

(2008) 05 PAT CK 0037

In the Patna High Court

Case No : Death Reference No. 2 of 2006 and Criminal Appeal Nos. 111, 167 and 179 of 2006

Medi Paswan, Ram Bilash Mandal, Bahadur Yadav and Arbind Kumar Rai

APPELLANT

Vs

The State of Bihar
 The State of Bihar Vs Bahadur Yadav

RESPONDENT

Date of Decision : 09-05-2008

Acts Referred:

Citation : (2008) 05 PAT CK 0037

Judgement

Mridula Mishra, J.—Death Reference No. 2 of 2006 has been heard analogous with Criminal Appeal No. 111 of 2006 (Medi Paswan v. The State of Bihar), Criminal Appeal No. 167 of 2007 (Ram Bilash Mandal v. The State of Bihar) and Criminal Appeal No. 179 of 2006 (Bahadur Yadav and Anr. v. The State of Bihar) and are being disposed of by a common judgment and order.

2. The Death Reference is for confirmation of judgment and order, dated 09.01.2006, passed by the Additional Sessions Judge, Fast Track Court, III, Bhagalpur, in Sessions Case No. 149 of 1998, whereby Bahadur Yadav, appellant No. 1, of Criminal Appeal No. 179 of 2006 has been convicted under Sections 302/34 and 379 of the Indian Penal Code and sentenced to death punishment. He is ordered to be hanged by neck till death u/s 302/34 of the Indian Penal Code. Against same impugned judgment, Appeals have been filed by appellants, Bahadur Yadav, Arbind Kumar Rai, Ram Bilash Mandal and Medi Paswan. Appellants, Arbind Kumar Rai, Ram Bilash Mandal and Medi Paswan, have been convicted under Sections 302/34 of the Indian Penal Code read with 379 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5,000/- (rupees five thousand) each u/s 302/34 of the Indian Penal Code. They have, further, been sentenced six months' rigorous imprisonment u/s 379 of the Indian Penal Code. In case of default of payment of fine they have to undergo simple imprisonment for two years.

3. The prosecution case, as unfolded in fardbeyan of informant, Mahohar Paswan

(P.W. 6), dated 17.11.1996, before the Sub Inspector of Police, Lodipur Police Station at 09.45 p.m. is that on the same day at about 06.45 p.m., the informant, Manohar Paswan, was returning to his house. He saw a crowd near Cooperative Bhawan and also came to know that his brother, Shaligram Paswan (deceased) has been apprehended by Constables. He asked one of the Constables, Bahadur Yadav, as to why his brother has been arrested, but no reply was given by him. Shaligram Paswan, who was in custody of Police Constables, told him that his rupees three hundred have been snatched by these Guards. The informant asked Bahadur Yadav and other Guards to get his brother free. On this, the Guard told him that since his brother has made allegation of snatching of rupees three hundred by them therefore, they would not let him free rather he will be produced before "Bada Babu". The informant, thereafter, returned to his house telling the Constables that if they do not want to let his brother to go, he himself will meet the Officer-in-Charge when he comes. The informant returned to his house and after changing dress, again, proceeded for Cooperative Bhawan to see his brother. When he had moved a little distance ahead of his house, he met co-villager, Gainu Paswan (P.W. 2). Gainu Paswan informed him that a Jawan of Home Guard, who is bald headed, has shot dead his brother and his dead body is lying in front of Cooperative Bhawan. The informant had also heard sound of firing some time earlier. He went running to the Cooperative Bhawan and saw his elder brother, Shaligram Paswan, lying dead in the field in front of Cooperative Bhawan. He was shot at in the middle portion of his neck. The Jawans of Home Guard were not near the Cooperative Bhawan. The informant enquired about the persons standing there and they informed that Shaligram Paswan was drinking toddy in Lodipur Pasikhana from where Chowkidar, Medi Paswan, brought him near the Guards on a false pretext that he is being called by the Officer-in-Charge. The Officer-in-Charge was not there at the Police Station and Medi Paswan took his brother near the Guards. Rupees three hundred cash which was in the pocket of his brother after selling the apples were snatched away by the Jawans of Home Guards. Shaligram Paswan was detained by the Guards. When the informant has requested the Jawans for releasing his brother, at that time "hmt Janta" watch was on his wrist, but that was found missing from the dead body of his brother. When the informant had gone to get his brother released from the clutches of Jawans of Home Guards, one of the Jawans, Bahadur Yadav, had told him that they could detain any person for twenty four hours. The informant alleged that the Jawans of Home Guards of Cooperative Bhawan have shot his brother dead. The reason behind the occurrence is snatching of rupees three hundred and wrist watch from his brother during which the dispute arose. The accused, Medi Paswan, Chowkidar, has fully aided in commission of the murder, because five days before the occurrence he had forcibly demanded rupees twenty from his brother, Shaligram Paswan, for drinking toddy, which was refused by his brother. The Chowkidar, Medi Paswan, was in the habit of taking money from people in which regard complaints have also been made to the Officer-in-Charge. On the day of occurrence also Medi Paswan, because of not giving the money, kept his brother

in guard of Jawans where he was shot dead and his money and wrist watch were snatched. The occurrence was witnessed, as per the fardbeyan by Genu Paswan, P.W. 2, Ram Anup Mandal (not examined) and Ganauri Mandal (P.W. 6) declared hostile.

4. On the basis of the fardbeyan, Sabour (Lodipur) P.S. Case No. 252 of 1996 was registered under Sections 302 and 379 of the Indian Penal Code read with Section 27 of the Arms Act against two named accused persons, namely, Bahadur Yadav and Chowkidar, Medi Paswan. So far Arbind Kumar Rai and Ram Bilash Mandal are concerned, their names were not in the column of the accused in the first information report. The police submitted charge sheet against named as well as unnamed accused persons. Cognizance was taken and the case was committed to the Court of sessions. Charge was framed, against the accused persons, under Sections 302/34 and 379 of the Indian Penal Code to which they pleaded not guilty and claimed for trial of the case.

