

(2013) 05 PAT CK 0044

In the Patna High Court

Case No : Criminal Appeal (DB) No. 261 of 1990

Rajendra Prasad Chourasia

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 23-05-2013

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 133, 144, 313

Penal Code, 1860 (IPC) — Section 109, 302, 34

Citation : (2013) 05 PAT CK 0044

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

Bench : Division Bench

Advocate : Krishna Prasad Singh and Mr. Ranjan Kumar, in CR. app DB No. 261 of 1990 and Mr. Bibhuti Prasad Pandey and Mr. Parmanand Kumar, in CR. app DB No. 285 of 1990, for the Appellant; Shashi Bala Verma, Assistant Public Prosecutor, for the Respondent

Final Decision : Allowed

Judgement

Mihir Kumar Jha, J.—Both these appeals arise out of common judgment dated 6.7.1990 whereby and whereunder the Sessions Judge, East Champaran, Motihari in S. Tr. No. 201/1989 arising out of Motihari Muffasil P.S. Case No. 103/1988 has convicted the appellants Rajendra Prasad Chourasia u/s 302/109 of the Indian Penal Code and sentenced him to undergo Rigorous Imprisonment for life while the other appellant Rajendra Prasad has been convicted for offence u/s 302 of the Indian Penal Code and also sentenced to undergo Rigorous Imprisonment for life in addition to his being convicted u/s 27 of the Arms Act with a sentence of R.I. for six months. The two sentences of appellant Rajendra Prasad, however, are to run concurrently. The prosecution case is based on the fardbeyan of one Ramanand Prasad, who on 4.7.1988 at about 12.15 A.M. in the night of 3.7.1988/4.7.1988 had stated before the Police Officer at Motihari Muffasil Police Station that at about 9.45 P.M. in the same night of 3.7.1988 he had heard hullah that Babulal Prasad was shot dead at Batraulia Chowk and

hearing such hullah he had rushed to Batraulia Chowk where he had found Rameshwar Mahto (P.W. 3), Rameshwar Paswan (not examined), Yakub Mian (P.W. 6) and Ramadhar Mahto (P.W. 7) to be present. According to the informant, P.W. 9, the aforesaid persons had informed him that only a few minutes earlier when his brother Babulal Prasad had arrived from Motihari and was going towards his house in their company and had reached on the pitch road in the eastern side of Batraulia Chowk, the appellants Rajendra Chourasia and Rajendra Prasad riding on a motorcycle had arrived from the back and having stopped the motorcycle the appellant Rajendra Chourasia had asked about the identity on which Babulal Prasad had stated about himself addressing Rajendra Chourasia as Rajendra Chacha. The informant has alleged that on this alone the appellant Rajendra Chourasia had given orders to shoot and the appellant Rajendra Prasad who was sitting behind the appellant Rajendra Chourasia had shot at Babulal Prasad by a pistol and Babulal Prasad in an injured condition having pressed his chest had ran towards the eastern side and had fallen down near Gumati of one Kedar Sah.

2. It is the further case of the informant that Rajendra Chourasia had in company of Rajendra Prasad fled away from the place of occurrence towards Motihari on the motorcycle and all the four persons who were accompanying Babulal Prasad had also withdrawn themselves out of fear. The informant has also stated that Babulal Prasad who had sustained gun shot injury in the right side of his chest was immediately loaded on a rickshaw for his being taken to Motihari hospital and the informant having known this fact had immediately proceeded towards Motihari on a bicycle and could meet his injured brother Babulal Prasad near Sirsa Chowk whom he has found on rickshaw being taken to Motihari. According to the informant his brother Babulal was unconscious and copious blood was oozing out of his injury in the right side of his chest. The informant had claimed that he had arranged a tractor and trailer from Sohan Babu of Sirsa but by time he could load his injured brother Babulal on the tractor and trailer arranged by him, he had succumbed to his injury. The informant has stated that thereafter he had carried the dead body of his brother Babulal Prasad alongwith his younger brother Surendra Prasad as also the villagers and residents of Batraulia, namely, Jagdeo Prasad, Harendra Kishore Yadav, Ram Ekbal Prasad, Sukhdeo Prasad and brought the dead body to the Police Station for recording of his fardbeyan.

