

(2009) 11 OHC CK 0058
In the Orissa High Court
Case No : CRA No"s. 12 and 23 of 2002

Mansoor Saha and Others

APPELLANT

Vs

Ramesh Chandra Giri ' Ramesh Giri and Others

RESPONDENT

Date of Decision : 06-11-2009

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 157, 159, 161, 174
Explosive Substances Act, 1908 — Section 7
Penal Code, 1860 (IPC) — Section 302, 34, 394, 396, 457

Citation : (2009) 11 OHC CK 0058

Hon'ble Judges : S.K. Mishra, J;P.K. Tripathy, J

Bench : Division Bench

Advocate : R.K. Pattanaik, S.C. Puspalka, S.S. Jena, M.C. Mohanty, A.N. Sarnantaray, K. Patil, S.S. Samal, Sourya Ch. Mohapatra, N. Swain, P.K. Beura, R. Agrawal, M. Beura, P. Mohapatra, R.K. Ray, Rabi Narayan Nanda, M.C. Mohanty, S. Sahoo and R.N. Panda, for the Appellant;

Final Decision : Dismissed

Judgement

S.K. Mishra, J.—The Appellants having been convicted for the offence under Sections 302/34, Indian Penal Code, 1860, have assailed the conviction and sentence passed by the Learned 2nd Addl. Sessions Judge; Cuttack in S.T. No. 605 of 1998,

2. The prosecution case in short is that the deceased-Badurzamal Saha, his wife deceased-Aina Bibi along with their children were residing in village Ganeswarpur within the jurisdiction of Tangi Police Station. Accused Namdar Saha and his sons are the front door neighbours of the said Badurzamal. The accused Ramesh Giri is a resident of that village but his house situates at a little distance from the house of accused and the deceased persons. Khairuzamal Saha-informant (P.W. 8), Sk. Shoban, deceased Lailoon Biwi, Pyari, Asmani Saha (P.W.1) are the children of late Badurzamal and his wife Aina Bibi.

3. In the fateful night of 24/25.4.1998 at about 12.30 A.M. informant as well as

the other members of family of Badurzamal had gone to sleep after having dinner. Some dacoits entered into his house. The informant's younger brother (Sk. Soban) was sleeping outside the house. The dacoits tied him by means of a rope. He raised cries, hearing which, the informant's mother Aina Bibi (deceased) opened the door. Suddenly one of the accused pierced a "Bhujali" into the belly of Aina. She cried aloud, hearing which, deceased Badurzamal Saha came and intervened. The culprits tackled him and also dealt blows by "Bhujali" on his head and neck. Hearing the cries of his parents, the informant who was sleeping in his room, came out and raised shouts by going to a nearby room. The culprits thereafter dragged him by giving kick blows. By then the informant could hear his father deceased Badurzamal saying; "AARE NAMDAR TU KAN MARI DABU". The culprit replied; "BANSA LOPA KARI DEBAKU ASICHI". Badurzamal told the informant that Namdar and his two sons killed him. Saying so, he breathed his last. The culprits also further assaulted the informant's sister, brother, after which, they removed cash, gold/silver ornaments and watches from his house. The dacoits exploded bombs in order to terrorise the inmates and co-villagers. Out of those culprits, informant could recognize accused Namdar and Mansoor Saha who while going away, told him that due to his good luck, he could survive and one day he (informant) will be murdered.

4. The conditions of the deceased Aina Bibi, Asmani Saha (P.W. 1), sister-Lailoon Bibi and Pyari Bibi were very serious. Informant sent them to hospital for treatment.

