
(2011) 11 PAT CK 0047

In the Patna High Court

Case No : Criminal Appeal (DB) No. 370 of 1989

Prem Lal Sah and Shankar Sah

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 09-11-2011

Acts Referred:

Citation : (2011) 11 PAT CK 0047

Final Decision : Allowed

Judgement

Ashwani Kumar Singh

1. The present appeal is directed against the judgment and order dated 13.6.1989 passed by learned Sessions Judge, Katihar in Sessions Case No.1 of 1985 convicting the appellants u/s 302 read with 34 of the Indian Penal Code and sentencing them to undergo rigorous imprisonment for life and further convicting them u/s 323 read with 34 of the Indian Penal Code and sentencing them to undergo rigorous imprisonment for one year. However, both the sentences have been ordered to run concurrently.

2. In this case on call when no one appeared on behalf of the appellants, by order dated 20.9.2011 Mr. Rajnandan Prasad, an Advocate, who was present in the court, was requested to assist the court as amicus curiae. He consented for the same and assisted the court when hearing was taken up.

3. The prosecution case is based on oral statement of one Upendra Pandit @ Sonai Pandit (P.W. -14) which was recorded on 13.11.1983 at 9.15 a.m. by Sub. Inspector of Police, Dharichan Ram (P.W. -17). The informant alleged that on the same day at about 1 a.m. while he was sleeping together with his son, Ram Bilash Pandit (P.W. -13) aged about 12 years and daughter Parwati Kumari (deceased) aged about six years in his room he wake up as he was struck on his head and had sustained bleeding injury. He then found his daughter Parwati Kumari in a precarious condition. She was restless. She had sustained sharp cut injury over her neck resulting into profuse bleeding. His daughter whispered

"Babu Babu" thrice and died instantaneously. He saw accused Shankar Sah Kasera (appellant No. 1), Prem Sah Kasera (appellant No. 2), wife of Prem Sah Kasera, Bijendra Yadav and other fleeing away from the courtyard. The informant raised alarm, upon which, his son Ram Bilash Pandit also got up and on seeing the condition of his father and sister he also started shouting. On alarm being raised, co-villagers Prahlad, Shashi Munshi, Indar Bhagat, Kritiya Nand Yadav, Jagarnath Sah and others came to his house and the informant disclosed them regarding the incident of occurrence. In the meantime, the Mukhiya of the village Kirpal Sah also arrived there. The informant has alleged that the motive behind the occurrence was ongoing land dispute with the appellants and they had previously also threatened the informant and his family members to kill. The informant further alleged that the appellants were associated with Santu Bhagat, Naresh Yadav and Jagdeo yadav, who always instigated them against the informant. Thus, he suspected that the accused persons might have killed his daughter and injured him in consultation with aforesaid Santu Bhagat, Naresh Yadav and Jagdeo Yadav. The informant, thus, claimed that the accused persons in order to grab his land committed murder of his daughter and injured him.

4. On the aforesaid fardbeyan a formal first information report was registered on 13.11.1983 at 7.00 p.m. being Katihar (Mufassil) P.S. Case No. 622 of 1983 u/s 302 of the Indian Penal Code. Apart from the appellants, wife of the appellant Prem Sah and one Bijendra Yadav were made accused in the F.I.R. The police took up investigation. On conclusion of investigation, charge sheet was submitted against the appellants and co-accused Bijendra Yadav. The Magistrate took cognizance of the offence and since the offence alleged was exclusively triable by the court of sessions, the case was committed to the court of sessions. Charges were framed u/s 302 read with Section 34 of the Indian Penal Code and Section 323 read with Section 34 of the Indian Penal Code against the appellants and co-accused Bijendra Yadav. The appellants did not plead guilty to the charges and claimed to be tried and thus, they were put on trial. The prosecution in order to prove its case examined altogether 17 witnesses. The appellants were held guilty of the charges but co-accused Bijendra Yadav was acquitted.

5. P.W. -4 Parsadi Paswan has been tendered for cross-examination by the prosecution.

6. P.W. -5 Sabhapati Yadav is a formal witness, who has proved fardbeyan which has been marked as Ext.-1. He has stated that the fardbeyan was in handwriting of Dharichan Ram who was the Officer-in-Charge of Muffasil police station in the year 1993.