5. The prosecution, in support of charge, examined eight witnesses. P.W. 1, Sushil Paswan is the son of Gainu Paswan (P.W. 2) and is not an eye witness. He is an inquest witness and has signed inquest report. In his evidence (Paragraph 6) P.W. 1 has admitted his statement was not recorded u/s 161 of the Criminal Procedure Code, during investigation. He is a hear-say witness whose house is at a distance of 1 K.M. north to the Police Station.

6. P.W. 2, Gainu Paswan, has been examined as eye witness. He is maternal uncle of the deceased and informant and father of P.W. 1. The evidence of P.W. 2 has heavily been relied upon by prosecution and he happens to be the star witness. P.W. 2 has claimed to have witnessed the incident when deceased was kept in captivity by the Home Guards and when the deceased was shot, on account of altercation relating to snatching of rupees. P.W. 2, in his evidence, has not named the assailant but has described physical features of the assailant that he was a bald headed person, who shot at Shaligram Paswan. P.W. 2 has stated, in his evidence, that the occurrence took place at 07.00 p.m. and at that time he was at tea stall, which is at a distance of 2-4 cubits from the actual place of occurrence. P.W. 2 is aged about sixty years, as per his deposition. This witness has also admitted, in his evidence, that no Test Identification Parade was held for identification of the assailant and for the first time he has identified the assailant in dock in Court.

7. P.W. 3 is Gholtan Paswan. As per the evidence of P.W. 2, Gainu Paswan, Gholtan Paswan came after the occurrence. P.W. 3 has been examined by the prosecution as an eye witness and he himself also claimed to be sitting at the shop of Indu Tanti at the time of occurrence. He claims to be eye witnesses of both parts of the prosecution story, i.e., the detention of the deceased by the accused persons and firing by them causing his death. P.W. 3 is also a seizure list witness, of empty cartridges. P.W. 3 has deposed that Shaligram Paswan was caught and taken away by Jawans from a toddy shop. P.W. 3 is the only witness who could identify Bahadur Yadav by name. He identified Ram Bilash Mandal in

Court, but could not name him. He failed to identify appellant, Medi Paswan, though he is Chowkidar of his village. P.W. 3 had admitted that he is cousin of deceased, Shaligram Paswan.

8. P.W. 4 is Ashok Kumar Mandal. This witness runs a shop of "chura dahi" near the place of occurrence. He has admitted that the date of occurrence was the evening puja of "chhath" festival and the offices, near-by the place of occurrence were closed. This witness has also admitted that his statement was not recorded u/s 161 of the Criminal Procedure Code, during investigation. He has stated that he was informed by three boys about the occurrence and has not witnessed the occurrence. He did not recognize the persons altercating with Shaligram Paswan, the deceased.

9. P.W. 5, Ganauri Mandal, has deposed that he was returning from market when altercation was going on between deceased and Jawans. The deceased was demanding his three hundred rupees and wrist watch from three Home Guards and one Chowkidar. The Guards and Chowkidar had confined him and were saying that matter will be decided after the Officer-in-Charge returns. He proceeded for his house and there he was informed by three boys that Shaligram Paswan was killed by the Guards. He, again, went to the place of occurrence, saw dead body of Shaligram Paswan lying on the ground with bleeding injury on his throat. The people were saying that Bahadur Yadav had killed him. This witness has been declared hostile and cross examined by the prosecution.

10. P.W. 6 is the informant, Manohar Paswan. He is own brother of deceased. He has deposed that when he was returning from Bhagalpur, he stopped near Cooperative Bhawan and saw scuffle going on in between Shaligram Paswan (deceased) and accused persons. He was informed that Guards have detained his brother, Shaligram Paswan. P.W. 6 has witnessed only first part of the occurrence. So far firing and shooting is concerned, he was informed by P.W. 2. He has not witnessed actual assault. He has deposed about the missing of watch from the wrist of his deceased brother, which was on his wrist when he had gone to Cooperative Bhawan for the first time and his brother had complained about snatching of rupees three hundred from him by the Home Guards. He has not identified the accused persons by name. Only Medi Paswan was identified by name. P.W. 6 has also stated that when he went to Cooperative Bhawan he had asked Bahadur Yadav, Guard, as to what was the matter, he did not reply. Another Home Guard replied that Shaligram Paswan has alleged regarding snatching of three hundred rupees from him and that is the reason that he has been detained by them. Informant, P.W. 6, is a hear-say witness, so far the actual assault is concerned. This witness has admitted that Bahadur Yadav was known to him from before and he did not know the name of others. This witness has also admitted that there were quite a large number of his co-villagers assembled at the place of occurrence, when he visited the place of occurrence receiving the information about the death of his brother.

11. P.W. 7 is Dr. Atul Kumar Mallick, who was posted as Assistant Professor,

Forensic Medicine at J.N.M.C., Bhagalpur, at the relevant time and performed the post mortem examination on the dead body of deceased, Shaligram Paswan. P.W. 7 had found one wound of entry with inverted margin 1 - 1/2 c.m. leading to left chest cavity near the middle of lower part of neck. His opinion is that bullet after piercing trachea entered left chest cavity from behind left clavicle and pierced left lung and its pleura causing fracture of left scapula and came out through wound of exit with everted margin 2- 1/2 c.m. 1-1/2 c.m. over scapular region 3" above. The injury was caused by fire arm grievous and dangerous of life, in an ordinary course of nature. P.W. 7 had found toddy in the stomach of the deceased and he was of the opinion that the deceased had taken toddy before death. He did not find any charring and blackening present at the point of injury.