5. In the meantime, the O.I.C., Tangi P.S. (P.W. 18) received a telephonic message regarding the law and order situation in the case village, Ganeswarpur, for which he made a Station Diary entry No. 254/98 by informing the same to the Superintendent of Police, Cuttack for deputation of Scientific Team. He proceeded to the spot. At the spot he received a written report (Ext.5) from informant-Kairu Zamal Saha, treated the same as F.I.R., examined him, visited the spot along with Scientific Team and Dog Squad, prepared the sketch map, held inquest over the deadbody of deceased Badurzamal Saha, prepared the inquest report and dispatched the deadbody for post-mortem examination. He also seized the material objects from the spot. He visited the Surgical Ward of S.C.B. Medical College and Hospital, Cuttack and found Aina Bibi, Lailoon Bibi, Pyari Bibi and Asmani to have been admitted as indoor patients. Finding the condition of Aina Bibi to be very critical, the Investigating Officer requested the doctor Pramod Kumar Mallick (P.W. 15) to record the Dying Declaration of Aina Bibi who was under his care and treatment. The doctor Pramod Kumar Mallick recorded the Dying Declaration of the said Aina Bibi. In such Dying Declaration, deceased Aina Bibi implicated all the accused persons who were responsible for causing her death. Lailoon Bibi and Aina Bibi succumbed to their injuries on 26.4.1998 and 28.4.1998 respectively. On 29.4.1998 the I.O. arrested all the four accused persons. The investigation was later over taken up by the C.I., Rudra Kumar Samal (P.W.16) and was completed by P.W. 17-Shri Jayadeb Sarangi. Jayadeb Sarangi submitted the charge-sheet against the accused

persons.

6. Originally the charges were framed for the offences under Sections 457/396/34 I.P.C read with Section 9 of the Explosive Substances Act, 1908. But at the time of hearing of arguments, the Trial Court having found the charges to be defective, on 9.10.2001 altered the same and framed charges under Sections 394/302/34 Indian Penal Code read with Section 9 of the Explosive Substances Act, 1986. After such framing of charge, on the prayer of the defence, P. Ws. 1 to 4, 8, 16 and 18 were recalled for further cross-examination and on 15.11.2001, 19.11.2001 and 10.12.2001 all such witnesses, whose further cross-examination were sought by the defence, were further cross-examined and discharged.

7. The plea of the defence is of denial. The accused Namdar and his sons have pleaded that they have been falsely implicated in this case due to their long standing land dispute with the deceased. The accused Ramesh Chandra Giri while denying his participation in the alleged incident, has taken the further plea that as he was a rising politician in the locality, his rivals by influencing the I.O., have implicated him in this false case to spoil and distort his image as a political leader.

8. In order to prove its case against the accused persons, prosecution examined eighteen witnesses and relied on several exhibits and one material object.

P.W. 8-Khairu Zamal Saha is the informant in this case. Informant, P.W.1-Asmani Saha, P.W.2 - Jahara Bibi, P.W. 3-Rahaman Saha and P.W.4 - Sk. Sobhan are the inmates of the case house and figured as eye-witnesses to the occurrence. P.W. 5-Abdul Latif Saha, P.W.6-Hossain Saha are the neighbours of the informant. P.W.7-Rahimuddin Saha is the rickshaw puller who carried the injured persons to the clinic at Chhatia. P.W. 10-Sk. Abdul is the son-in-law of deceased Baidur Zamal Saha and is a witness to the Dying Declaration of deceased Aina Bibi. P.W. 11-Sura Chandra Mallick is the Grama Rakshi of the village. The rest of the witnesses are official witnesses. P.W. 9-Smt. Nirupama Sethi, ASI, held the inquest of the dead body of deceased-Lailoon Bibi. P.W. 12-Krushna Chandra Das, the Record Keeper of S.C.B. Medical College and Hospital, Cuttack has produced the head-head ticket of the injured Asmani Saha. P.W. 13-doctor Nihar Ranjan Nanda had conducted operation on the brain of the injured Asmani Saha (P.W.1). P.W. 14-doctor Jitendra Kumar Balabantaray had conducted post-mortem examination on the dead bodies of deceased Badurzamal Saha, Lailoon Bibi and Aina Bibi and prepared the Exhibits 10,11 and 12 the respective post-mortem reports. P.W. 15-Dr. Pramod Kumar Mallick, on police requisition, recorded the dying Declaration of deceased Aina Bibi. P.W. 18 Sujogya Kumar Misra, P.W.16-Rudra Chandra Samal and P.W.17-Jayadeb Sarangi are the Investigating Officers in this case, Defence has not examined any witness in this case but has relied upon the extracts of the Station Diary Entry bearing No. 462 dated 25.4.1998 which was prepared by A.S.I., B.S. Balabantaray.

9. Learned Trial Court after careful examination of the evidence led on behalf of the prosecution, keeping in view the defence case suggested, has come to the

conclusion that the prosecution failed to prove its case under Sections 394 Indian Penal Code and u/s 7 of the Explosive Substances Act and acquitted the accused of those charges. Further relying upon the evidence of the eye-witnesses, including the evidence of the child witness, as corroborated by medical evidence, dying declaration, the Trial Court has come to the conclusion that the prosecution has proved its case beyond all reasonable doubts that the convicts-Appellants have committed the murder of Badurzamal Saha, Lailoon Bibi and Aina Bibi and, therefore, proceeded to convict all the Appellants under Sections 302/34 Indian Penal Code and sentenced them to undergo imprisonment for life.