7. P.W. -7, Govinda Poddar is also a formal witness who has proved his signature on the seizure list prepared the Investigating Officer which has been marked as Ext.-2. It is to be noted here that this witness is resident of the village in which occurrence took place. He has been cross-examined on behalf of the appellants. In cross-examination he has stated that though he had seen blood-stains on the neck and on the cloth of the victim Parwati Kumari, he did not see any mark of

blood on the cloth of the informant Upendra Pandit and his son Ram Bilash Pandit. He has also admitted that he had not seen any mark of blood on the pillow kept on the cot on which the victim, the informant and the witness Ram Bilash Pandit were sleeping.

8. P.W. 9, Kripalal Sah is also a formal witness. He has proved his signature on the seizure list prepared by the investigating officer which has been marked as Ext. 2/1.

9. P.W. 12, Haiya Devi is wife of the informant. She is a hearsay witness. She has stated that on the date of occurrence she was not present in her house. She came to know regarding the occurrence in the next morning from Nimai Pandit (P.W. -8) who told her that her husband and daughter were killed by the appellants and co-accused Savitri Devi. She was also told that Jagdish Sah and Naresh Yadav were present at the time of occurrence and they were instrumental behind the killing of her husband and daughter. Nimai Pandit had brought her on a bicycle. When she reached her house she found her husband in an injured condition. On enquiry, he also disclosed that the appellants and co-accused Savitri Devi at the instance of Jagdeo Yadav and Naresh Yadav perpetrated the crime. She has been confronted with her previous statement recorded by the police. Her attention was drawn that she had stated before the investigating officer that she knew nothing about the occurrence to which fact she denied. It is to be noted here that the investigating officer (P.W. 17) in his deposition has categorically stated that this witness in her statement u/s 161 of the Code of Criminal Procedure had stated that she knew nothing about the occurrence.

10. P.W. 1, Jagarnath Sah and P.W. 11, Man Mohan Yadav have been declared hostile by the prosecution.

11. P.W. 17, Dharichan Ram is the main investigating officer of this case.

12. P.W. 15, Suresh Yadav subsequently took charge of investigation from Dharichan Ram (PW-17) and submitted chargesheet in this case.

13. P.W. 16, Ramdeo Rai is a Medical Officer, who was posted at Sadar Hospital, Purnea at the relevant time and had conducted the postmortem examination on the dead body of Parwati Kumari at 11 a.m. on 13.11.1983.

14. Janardan Prasad Yadav (P.W. 2), Jahur Mian (P.W. 3), Shashi Bhushan Bhagat (P.W. 6) and Nimai Chandra Pandit (P.W. 8) are all hearsay witnesses.

15. P.W. 2, Janardhan Prasad Yadav has stated that in the morning of 13.11.1983 he came to know from the informant (Upendra Pandit) that Parwati Kumari was killed. He has also stated that in the night he had seen the appellants Shankar Sah and Prem Sah together with Mukki Sah, Naresh Yadav, Jagdeo Yadav and others near the house of Sonai @ Upendra Pandit.

16. P.W. 3, Jahoor Mian has stated that 2 1/2 years ago in the night at about 10.30 p.m. while he was proceeding towards his field he had seen Shankar Sah,

Mukki Sah and Prem Sah near the pond. They were talking to go to the house of Jagdeo in order to accomplish the work. He, thereafter, went to watch his field. In the morning when he returned he came to know that the daughter of the informant was killed. When he went there he found Parwati Kumari lying dead. P.W. 6, Shashi Bhushan Bhagat has stated that he woke up in the night on hue and cry raised by the informant. He went there and found the daughter of the informant dead. She had sustained sharp cutting injury on her neck. On enquiry, the informant disclosed that the appellants had killed her. In cross-examination he has stated that he had not seen the actual incident of murder. He has further stated that he did not go inside the room of the house of the informant and could not assign any reason as to why the informant, his son and the daughter were sleeping in "Varandah" on the date of occurrence.