12. P.W. 8, Md. Shakur, is an Advocate Clerk. He has proved all documents relied upon by the prosecution, including the letter of investigating officer to Sergeant Major asking for his opinion regarding firing made from rifle No. 30176Z, butt No. 581, barrel No. 303 and inspection report of rifle sent by Sergeant Major, Vinod Kumar Sinha, marked as Exhibits 4, 4/1 the Guard Book of deputed Constables, dated 03.11.1996 to 17.11.1996, Exhibit 5, seizure list, Exhibit 6, inquest report, Exhibit 7, statement of Gainu Paswan, Ganauri Mandal and Ramrup Mandal, recorded by Kamlesh Mishra, Judicial Magistrate, 1st Class, Bhagalpur, u/s 164 of the Criminal Procedure Code as Exhibits 8, 8/1 and 8/2 as well as statement of Ashok Kumar Mandal, Dilip Mandal, recorded u/s 164 of the Criminal Procedure Code by Shri Arun Kumar Jha, Judicial Magistrate, 1st Class, Bhagalpur, as Exhibits 8/3 and 8/4. He has also proved the fardbeyan recorded by the Officer-in-Charge of Lodipur Police Station as Exhibit 9 as well as paragraphs 20, 21 and 66 of the case diary marked as Exhibit "A". He has admitted that since he is an Advocate Clerk he has no personal knowledge about the case and fardbeyan or any paper related to this case as they were not prepared in his presence. He has also admitted that none of the witnesses were examined by the investigating officer in his presence and he is not acquainted with the witnesses. He can not identify the signature of the witnesses and further he has admitted that the gun from which firing was made not seized in his presence.

13. Two defence witnesses have been examined. One of them was appellant, Medi Paswan, himself. The defence witnesses have been examined in support of the claim of alibi taken by appellant, Medi Paswan, that he was on duty at different place at the time of alleged occurrence and camman was issued in his favour in regard to this duty.

14. The statement of appellants, Medi Paswan, Arbind Kumar Rai, Ram Bilash Mandal and Bahadur Yadav, has been recorded u/s 313 of the Criminal Procedure Code. All appellants in the statement u/s 313 of the Criminal Procedure Code have denied that the murder of the deceased, Shaligram Paswan, was committed by them, Bahadur Yadav has specifically stated in his statement u/s 313 of the

Criminal Procedure Code that on the date of occurrence Arbind Kumar Rai was on sentry duty at the time of occurrence. The rifle from which murder of deceased, Shaligram Paswan, was committed and seized had been issued in the name of Home Guard, Arbind Kumar Rai. The shot had been fired with butt No. 581 which belonged to Arbind Kumar Rai. The shot had not been fired from his rifle and he has been implicated falsely.

15. The investigating officer of the case has not been examined and paragraphs 20, 21 and 66 of the case diary have been exhibited and marked as Exhibit "A". Exhibit "A" is the statement of Arbind Kumar Rai. His statement is that deceased, Shaligram Paswan, was in drunken stage and creating nuisance, as such, detained by the Guards. Fifty-sixty people had assembled there and started creating trouble, as such, in order to save Government rifles as well as to scare the mob, fire was made by him in the sky which accidentally hit Shaligram Paswan and he died on the spot. He, along with two Jawans of Home Guards, Bahadur Yadav and Ram Bilash Mandal, went to Lodipur Police Station with rifle and cartridges. Next statement is of appellant, Ram Bilash Mandal, where it has been stated that firing of shot was done from the rifle of Arbind Kumar Rai, who was on sentry duty at the time. Firing made from his rifle hit Shaligram Paswan and he died. The supervision note, which is part of the case diary, has also been exhibited and there the finding is that the accused persons detained Shaligram Paswan in the Guard Room at the instance of Medi Paswan. Shaligram Paswan was trying to flee away and this accused, Arbind Kumar Rai, who was on sentry duty pointed the Government rifle towards the deceased and said that if you will try to flee away you will be shot dead. In this process the shot was fired with the rifle, which hit Shaligram Paswan and he died on the spot.

16. Exhibit 4 is the letter which has been written by the investigating officer of Sabaur (Lodipur) P.S. Case No. 252 of 1996 to the Sergeant Major, Police Line, Bhagalpur, regarding examination of butt No. 581 in connection with case registered as Sabaur (Lodipur) Police Station under Sections 302/34 and 379 of the Indian Penal Code and 27 of the Arms Act against Home Guards, Jawans and Chowkidar. A request has been made to examine the rifle No. 30176Z, butt No. 581, barrel No. 303, and an empty cartridge, at the bottom of which O.K. 887 is mentioned and report whether the pillet has been fired from this rifle or not and the empty cartridge belongs to the same rifle or not. Exhibit 4/1 is report of Sergeant Major where it has been mentioned that the smell of gun powder is still coming from the barrel No. 303, rifle No. 30176Z with butt No. 581. It is clear that a shot has been fired from this rifle and the rifle is in working order. Exhibit 5 is writing, dated 17.11.1996, in the Guard Book. The Guard Book relates to assigning of sentry duty and the Government properties like rifles and cartridges supplied to them. Exhibit 5 reads as follows:

Today, i.e., on 17.11.1996, the armed guard of 1/4 was deputed in Lodipur village under Lodipur Police Station from 08.00 a.m. for the next 24 hours. Each of them was assigned sentry duty for two hours each for safety of the

Government properties like five rifles, 100 round (unintelligible) cartridges and other Government properties and they have been warned to remain alert and vigilant while discharging the duty. If any laches is found, departmental proceeding will be initiated against them. Everything was explained to them and their signatures were obtained so that they may be of used when required." In this Guard Book the arms supplied to each person on sentry duties and their details have been mentioned in which butt No. 581, cartridge No. 9449 was allotted to Arbind Kumar Rai. Bahadur Yadav was allotted rifle butt No. 565/26,7728. Exhibit 6 is seizure list where the details of the seized articles shows seizure of one barrel No. 303 rifle of the police of which butt No. is 581, and rifle No. 30176Z is mentioned in which an empty cartridge No. 303 has been recovered as O.M. 88-70 mentioned on its bottom. Exhibit 12 was one of the Guard Book in which entries have been made from 03.11.1996 to 17.11.1996.