10. In course of hearing of this appeal, Learned Counsels appearing for the convict-Appellants have assailed the conviction on the following grounds:

- i. it is alleged that though the F.I.R. was lodged on 25.4.1998, the same was not dispatched to the Court immediately and after two days it was placed before the Magistrate having jurisdiction;
- ii. there is no immediate motive to commit the offence in this case;
- iii. the fact that the investigating agencies sought assistance of the trekker dog squad, creates doubt that the authors of crime were not known till the FIR was lodged;
- iv. one of the Appellants; namely, Ramesh Chandra Giri, is a signatory to the inquest report of the dead body of Badurzamal Saha, was examined as a witness by the I.O.; his subsequent implication, creates doubt about the veracity of the prosecution case;
- v. existence of light in the spot house is very much doubtful in view of the specific evidence of P.W.4 that the culprits were holding torch and they had focused the same on his face;
- vi. though the informant and injureds and the accused were co villagers they were not identified by the inmates;
- vii. the evidence of child witness, recorded long after the occurrence, is risky;
- viii. the dying declaration could not be relied upon, the evidence of eye-witnesses are not above reproach, major part of the evidence were disbelieved by the Learned lower Court;
- ix. non-examination of the independent material witnesses including one injured witness Pyari Bibi and not reflecting the name of eye witnesses in the inquest report, cause a serious doubt on the prosecution.

11. Learned Government Advocate on the other hand has supported the findings recorded by the Learned Trial Court and has argued that the technicalities should not come in the way of the Court to punish the guilty when the guilt of the Appellant have been brought home with certainty.

12. In this case the findings of the Learned Lower Court that the deaths of the

three deceased were homicidal in nature have not challenged by the defence. On examination of the evidence of P.W. 14 Dr. Jitendra Kumar Balabantaray shows that he had conducted post-mortem examination on Badurzamal Saha on 25.4.1998 at about 2.45 P.M.. Ext. 10 is the post-mortem, examination report thereof. The doctor opined that the cause of death was due to shock and hemorrhage causing the injury sustained by him. The time of post-mortem examination since death was fixed A. 12 to 15 hours. Evidence of P.W. 14 further reveals that he conducted post-mortem examination on the dead body of Lailoon Bibi on 27.4.1998 at about 1.30 P.M.. Ext.11 is the post mortem report, the cause of death is opined to be due to carnio cerebral injuries resulting in shock and hemorrhage. The time of post-mortem examination since death was fixed to 18 to 24 hours. The evidence of P.W. 14 further reveals that he conducted post-mortem examination on the dead body of Aina Bibi on 28.4.1998 at 3 P.M. He opined the cause of death due to shock and hemorrhage due to the injuries. He has opined that the injuries found on the persons of the deadbodies were ante-mortem in nature. The injuries were sufficient to cause death in the ordinary course of nature. Hence, the findings of the Learned Trial Court that the death of the deceased persons were homicidal in nature, requires no interference.

13. Coming to the first contention raised by the Appellants, it is seen that the F.I.R. was lodged on 25.4.1998 at about 8.30 A.M. at the spot. The F.I.R. reveals that the same was dispatched from the Police Station on 25.4.1998. It is seen that the Learned J.M.F.C., Banki has seen the F.I.R. on 27.4.1998. On the basis of this, Learned Counsel for the Appellants submitted that the F.I.R. was dispatched long after its lodging and, therefore, possibility of false implication after due deliberation cannot be ruled out. However, though P.W. 18 was cross-examined at length and in fact after recast of the charges, though he was further cross-examined by the defence, not a single question has been asked as to why the F.I.R. was placed before the Learned Magistrate on 27.4.1998. Furthermore, the Hon"ble Apex Court in Mohammad v. State of U.P. (2007) 14 SCC 16 has examined the provision of Section 157 of the Code of Criminal Procedure, 1973 (hereinafter referred to as "Code" for brevity) and held that the said provision is designed to keep the Magistrate informed of the investigation of such cognizable offence so as to enable him to control the investigation and if necessary to give appropriate direction u/s 159 of the Code. It further held that where the F.I.R. has shown as actually been recorded without delay and the investigation started on the basis of F.I.R., delay in sending the report to the Magistrate cannot by itself justify the conclusion that the investigation was tainted and the prosecution insupportable. The Apex Court further ruled that the delay contemplated u/s 157 of the Code, for doubting authenticity of the F.I.R. is not every delay but only extra-ordinary delay and unexplained delay. Observing that there are various authoritative pronouncements on the subject and the law is well settled that the delay in dispatch of the F.I.R. by itself is not a circumstance which can throw out the prosecution case in its entirety particularly in case where the prosecution provides cogent and reasonable explanation for the delay in dispatch of the F.I.R.