17. P.W. 8, Nimai Chandra Pandit has also stated in line with P.W. 6 in his examination-in-chief. In cross examination when it was suggested that in his statement before police he had stated that neither he knew nor any one disclosed him name of the assailants he simply replied that he did not remember that fact.

18. Thus, it appears that none of the aforesaid witnesses had actually seen the commission of crime. The hearsay witnesses apart from Haiya Devi (P.W. 12) are consistent in saying that they came to know regarding name of the accused persons involved in the crime from the informant, Upendra Pandit. None of them have stated that Upendra Pandit had also received any injury.

19. P.W. 6 and P.W. 8 have stated that the informant told them that the alleged murder was committed by the appellants and none else.

20. What remains to be noticed now is deposition of Ram Bilash Pandit (P.W. 13), who admittedly is brother of the deceased and son of the informant and Upendra Pandit (P.W. 14) who is informant himself. P.W. -13 has stated in examination-in-chief that in the night of the occurrence he was sleeping together with his father and sister on the same cot in "Varandah" of the house. He woke up when his father cried "Mara Mara". Apart from the appellants, he saw Savitri Devi, Mukki Sah, Naresh Yadav and Jagdeo Yadav fleeing away. His father had sustained injury on his head whereas his sister had sustained injury on her neck and it was profusely bleeding. She whispered "Babu Babu" thrice and died instantaneously. He has also stated that prior to the occurrence appellant Premlal Sah had organized a meeting near his field. In cross examination he has stated that there are two rooms in his house. They used to sleep in "Verandah" in summer season. At the time of occurrence it was winter. He has further stated when he woke up, he found Shankar Sah, Prem Sah, Savitri Devi, Naresh Yadav and Jagdeo Yadav towards east of the "Verandah" and when he raised "Hulla" they fled away. He has also stated that on alarm being raised several persons had assembled near the place of occurrence. They were twelve in number. When his attention was drawn towards his previous statement made to police in which he had stated that he had saw three persons fleeing away on cry of his father but could not identify

them, he denied to have made such statement before the police. He has further stated that he did not see co-accused Bijendra Yadav at the time of occurrence. He also admits that Mukki Sah was arrested in this case. Let it be noted here that when the investigating officer (P.W. 17) was examined, he has categorically stated that Ram Bilash Pandit (P.W. -13) in his statement recorded u/s 161 of the Code of Criminal Procedure had stated that on alarm raised by his father he woke up and noticed three persons fleeing away but could not identify them.

21. The informant is P.W. 14. He has stated that on the date and time of occurrence while he was sleeping together with his son and daughter on the same cot, some one hit him by "Bhujali" (a sharp cutting weapon). He sustained injury on his head. He woke up and found that neck of his daughter was slit. She whispered "Babu Babu" thrice and died. He stated that he saw the appellants in "Verandah" and Mukki Sah, Naresh and Jagdeo in the courtyard. Savitri Devi was also near the door. He saw them fleeing away. He chased them and raised alarm. Several persons came at the place of occurrence. He named Shashi Munshi, Prahlad Bhagat, Jagannath Sah, Inder Bhagat, Nimai Pandit, Krityanand Yadav, Manorath Das, Raghunandan Bhagat, Sidheshwar Bhagat and Kripalal Mukhiya among the persons, who came on hue and cry raised by him. He has further stated that Mukhiya informed the police on phone. The Chaukidar went to the police station. A police officer came at the place of occurrence. He saw the dead body and recorded his fardbeyan.

22. The informant was cross-examined. In his cross-examination he has stated that he was sleeping in "Verandah" of northern room. His son and daughter were sleeping together with him on the same cot. On being assaulted he shouted "Chor Chor". On his hue and cry witnesses came. The moment he stood up, the miscreants fled away. He and his son chased them. The investigating officer came in the morning and recorded his oral statement. He had given name of Mukki Sah as an accused in his fardbeyan. Mukki Sah was arrested in the night and the investigating officer took him to police station but he was let off. He has further stated that in the oral statement recorded by police he had not disclosed name of Bijendra Prasad Yadav as one of the accused. One Narain Prasad, a Mukhiya came immediately after arrival of investigating officer. The investigating officer called him near the door of Jagannath Sah (P.W. 1) after arrival of Narain Mukhiya and took him inside the room. The investigating officer took his thumb impression on five blank sheets of paper. He has gone to the extent of saying that Bijendra Prasad Yadav, a co-accused, who was tried together with the appellants, was falsely implicated in this case. He has denied the suggestion that his wife had fled away with Inderlal Yadav. He has also denied the suggestion that he was not sleeping together with his son and daughter in the "Verandah" of the house in the night of occurrence. When attention was drawn to his previous statement recorded by the police, he denied that he had stated before the police that he was sleeping inside the room. He has also denied that he had not stated before the police that someone struck him by "Bhujali". He has further denied the fact that he had not stated before the police that he had seen the appellants