17. The counsel for the appellants has submitted that Exhibits 4, 4/1, 5 and "A", which are admitted Exhibits, show that the prosecution has screened and concealed the real story. There is another part of the story which has erroneously been ignored by the trial Court while examining the evidence. In the trial Court judgment neither the statement of appellant, Bahadur Yadav, recorded u/s 313 of the Criminal Procedure Code nor Exhibits 4, 4/1, 5 and Exhibit "A" have been considered or discussed though these Exhibits throw light that the firing was not made by Bahadur Yadav as deposed by the prosecution witnesses. The prosecution witnesses, as such, are not trust worthy and their claim to have witnessed the occurrence is also not correct.

18. Mr. Sanjay Singh, counsel appearing for the appellants, Bahadur Yadav and Arbind Kumar Rai, has submitted that judgment of conviction and order of sentence passed by the trial Court is erroneous as the evidence, documentary as well as oral, has not been considered in it's correct perspective. So far the documentary evidence, such as, Exhibits 4, 4/1 and "A" are concerned, they were marked Exhibits without any objection. Only Exhibit 5 was marked Exhibit with objection, but Exhibit "A", statement of Arbind Kumar Rai, Ram Bilash Mandal (appellants) recorded by the investigating officer, during investigation of the case, support that the firing was made by rifle No. 30176Z, barrel No. 303 and butt No. 581. Arbind Kumar Rai himself made a statement that firing was made from his rifle just to scare the mob in order to protect the Government properties, such as, rifles and cartridges kept at Cooperative Bhawan. This Exhibit is further corroborated by the statement of appellant, Bahadur Yadav, recorded u/s 313 of the Criminal Procedure Code. The trial Court completely ignored and over looked these unimpeachable and important piece of evidence. Over looking these evidence a judgment of conviction was passed and appellant, Bahadur Yadav, has been awarded death sentence.

19. The counsel for the appellants has, further submitted that in the present case non-examination of the investigating officer has caused prejudice to the case of defence. In fact, investigating officer was withheld by the prosecution

deliberately. The prosecution has not shown any reason for non-examination of the investigating officer. It has further been submitted that had the investigating officer been produced by the prosecution he would have been confronted to those two paragraphs in the case diary which have been marked Exhibit "A" and true facts would have come in fore. The prosecution has withheld examination of investigating officer with an intention to cover up the lacunae in prosecution case. The informant, in the first information report, has not mentioned about existence of tea shop or refreshment shop from where two witnesses, i.e., P.Ws. 2 and 3 have claimed to have seen the incident. If the investigating officer would have been examined he could have been confronted with the surrounding of place of occurrence to bring about the real fact and ability of the witnesses to witness the occurrence. The time of occurrence is 07.30 p.m. in the month of November, i.e., a winter time. None of the witnesses have stated about source of light for identification at the time of occurrence. If the investigating officer would have been examined these questions could have been forwarded to him, as the source of light for identification has relevance in this case as the witnesses have not said that the accused were very well known to the witnesses. No independent witness has been examined though evidence of prosecution witnesses disclose that several persons and co-villagers were present at the place of occurrence. Due to non-examination of the investigating officer, the Exhibits could not be duly proved.

20. The counsel for the appellants has drawn my attention towards the order, dated 22.08.2005, passed by the trial Court. During the pendency of trial a petition was filed by the prosecution u/s 311 of the Criminal Procedure Code for examining the investigating officer in the interest of justice. No objection was raised on behalf of appellants, Bahadur Yadav and Ram Bilash Mandal but the objection was raised on behalf of appellants Arbind Kumar Rai and Medi Paswan. Submission of the Public Prosecutor was also before the trial Court that investigating officer's examination is necessary to prove certain documents. Judge of the trial Court was also of this view that examination of investigating officer was essential for the just decision of the case as examination report of rifle, inquest report, duty register and seizure list and also the application for the test of rifle in the hand writing of the investigating officer are already on record, as such, investigating officer's examination is essential. In spite of that investigating officer was not examined and all these documents were proved by P.W. 8.

21. As a matter of rule in all cases due to non-examination of the investigating officer adverse inference can not be drawn against the prosecution and a general opinion can not be formed that defence has been prejudiced. But in the present case wherein even the trial court was of the view that for just decision, examination of investigating officer is essential, an adverse inference can be drawn against prosecution. Investigating officer was an important witness in the present case as on his evidence the life of an accused was hanging in balance. Due to non-examination of investigating officer a part of crucial evidence has

been screened from Court's scrutiny. In such case it is very unsafe to sentence an accused the extreme penalty.