the Apex Court refused to give weight to the defence contention.

Similar view has been taken by the Apex Court in Ashok Kumar Pandey Vs. State of Delhi, .

It is further seen from the evidence on record that at the initial stage, when the O.I.C., Tangi P.S. received information about the law and order situation at Ganeswarpur, he proceeded thereto. Thereafter at the spot he received the F.I.R. from the informant, i.e., P.W. 8 and he has mentioned in the formal F.I.R. that he has dispatched it on the very date, i.e., 25.4.1998. Keeping the totality of facts in this case, it cannot be held that there is delay in dispatch of F.I.R. and late receipt of the same in the Court has cast a doubt on the prosecution case.

14. The next question raised by the Learned Counsel for the Appellants is that there is no immediate motive for commission of this offence. There is no dispute in this case that there was long standing land dispute between the family members of the informant and the accused persons. In fact it is the plea of the accused persons that due to long standing land dispute, they have been falsely implicated in this case. Plea long standing dispute and prior enmity is, in fact, a double edged weapon which cuts both ways. Defence may take the plea of false implication and the prosecution shall base upon it to provide the motive for the offence. Be that as it may, the Supreme Court in Raghbir Singh v. State of Punjab reported in (1996) SCC 233 237 has held that even in absence of motive, guilt of the accused can be established in a given case if the other evidence on record is trustworthy and the absence of proof of motive can not possibly be considered as fatal to the prosecution case where the ocular evidence is reliable.

15. In the reported decision of Mulakh Raj, etc. Vs. Satish Kumar and others, , the Apex Court has observed that motive always locks up in the mind of the accused and some time it is difficult to unlock. People do not act wholly without motive. The failure to discover the motive of an offence does not signify its non-existence.

16. The failure to prove motive is not fatal as a matter of law. Proof of motive is never an indispensable for conviction. When facts are clear it is immaterial that no motive has been proved. Therefore, absence of proof of motive does not break the link in the chain of circumstances connecting the accused with the crime, nor militates against the prosecution case. Thus it is clear that the Supreme Court has consistently viewed that proof of motive is not essential to record a conviction in a criminal case even if the case is based entirely on circumstantial evidence. In this case prosecution has examined the eye-witnesses. If their evidence is found to be reliable then absence of immediate motive by itself will not cast any doubt on the prosecution case.

17. Learned Counsel for the Appellants also stressed on the seeking of assistance of the Tracker Dog by the Investigating agency. Learned Counsel has submitted that such an act by the Investigating agency create a doubt that the authors of the crime were not known till lodging of the F.I.R. Firstly it is seen from the F.I.R.

names of three accused-Appellants; Namodar and two sons have been mentioned. It is not the case that the F.I.R. has been lodged against unknown persons. Evidence regarding the leading of a Tracker dog is inadmissible as evidence. Such Tracker dogs are used only to help the investigation not only to identify suspects but also to identify the stolen articles from different places of concealment. In this case, the prosecution alleged that cash and ornaments were stolen from the house of the deceased. So use of Tracker dog in no way can indicate that the assailants were not known at the time of beginning of investigation. Furthermore, the I.O. has clarified in the cross-examination that requisition for dog tracking is made whenever physical evidence is available during investigation of the case. Thus this contention raised by the Learned Counsels for the Appellants also falls to ground.