3. The informant while giving background of the aforementioned occurrence has also stated that he had heard people saying that from the day earlier the appellant Rajendra Chourasia alongwith his bodyguard appellant Rajendra Prasad was celebrating in his medicine factory. The motive of the occurrence according to the informant was that his brother Babulal Prasad had filed a case in court against Rajendra Chourasia and there was a tension atmosphere on account of the same. He had also disclosed that the appellant Rajendra Chourasia had launched a proceeding u/s 133 Cr. P.C. as with regard to constructing houses in front of his factory which was opposed by his brother Babulal Prasad who had made a protest as with regard to discharge of contaminated water coming out of

Ayurvedic medicine factory of Rajendra Chourasia. According to the informant Rajendra Chourasia was aggrieved on account of opposition made by his brother Babulal Prasad and as such, he had got his brother eliminated and killed with the help of the appellant Rajendra Prasad, his bodyguard.

4. On the basis of the aforementioned fardbeyan of the informant Ramanand Prasad Motihari Muffasil P.S. Case No. 103/1988 was instituted u/s 302/34 I.P.C. as also u/s 27 of the Arms Act and the police had submitted its charge sheet whereafter the case was committed to the court of sessions and led to S. Tr. No. 201/1989 resulting into the impugned judgment of conviction and sentence as narrated above. The two appeals in fact of both the appellants Rajendra Prasad Chourasia and Rajendra Prasad arising out of common impugned judgment have been heard together and are being disposed of by this common judgment.

5. The defence of both the appellants as may be culled out from the trend of cross-examination of the prosecution witnesses as also their own statement u/s 313 Cr. P.C. is one of plain and simple denial of the alleged occurrence. The appellant Rajendra Prasad Chourasia has further entered into his specific defence that he had been falsely implicated not only on account of business rivalry but also at the behest of those very persons against whom he has brought a proceeding u/s 133 Cr. P.C. for creating public nuisance. He has also got five defence witnesses examined to prove that the other appellant Rajendra Prasad was never employed by him in any capacity much less his bodyguard and that the entire prosecution case in respect of a veteran litigant which the deceased Babulal Prasad was, had taken place in altogether different manner in which he had been claimed on account of previous admitted animosity and rivalry.

6. Mr. Krishna Prasad Singh, learned Senior counsel appearing on behalf of the appellant Rajendra Prasad Chourasia and Mr. Bibhuti Prasad Pandey, learned Senior counsel appearing on behalf of the appellant Rajendra Prasad, have assailed the impugned judgment on a number of grounds but their main attack is that the prosecution has not been able to substantiate its charge against either of the two appellants and in this regard their specific criticism to the impugned judgment is that the trial court has miserably failed to take into account that there was actually no eye witness to the alleged occurrence and even the two, namely, Laxuman Mahto (P.W. 2) and Rameshwar Mahto (P.W. 3) who were projected as eye witnesses had got thoroughly exposed in their cross-examination. According to both learned senior counsel there is in fact no eye witness to the occurrence.

7. Proceeding further they have also submitted that the prosecution has also been responsible in suppressing the true version in league of the Investigating Officer who for the reasons best known to him did not care to investigate the case properly and left the matter in a huff by omitting to even examine and record the statement of Kedar Prasad, the Gumati owner where the deceased is said to have run away for taking shelter after receiving gun shot injury as also Mathura Mahto, the rickshaw-puller who according to P.W. 3 had been

immediately brought at the place of occurrence for taking the injured Babulal Prasad to Motihari for his immediately treatment and had continued to carry him at least Sirsa Bazar when he was sought to be loaded on a tractor and trailer at Sirsa Bazar for his being taken to Motihari. In this regard they have also pointed out to yet another fatal infirmity on the part of the Investigating Officer in not even examining much less nabbing one Punyadeo Jha about whom it had got revealed that the deceased on the fateful night had come up to Sirsa Bazar from Motihari on his (Punyadeo Jha's) moped before hiring a rickshaw and coming to Batraulia Chowk.

8. Learned counsel for the appellants have also highlighted the obvious discrepancy in ocular evidence and in the medical evidence by pointing out that even when the consistent prosecution case as with regard to the manner of occurrence was that both the appellants had surrounded the deceased while riding on a motorcycle and had shot him from the front, the doctor while conducting the postmortem has found the wound of entrance of only gun shot injury to be in the back portion and its exit in front portion of the chest.

