lal Mahto, Basudeo Poddar were also coming. All the accused persons having caused aforesaid injury thereafter had escaped towards southern direction and during course of lifting, his son had disclosed that while appellants Kaila, Sukan, Bishun Narain and Jangal had apprehended him it was appellant Kaila had shot at him. The informant thereafter took his son to Padari Hospital, Mokama on a jeep along with his co-villager Ramudgar Sharma, Phulena Rai where the doctor after examining his son had declared him dead and had also disclosed that the dead body of his son will be handed over on the next day after holding his postmortem. The informant claimed that thereafter he returned back to P.S. to lodge his First Information Report. The motive for the aforesaid occurrence has been alleged by the informant to be some litigation between appellant Kaila Sah and his step brother Prabhat Sah wherein he had taken side on behalf of Prabhat Sah.

2. On the basis of the aforesaid First Information Report, Bhagwanpur P.S. Case No. 9 of 1986 was registered whereupon investigation proceeded and concluded by submission of a charge sheet and cognizance was taken and as the offences were exclusively triable by the court of session, the case was committed to the court of sessions whereupon after completion of trial the impugned judgment of conviction and sentence has been passed resulting into filing of these two appeals.

3. The defence of the appellants, as is evident from the mode of cross-examination as well as from their statement recorded u/s 313 of the Cr.P.C. is of their complete innocence as well as of false implication. It is further been pleaded that on account of village politics these appellants have been falsely roped in this false and fabricated case. To support the same, defence had also

examined its witnesses as well as also exhibited certain documents.

4. In order to prove its case, the prosecution had examined altogether 8 PWs out of whom P.W. 1 is Dasrath Mahto, P.W. 2 is Ghuni Lal Mahto, P.W. 3 is Daya Ram Mahto, P.W. 4 is Shadhu Saran Mahto (informant), P.W. 5 is Braj Deo Rai, P.W. 6 is Rajendra Prasad Yadav, P.W. 7 is Dr. Bindeshwari Prasad, P.W. 8 is Rabindra Prasad Singh the I.O. Side by side the prosecution also exhibited Exhibit 1 Series, Signature of informant and witnesses, Exhibit 2 fardbeyan, Exhibit 3 formal FIR, Exhibit 4 seizure list, Exhibit 5 postmortem report, Exhibit 6 Carbon copy of Complaint Title Suit No. 11 of 1980, Exhibit 7 show cause filed in a proceeding u/s 107 of the Cr.P.C. The defence had also examined two DWs, D.W. 1 Jai Jai Ram Chourasia and D.W. 2 is Masudan Lal and had exhibited two sale deeds as Exhibit A and B.

5. While assailing the judgment of conviction and sentence recorded by the learned lower court, it has been submitted on behalf of Learned Counsel for the appellant-convict that the finding recorded by the learned lower court is unsustainable in the eye of law as well as on facts basically on account of the fact that the learned lower court had failed to appreciate that the prosecution case suffered from inherent lacuna as well as ignoring the relevant disclosure made by the prosecution witnesses certifying the same. The Learned Counsel further elaborating his submission urged that none of the independent witnesses had come forward to support the case of the prosecution. It has also been submitted that informant could not be an eye witness because the place from where he had claimed to view the entire occurrence at the alleged place of occurrence, he could not have done so, on account of presence of Baraita (a thatched house) constructed for plantation of betel as well as orchard. Not only this, the Learned Counsel had also expanded his submission that the occurrence so alleged happens to be in mid winter season and during said period, at 04:30 P.M. on account of fog there would not be clear visibility, and therefore when the distance in between the place where informant was standing and the place where deceased was shot at, happened to be far away covering more than 200 yards it was not possible for the informant to see the occurrence..

6. The Learned Counsel for the appellants have also submitted that so far ocular evidence is concerned, only two witnesses, that means to say PW-3 and PW-4, have come forward in a way to support the prosecution case as eyewitness but when the evidence of P.W. 3 is gone through, apart from his being of tender age, so many infirmities are found in his evidence on account of which his evidence cannot be relied upon. They have also submitted that presence of P.W. 3 has purposely been introduced by P.W. 4 informant to have his evidence corroborated otherwise there was no occasion for P.W. 3 to be present at that very moment. In likewise manner, it has submitted that P.W. 4 the informant intentionally and purposely introduced factum of oral dying declaration so that even if his status as an eye witness is discredited, his evidence could remain firm at least on that score. Not only this, it has further been submitted that when evidence of P.W. 3

and P.W. 4 over manner of assault as well as on the point of oral dying declaration is simultaneously and properly analyzed both of them are found to have contradicted each other in such a manner that evidence of both the witnesses becomes untrustworthy and unreliable. According to Learned Counsels, apart from the evidence of P.W. 3 and P.W. 4 there happens to be no other evidence on record to connect the appellants with the offence as alleged and though from the evidence of P.W. 3 as well as P.W. 4, a theme of oral dying declaration has been brought in picture, but as both of them happen to be inconsistent on this score, even the factum of dying declaration is found to be profaned.