18. Learned Counsel for the Appellants has argued on the question of identification of the accused persons as well as the veracity of the eyewitnesses in this case. It is argued that the evidence on record in the shape of eye-witness is not believable. It is further argued that the evidence of child witness-P.W.1 which was recorded u/s 161, Code of Criminal Procedure long after the occurrence, is very risky. It is further argued that in the inquest report the names of eye-witnesses and the accused persons have not been mentioned. Hence it is submitted that the Learned Trial Court has erred in coming to the conclusion that the prosecution has failed to prove its case beyond all reasonable doubt. Evidence of P.W. 8-Khairu Zamal Saha shows that on 24.4.1998 at midnight at about 12.30 O'clock while he was sleeping in the house, he heard hue and cry for which he opened the door and came to the verandah. He found that about 8 to 10 persons assaulting the family members in the said room of his house. His house consist of one "Khanja" having two rooms in one side while other three rooms are in the other side. He shouted for his neighbour Kanhei (P.W. 5) through the window. While shouting, some of the culprits caught hold of him and pushed him aside. The said culprit had insisted on others to assault him. That place was completely a dark place. He concealed himself under the "Amar" which was closed to front door. He saw through that place that accused Namodar was holding a torchlight in one hand and a "Farsa" in the other. Accused Mansoor was holding a bhujali. He heard the alarming sound of his father who was saying "NAMODAR TU KANA MOTE MARIDEBU?" By that time the P.W. 8's father was assaulted brutally who leaned at the wall near the veranda. At that time Aina Bibi was shouting from the house for his neighbour Kanhei (P.W.5). The villagers were also making "hullah" outside. By that time there was blasting of bombs. The culprits were also assaulting Asmani Saha, Lailoon Bibi and Pyari Bibi. He has categorically stated that accused Naiman Saha was assaulting them which he has seen. Some persons who were wearing half pants, rushed into the room where he was sleeping. But he could not identify them. The witness has further stated that his father in an agonizing voice told him that he was assaulted by the accused Namodar and his group. His father also told him that his mother was also assaulted by them. While the witness was giving water to his father, he

succumbed to the injuries. By that time his younger brother Sk Sobhan and other villagers came there. Sobhan shifted the injured persons including his mother to the hospital. The witness was told by his wife Jahara Bibi that culprits have taken away valuables. He has stated that he lodged the F.I.R. Police held inquest over the dead body of his father and this witness has been extensively cross-examined at different stages. He has stated that he knew the accused earlier since his childhood. He stated that the witnesses, namely, Mango Mahammad, Baikuntha Brahma and Ramesh Chandra Giri have signed the Ext.6 in column-9 of the inquest report. He has also stated that he was scared at the time of the occurrence. He has also stated that he has not sworn any affidavit which has been marked as "X" for identification stating that neither Ramesh Chandra Giri was seen by anyone at the time of occurrence nor his mother implicated Ramesh Chandra Giri in connection with this occurrence. In cross-examination he has admitted about the family dispute with Namodar Saha and his sons.

19. Thus it is clear that at the stage of lodging of F.I.R., name of Ramesh Chandra Giri was not mentioned in the F.I.R. It appears that the evidence relating to the involvement of Ramesh Chandra Giri came to fore when the Dying Declaration of the deceased Aina Bibi was recorded. The Dying Declaration was recorded by doctor Pramod Kumar Mallick (P.W.15). He has stated that on 25.4.1998 he was the Assistant Professor, Surgery, S.C.B. Medical College and Hospital, Cuttack. On that day he was in charge of the treatment of the indoor patient Aina Bibi, wife of Badruzamal Saha. On police requisition -he recorded the dying Declaration of Aina Bibi. The patient disclosed her name as Aina Bibi. She also being asked by him, answered that Namodar Saha; his son Mansoor Saha, youngest son Naiman Saha and Ramesh Chandra Giri assaulted her. She also answered that she was assaulted by means of a "Bhujali" and "Farsa". She also told the witness that Ramana and 8 to 10 others assaulted her on her back. The deceased told him that the above-named accused persons assaulted her and her children. Namodar was holding a torch. Witness told that the deceased gave her Dying Declaration in Oriya language and he recorded the same in Oriya in presence of witnesses Sk. Abdula, son of Sk. Hossain and Bipra Charan Prusty, son of Duryodhan Prusty. Ext.7 is the Dying Declaration recorded by him. Ext.7/2 is his signature thereon. The recording was completed at 8.15 P.M.