9. They have also pointed out that when admittedly the informant was not an eye witness and he had given his version as disclosed to him by four of them whom he had made at Batraulia Chowk, the resultant hearsay version of the informant could have only inspired confidence if the four persons narrating him regarding the entire occurrence were themselves eye witnesses.

10. In this regard Mr. Pandey, learned Senior counsel appearing on behalf of the appellant Rajendra Prasad, has taken great pain in referring to the evidence of the informant as well as his earliest version in the fardbeyan to show that even when he did not claim P.W. 2 Laxuman Mahto to be present at the place of occurrence when he had reached first on hearing hullah of gun shot injury on his brother, the latter had been projected as an eye witness. In the same manner he has also submitted that though P.W. 3 was named by the informant who is said to have narrated an eye version account of the occurrence but then even when the informant had left immediately the place of occurrence after acquiring knowledge of the manner of occurrence from the four persons including P.W. 3, an effort was made by the prosecution to develop its case that P.W. 3 also was all along present even upto Sirsa Bazar which were found to be wholly untrue on a conjoint reading of the evidence of the informant and P.W. 3.

11. Mr. Krishna Prasad Singh, learned Senior counsel appearing on behalf of the appellant Rajendra Prasad Chourasia, in addition to the aforementioned submissions of Mr. Pandey has gone to add that as a matter of fact when the prosecution having created the ghost presence of both Kedar Prasad, the Gumati shop owner at the place of occurrence as also Mathura Mahto, the rickshaw-puller on whose rickshaw the deceased was sought to be taken away from the place of occurrence to Motihari for treatment were not examined by the police and also not produced in court, they had been brought as defence witnesses and from the combined reading of their evidence in court it becomes clear that the

occurrence as alleged by the informant and his witnesses had never taken place, rather the deceased was done to death in altogether different manner and at a different place.

12. In this regard he has also referred to both oral and documentary evidence led by the defence to establish that the appellant Rajendra Prasad Chourasia had never engaged the appellant Rajendra Prasad as his bodyguard and when the prosecution having made a bald allegation had left the matter, the defence had brought clinching evidence to show that the appellant Rajendra Prasad was not in any sort of employment of the appellant Rajendra Prasad Chourasia. On these broad made propositions as also sought to be developed in course of their arguments both the learned counsel for the appellants have submitted that the impugned judgment of conviction and sentence of the appellants cannot be sustained either on fact or in law and the same is fit to be set aside.

13. Ms. Shashi Bala Verma, learned Addl. Public Prosecutor appearing on behalf of the State, on the other hand, has submitted that the impugned judgment of conviction and sentence would require no interference especially when the occurrence leading to gun shot injury on the deceased and his resultant death at the hands of the appellants has been fully proved in the evidence of two eye witnesses P.W. 2 and P.W. 3. She has stated that even when P.W. 6 and P.W. 7 have turned hostile to the prosecution case, their statement in the court would at least support the factum of occurrence taking place at the place of occurrence suggested by P.W. 2 and P.W. 3 and therefore, the version of P.W. 2 and P.W. 3 at least stands corroborated to that extent from the evidence of P.Ws. 6 and 7.

14. As with regard to discrepancy in ocular and medical evidence she has submitted that it was night and the only source of light was either the moonlit light or from the headlight of the motorcycle and in this paucity of clear light if there has been some confusion with regard to angle of causing gun shot injury, the same in any view of the matter would completely demolish the prosecution case especially when one fire arm injury as alleged in the fardbeyan of the informant P.W. 9 stands fully supported and corroborated in the medical evidence of the doctor, P.W. 8.

15. She has sought to explain prosecution case was not at all weakened by alleged withholding of the evidence of Kedar Prasad, the Gumati shop owner or Mathura Mahto inasmuch as she is of the view that in absence of any evidence that Kedar Prasad was present in his shop when the occurrence of shooting near his Gumati had taken place, his non-examination either by the police or in the court would not materially affect the prospect of the prosecution case. In the same vein she has also submitted that non-examination of Mathura Mahto, the rickshaw-puller either by the police or in court by the prosecution was immaterial, inasmuch as he too was introduced only after the main occurrence had already taken place of which he was not an eye witness.