in the "Verandah" of the house.

23. I may notice here certain important facts with respect to deposition of P.W. 14. In his examination-in-chief itself he has named Mukki Sah, Naresh Yadav and Jagdeo Yadav, who are alleged to have been seen by him in the courtyard at the time of occurrence apart from appellants Shankar Sah and Prem Sah. Neither Mukki Sah nor Naresh Yadav nor Jagdeo Yadav have been made accused in the first information report nor they have been sent up for trial in the chargesheet nor they have been summoned u/s 319 of the Code of Criminal Procedure. Another important factor is that the informant has himself doubted the fardbeyan by saying that he did not name Bijendra Yadav as an accused in this case and the investigating officer had taken his thumb impression on five blank sheets of paper. Thus, the informant has let off one of the named accused Bijendra Yadav in his deposition. It is also to be noted here that the informant has alleged that on hue and cry being raised by him apart from others Shashi Munshi, Prahlad Bhagat, Inder Bhagat, Krityanand Yadav, Manorath Das, Raghunandan Bhagat and Sidheshwar Bhagat came to his house immediately after the occurrence. These witnesses have not been examined in course of trial. It may further be noted that one "Chaukidar" is also said to have arrived at the place of occurrence and "Chaukidar" went to the police station. The identity of Chaukidar has not been disclosed by the informant and no Choukidar was examined by the prosecution in course of trial. The informant has admitted in his cross-examination that he had dispute relating to land with the appellants from before the occurrence.

24. The informant, though, claims to have sustained injury by "Bhujali", the prosecution has not brought on record any medical report in this regard.

25. Learned Counsel for the appellants at this stage has rightly brought to the notice of the court the fact that a report regarding commission of a cognizable offence was already given to the investigating officer, who at the relevant time was also acting as Officer-in-Charge of Katihar Mufassil Police Station on 13.11.1983 at 4.30 p.m. by Chaukidar, Nakshatra Paswan and the investigating officer had proceeded to the place of occurrence from the police station after receipt of information that the daughter of the informant had been murdered. The investigating officer thereafter reached and inspected the place of occurrence, prepared the inquest report, seized blood stained earth, blood stained old white "Saree" and other articles. He prepared dead body Challan and sent the dead body of the deceased Parwati Kumari together with Constable, Ram Pakan Singh and Ghulat Paswan for postmortem examination to Sadar Hospital, Purnea. He, thereafter, recorded the fardbeyan and sent the same for institution of first information report. A formal first information report was thereafter drawn by the Officer-in-Charge of the Police Station namely, P.P. Karn. The fardbeyan recorded in the pen and signature of S.I., Dharichan Ram has been marked as Ext.1. The signature of Govind Poddar and Kripalal Sah on the seizure list has been marked as Ext.2 and 2/1 respectively. The postmortem

report has been proved and marked as Ext.3. The seizure list has been proved and marked as Ext.4 and the formal first information report has been proved and marked as Ext.5 in course of trial. It is to be noted here that neither the "Chaukidar" Nakshatra Paswan nor the Chowkidar Rampakan Singh and Ghulat Paswan, nor the officer incharge, P.P.Karn have been examined on behalf of the prosecution in course of trial. Even the dead body Challan which is said to have been prepared by Dharikchan Ram (P.W. 17) has not been brought on record. The importance of this aspect would be discussed hereinafter.