22. Counsel for the appellant submits that in a criminal case failure of prosecution to produce relevant evidence leads to the presumption that evidence was withheld as it was unfavourable for the prosecution. Since a material witness has been withheld, adverse inference should have been drawn against prosecution. Correct law as to proper effect of the non-production of witness has been laid down by Supreme Court in case of *Sawal Das Vs. State of Bihar*, . In the decision reported in 1974 Cr.L.J. 664, a material witness was withheld by the prosecution and the counsel for the appellant had asked the Court to give him the benefit of optional presumption u/s 114 illustration (g) of the Evidence Act and to infer that if the witness had been produced it would have damaged the prosecution case against the appellant. The Hon'ble Judges of the Apex Court while considering this submission held that the evidence of the material witness could not be withheld whatever may be it's effect upon the case. The finding was recorded relying on the principle laid down by Privy Council in *Stephen Seneviratne v. The King* AIR 1936 PC 289 at page 300, it was observed as follows:

Their Lordships do not desire to lay down any rules to fetter discretion on a matter such as this which is so dependent on the particular circumstances of each case. Still less do they desire to discourage the utmost candour and fairness on the part of those conducting prosecutions, but, at the same time they cannot, speaking generally, approve of an idea that a prosecution must call witnesses irrespective of considerations of number and or reliability or that a prosecution ought to discharge the functions both of prosecution and defence. If it does so, confusion is very apt to result, and never is it more likely to result than if the prosecution calls witnesses and then proceeds almost automatically to discredit them by cross-examination. Witnesses essential to the unfolding of the narrative on which the prosecution is based, must, of course, be called by the prosecution, whether in the result the effect of their testimony is for or against the case for the prosecution.

23. The correct law as to the proper effect of non-production of witnesses can not be decided in the abstract. It is a question of fact to be determined on consideration of the circumstances of a particular case, in which, inter alia, the following factors should receive due consideration.

- (1) Whether the witness is in a position to give relevant and material evidence
- (2) Whether the witness is within easy reach of the prosecution or not, or whether there are circumstances justifying withholding of a witness, i.e., the witness is likely to be hostile to the prosecution.
- (3) The nature and intensity of the controversy raised by the defence on a particular issue of which the witness is expected to give evidence.

(4) Persuasiveness of the evidence, which is on record.

24. I am of the view that in the present case the investigating officer was an important witness as on his evidence the life of an accused was hanging in balance. The investigating officer could have explained the material Exhibits which were collected during the investigation and already on record. Due to non-examination of investigating officer, a part of crucial evidence has been screened from scrutiny of the Court. In such case, it is very unsafe to sentence an accused of that extreme penalty. Non-examination of the investigating officer, in the present case, has very much prejudiced the case of defence and an inference can be drawn against the prosecution that the investigating officer was not produced in spite of the fact that he was within easy reach of the prosecution and the witness was in a position to give relevant and material evidence.

25. The counsel for the appellant has further submitted that the trial court has totally over looked rather ignored the statement u/s 313 of the Criminal Procedure Code. It is well settled that the provision u/s 313 of the Criminal Procedure Code is mainly intended to benefit the accused as it is corollary to the benefit to the Court in reaching the final conclusion. The provision is intended to most sultry principle of natural justice. The question u/s 313 of the Criminal Procedure Code and put by the Court to the accused to afford him to explain the situation and that is the reason that Statute provides for personal presence of the accused in Court. It is obligatory on the Court to consider the statement recorded u/s 313 of the Criminal Procedure Code in it's correct perspective. In the present case, consideration of statement recorded u/s 313 of the Criminal Procedure Code was much more needed specially when the investigating officer was not examined and Exhibits 4, 4/1, 5 and "A" were on record to corroborate the statement of appellant, Bahadur Yadav, u/s 313 of the Criminal Procedure Code.

26. The object of examination u/s 313 of the Criminal Procedure Code is to give the accused an opportunity to explain the case made against him and that statement can be taken into consideration for judging guilt or innocence of the accused. In *Hate Singh Bhagat Singh Vs. State of Madhya Bharat*, it has been laid down by the Bose J. that statement of accused persons recorded u/s 313 of the Criminal Procedure Code are among the most important matters to be considered at trial. It was pointed out that the statement of the accused recorded by committing Magistrate and the Sessions Judge are intended in India to take place of what in England and in America, he would free to state in his own way in the witness box and they have to be received in evidence treated as evidence and be duly considered at the trial. The position remains unaltered even after the insertion of Section 315 of the Criminal Procedure Code and the statement u/s 313 of the Criminal Procedure Code has to be considered in the same way as in Section 315 of the Criminal Procedure Code is not there.

27. In the present case, the trial Court should have given credence to the statement recorded u/s 313 of the Criminal Procedure Code, considering the

Exhibits on record, which corroborated the statement of Bahadur Yadav u/s 313 of the Criminal Procedure Code. Exhibit "A" which is inculpatory statement of one of the co-accused, Arbind Kumar Rai, recorded u/s 161 of the Criminal Procedure Code was indicative of this fact that the gun fire at deceased was not made by Bahadur Yadav rather it was accidental fire opened from the rifle held by Arbind Kumar Rai and that caused fatal injury to deceased. This was a very important and unimpeachable piece of evidence but ignoring and over looking this piece of evidence, an order of conviction was passed against all accused persons and so far Bahadur Yadav is concerned, he was awarded death sentence ignoring Exhibits 4, 4/1, 5 and "A" as well as statement of Bahadur Yadav recorded u/s 313 of the Criminal Procedure Code.

28. It has further been submitted by the counsel that evidence on record indicates that it is not a case which come within the category of rarest of rare cases. There is evidence of P.W. 6, the informant, who is not an eye witness, so far the assault is concerned, and the evidence of P.W. 2, who has not identified Bahadur Yadav by name to show that deceased was shot by Bahadur Yadav. P.W. 2, in his evidence, has stated that he does not know the name of Constable, who shot the deceased, but can identify him. P.W. 2 as well as other witnesses have admitted that no Test Identification Parade was held. P.W. 2 identified Bahadur Yadav in Court as bald headed man who opened fire. Other than P.W. 2 there is no evidence of any witness. On record, to justify that Bahadur Yadav opened fire and caused fatal injury. P.W. 1, Sushil Paswan, was not examined by police during investigation. For the first time, he was being examined in Court. Similar is the case of P.W. 4. He has not witnessed the real occurrence. P.W. 6, in his evidence, has stated that Gainu Paswan (P.W. 2) had informed him that Police Constable, Bahadur Yadav, has shot fire at his brother. This is in complete contradiction of the evidence of P.W. 2, who has stated that he had not disclosed the name of the assailant, but only said that he can identify the assailant.