7. It has further been submitted that there happens to be inconsistency in the manner the deceased was lifted to Padari Hospital, Mokama, and further when the deceased was declared dead at Padari Hospital, Mokama, inasmuch as in that event it was expected at the hands of informant to give proper information to the Mokama Police but in stead thereof the informant for no good and valid reasons chose to return back and gave First Information Report at Bhagwanpur Police Station. In this regard it has been explained that from the evidence of Investigating Officer, it is evident that he had not received inquest report till conclusion of the investigation nor he had gone to Padari Hospital to see whether dead body was lying there or not and also that he took no steps for facilitating postmortem over dead body of deceased. Explaining this aspect it has been contended that at the other hand Ext. 5, P.M. report gives different colour bringing presence of Police Officer of Mokama P.S. in the background of inquest report prepared by the Police Officer of Mokama P.S. Thus, it has been urged that having cumulative effect of the evidence on the record, adduced on behalf of prosecution, the complicity of appellants in the alleged occurrence is are found to be completely ruled out and on account thereof, the judgment of conviction and sentence recorded by the learned lower court happens to be unwarranted and uncalled for and as such cannot be sustained.

8. On the other hand, the learned Additional P.P. while refuting submission raised on behalf of appellants has argued that the evidence on record conclusively lead to one and only one conclusion regarding complicity of appellants during commission of an occurrence wherein the deceased was done to death by them. In this regard she has submitted that certainly there happens to be some sort of lapses on the part of the Investigating Officer during course of investigation as in spite of having been informed regarding dead body at Padari Hospital, Mokama he did not care to go there and do the needful but such error on the part of Investigating Officer did not materially affect the otherwise consistant evidence of prosecution. Then it has also been submitted that true, it is that other than the family members have turned volte-face to the prosecution but that does not mean that prosecution has not been able to substantiate its case inasmuch excluding certain minor, superficial contradictions or embellishment which has got no bearing on the fate of the case, the prosecution on the basis of evidence in its entirety has proved the occurrence having been committed at the hands of

appellants and therefore, judgment impugned herein does not require any sort of interference.

9. Now coming to evidence, it is found that P.W. 2 Ghuni Lal Mahto and P.W. 5, Brajdeo Rai were declared hostile. P.W. 8 Rabindra Prasad Singh happens to be formal in nature as he had simply exhibited plaint of title suit no. 11 of 1980 as well as show cause filed by accused in 107 Cr.P.C. proceeding.

10. P.W. 1 Dasrath Mahto happens to be the seizure list witness who had deposed that on 31.01.1986 at about 10 P.M. the I.O. had seized blood stained earth from Chandadih Kacchi road near library and for that seizure list was prepared over which he along with Ramashish Rai have put their signature. During cross-examination he had disclosed that the place from where I.O. had taken blood stained soil happens to be 10 Rassi away from his house where he had arrived there after hearing hullah of commission of murder at a point of time when 25 to 50 persons were already present over there and that he had remained there from 8 P.M. to 10 PM. Before returning back to his place.

11. P.W. 7 happens to be Dr. Bindeshwari Prasad who on 02.02.1986 at 11:45 A.M. while was posted at Barh had conducted postmortem over dead body of Raja Ram Mahto and found the following injuries while recording his opinion in P.M. Report (Exhibit-5):-

A lacerated wound 3/4" x 1/2" deep up to trachea. There was blackening around the wound with inverted margin and there was blackening of the margin also and a metallic piece simulating a bullet was recovered from right side of the neck under the skin. There was no outlet. A metallic piece was sealed and sent. There was a hole in left side to right side of trachea and the right common carotid vein was lacerated and bleeding was present. Time elapsed since death within 48 hours. Death, in my opinion, has been shock and hemorrhage as a result of which firearm injury. Sealed bottle containing a metallic piece simulating bullet is sent herewith

12. From the postmortem report it is also evident that rigor mortis was absent and undigested Dalmot was found in stomach. During cross-examination of P.W. 7 the doctor at para-5, it is evident that the bullet was fired from a close range and such bullet might have been fired from a distance of one and half yards. Then he had also disclosed the manner of assessment of distance having been based on blackening, margin and the surface of the wound. According to him the firing was made from left of the deceased while he might have been in standing as well as lying position and that time of deaths within 48 hours means 36 to 48 hours. Thus, the medical evidence covers the time of occurrence as per ocular evidence when the deceased was shot dead.

13. In this background this Court would examine ocular evidence of the two eyewitnesses examined by the prosecution. P.W. 3 happens to be Daya Ram Mahto younger brother of deceased Raja Ram is the first eyewitness. His evidence in court was recorded on 12.12.1989 while he was aged 12 years. True

it is that the Trial Court did not care to test his mental equilibrium inasmuch as there is complete absence of any sort of remark on this aspect by the trial court specially when the occurrence being of the year 1986 therefore on the alleged date and time of occurrence his age was around 9 years. His name finds place in the fardbeyan as eyewitness but because of his being of such tender age his evidence is required to with due care and caution.