In cross-examination he has stated that the Dying Declaration does not contain the signature or the LTI of the deceased. The witness has not given any certificate in the said Dying Declaration regarding the state of mind of the deceased and her physical condition. There is no endorsement in the Dying Declaration (Ext. 7) that the statement was read over and explained to the deceased after being recorded. He has not mentioned the bed-head ticket number or any particulars relating to the declarant being admitted in the hospital in the Dying Declaration. No departmental seal has been affixed to the same. He has stated in cross-examination that he did not remember in which language the declarant has given her statement which he recorded in Oriya. He denied the

suggestion that Ext.7 is a created document. He has further stated that he could not say about the presence of any relation of the deceased at the time of recording of the Dying Declaration. Ext.7 discloses that whatever he has stated in his evidence is reflected in the Dying Declaration recorded by him. He has not tried to improve upon it. P.W. 15 is a responsible public Official. He does not have any motive to depose falsehood against the Appellants. So there is no reason to disbelieve him. P.W. 15 is also corroborated by the witness Abdulla (P.W. 10). P.W. 10 has stated that he came to the S.C.B. Medical College and Hospital and found that his mother-in-law Aina Bibi has regained sense. Aina gave out the names before the doctor and stated before the doctor that accused Namodar Saha and accused Ramesh Giri assaulted her (mother-in-law) by means of "Bhujali" and "Farsa". She also stated before the doctor that the accused persons along with 4 to 5 others assaulted the other injured persons. The Learned Counsel for the Appellants has very emphatically argued that there is no endorsement of the doctor that the deceased was in a fit state of mind to make the declaration. However, it is seen from the evidence of the doctor-P.W.15 that absolutely no cross examination was directed regarding the mental capacity of the deceased at the time of making the Dying Declaration. Only after such a question is raised by the defence and the prosecution failed to prove the mental capacity to make a declaration, in clear terms, then only the prosecution shall fail if there is no proof regarding the stable mental condition of the declarant.

The defence has criticised the prosecution case on the ground that the names of the eyewitnesses have not been mentioned in the inquest report. To answer this submission we simply rely on the reported case Khujji alias Surendra Tiwari Vs. State of Madhya Pradesh, , wherein at page 638 the Supreme Court has held:

8. It was faintly submitted by Counsel for the Appellant that the evidence of eye-witnesses could not be relied upon as their names did not figure in the inquest report prepared at the earliest point of time. We see no force in this submission in view of the clear pronouncement of this Court in Pedda Narayana and Others Vs. State of Andhra Pradesh, Referring to Section 174 of the Code of Criminal Procedure this Court observed at page-89 as under:

A perusal of this provision would clearly show that the object of the proceedings u/s 174 is merely to ascertain whether a person has died under suspicious circumstances or an unnatural death and if so what is the apparent cause of the death. The question regarding the details as to how the deceased was assaulted or who assaulted him or under what circumstances he was assaulted appears to us to be foreign to the ambit and scope of the proceedings u/s 174. In these circumstances, therefore, neither in practice nor in law was it necessary for the police to have mentioned these details in the inquest report.

20. The next piece of evidence which comes to play as far as Ramesh Chandra Giri is concerned, is the evidence of P.W. 1, a child witness. At the time of his examination in the Court, he was aged about 10 years old. Learned Addl. Sessions Judge has asked him probing questions and has come to the conclusion

that the witness gives rational answer for which he found to be a competent witness. In the examination-in-chief he has stated that in the night of occurrence at about 9.30 or 10.00 he was sleeping in his house. By that time he heard "GHO GHA" sound and woke up and saw Ramana Giri to be assaulting on the belly of his mother by means of a "Bhujali". When he went near his mother, Ramana Giri assaulted him on his head. He also saw Nam (Namodar) assaulting his father. Tiki was assaulting the two sisters of the witness, namely, Lailoon and Pyari by chasing. The accused persons Mansoor and Naiman were assaulting his father. He has identified all the accused persons standing on the dock. He has been cross-examined extensively. In cross-examination he has stated about the occurrence, to the police. He has stated at paragraph-7 that he had come to Cuttack two to three times. He has come to Court along with his brothers; Khairu and Sobhan. None had tutored him to tell about the same in Court. He had denied the suggestion that he has not seen the occurrence. The defence Counsel has tried to bring out that he was being tutored for deposing falsehood in this case, but he has not succeeded to bring out any material on record to show that actually this witness was tutored by anyone to speak falsehood against the Appellants. Moreover the contention that P.W. 1 was examined long after the incident and his evidence should not be believed is of no consequence in this case because of the fact that he had sustained grave injuries and was operated upon. He could be examined after his discharge from the Hospital. So delayed examination in this case is not of much consequence.