29. The counsel for the appellants has, further, submitted that extreme penalty of death could be inflicted only in gravest cases of extreme culpability, which is absent in the present case. In support of his submission the counsel has placed reliance on a decision reported in Krishna Mochi and Others Vs. State of Bihar, . In this decision relying on the decision of Machhi Singh v. State of Punjab and Bachchan Singh's case, it has been held that only cases can be categorized as rarest of rare cases in which the collective conscience of the community is so shocked that it will expect the holders of the judicial power to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty. The community may entertain such a sentiment in the following circumstances:

- (i) When the murder is committed in extremely brutal grotesque diabolical revolting or dastardly manner so as to arouse intensive and extreme indignation of the community.
- (ii) When the murder is committed for a motive which evinces totally depravity

and meanness.

(iii) When murder of a member of scheduled caste or minority community etc. is committed not for personal reasons but in circumstances which arouse social wrath.

(iv) When the crime is enormous not proportionate.

(v) When the victim of murder is (a) an innocent child who could not have or has provided even an excuse, much less provocation, for murder, (b) a helpless woman or a person rendered helpless by old age or infirmity, (c) When the victim is a person vis-a-vis whom the murderer is in a position of domination or trust, (d) when the victim is a public figure generally loved and respected by community for the services rendered by him and the murder is committed for political or similar reasons other than personal reasons.

30. The counsel for the appellants submits that the ocular evidence, so far on the point of the identification of Bahadur Yadav, as the assailant, is concerned, is not consistent. Only physical description of the assailant was given, but for identification purposes he was never put on Test Identification Parade. In spite of that Bahadur Yadav was presumed to be the assailant and awarded the highest punishment of the land, i.e., death sentence.

P.Ws. 1, 2 3 and 6 have admitted that no Test Identification Parade was held. Further it has been submitted that considering Exhibits 4, 4/1, 5 and "A" the Court should have inferred and presumed that Bahadur Yadav had not opened fire. There is no oral evidence of the witnesses that the rifle which was held and allotted to Arbind Kumar Rai was either taken away by Bahadur Yadav from Arbind Kumar Rai or Arbind Kumar Rai had given his rifle for firing to Bahadur Yadav. The evidence on record shows that all accused appellants were holding rifle, as such, the presumption would be that firing was made by the person who was holding a particular rifle as he only could have opened from that rifle. The trial Court committed serious error by not considering this evidence. Accordingly, the sentence of death awarded to appellant, Bahadur Yadav, should be rejected.

31. Mr. Lala Kailash Bihari Prasad, very fairly admitted that considering the evidence available on record, in the present case, it can not be put in the category of rarest of rare cases and his conscience do not allow to support the death sentence awarded to Bahadur Yadav.

32. Considering the entire materials as well as evidence on record and the criteria which has been laid down by the Supreme Court in AIR 1981 S.C. 91 (Dudh Nath Pandey v. The State of U.P.) as well as other decisions which have been relied upon in this decision. I am of the view that none of criteria is fulfilled in the present case. It can not be categorized as rarest of rare cases shocking the mind of general people to the extent that death punishment can only be appropriate to compensate the offence committed by the accused. Accordingly, sentence of death, awarded to Bahadur Yadav, is rejected. Death Reference No. 2

of 2006 is dismissed.

33. Now the question arises whether the appellants are liable to be convicted u/s 302/34 of the Indian Penal Code. The counsel for the appellants have submitted that the evidence on record is indicative of the fact that the deceased was detained by the accused appellants for the reason that he made allegation of snatching money from him. P.W. 6, the informant, in his fardbeyan as well as in his evidence in Court, has stated that when he came to know that his brother has been detained by the Constables, he approached them and requested to release him. His request was refused saying that since Shaligram Paswan has made allegation of snatching away of money he will be produced before the Officer-in-Charge of the Police Station. The informant, thereafter, left the place, went to his house and when again he was coming to Cooperative Bhawan on way he was informed by P.W. 2 that Shaligram Paswan has been shot at and killed. From the evidence, it is clear that there was no intention to kill rather the detention related to snatching of money and it's clarification on arrival of the Officer-in-Charge. So far the firing is concerned, it is explained by Exhibits "A". None of the witnesses in their evidence have stated that there was any accostation by any accused for killing the deceased. In this view, the conviction u/s 302/34 of the Indian Penal Code is erroneous. There was no intention to kill but the firing was made to scare the mob which had assembled at the place of occurrence, considering the security and safety of the weapons stored in Cooperative Bhawan. It was an accidental death and the act does not amount to culpable homicide amounting to murder. The act is not culpable as the bullet missed the target and killed the deceased. The appellants, as such, can not be held guilty of an offence punishable u/s 302/34 of the Indian Penal Code. At best they could have been convicted u/s 304 part II of the Indian Penal Code, i.e., culpable homicide not amounting to murder. The prosecution in order to bring a case u/s 300 of the Indian Penal Code is required to establish that a fatal injury was caused. The nature of the injury was sufficient to cause death and there was an intention to inflict that particular injury and it was not accidental or unintentional or that some other kind of injury was intended. Once these three elements are proved the offence can be held u/s 300 of the Indian Penal Code. On the other hand, for bringing the case within purview of Section 304 of the Indian Penal Code the consideration should be whether the injury was unintentional, accidental and the seriality of the attack.

34. The evidence, in the present case, shows that there was only one fire. It was not repeated though all other accused were also armed with rifle. Exhibit "A" shows that the firing was made with an intention to scare the mob assembled at the place of occurrence for the safety of the Government property, like arms. So far the injury caused to the deceased, it was accidental. The evidence of the witnesses is that the barrel was put on the neck of the deceased and fired but that has not been corroborated by the medical evidence as no blackening or charring had been found at the entry point of the injury. The evidence of the witnesses also does not show that any of the accused exhorted for shooting.