14. He in his examination-in-chief had said that Raja Ram was his brother who was murdered about 3 years 11 months and 12 days ago. It was Friday. Time was at 04:30 P.M. He along with his brother was returning from his field where chillies were planted. As soon as both of them reached near Chandadih School, appellants Kaila, Sukan, Bishun Narayan and Jangal came from school and then thereafter, all of them caught hold his brother where after appellant. Kaila had shot at his brother causing injury on his person. He had also stated that appellant Sukan had also fired but he could not see as to whether any injury was caused to his brother or not due to such firing. He had claimed that thereafter Sadhu Sharan Mahto (PW-4) along with his father Ghuni Lal (PW-2) and Brajdeo (PW-5) came there and all the accused persons escaped towards Baraitha. His father had a talk with Raja Ram (deceased) and during course thereof he had disclosed that Kaila had shot at him. Then he had also disclosed that his brother was being suspected for an occurrence of Dacoity committed at the shop of Kaila. Thereafter, according to him the people had lifted his brother and taken to Padari Hospital and his brother had died after sometime.

15. During cross-examination in para-5 he had disclosed that he was a student of Shanti Niketan School which was 1 KM away from his house and that he did not go to school on that day as instructed by his father. He had also disclosed that he was not going to school for last two or three days before the occurrence. He had divulged presence of Janta Pustakalaya which was on Kacchi Road. Further he had disclosed that library is a place where students are being taught. In para-6 he had disclosed that occurrence was committed 10 to 15 lagga east to Janta Pustakalaya over Kacchi Road which was at a distance of 100 to 150 hands. He had also stated that there happens to be one library at Kacchi Road which is known as Chandadih School and on the alleged date of occurrence the school was closed. He had further disclosed that near Chandadih School there was a Baraitha (a fenced place where betel plant is grown) in both sides. In para-7 he had disclosed that his land was east to school. In para-8 he had narrated that Chandadih School was south to Kacchi Road through which both the brothers were coming and all the accused persons were sitting since before at the school and both the brothers were encircled by all the accused persons in front of school. At that of time no one else except all the accused and he with his brother were present. According to him appellants Jangal and Bishun Narayan caught hold his brother and threw him on ground and his brother was lying on his back and that rest of the two accused were also present. He had also stated that thereafter appellant Kaila had shot his brother in his neck while appellant Sukna also fired but he was unable to say whether it had caused any injury as he ran

away raising alarm.

16. He had further stated that he had gone up to the field of Govind Mahto lying West to Chandadih School at a distance of 60 hands in which mustard was grown and had raised alarm for ten minutes leading to arrival of Brijdeo Rai (PW-5), Phulena Yadav (not examined), Ghuni Lal Chaurasia (PW-2) and his father (PW-3) as also many other persons. He had disclosed to them as to how his brother was assaulted. Then he had returned back along with them to his brother who was still alive till then. In para-9 he had disclosed that he along with his father and rest of the persons remained there for an hour or even more. He had admitted that he did not accompany his brother to hospital and his brother was taken away on Rickshaw from Chandadih School towards Bhagwanur and then thereafter was carried to Padari Hospital on a Jeep. In par-10 he had disclosed that he was not aware of the fact as to whether there was any prevailing animosity between his family with the family of accused person. He had, however, disclosed that his brother was being suspected by the accused persons of having his hand during commission of dacoity in the shop of appellant Kaila which had been committed about one and half month ago. Then there happens to be contradiction in his evidence with regard to accused Jangal and Bishundeo Narayan whose names were not at all disclosed by him before the Investigating Officer during course of his previous statement as well as also to the fact that aforesaid two accused persons had thrown his brother (deceased) on ground. His further contradiction was with regard to his coming from chilly field along with Raja Ram as also on the point of oral dying declaration to the effect that deceased brother had disclosed to his father that appellant Kaila had shot at his brother.

17. P.W. 4 Sadhu Sharan Yadav happens to be the informant. He in examination-in-chief had deposed that the occurrence took place on 31.01.1986 at about 04:30 P.M. At that very time he was preparing tobacco at the crossing near library along with Brijdeo Rai (PW-5) and Ram Padarath Poddar (not examined) and had seen his son Raja Ram coming from eastern side after watching his filed. According to him as soon as his son reached in front of Chandadih School, appellants Sachidanand Sah @ Kaila Sah, Ram Padarath Chaurasia @ Sukan Chaurasia, Bishun Narain Sah, Jangal Chaurasia came and caught hold his son where after appellant Sachidanand @ Kaila shot at his son Raja Ram which had hit him as a result of which he fell down. He had also stated that appellant Ram Padarath Chaurasia had also fired but he could say whether his firing had hit his son or not. He claimed to have rushed towards place of occurrence raising alarm. At the time when his son Raja Ram was shot at he had seen P.W. 3 Daya Ram, his another son, also coming from by the side of P.O. and Ghuni Lal Chaurasia as well as Basudeo Poddar were also coming. When he had reached at the place of occurrence, his son Raja Ram (deceased) had disclosed that appellant Kaila had shot him and Raja Ram had further disclosed that appellants Kaila, Ram Padarath, Bishun Narayan and Jangal Chaurasia escaped towards Baraitha after shooting him. Then, thereafter, he claimed that he had lifted his son and taken to