16. In the light of these broad submissions Ms. Verma has dwelt upon the aspect

that since enmity cuts both the ways, it cannot be said that the appellant Rajendra Prasad Chourasia was not instrumental in getting the deceased Babulal Prasad eliminated by his bodyguard appellant Rajendra Prasad. She has accordingly submitted that the impugned judgment of conviction and sentence would require no interference.

17. Before we would analyze the aforementioned submissions of both the parties it would be necessary for us to record here that the prosecution in support of its case had examined ten witnesses, out of whom P.W. 1 Harendra Kishore Yadav is a formal witness, who had proven his signature on the inquest report. P.W. 2 Laxuman Mahto and P.W. 3 Rameshwar Mahto are said to be two eye witnesses to the occurrence. P.W. 4 Jagdeo Prasad and P.W. 5 Surendra Prasad are the two hearsay witnesses. P.W. 6 Yakub Ansari and P.W. 7 Ramadhar Mahto are the two witnesses whom the prosecution has declared hostile. P.W. 8 is the Dr. Bishwanath Tiwari who had conducted postmortem on the person of the deceased. P.W. 9 Ramanand Prasad is the informant who again is a hearsay witness and P.W. 10 Narendra Kumar is the Investigating Officer.

18. The prosecution has also led its documentary evidence in form of Exts. 1 series being the signature of the witnesses over the inquest report/F.I.R., Ext. 2 the postmortem report, Ext. 3 the F.I.R., Ext. 4 inquest report, Ext. 5 seizure list, Ext. 6 certified copy of the order of cognizance passed by the C.J.M. in Trial No. 280/88.

19. As noted above, the two appellants had also entered into defence and they have examined five defence witnesses, namely, D.W. 1 Mathura Mahto, the alleged rickshaw-puller, D.W. 2 Motilal Chaudhary, the toddy shop owner at Batraulia Chowk, D.W. 3 Kedar Prasad, the Gumati shop owner near the place of occurrence, D.W. 4 Dharmnath Prasad, the Supervisor in the laboratory of the appellant Rajendra Prasad Chourasia and D.W. 5 Ram Bachan Ram, the Labour Superintendent of the Govt. of Bihar. Additionally the defence has also adduced documentary evidence in form of Ext. A certified copy of the judgment in Tr. No. 1205/88, Ext. B certified copy of the charge sheet in Muffasil P.S. Case No. 6/89, Ext. C certified copy of the order in Case No. 334(M)87, Ext. D certified copy of the F.I.R. in Muffasil P.S. Case No. 142/86, Ext. D/1 certified copy of the F.I.R. in Muffasil P.S. Case No. 6/89, Ext. E certified copy of the report u/s 144 Cr. P.C. in non-F.I.R. Case No. 23/87, Exts. F to F/11 name of the employees and the attendance from January, 1988 to December, 1988, Ext. G and G/1 initial of the Labour Superintendent dated 14.3.1988 and 29.6.1988 and Ext. H notice of 1989 of the office of Assistant Labour Commissioner.

20. We have already found that the prosecution case is based on hearsay version of the informant who is said to have gone to the place of occurrence on hearing hullah and has been narrated of the entire occurrence by the four persons, namely, Rameshwar Mahto (P.W. 3), Rameshwar Paswan (not examined), Yakub Ansari (P.W. 6) and Ramadhar Mahto (P.W. 7). As noted above, out of four of them who had allegedly apprised the informant as with regard to the role of the

two appellants in the murder of his brother Babulal Prasad, one of them Rameshwar Paswan has not been examined and no explanation has been given as with regard to his non-examination. The other two, namely, Yakub Ansari and Ramadhar Mahto were examined by the prosecution as P.W. 6 and P.W. 7 but they too have turned hostile. Thus, the solitary person who in the version of the informant had given the entire narration of the occurrence showing involvement of these two appellants is P.W. 3.