35. Framers of the Code used the words "intention and knowledge" for two purposes as both are not same. The knowledge is bare awareness of the person about the consequences of his act, but, so far intention is concerned, it is purposeful doing of all thing to achieve of a particular thing. In the present case, evidence of witness do not prove that fire was opened with an intention to kill. This is further supported by Exhibit "A", as such, the conviction of appellants u/s 302/34 of the Indian Penal Code is not justified. At best the conviction can be u/s 304 part II of the Indian Penal Code as there was no intention to cause death or any such fatal injury as is likely to cause death. The act of principal offender on the basis of Exhibit "A" comes within exception (3) of Section 300 of the Indian Penal Code, i.e., homicide is not murder, if the offender being a public servant. Acts in advancement of public justice, exceeds the power given to him by law and causes death by doing an act, in good faith which he believes to be lawful and necessary for the due discharge of the duty without ill will towards the person whose death is caused.

36. Counsel for the State, on the other hand, has submitted that the appellants are public servants and the act done by them is an unlawful act, the shooting was not done under the orders of superior officers, neither there was any circumstance forcing them to open fire for the public security. The act done by them is well within the definition of murder as the appellants are not protected by the orders of superior officer.

37. In the present case, what I find that the prosecution has failed to bring the relevant and necessary evidence to prove the charges beyond reasonable doubt. The investigating officer whose evidence was valuable for proving the charge was withheld from being examined in Court. The documents which were collected, during investigation, and the statement of appellants, Arbind Kumar Rai and Ram Bilash Mandal recorded during investigation disclosed some other story than the story of the prosecution. If inculpatory statement of Arbind Kumar Rai and the statement of Ram Bilash Mandal (Exhibit "A") is believed as corroborated by Exhibits 4, 4/1 and 5 in that case the act of opening fire will fall within Exception (3) of Section 300 of the Indian Penal Code and punishable under part II of Section 304 of the Indian Penal Code.

38. Considering the entire evidence and material, on record, I am of the view that the conviction of appellants, Bahadur Yadav, Arbind Kumar Rai and Ram Bilash Mandal needs interference. So far conviction u/s 302/34 of the Indian Penal Code is concerned, it is modified and they are convicted u/s 304 part II of the Indian Penal Code. Conviction u/s 379 of the Indian Penal Code is confirmed. The appellant, Bahadur Yadav, is in custody since the date of occurrence. Other accused appellants have also remained in custody for a considerable long time, as such, the sentence is modified to the period already undergone by the appellants. They are discharged from the liability of their bail bonds.

39. Accordingly, Criminal Appeals No. 167 and 179 of 2006 are dismissed.

40. The counsel appearing for the appellant, Medi Paswan, has submitted that so far this appellant is concerned, he has been convicted under Sections 302/34 and 379 of the Indian Penal Code holding that he had common intention in commission of the offence. In the present case the prosecution story is in different parts. The first part is that deceased was drinking toddy in the toddy shop from where Chowkidar, Medi Paswan, brought him to the Guard telling a lie that the Officer-in-Charge was calling him. The money, thereafter, was snatched away by the Jawans of Home Guard and the deceased was detained by the Jawans of the Home Guard. The reason behind the occurrence is snatching of rupees three hundred and wrist watch from Shaligram Paswan (deceased). The other reasons for occurrence is that Medi Paswan had demanded rupees twenty, from the deceased five days earlier to the occurrence for drinking toddy, but the same was refused. On the day of occurrence also he took the deceased from toddy shop for not giving him money and kept him in guard where the Jawans shot him dead in course of snatching money and watch P.W. 1, in his evidence, has stated that the cause of occurrence is that Medi Paswan had demanded rupees twenty from Shaligram Paswan five days earlier for drinking toddy and due to that the dispute arose. P.W. 1 identified Medi Paswan in Court but he was not examined by the investigating officer during investigation. The deposition of P.W. 2 is that he saw Medi Paswan and three Jawans of Home Guard quarrelling with Shaligram Paswan as they had taken rupees three hundred and wrist watch from him and Shaligram Paswan was asking them to return his watch and money. They threatened him to go otherwise they will shoot him. After that they shot at him. P.W. 6, the informant, has not stated anything about the presence of appellant, Medi Paswan, at the place of occurrence.

41. The counsel for the appellant has also submitted that due to non-examination of the investigating officer a serious prejudice has been caused to this appellant. In case the investigating officer would have been examined he could have proved the command issued in favour of the appellant for doing duty at different place and the plea of alibi taken by this appellant to show that he was not present at the place of occurrence at the relevant time would have been proved. This appellant in order to prove his plea of alibi has examined himself as D.W. 1 and other witness as D.W. 2 to prove the command issued in his favour for doing duty at another place at the time of occurrence.

42. The counsel for the State has submitted that the plea of alibi is a very weak piece of evidence. The alibi means that the person concerned was not available at the relevant place at relevant time. The alibi has to be proved with absolute certainty, from the evidence of witnesses that the distance of the place for which command was issued in favour of appellant, Medi Paswan, was very far off and one may not be present within short time from one place to another. So far the presence of this appellant is concerned, that has been corroborated from the evidence of P.Ws. 1, 2, 3, 4 and 6. They all have stated that Medi Paswan was

present there. The plea of alibi postulates physical impossibility of the presence of the accused at the scene of offence by reason of his presence at another place. The plea, therefore, can succeed only if it is shown that accused was too far away at the relevant time and because of that he could not be present at the place where crime was committed. Evidence of witness in present case show that two places, i.e., place for which duty was assigned to Medi Paswan and place of occurrence are not far off. Witness have supported presence of this appellant at place of occurrence. I find no error in finding, recorded by trial Court, rejecting plea of alibi, taken by this appellant.