Padari Hospital where the doctor had declared him dead. The doctor had further disclosed that the dead body could be handed over on the next day after completion of postmortem. Accordingly, he had returned back and gone to Police Station where he had given his fardbeyan. The motive for occurrence in the evidence of P.W. 4 has been shown that as he was doing pairvi in a suit filed by step brother of appellant Sachidanand his son was done to death. He had also stated that there was theft in the shop of Sachidanand in which role of his son was being suspected. He had also disclosed that I.O. had inspected the place of occurrence in his presence and in presence of Dasrath Mahto and Ramashish Ram and the I.O. had seized blood stained earth from the P.O. for which a seizure list was prepared.

18. During his cross-examination in Para-6, Para-7, Para-8 he had stated about genealogical table of both sides. In para-7 he had also disclosed that Ram Udgar had not purchased land in his village nor he had purchased land from Ram Udgar. In para-9 he had admitted that he has got share in the land having orchard thereupon situated adjacent to the land of Jangal Chaurasia. Then he had denied the suggestion that on account thereof there happens to be dispute with Jangal Chaurasia. In para-12 he had admitted that the dispute between them had originated about two or three months ago and before that was no dispute amongst them. In para-15 he had submitted that the title suit was filed by Anandi Sah and Prayas Chandra Sah against Mahaveer, Ram Bilas, appellants Sachidanand Sah and Bishun Narayan and that he had joined the Plaintiff (Prayas) during course of preparation of the plaint of the suit. Then he had disclosed that he had not done any pairvi on any dates in the aforesaid title suit after its being filed. He had further disclosed that theft was committed in the shop of appellant Sachidanand about two or three days prior to the occurrence and earlier to it no theft was committed in the shop of appellant Sachidanand. He had also stated he was unaware of the fact whether appellant Sachidanand had instituted any case as with regard to theft, but Sachidanand had threatened him but he had not complained anywhere as with regard to it. He had further disclosed that he had got scribed the fact of theft in the shop of Sachidanand and threatening given by Sachidanand in his fardbeyan.

19. In para-12 PW-4 had given topography of the village along with the P.O. He had also disclosed that there was a pitch road crossing through Chandaul village east to west which went further to Bhagwanpur lying in east while it also went to Kadrabad which was in west. He had stated that one library was in South to that pitch road which was known as Janta Pustakalaya and that the crossing was near that library. He had also explained that one Kacchi road originated from that very crossing and went to Mehdauli and that he along with his co-villagers was present at that crossing. He had also admitted that he had not rushed after hearing sound though he had seen Sachidanand shooting his son and when Sachidanand had shot at his son only, then he had rushed. The distance in between crossing to P.O. according to him was 15 to 16 Rassi which was subsequently explained as 250 to 300 hands. In para-19 he had disclosed that

the chilly field from where Raja Ram and Dayaram were returning was North-East to the P.O. and his two or three plots were in vicinity thereof. Then he had denied that he no land having chilly plantation lying West to place of occurrence. In para-20 and 21 there happens to be contradiction.

20. In para-21 he had further disclosed that none of the accused had caught hold his son rather all the accused persons encircled his son and then appellant Sachidanand had shot at him. Then he had disclosed that he had an occasion to see the accused before the occurrence on the same day at about 10:11 A.M. as well as at the time of occurrence In para-22 he had disclosed that when he saw the accused persons at the time of occurrence, he was eight or nine hands away from his son and the accused person came near his son and then had fired. His son had sustained a single gun shot injury and then fell down. He was standing at the time of firing. Then he had also disclosed that while appellant Jangal was east to him. Appellant Sachidanand and Ram Padarath were in South and appellant Bishun Narayan was in West to his son. At the time of occurrence his son was coming from Eastern side and when his son came, appellant Bishundeo and Jangal had caught hold his hands and at that moment appellant Sachidanand had fired. When his son fell down after sustaining injury, he had rushed from crossing and when he reached at the place of occurrence, his son was lying on the Earth and was restless. Appellant Ram Padarath according to him had fired while his son was lying and at the time of firing made by Ram Padarath he had already crossed half way but by that time all the accused persons flew towards Southern side.

21. PW-4 had claimed arrival of Birdeo Rai, Ram Prakash, Ram Udgar, Dayaram, only after he had reached near his injured son, and that Ghunilal and Basudeo had arrived after his arrival followed by many villagers. He had not requested any of them to inform the police and after remaining there for ten or twelve minutes he took his son to Hospital on a jeep. He however could not name owner of the jeep but had claimed that they had reached at the Padri Hospital at about 07:00 P.M. through the crossing. Then he had given the location of Bhagwanpur P.S. from the road and had also disclosed the location of Bhagwanpur Hospital which was not in existence at the relevant time. He had also stated that neither he took his son to the Dahia Hospital nor he informed the police. Then he had denied the suggestion that his deceased son was a hardened criminal and that in the aforesaid background he had sustained own self-inflicted injury. He had also denied the suggestion that on account of land dispute the accused appellants had been falsely roped in.