21. From the foregoing discussions it is clear that the Dying Declaration made by late Aina Bibi and the statement of P.W.1 regarding complicity of Ramesh Chandra Giri are complementary to each other and goes long way to prove the case of the prosecution against Ramesh Chandra Giri. Learned Counsel for the Appellant submitted that the prosecution witness has stated regarding complicity one Ramana Giri and not against Ramesh Chandra Giri. However, P.W. 18 at paragraph-21 of his deposition has explained that during his incumbency as O.I.C., Tangi P.S. from 1995 to 1998, he had personal knowledge that accused Ramesh Chandra Giri was also called Ramana Giri as he had several acquaintances with him because he was involved in politics. Thus there is no escape from the conclusion that the prosecution has amply proved that the accused Ramesh Chandra Giri is also known as Ramana Giri and, therefore, such a contention regarding the identity of the accused is also of no substance.

22. P.W. 2-Jahara Bibi, wife of the informant deposed that on the occurrence night, on hearing "hullah", her husband woke her up to listen the "hullah" and, thereafter, her husband, i.e., P.W. 8 went to the KOTHI GHAR. By then, she was standing near the door. She has seen two persons assaulting his mother-in-law by "Bhujali". She has identified the accused persons to be Ramana Giri and Mansoor in the dock. She has further stated that those persons entered inside her room and took away the ornaments. She further stated that the accused Ramana " Ramesh had Kept a "Bhujali" on her neck and accused Mansoor removed the articles. When the bomb exploded, the culprits fled away. She saw

her father-in-law Badruzamal Saha was lying dead. She also found Aina Bibi had sustained injuries on her belly and the deceased Lailoon Bibi had sustained injury on her head. Pyari Begum and Asmani Saha had sustained injuries. Learned lower Court after examining the evidence of this witness, has held that she withstood the cross-examination of the defence and nothing vital and substantial has been elicited from her in cross-examination to disbelieve her statement made on oath. Learned Trial Court has also examined the evidence of Raheman Saha and Sk. Soban, P. Ws. 3 and 4, extensively and has come to the conclusion that on a close scrutiny of the evidence of these witnesses, it was made out that the weapon of offence used by the Appellants and the location of the injuries caused due to the assault by the weapon in course of occurrence and the assault has been vividly narrated by them. The Learned Trial Court further held that it is the direct evidence of P.W. 3 that accused Namodar Saha and accused Mansoor Saha assaulted Badruzamal by means of "Bhujali" and Naiman Saha " Tiki assaulted Lailoon Bibi and Pyari Begum by means of a "Bhujali". We do not find any material to discredit the evidence recorded by the Learned Sessions Judge in this respect. We also take note of the fact that all these witnesses are inmates of the house and hence they are natural witnesses to the occurrence. Moreover, the presence of injuries on their persons make their presence at the case house (i.e., the spot) all the more certain.

23. Learned Counsel for the Appellants has submitted that the prosecution has failed to establish that there was sufficient light at the spot and, therefore, challenge the identification made by the inmates of the house. The evidence of P.W. 3 at para-1 and P.W. 4 at para-7 shows that the house was electrified and at that time some electric lights were burning. P.W. 4 has stated that the electric light was illuminating inside the house but there was no light outside their house. P.W. 3 has also stated that while he woke up, he saw accused persons Namodar and his son Mansoor was holding a torchlight at the time of the occurrence. It is evident from the materials on record that the occurrence took place for about an hour. The entire incident was not confined to a particular room or a Court-yard. The Learned lower Court has taken note of the reported decision of AIR 2001 2842 (SC) . The Supreme Court in the said case has held that it must be remembered that the incident had taken place in a village. Villagers are accustomed to less light. The Apex Court held that such identifying witnesses have properly identified the culprits. Relying on the reported decision of Kalika Tiwari and others Vs. State of Bihar, , the Apex Court held that the visibility capacity of urban people acclimatized to fluorescent light or, incandescence lamps is not the standard to be applied to villagers whose optical competency is attuned to country made lamps. The Apex Court further ruled that the visibility of villagers is conditioned to such lights and hence it would be possible for them to identify men and matters in such light. This becomes all the more important when the assailants are from the same village. Similar view has been taken by the Apex Court in Machi Singh v. State of Punjab (1993) 3 SCC 470 wherein the light shed by lantern was considered sufficient in identifying the culprits by