26. When Dharichan Ram (P.W. 17) was cross-examined he has admitted the fact that he had received information regarding murder of the deceased at the police station from Nakshatra Paswan. A station diary entry was made on such information. Curiously enough the station diary entry has not been brought on record. In other words, from the first information report on which the police proceeded to investigate the case has been suppressed and withheld deliberately by the prosecution. P.W17 has further admitted that he had inspected the place of occurrence at the instance of "Chaukidar" Nakshatra Paswan. He has further admitted that after receipt of information at about 4.30 a.m. on 13.11.1983 he reached at the place of occurrence at 6 a.m., i.e.within 90 minutes of receipt of information. He admits that he had prepared seizure list of the materials like blood stained "Saree", blood stained "Motia" (bed sheet) and blood stained earth but did not mention time in the seizure list. He also admits that there are certain cuttings in the seizure list. The material exhibits so seized were neither produced in the court nor sent for chemical examination. P.W. 17 further admits that though he had prepared inquest report, the same was not available. we may note here that non-production of station diary entry (sanha), inquest report, material exhibits seized and admitted cuttings over the seizure list which was prepared without mentioning time thereon caused serious doubt upon the veracity of the prosecution case. It is reiterated that the investigation officer has contradicted the statement of P.W. 13, Ram Bilash Pandit by saying that Ram Bilash Pandit had not taken name of the persons, who were seen by him at the time of occurrence while fleeing away. It appears that after conducting major part of investigation P.W. 17 was transferred and he handed over charge of investigation to investigation officer, Suresh Prasad (P.W. 15), who conducted investigation thereafter and submitted chargesheet in this case.

27. P.W. 15 has stated that he recorded statement of witnesses, Man Mohan Yadav (P.W. 11), Janardan Prasad Yadav (P.W. 2) and Jahur Mian (P.W. 3). There is nothing much to be discussed about P.W. 15. As stated above, he has simply submitted chargesheet in this case. He did not even inspect the place of occurrence as has been admitted by him in his cross-examination.

28. Learned Counsel appearing on behalf of the appellants has, thus, submitted that the prosecution has tried to implicate the appellants in a false case after due consultation and deliberation as admittedly they were on inimical term. Allegedly the occurrence took place at about 1 a.m. on 13.11.1983. The information

regarding murder of daughter of the informant was duly given to the investigation officer (P.W. 17) at 4:30 a.m., who at the relevant time claims to be acting as an officer incharge of the concerned police station. Since information was neither vague nor cryptic, the same should have been treated as the first information report. The prosecution has deliberately suppressed the initial report made to the Police. The Investigating Officer (P.W. 17) admits that on receipt of such information a Sanha entry was made but the said Station Diary Entry has also not been brought on record. P.W. -17, the investigating officer has admitted that on reaching the place of occurrence it was Nakshatra Paswan (Choukidar) who took him to the place where the dead body of Parwati Kumari was lying. Thus, it can safely be presumed that it was Nakshatra Paswan who reported regarding commission of a cognizable offence at the Police Station. He accompanied the Investigating Officer (P.W. 17) to the place of occurrence from the Police Station and it was at his instance he inspected the place of occurrence, prepared the dead body challan, inquest report, seizure list etc. and sent the dead body for post-mortem examination together with two Chowkidars. It is submitted on behalf of the appellants that when all these happened the informant, Upendra Pandit (P.W. 14) or his son Ram Bilash Pandit (P.W. 13) was not even present at the place of occurrence. They are neither seizure list witnessed nor they accompanied with dead body of the deceased, Parwati Kumari. There was no reason for Investigating Officer who admittedly had reached at the place of occurrence at 6.00 a.m. in the morning to have waited for more than three hours to record purported fard-beyan of the informant which admittedly was recorded at 9.15 a.m. on 13.11.1983. Learned Counsel for the appellants, thus, submits that the aforesaid fard-beyan was as a matter of fact a statement recorded in course of investigation of the case and the same should not have been treated as first information report since the informant has put his thumb impression on it. The first information report thus, would be hit by Section 162 of the Code of Criminal Procedure.