22. P.W. 5 Braj Deo Rai a FIR named witness, was declared hostile on account of non-supporting the case of the prosecution over complicity of accused/appellant to be an assailant of deceased. He however had supported the factum of occurrence disclosing therein that on the alleged date and time of occurrence while he was at a tea stall near library, he had heard sound of firing whereupon he had gone near Chandadih School where he found Raja Ram lying in pool of

blood..

23. P.W. 6 Rajendra Prasad Yadav happens to be the Investigating Officer. He had deposed that on 31.01.1986 while he was posted as Officer-in-charge of Bhagwanpur P.S. had recorded fardbeyan of Sadhu Saran Mahto in presence of Dinesh Chaurasia as well as Ram Udgar and had exhibited the same. After registering a case thereupon proceeded with investigation and recorded further statement of informant. At about 09:30 P.M. he reached at the place of occurrence and inspected the same in the light of lantern as well as torch as pointed out by the informant which happens to be the village Kacchi road which goes towards Mehdauli. About 200 yards West to the place of occurrence this Kacchi road joins with pitch road. Copious blood was found at the place of occurrence which was seized and for that seizure list was prepared in presence of witness Ramashish Rai and Dashrath Mahto in carbon process and had exhibited the same. Just East to the place of occurrence was Chanddaih Upper Primary School and the Kutchi road met with pitch road after going towards West which was commonly known as Tinmohani. The Baraitha of Chatter Mahto was in Eastern-Southern side of place of occurrence and land of Ramroop Mahto was West to it and from the junction of road the place of occurrence was clearly visible. He has also been confronted with of the statement of the witness who were declared hostile that means to say of P.W. 2 as well as P.W. 5 who during their statement u/s 161 of the Cr.P.C. had fully supported the case of the prosecution. He had also said that he had recorded statement of seizure list witnesses and also conducted raid at the house of accused Sachidanand Sah @ Kaila Sah and during course thereof, 20 rounds of.303 cartridges along with four chargers were recovered from his house. He had further stated that he had not received inquest report from Mokama P.S. though he had received postmortem report and then thereafter, after completing investigation had submitted the charge sheet.

24. During cross-examination he had admitted that charge sheet was not submitted against appellants Jangal Chaurasia and Bishun Narayan Sah. Then his attention has been drawn towards contents of FIR which certainly appears to be legally not entertainable because of the fact that he does not happens to be the maker of the same. At para-17 he had admitted that he had not seized the lantern as an exhibit. Further he had disclosed that the torch belongs to him but he had not seized it for the purpose of its being exhibited. In paras-18, 19 and 20 there happens to be contradiction with regard to statement of Daya Ram Mahto as also with regard to non-mentioning of names of accused Jangal and Bishun Narain. However his other part of evidence including disclosure of oral dying declaration is not found properly placed in consonance with evidence of P.W. 3 Para-10. He had also denied the suggestion of the defence that from the junction i.e. crossing the place of occurrence was not visible. He further admitted that he had not investigated the point whether on the alleged date and time of occurrence the school was open or not.

25. P.W. 8 Rabindra Prasad Singh happens to be formal in nature and had exhibited the plaint of Title Sunit No. 11 of 1988 filed by brother of one of the accused Ram Udgar as well as show cause filed on behalf of accused Ram Udgar in a 107 Cr.P.C. proceeding.

26. From the evidence as discussed above, it is evident that the prosecution through the evidence of PW-3 and PW-4 in particular had claimed to prove its case with regard to assault made over person of deceased Raja Ram on 31.01.1986 at 04:00 P.M. on Kacchi Road near Chandadih Upper Primary School by means of firing of appellant Kaila @ Sachidanand. It is also evident from the nature of evidence adduced on behalf of prosecution that only two witnesses that means to say P.W. 3 and P.W. 4, the son and father respectively claimed to be eyewitness to the occurrence arraying the appellant Kaila responsible for committing murder of deceased Raja Ram. After scrutinizing the evidence of I.O., it is however evident that P.W. 3, Daya Ram Mahto had not named appellants accused Jangal Chaurasia as well as Bishun Narain though their names were mentioned in the written report i.e. FIR. It is also evident from the deposition of P.W. 3 and P.W. 4 that they are also inconsistent on the following points:-

a) While P.W. 3 had disclosed that they remained at the place of occurrence for about one and half an hour, P.W. 4 had disclosed that they remained only for ten minutes.

b) As per evidence of P.W. 3 the deceased was lifted from place of occurrence on rickshaw to Bhagwanpur from where he was carried to Padari Hospital on jeep while the P.W. 4 had disclosed that deceased was straightway taken away on a jeep to Padri Hospital.

c) P.W. 3 had narrated that he along with deceased was coming jointly after inspecting chilly field while P.W. 4 had disclosed that while firing was made over Raja Ram, his son Daya Ram PW-3 was coming from by the side.