21. It has to be however taken into account that P.W. 3 Rameshwar Mahto is a toddy shop owner who has his shop in front of the medicine factory of the appellant Rajendra Prasad Chourasia. Admittedly Rajendra Prasad Chourasia was aggrieved on account of construction of building/shops in front of his factory and had initiated a proceeding u/s 133 Cr. P.C., a fact which has been also admitted by the informant P.W. 9 in his First Information Report itself. P.W. 3 in fact in his cross-examination has candidly admitted that he had no real concern with the deceased Babulal Prasad and in fact he was not on visiting terms with Babulal Prasad inasmuch as he had insignificant acquaintance with him and used to see him occasionally crossing the road on which his shop was situated. As a matter of fact when P.W. 3 had also admitted that he was not even on talking terms with the deceased Babulal, it becomes wholly a doubtful proposition as to whether in the fateful night of 3rd of July, 1988 the deceased having started from Motihari on a rickshaw and arrived near the shop of P.W. 3 at Batraulia Chowk, could have asked for his company for being taken to his house which according to the Investigating Officer was at a distance of 2 furlong from Chowk.

22. In this backdrop when evidence of PW-3 in court is examined, it becomes clear that he has made an effort to pose as an eye witness, inasmuch as he has claimed that after the deceased had received gun shot injury and had fallen down near betel shop of Gumati of Kedar Prasad he in company of Rameshwar had lifted Babulal and had taken him upto Sirsa Bazar. This part of his improvement that he had taken Babulal upto Sirsa Bazar however is an out and out improvement to only become eye witness, inasmuch as the informant had stated that he having heard hullah when he had reached at Chowk and was informed of the occurrence by all the four persons, namely, P.W. 3 Rameshwar Mahto, P.W. 6 Yakub Ansari, P.W. 7 Ramadhar Mahto and Ramesh Paswan (not examined he had left them at Chowk itself because they had informed him that his brother Babulal had been taken away by some other villagers on rickshaw and in fact the informant on hearing this had speeded his cycle towards Sirsa Bazar where he had met his brother in an injured condition. Thus, this part of improvement made by P.W. 3 in his examination-in-chief contrary to the version of the informant would require us to examine his evidence with great care and caution as he remains the only eye witness to support the hearsay version of the informant.

23. P.W. 3, however, had got immediately exposed in his cross-examination because he had stated therein that when the deceased had got down from

rickshaw near the Chowk where his shop was also situated, he had seen Kedar Prasad, the betel shop Gumati owner to be present in his shop. He had also named Rajendra Sah to be present in his shop at the time of arrival of the deceased at the Chowk on rickshaw. Thus, in the light of the evidence of P.W. 3 the presence of Kedar at his betel shop becomes an admitted fact and yet even when the deceased is said to have ran towards the Pan shop of Kedar and fallen over there with gun shot injury in his person, the Investigating Officer did not care to examine Kedar much less make him a charge sheet witness as has been admitted by the Investigating Officer, P.W. 10 in his evidence in court.

24. A question would, therefore, arise as to why P.W. 3 should be disbelieved on the material point which is inconvenient to the prosecution. It has to be noted that when the prosecution did not examine Kedar as a witness, the defence had examined Kedar as D.W. 3 and in his evidence in court he had clearly stated that he was present in the Pan shop when he had heard that the deceased had sustained injury near Sirsa Pool and was lying unconscious over there. D.W. 3 Kedar Prasad, whose presence in his shop has been accepted by P.W. 3, has also stated that he had gone to Sirsa Pool where he had found the deceased unconscious in the western portion of the Pool and could not come to know of the name of the assailants. He had also denied that the deceased had ever received any injury near his Pan shop.

25. This Court therefore will have no difficulty in holding that once the prosecution had brought the presence of Kedar Prasad, the betel shop owner in picture, it could not have summarily given up its case, inasmuch as there is not even this much of explanation in the evidence of the Investigating Officer that he did not examine Kedar Prasad, near whose shop the deceased had fallen down after running away from the place of occurrence because Kedar Prasad was not present in his shop at the time of place of occurrence. On the contrary Kedar Prasad (D.W. 3) was cross-examined at length by the Public Prosecutor and he had stood firm of his statement that he was present in his shop and his pan shop used to remain opened till 10.30 pm in the night and was not closed on any of these days.