witness who belong to rural areas. Applying such standard to this case, it is seen that all the Appellants are from the same village as that of the identifying witnesses. There is material on record to the effect that the village was electrified and when the occurrence took place the lights inside the rooms were on. Such electric lamps of that room must be shedding some light outside also and in that view of the matter, this Court is of the view that in this case identification of the Appellants cannot be doubted because of insufficiency of light and the findings recorded by the Learned Trial Court has to be accepted on this score. The Learned Counsel for the Appellants has pointed out some trivial contradictions and argued that the evidence of the eye-witnesses should not be believed. While appreciating the evidence of the eye-witnesses, the Court should not expect a photographic representation of the details of the incident. *Bharwada Bhoginbhai Hirjibhai Vs. State of Gujarat*, held as follows:

Overmuch importance cannot be attached to minor discrepancies. The reasons are obvious:

(1) By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

(2) Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprised. The mental faculties therefore cannot be expected to be attuned to absorb the details.

(3) The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind, whereas it might go unnoticed on the part of another.

(4) By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape-recorder.

(5) In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess-work on the spur of the moment at the time of interrogation. and one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

(6) Ordinarily a witness cannot be expected to recall accurately the sequence of events which takes place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

(7) A witness, though wholly truthful, is liable to be overawed by the Court atmosphere and the piercing cross-examination made by Counsel and out of nervousness mix up facts, get confused regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of

the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him Perhaps it is a sort of a psychological defence mechanism activated on the spur of the moment.

6. Discrepancies which do not go to the root of the matter and shake the basic version of the witnesses therefore cannot be annexed with undue importance. More so when the all important "probabilities factor" echoes in favour of the version narrated by the witnesses."

24. Similarly in the reported decision of State of Himachal Pradesh Vs. Lekh Raj and Another, , the Apex Court has observed as follows:

The criminal trial cannot be equated with a mock scene from a stunt film. The legal trial is conducted to ascertain the guilt or innocence of the accused arraigned. In arriving at a conclusion about the truth, the Courts are required to adopt a rational approach and judge the evidence by its intrinsic worth and the animus of the witnesses. The hypertechnicalities or figment of imagination should not be allowed to divest the Court of its responsibility of sifting and weighing the evidence to arrive at the conclusion regarding the existence or otherwise of a particular circumstance keeping in view the peculiar facts of each case, the social position of the victim and the accused, the larger interests of the society particularly the law and order problem and degrading values of life inherent in the prevalent system. The realities of life have to be kept in mind while appreciating the evidence for arriving at the truth. The Courts are not obliged to make efforts either to give latitude to the prosecution or loosely construe the law in favour of the accused. The traditional dogmatic hypertechnical approach has to be replaced by a rational, realistic and genuine approach for administering justice in a criminal trial. Criminal jurisprudence cannot be considered to be a utopian thought but have to be considered as part and parcel of the human civilization and the realities of life. The Courts cannot ignore the erosion in values of life which are a common feature of the present system. Such erosions cannot be given a bonus in favour of those who are guilty of polluting society and mankind.

25. These two decisions of the Apex Court shows that the criminal Courts have to adopt a pragmatic approach in appreciating the evidence in criminal cases. Keeping in view the nature of the case where the Appellants entered into the house of the informant while the family members were sleeping, all of a sudden started assaulting everybody which have resulted in a chaotic situation the evidence have to be appreciated. In a situation where some of the witnesses were severely injured and some of the inmates of the house were murdered it is held that there is bound to be some discrepancy in the narration of the eye-witness and in fact such minor discrepancies are natural. A parrot like repetitive evidence would have indicated towards tutoring or the fact that they were deposing by rote. The ratio laid down by the Hon''ble Apex Court in the decision aforesaid, this Court comes to the conclusion that the prosecution has proved its case beyond all reasonable doubt and there is no escape from coming to the

conclusion that the prosecution case has been established beyond all reasonable doubt.

26. In the result, it is held that the Learned Lower Court had properly discussed the evidence on record keeping in view the probability of the defence case, had a perspicacious and correctly oriented view of the entire case and come to a just and proper conclusion and, therefore, there is no scope to interfere with the findings of the Learned Trial Court.

Accordingly the appeals fail and are dismissed.

P.K. Tripathy, J.

I agree.