27. The informant P.W. 4, as it appears had developed its story with regard to motive in the background of divulgence of the fact by P.W. 3 that there was theft in the shop of accused Kaila wherein hands of deceased was suspected. In likewise manner though the informant P.W. 4 denied to have purchased land from accused Ram Udagar in name of his wife which the defence had controverted by bringing Exhibit-B, the sale deed.

28. Presence of oral dying declaration which as per P.W. 3 happens to be that Raja Ram had disclosed is not at all found in same way from the evidence of P.W. 4 who at first count said but had further said So there is also inconsistency in exact wording of oral dying declaration. Moreover, defence had tried to place that the evidence of PW. 3 happens to be development on this score, and, P.W. 6, in Para 20 of his evidence did not support PW-3 on this score.

29. These are infirmities appearing from the record and thus the case of the prosecution has to be considered in a more cautious manner to come to the just,

legal and right conclusion. From the evidence as culled out as well as from the suggestion given by the appellant, there is no doubt or hitch to accept the inter se relationship amongst the prosecution party as well as the fact that they were having strained relationship and inimical for a long period. Enmity, has been labelled as a double edged sword. It can be a cause for false implication and in likewise manner it can also be a cause for commission of the occurrence. That means to say in the background of enmity persisting amongst the parties, the evidence are to be dealt with more cautiously as well as minutely to infer as to which of the two probability, as disclosed above is possible.

30. In the case of Dr. Sunil Kumar Sambhudayal Gupta and Others Vs. State of Maharashtra, the theme of material contradiction has been elaborately dealt with by the Apex Court wherein after taking into account the earlier decisions it has been held that:-.

30. While appreciating the evidence, the court has to take into consideration whether the contradictions/omissions had been of such magnitude that they may materially affect the trial. Minor contradictions, inconsistencies, embellishments or improvements on trivial matters without effecting the core of the prosecution case should not be made a ground to reject the evidence in its entirety. The trial court, after going through the entire evidence, must form an opinion about the credibility of the witnesses and the appellate court in normal course would not be justified in reviewing the same again without justifiable reasons. (Vide State v. Saravanan (2008) 17 SCC 587)

31. Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide State of Rajasthan v. Rajendra Singh (2009) 11 SCC 106)

32. The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt. (Vide Mahendra Pratap Singh Vs. State of Uttar Pradesh, .)

33. In case, the complainant in the FIR or the witness in his statement u/s 161 CrPC, has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded. (Vide State v. Sai (2208) 15 SCC 440.)

34. In State of Rajasthan v. Kalki, while dealing with this issue, this Court observed as under: (SCC p. 754, para 8)

8. ... In the depositions of witnesses there are always normal discrepancies

however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person.

35. The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (See *Syed Ibrahim Vs. State of Andhra Pradesh*, and *Arumugam v. State* (2008) 15 SCC 590.)

36. In *Bihari Nath Goswami Vs. Shiv Kumar Singh and Others*, this Court examined the issue and held: (SCC p. 192, para 9)

P. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.

37. While deciding such a case, the court has to apply the aforesaid tests. Mere marginal variations in the statements cannot be dubbed as improvements as the same may be elaborations of the statement made by the witness earlier. The omissions which amount to contradictions in material particulars i.e. go to the root of the case/materially affect the trial or core of the prosecution case, render the testimony of the witness liable to be discredited.

31. That means to say material contradictions are those contradictions or omissions which could materially adversely affect the root of the case or would jeopardise the veracity of the evidence of the PWs over its credibility, truthfulness and further on account thereof, an attempt has been made to develop the prosecution case inconsonance with its inception on material aspect. In the backdrop of aforesaid settled principle of law while there would be no difficulty in holding that PW-4 the informant stood contradicted on the major issue of manner of assault and his evidence read in isolation does not inspire confidence but then the evidence of PW-3 by and large has remained satisfactory either on the issue of place of occurrence or manner of occurrence. Only embellishment made by PW-3 as with regard to naming appellants Jangal Chaurasia and Bishun Narayan Sah whom he did not name before the police cannot totally obliterate his other part of evidence. Thus, even if PW-4 is to be disbelieved as an eyewitness, the testimony of PW-3 as an eyewitness definitely inspires confidence. As noted above the dying declaration introduced by PW-4 informant was his innovation for becoming an eyewitness but the evidence of PW-3 cannot be altogether rejected if in his evidence in the court he had tried to support the story of dying declaration. The evidence of PW-3 in fact can survive by applying the principle of segregating chaff from the grain as was also held in the case of *Sucha Singh and Another Vs. State of Punjab*, wherein it was held as follows:

Even if major portion of evidence of a witness is found to be deficient, in case

residue is sufficient to prove guilt of an accused, it is the duty of Court to separate grain from chaff. Falsity of particular material witness or material particular would not ruin it from the beginning to end. The maxim "falsus in uno falsus in omnibus" has no obligation in India and the witness cannot be branded as a liar. In case this maxim is applied in all the cases it is to be feared that administration of criminal justice would come to a dead stop. Witnesses just cannot help in giving embroidery to a story, however, true in the main. Therefore, it has to be appraised in each case as to what extent the evidence is worthy of acceptance, and merely because in some respects the court considers the same to be insufficient or unworthy of reliance it does not necessarily follow as a matter of law that it must be disregarded in all respects.