26. D.W. 3 in fact had also stated that the I.O. had on the following day made enquiry from him and he was not aware as to whether his statement was recorded in the case diary by the Police Officer or not. The manner in which the Investigating Officer P.W. 10 had explained his course of investigation in paragraph 11 of his cross-examination would also unfold that the presence of Kedar was sought to be deliberately withheld by the prosecution inasmuch as the I.O. had himself admitted that he had made inspection of the shop of Kedar Prasad where he did not find any blood and in such a situation it would be difficult for this Court to approve the conduct of the Investigating Officer in not examining Kedar Prasad though he had inspected his shop on the following day of the occurrence.

27. The next vital clue found from the evidence of P.W. 3 is that he had claimed

that after sustaining of gun shot injury by the deceased on his person when he had fallen down near the shop of Kedar prasad (D.W. 3), it was he (P.W. 3) who had gone to bring a rickshaw for carrying the injured Babulal Prasad to Motihari for his treatment. In paragraph 6 he had stated that when he had gone to bring the rickshaw he had found the same near the shop of Gauri Sahni, who was the owner of Rickshaw but since he was not present he had hired the services of Methul Mahto, another rickshaw-puller. Methul Mahto, therefore, became an important clue for the prosecution, inasmuch as he was the person who could have said as to whether the deceased first of all had sustained injury near the Chowk and had fallen down near betel shop of Kedar Prasad and secondly, whether the deceased was carried from the Chowk to Sirsa Bazar from where the informant had arranged a tractor and trailer for the deceased being taken to Motihari or was carried from Sirsa pool where D.W. 3 Kedar Sahni had found the deceased in an injured condition.

28. It is quite significant to note here that the Investigating Officer had made no effort to search for Methul Mahto the Rickshaw Puller or for that purpose any rickshaw-puller on whose rickshaw the deceased was said to have removed from Chowk to Sirsa Bazar. Assuming that P.W. 3 had not stated before the Investigating officer as with regard to his (P.W. 3) being instrumental in arranging rickshaw of Methul Mahto or for that purpose accompanying the deceased from the Chowk upto Sirsa Bazar as has been stated by P.W. 10 in paragraph 19 of his cross-examination, the Investigating officer had still the duty to find out the correctness in the story of removal of the deceased on rickshaw from the Chowk, inasmuch as he had admitted in his cross-examination that P.W. 3 had stated that from the Chowk Jagdeo Prasad (P.W. 4), Harendra Kishore Yadav (not examined), Ram Ekbal (not examined) and Sukhdeo Prasad (not examined) were actually the persons who had taken the deceased on rickshaw for his treatment from the Chowk.

29. As a matter of fact the following passage of evidence of P.W. 10 would not only fully expose the effort of P.W. 3 of becoming eye witness but would also go to show that P.W. 3 did not move from the Chowk much less become instrumental in accompanying the deceased for his treatment either upto Sirsa Bazar or upto Motihari by rickshaw or by tractor and trailer. In this regard it would be also useful to quote paragraph 6 of the deposition of PW3, which reads as follows:-

30. This part of the statement of P.W. 3, however, has been found to be wholly untrue, inasmuch as the I.O. (P.W. 10) in his evidence in course of his cross-examination had frankly conceded that:

31. If the aforesaid conduct of P.W. 3 in introducing Kedar Prasad (D.W. 3) as also Methul Mahto (D.W. 1) was simply his over excitement to support the prosecution case as an eyewitness the prosecution became bound by it because its solitary alleged reliable eye witness had came out with a specific case. This part of statement of PW3 of Methul Mahto being rickshaw-puller whom P.W. 3

had brought and had lifted the deceased for his being loaded on rickshaw and also had accompanied him up to Sirsa Bazar is found to be wholly false when the evidence of D.W. 1 Methul Mahto is examined. D.W. 1 in his evidence in court had stated that he was never engaged in pulling rickshaw and in fact he had heard the sound of firing coming from the village Sirsa whereafter he and another had gone to Sirsa Pool and had seen the deceased lying on the western side of Sirsa Pool in an unconscious state. He had in fact specifically stated in paragraph no. 2 that:

32. Though D.W. 1 was cross-examined at length by the Public Prosecutor nothing could be brought on record to establish that Methul Mahto was a rickshaw-puller. As a matter of fact even when P.W. 3 had disclosed the name of rickshaw owner to be Gauri Sahni, he too was not examined by the prosecution to support that D.W. 1 was actually engaged in pulling of rickshaw and that on the fateful night his services were utilized for taking the deceased from Chowk to Sirsa Bazar before being removed on tractor and trailer to Motihari.