29. Thus, we find from the discussion made hereinabove, that P.W. -11 has been declared hostile. P.W. -4 has been tendered for cross-examination. P.W. -5, P.W. -7, P.W. -9 and P.W. -10 are all formal witnesses. P.W. -2, P.W. -3, P.W. -6, P.W. -8, P.W. -12 are hearsay witnesses, who are all inconsistent in their deposition. P.W. -13 son of the informant has been contradicted by the Investigating Officer (P.W. -17) on material point with respect to identification of the accused and P.W. -14 the informant, who claims himself to be an injured eye-witness but has himself not been able to prove the injuries caused upon him. He has given a clean chit to the co-accused Vijendra Prasad Yadav whose name was initially, given in the oral statement on record by the Investigating Officer. He has doubted veracity of fardbeyan by saying that the I.O. had taken his thumb impression on 5 blank sheets of paper.

30. Learned Counsel for the appellants submits that the inquest report has also been deliberately withheld by the prosecution. The investigating officer has admitted that there are several cuttings on the seizure list and the time of

preparation of seizure list is not mentioned. He could not explain as to why such cuttings were made on the seizure list. The investigating officer has hesitantly admitted that he had recorded Station Diary Entry prior to leaving the Police Station on 13.11.1983.

31. Learned Counsel for the appellants has next submitted that though fard-beyan was recorded at 9.15 a.m. on 13.11.1983, the first information report was registered at 7.00 p.m. on 13.11.1983. The investigating officer reached at the place of occurrence within ninety minutes as noted above. There was no reason as to why the first information report was registered after almost 13 hours after the Investigating Officer reached at the place of occurrence. It appears that the investigating officer was waiting for the informant to come so that a purported fard-beyan could have been recorded. The first information report was registered only after most of the crucial part of investigation was over. As stated above the inquest report, seizure list, postmortem report everything was available before the investigating officer prior to institution of the first information report. Thus, the first information report and the investigation pursuant thereto were tainted. We find force in the argument advanced on behalf of the appellants. We may note here that the Apex Court in the case of Arjun Marik v. The State of Bihar since reported in (1994) Suppl. 2 SCC 372 considered this aspect and summed up its finding in paragraph 22 of the judgment, which reads as follows:-

(22) As seen above the police station was at a distance of only 400-500 yards from the place of occurrence. The evidence discussed above also goes to show that Surnath Jha had gone to the police station. It is, therefore, quite improbable that Surnath Jha having gone to the police station would not have lodged the report there and would have preferred to come back to the place of occurrence to make Fard-beyan later at 8.00 a.m. The Police Inspector, Doman Razak, PW 10 admits that he had received the intimation about the three murders and that he had recorded the same in the Roznamcha Sanha but has not produced the said entry of the Roznamcha Sanha which further deepens the doubt for which adverse inference in the natural consequence. Further a perusal of evidence of Anil Kumar Jha, PW 3 who is a witness to the inquest reports which were prepared at the place of occurrence on 20-7-1985 between 9.00 and 9.30 a.m. and that in all the three inquest reports "P.S. Case No. 112 of 1985, dated 20-7-1985" was written. It shows that the Police Inspector had registered the offence in the police station on the basis of the information received about the crime before leaving for the place of occurrence otherwise there was no question of recording the case No. on the inquest reports. It appears that the Sanha report was purposely not produced in the Court as it did not reflect any doubt on the appellants to be the perpetrators of the crime and it was at a later stage after deliberations that it was found that the appellants were the frequent visitors to the house of Sitaram and used to take loan from him and, therefore, on the basis of doubt the house of appellants was raided at 3.00 p.m. on 20-7-1985 and after having effected seizure of articles from that house, Fard-beyan, Ext. 3 was obtained from Surnath Jha, PW 6 in which doubt was expressed on the

appellants. This is one part of the suspicious story of the prosecution case.

32. We may also refer to a judgment of the Apex Court since reported in Ramesh Baburao Devaskar and Others Vs. State of Maharashtra, in which institution of F.I.R. after preparation of inquest report in a murder case by the investigating officer has been deprecated in the background of the facts of that case. The object, value and use of F.I.R. is by now well settled. The first information report is a report relating to the commission of an offence, given to the police and recorded by it u/s 154 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."). Though, as observed by the Privy Council in King Emperor v. Khwaja Nazir Ahma (1994) 71IA 302, recording of a first information report is not a condition precedent to the setting in motion of the criminal investigation yet from the view point of the investigating authorities it conveys to them earliest information regarding the circumstances in which the crime was committed; the names of the culprits and the role played by them as well as the names of the witnesses present at the scene of occurrence, so vital for effective and meaningful investigation. The information about an occurrence can be given by any person knowing about the commission of such an offence and not necessarily by an eyewitness. The F.I.R. does not constitute substantive evidence. It can be used as a previous statement for the purpose of either corroborating it's maker u/s 157 of the Evidence Act, 1872 or for contradicting him u/s 145 of the Evidence Act. It can be used for corroborating or contradicting other witnesses.