32. As with regard to discrepancies in the investigation, the presence of rickshaw puller as well as driver of jeep consequently became visible as the deceased was lifted to Padari Hospital thereupon but during course of investigation, the I.O. failed to search out those two persons and got their statement during course of investigation. It is further evident that the place of occurrence was visited only once by the Investigating Authority that too on 31.01.1986 at about 09:30 P.M. The visibility of place of occurrence from crossing i.e. from junction of road where PW-4 was stationed without any obstacle could also be perceived by I.O. surprisingly at that moment in the night.

33. Not only this, although from the First Information Report, it is evident that informant had already mentioned the fact that deceased was carried to Padari Hospital where his dead body was retained by the doctor on the ground of holding of postmortem but the Investigating Officer did not care to visit Padari Hospital, Mokama or to contact the police officials of Mokama Police Station who had held inquest and sent the dead body of deceased for postmortem. How the postmortem report was transmitted by Mokama Police to him has also not been explained and in fact there is absence of any information on this score in the entire evidence on record.

34. Admittedly, from the facts referred in foregoing paragraph, it is evident that there happens to be lapses on the part of the Investigating Authority during course of investigation. It is strange that the I.O. was not at all cross-examined on some of the aforesaid vital aspects, more particularly, with regard to his non-examination of the rickshaw puller, the driver of the jeep, not being in contact with the Mokama police officials as well as not going to the Padari Hospital and thus those things cannot be now taken on record for drawing any adverse inference against prosecution. With regard to non-seizure of torch as well as lantern, by the IO will also not cause any deficiency in the prosecution case in the background of the fact that none of the witnesses had claimed identification by such torch or lantern nor the place of occurrence has been in any way shifted to other place. Only the inspection of place of occurrence was made by IO in the light of lantern and torch and so non-seizure thereof, is not going to cause any sort of fatal infirmity in the case of the prosecution as neither the death of Raja

Ram by means of firearm is in controversy nor there is any uncertainty in ocular evidence over the place of occurrence.

35. With regard to failure/deficiency in the investigation of the case by the Investigating Authority and its effect on prosecution case has been taken into consideration by the Hon''ble Apex Court in the case of Ram Bihari Yadav Vs. State of Bihar and Others, , Surendra Paswan Vs. State of Jharkhand, , Amar Singh Vs. Balwinder Singh and Others, and recently in case of Sheo Shankar Singh Vs. State of Jharkhand, 2011 (3) PLJR SC 212. wherein the Apex Court after considering the aforesaid earlier decisions in para-42, had held that:-

Any such deficiency does not necessary lead to the conclusion that the prosecution case is totally unworthy of credit. Deficiencies in investigation by way of omissions and lapses on the part of investigating agency cannot in themselves justify a total rejection of the prosecution case.

Considering this very aspect of lapses in investigation the Apex Court in State of Karnataka Vs. K. Yarappa Reddy, had held as follows:-

19. ... It is well-nigh settled that even if the investigation is illegal or even suspicious the rest of the evidence must be scrutinized independently of the impact of it. Otherwise the criminal trial will plummet to the level of the investigating officers ruling the roost. The court must have predominance and pre-eminence in criminal trials over the action taken by investigating officers. Criminal justice should not be made a casualty for the wrongs committed by the investigating officers in the case. In other words, if the court is convinced that the testimony of a witness to the occurrence is true the court is free to act on it albeit the investigating officer's suspicious role in the case.

36. While it is true that the investigation in a criminal case has to be conducted in a fair and impartial manner as was also held by Apex Court in the case of Mohd. Imran Khan Vs. State (Govt. of NCT of Delhi), the Apex Court, while:-

31. The investigation into a criminal offence must be free from all objectionable features or infirmities which may legitimately lead to a grievance to either of the parties that the investigation was unfair or had been carried out with an ulterior motive which had an adverse impact on the case of either of the parties. The investigating officer is supposed to investigate an offence avoiding any kind of mischief or harassment to either of the party. He has to be fair and conscious so as to rule out any possibility of bias or impartial conduct so that any kind of suspicion to his conduct may be dispelled and the ethical conduct is absolutely essential for investigative professionalism. The investigating officer "is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real unvarnished truth.

but then this Court in the facts of the present case will have no difficulty in holding that on account of aforementioned infirmities in the investigation, the prosecution case as a whole cannot be rejected because whatever mistakes have

been committed by the Investigating Officer in course of investigation do not materially much less adversely affect the prosecution case.

37. With regard to plea of non-examination of independent witnesses and further whoever were examined, had turned hostile it has to be recorded the same does not affect the prosecution case, more particularly, in the background of the fact that both the parties that means to say the prosecution as well as appellant/accused were admittedly at logger heads since before. This aspect has properly been explained by Apex Court in the case of Appabhai and Another Vs. State of Gujarat, , wherein it was held that:-

11.....Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether -in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability, if any, suggested by the accused. The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The Court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner. In Rana Partap and Others Vs. State of Haryana, O. Chinnappa Reddy J. speaking for this Court succinctly set out what might be the behaviour of different persons witnessing the same incident. The learned Judge observed (at p. 330) (of SCC : (at 682 of AIR) :

Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counterattacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.