43. It has further been submitted that in the present case entire occurrence has not taken place in one go but there is major transformation and time lag between one act and another, as such, it can not be said that initial intention of snatching money at what point of time transferred into intention to kill and that was shared by all. This appellant, Medi Paswan, has erroneously been convicted u/s 302/34 of the Indian Penal Code for having common intention to commit murder of the deceased.

44. The counsel appearing for the State has submitted that so far this appellant, Medi Paswan, is concerned, he is identified as an accused at the very first instance as it is apparent from fardbeyan. The occurrence took place because of the act of this appellant as he demanded money and on refusal, on false pretext, he took the deceased near the Home Guard, and his money was snatched when the deceased insisted for returning it, he was shot. The case was also recorded promptly without loosing any time. The occurrence took place on 07.11.1996 at 07.30 p.m. and fardbeyan was recorded at 09.45 p.m., as such, there is no opportunity for any concoction or fabrication. So far common intention is concerned, it can occur within a moment and for that any time lag is not necessary. This Medi Paswan was identified by P.Ws. 1, 2, 3, 4 and 6 being member of that unlawful assembly which caused death of deceased.

45. The counsel appearing for the appellant, Medi Paswan, has placed reliance on a decision reported in Dharam Pal and Others Vs. State of Haryana, to support his contention that this appellant did not share common intention to commit murder. The finding of the Apex Court in this decision is:

It may be that when some persons start with a pre-arranged plan to commit a minor offence, they may in the course of their committing the minor offence come to an understanding to commit the major offence as well. Such an understanding may appear from the conduct of the persons sought to be made vicariously liable for the act of the principal culprit or from some other incriminatory evidence but the conduct or other evidence must be such as not to leave any room for doubt in that behalf. A Criminal Court fastening vicarious liability must satisfy itself as to the prior meeting of the minds of the principal culprit and his companions who are sought to be constructively made liable in respect of every act committed by the former. There is no law which lays down that a person accompanying the principal culprit shares his intention in respect of

every act which the latter might eventually commit. The existence or otherwise of the common intention depends upon the facts and circumstances of each case. The intention of the principal offender and his companions to deal with any person who might intervene to stop the quarrel must be apparent from the conduct of the persons accompanying the principal culprit or some other clear and cogent incriminating piece of evidence. In the absence of such material, the companion or companions cannot justifiably be held guilty for every offence committed by the principal offender. The common intention to commit an offence graver than the one originally designed may develop during the execution of the original plan e.g. during the progress of an attack on the person who is intended to be beaten but the evidence in that behalf should be clear and cogent for suspicion, however strong suspicion, cannot take place of the proof which is essential to bring home the offence to the accused.

In *Rana Partap and Others Vs. State of Haryana*, it has been held as follows:

The evidence, while it discloses that there was some previous trouble between the deceased and Manmohan, does not disclose any special ill-feeling between the deceased and Rana Partap and Sat Pal. But the circumstance that the three accused came together, and that two of them held the deceased while the third one stabbed him clearly indicates that they shared some common intention. The question is whether the common intention was to do away with the deceased ? The evidence is not very clear whether Rana Partap and Sat Pal continued to hold the deceased even after Manmohan started stabbing him. Neither Rana Partap nor Sat Pal is alleged to have said anything to indicate that they wanted the deceased to be done away with. Manmohan himself did not say that he was going to finish the deceased. He only said that he wanted to teach him a lesson. In the circumstances, we are unable to hold that the only inference possible is that Rana Partap and Sat Pal shared the common intention with Manmohan to kill the deceased. No doubt they held the deceased and this facilitated the stabbing by Manmohan. But there is nothing whatever to indicate that they knew that Manmohan would cause fatal injuries to the deceased, though they must have anticipated that he would cause grievous injuries. It is one of those borderline cases where one may with equal justification infer that the common intention was to commit murder or to cause grievous injury. But the benefit of any such doubt must go to the accused. In the circumstances, we conclude, but not without hesitation, that the common intention of the accused has not been established, beyond reasonable doubt, to be to cause the death of the deceased. But it certainly was to cause grievous injuries to the deceased. The conviction of Rana partap and Sat Pal u/s 302 read with Section 34 and the sentence of life imprisonment and therefore set aside and instead they are convicted u/s 326 read with Section 34 and sentenced to suffer rigorous imprisonment for a period of five years etc. So far as Manmohan is concerned, the three stab injuries inflicted by him are sufficient in the ordinary course of nature to cause death. His conviction and sentence are confirmed.

46. In the present case, the evidence of the witnesses show that appellant, Medi Paswan, demanded money, on refusal, he brought the deceased near the Home Guard Constables. None of the witnesses has stated that Medi Paswan had brought the deceased near the Home Guard for murder purposes but the only motive alleged is of snatching the money and watch. So far the shooting part is concerned, there is no evidence that he either shared that intention or any of his conduct indicated sharing common intention of murdering the deceased. Simply, presence of this appellant at the time of shooting will not be sufficient for his conviction u/s 302/34 of the Indian Penal Code, i.e., sharing common intention for the act of principal offender. There is evidence, on record, to show that he shared common intention for snatching the money. In this view, his conviction u/s 302/34 of the Indian Penal Code is set aside. He is acquitted of the charge u/s 302/34 of the Indian Penal Code, but his conviction u/s 379 of the Indian Penal Code is affirmed. The appellant has remained in custody for more than 14 1/2 months, he is aged about 80 years, as such, he has undergone his period of sentence for conviction u/s 379 of the Indian Penal Code. He is discharged from the liability of the bail bond.

This Appeal [Cr. Appeal No. 111 of 2006 (D.B.)] is partly allowed.

Shailesh Kumar Sinha, J.

47. I agree.