33. We may further refer to the judgment of the Apex Court since reported in Sahib Singh Vs. State of Haryana, (Sahib Singh v. State of Haryana) and Kishan Singh (D) through LRs. Vs. Gurpal Singh and Others, in which deliberate delay in lodging the F.I.R. without proper explanation has been held fatal to the prosecution case.

34. Learned Counsel for the appellants has also argued that the entire investigation in the present case was tainted. A deliberate attempt has been made by the Investigating Officer to implicate the appellants after due deliberation and consultation and after suppressing the report originally received regarding commission of a cognizable offence. The Investigating Officer failed in discharge of its duty. The duty of Investigating Officer is to unearth the truth and not to concoct and fabricate story in order to implicate and fix innocent person in a criminal case. We find in the present case that neither the information received first was treated as F.I.R nor the subsequent statement was properly registered nor formal F.I.R. so registered was transmitted to the court promptly. There is inordinate delay in receipt of F.I.R in court. As noted above, the occurrence took place at 1.00 a.m. on 13.11.1983. The information was received in the police station in this regard at 4.30 a.m. on the same day. The police reached at the place of occurrence on the same day at 6.00 a.m. The F.I.R. was registered at 7 a.m. on 13.11.1983. It was sent to the court on 14.11.1983 but was received in the court on 18.11.1983. There is no explanation for the delay in receipt of the F.I.R. Regarding sending a copy of F.I.R. to the Magistrate, section 157 of the

Code of Criminal Procedure provides:

(1) If, from information received or otherwise, an officer incharge of a police station has reason to suspect the commission of an offence which he is empowered u/s 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police report and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the State Government may by general or special order, prescribe in this behalf, to proceed, to the spot, to investigate the facts and circumstances of the case, and, if necessary, to take measures for the discovery and arrest of the offender:

Provided that-

(a) when information as to the commission of any such offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police station need not proceed in person or depute a subordinate Officer to make an investigation on the spot,

(b) if it appears to the Officer in charge of a police station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clause (a) and (b) of the proviso to sub-section (1), the officer in charge of the police station shall state in his report his reasons for not fully complying with the requirements of that sub-section, and, in the case mentioned in clause (b) of the said proviso, the officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the State Government, the fact that he will not investigate the case or cause it to be investigated.

35. Delay in lodging the FIR often results in embellishment, which is a creature of an afterthought. On account of delay, the FIR not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a coloured version or exaggerated story. With a view to determine whether the FIR was lodged at the time it is alleged to have been recorded, the courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution can offer a satisfactory explanation for the delay in despatching or receipt of the copy of the FIR by the local Magistrate. Prosecution has led no evidence at all in this behalf.

36. We may take note of the judgment of the Apex Court in this regard in the case of Arjun Marik Vs. State of Bihar (supra) in which in a case arising from State of Bihar the practice of not sending the F.I.R. to the residence of a Magistrate on Sundays and holidays has been deprecated and the authorities

have been reminded to wake up and see that the provisions of section 157 of the Code of Criminal Procedure are complied with in letter and spirit.

37. On the basis of aforesaid discussions we find force in the argument made on behalf of the appellants that the delay in registration of F.I.R., its transmission to the court and its receipt in the court in the background of the evidence collected in course of trial has made the entire investigation tainted and inference should be drawn that the same had been drawn after due deliberation, consultations and discussions. It would be unsafe to rely upon such investigation.