38. In the backdrop of aforesaid settled position in law under the guidelines and principle as propounded by the Apex Court when the evidence on record is taken together, it is evident that the presence of P.W. 3 as an eyewitness to occurrence has not been shaken, specially when the defence had escaped to cross-examine this witness on material points. As such the status of PW-3 as an eyewitness to occurrence is beyond any pale of doubt. The only criticism against him of being

his tender age and thus affecting the status of this witness cannot be accepted specially when he had faced the cross-examination for days together and stood firm almost on material aspects and from the tenor of his answers it is quite clear that he had appreciated the thing in a proper way and thus his evidence inspires confidence of his being a truthful eye witness to the occurrence and such evidence of a truthful child witness can not be altogether brushed aside on the ground of age inasmuch as Section 118 of Evidence Act itself recognizes the status of a child witness.

39. Nonetheless, his evidence is also to be looked into carefully to search out as to whether there happens to be same sort of material development. The only deficiency in the evidence of PW-3 on this score is his naming of appellants/accused Jangali and Bishun Narain Sah who appear to have been pulled in at the behest of his father PW-4. In likewise manner there happens to be his story developed over oral dying declaration although the same had not properly been flashed by him in his statement before the I.O. as may be found from the evidence of P.W. 6 in Para-20. The aforementioned limited embellishment in the evidence of PW-3 however cannot mean that his entire evidence as an eyewitness is fit to be rejected. Reference in this connection may usefully be made to the judgment of Sukhdev Yadav and Others Vs. State of Bihar, wherein it was held:

It is indeed necessary however to note that there would hardly be a witness whose evidence does not contain some amount of exaggeration or embellishment, sometimes there would be a deliberate attempt to offer the same and sometimes the witnesses in their over anxiety to do better from the witness box details out an exaggerated account.

40. Thus, this Court while accepting the evidence of PW-3 as an eyewitness would not accept PW-4 as a truthful witness because after going through the entire evidence his testimony does not inspire confidence of his being an eye witness to occurrence and in fact that happens to be also the reason behind his introduction of oral dying declaration of the deceased. Non presence of oral dying declaration in the statement of PW-3 who brought it for the first time under main stream only during course of trial has made the authenticity of oral dying declaration under theme of distrust as well as being ambiguous, specially when there also happens to be inconsistency between them. In this regard it is pertinent to refer to the judgment of Apex Court in the case of Waikhom Yaima Singh v. State of Manipur reported in 2012 Cr.L.J. 2673.

15. There can be no dispute that dying declaration can be the sole basis for conviction, however, such a dying declaration has to be proved to be wholly reliable, voluntary, and truthful and further that the maker thereof must be in a fit medical condition to make it. The oral dying declaration is a weak kind of evidence, where the exact words uttered by the deceased are not available, particularly because of the failure of memory of the witnesses who are said to have heard it. In the present case also, the exact words are not available. They

differ from witness to witness. Some witnesses say about the name of the village of the appellant having been uttered by the deceased and some others do not. Further, Dr. Ningombam Shyamjai Singh (PW-12) was also not cross-examined by the Public Prosecutor in this case about the medical condition of the deceased and further fact as to whether he was in a fit condition to make any statement. Last, but not the least, though the witnesses claimed to have reported to L. Ningthouren Singh (P.W. 14) about such dying declaration and the name of the assailant, there is no reflection of the name in the FIR.

41. Thus the evidence of PW-4 as an eyewitness for the reasons disclosed above does not merit acceptance leaving it to be a case of single eyewitness i.e. P.W. -3. Law however does not require counting the number of witness to have the fact proved rather it depends on credit worthiness of the witness as is also the mandate of Section 134 of the Evidence Act. However, courts are at liberty to seek for corroboration in case there is some doubt about the sole testimony. The time honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. It is, therefore, open to a competent court to fully and completely rely even on a solitary witness and record conviction.

42. As observed above, the evidence of P.W. 3 is found credit worthy and thus can be relied upon. Consequent thereupon, the case of prosecution is found proved against appellant Sachchidanand Sah @ Kaila Sah as well as Ram Padarath Chaurasia @ Sukan Chaurasia and to that extent finding of the learned trial court is confirmed. As such these two appeals relating to Sachchidanand Sah @ Kaila Sah as well as Ram Padarath Chaurasia @ Sukan Chaurasia are dismissed. They are on bail and as such their bail bonds are cancelled with a direction to them to surrender before the trial court to serve out their sentences as recorded by the trial court. With regard to appellants Jangal Chaurasia and Bishun Narayin Sah, the nature of evidence as discussed above have entitled them to avail the privilege of benefit of doubt. Accordingly, judgment of conviction and sentence recorded by the learned trial court to that extent is set aside and the two appeals to that extent is allowed. They are on bail and therefore they would now also stand discharged from liability of their bail bonds.