38. When we look into the facts of the present case we fail to reconcile as to why the investigating officer would have continued to be present for over three hours at the place of occurrence. Had it been only for the purposes of recording fardbeyan. If that was so, it becomes highly doubtful as to whether the informant or his son was even present at the place of occurrence when the occurrence took place or they reached subsequently on some information received through someone and then taking advantage of the situation implicated the appellants with whom there was admitted enmity from before due to land dispute. We may also take note of the judgment of Hon"ble Supreme Court since reported in 2006 (2) SCC 250 (Om Prakash v. State of Haryana) in which delay of four hours in lodging the first information report was considered to have created doubt about the prosecution case.

39. Learned Counsel for the appellants has next submitted that the defence has seriously been prejudiced due to non-examination of important witnesses such as Nakshtra Paswan ("Chaukidar") and two Constables, namely, Ram Pakan and Gulat Paswan, who accompanied the corpse and identified the deceased before the doctor, who conducted the postmortem examination, Officer Incharge, P.P. Karn, who drew formal first information report, the witnesses, namely Shashi Munshi, Prahlad Bhagat, Jagannath Sah, Inder Bhagat, Nimai Pandit, Krityanand Yadav, Manorath Das, Raghunandan Bhagat, Sidheshwar Bhagat and Kripalal Mukhiya, who reached at the place of occurrence on shouting of the informant as narrated by him in his examination in chief. It is submitted that for non-examination of these important witnesses an adverse inference should be drawn against the prosecution. It is also submitted that non-production of Station Diary Entry, inquest report and dead body challan in course of trial has also caused serious prejudice to the defence case.

40. We find force in the submission. In a judgment of the Apex Court since reported in AIR 1954 SCC 51 (Habeeb Mohd. v. State of Hyderabad) it has been observed that a top ranking police Officer who was present at the scene of the occurrence was a material witness. He was not examined during trial on the ground that if produced, he would not speak truth. The Hon"ble Supreme Court observed that "not only does an adverse inference arise against the prosecution case from his non-examination of that police officer as a witness but circumstance of his being withheld from the court casts a serious reflection on the fairness of the trial."

41. Similarly, in yet another judgment of the Apex Court since reported in State of U.P. and Another Vs. Jaggo alias Jagdish and Others, it has been held that "the mere presentation of an application to the effect that a witness had been won over was not conclusive of the question that the witness had been won over. In such a case the witness could have been produced for cross-examination by the accused. That would have elicited the correct facts."

42. We are of the opinion that an adverse in terms of section 114(g) of the Evidence Act has to be drawn against the prosecution for non-examination of several important witnesses and withholdment of important documents as noted above. The prosecution case suffers from serious infirmities which cannot be brushed aside. The prosecution has deliberately tried to hide the truth from the court and this casts a serious reflection on the bonafide of the prosecution case.

43. In the present case, apparently witnesses are not reliable, the first information given to the police regarding commission of a cognizable offence on the basis of which station diary entry had admittedly been made, has been withheld, the inquest report prepared at the place of occurrence has also been deliberately withheld, the seizure list admittedly contains several cutting and no time of preparation of seizure list is mentioned therein, the fardbeyan was recorded more than 3 hours after reaching and inspecting the place of occurrence, the F.I.R. was registered 13 hours after reaching the place of occurrence and 10 hours after recording the fardbeyan, the F.I.R. reached the court 4 days after its transmission and several independent witnesses, who came to the place of occurrence immediately pursuant to the alarm raised by the informant, have not been examined by the prosecution and no explanation has been given for non-examination of those witnesses in the court. In the background of the facts of the present case and the laws applicable to the facts of this case, we have no hesitation in holding that the prosecution has failed to prove its case beyond reasonable doubt.

44. We, thus, set aside the judgment and order dated 13.6.1989 passed by the learned Sessions Judge, Katihar in Sessions Case No. 1 of 1985 by which the appellants have been convicted and sentenced to undergo imprisonment. The appellants, who are already on bail, are discharged from the liabilities of their bail bonds.

45. In the result the appeal stands allowed.

46. I appreciate the sincere effort of Mr. Raj Nandan Prasad, Learned Counsel for the appellants, who has argued the case as Amicus Curiae. The Legal Aid Authority of Patna High Court should make payment of fee of the Learned Counsel for the appellants for one day's argument which is quantified as Rs. 2,500=00 only.