33. It is true that P.W. 3 may have again made an improvement for giving credibility of his being an eye witness by disclosing the name of Methul Mahto as rickshaw-puller, a fact which was also not found to have been substantiated by the Police Officer P.W. 10 but then if P.W. 3 was consistently making embellishment, could it be said that his version of occurrence was sacrosanct. Specially when he was the solitary witness for the prosecution in course of trial on account of PW6 and PW7 turning hostile and non examination of Rameshwar Paswan.

34. As noted above, in his earlier statement before the Police P.W. 3 had disowned to have accompanied the deceased on rickshaw and had named four persons, namely, Jagdeo Prasad, Harendra Kishore Yadav, Ram Ekbal and Sukhdeo Prasad to be the persons who had accompanied Babulal on rickshaw. Out of the aforesaid four persons three of them, namely, Harendra Kishore Yadav, Ram Ekbal and Sukhdeo Prasad have not been examined by the prosecution and the remaining person, Jagdeo Prasad (P.W. 4) has also claimed to be only hearsay witness who had acquired knowledge about the occurrence from Rameshwar Paswan (not examined), Rameshwar Mahto (P.W. 3), Laxuman Mahto (P.W. 2) and Yakub Ansari (P.W. 6), he did not even claim to have taken the deceased from the Chowk to Sirsa Bazar on rickshaw.

35. As a matter of fact the evidence of PW4 in court in paragraph no. 2 would leave nothing for speculation that he had accompanied Babulal from Sirsa Darbar on tractor and had gone to the Police Station alongwith the informant. P.W. 4 and thus is a hearsay witness who has given a complete turn to the prosecution case inasmuch as according to him Sirsa Darbar was at a distance of 1/2 K.M. from Batraulia Chowk and the injured Babulal was first examined at Sirsa Darbar by one Sohan Babu. The presence of P.W. 4 at the police station where he is said to become inquest witness being not in doubt, it would be really exposing the claim of P.W. 3 to be eye witness of the occurrence especially when he in his earlier

statement to the police had never claimed to have accompanied the deceased to even Sirsa Darbar, a fact which was also further corroborated while contradicting the stand of P.W. 4 in paragraph 8 of his cross-examination read with paragraph no. 20 of the cross-examination of P.W. 10.

36. A question would thus arise as to whether the evidence of P.W. 3 against whom admittedly a proceeding u/s 133 Cr. P.C. was initiated at the behest of the appellant Rajendra Prasad Chourasia could be believed as the solitary reliable eye witness? As noted above, P.W. 3 had no concern with the deceased and was not even on talking terms with the deceased and as such, his story that the deceased had come to him and has asked him to accompany to his house after getting down from the rickshaw would pose a big question as to whether the deceased was coming from rickshaw from Motihari to his village home or had hired at rickshaw at Sirsa Chowk.

37. It is here again that the prosecution has left the vital clue wholly unattended inasmuch as it has come in evidence of the I.O. PW-10 that he could come to know that the deceased in the fateful night had come upto Sirsa Bazar on a Moped of Punyadeo Jha of village Batraulia. In this regard the informant (P.W. 9) in his further statement before the police had stated that Punyadeo Jha was seen alongwith the deceased on the motorcycle while returning from Motihari and had come upto Sirsa on Moped/motorcycle of Punyadeo Jha. This aspect of the matter was admitted by the Investigating Officer in paragraph no. 22 which reads as follows:

38. Surprisingly the Investigating Officer having got the clue of Punyadeo Jha to have accompanied the deceased in the fateful night from Motihari to Sirsa had not even cared to record the statement of Punyadeo Jha as would be apparent from Paragraphs no. 15 and 16 of his cross-examination which reads as follows:

39. Thus, the Investigating Officer had happily left the clue of Punyadeo Jha unattended as he did in the case of Kedar Prasad, betel shop owner and Methul Mahto (the alleged rickshaw-puller) taking the deceased from the Chowk to Sirsa Bazar. The net impact of this part of discussion of evidence of P.W. 3 read with the evidence of P.W. 10 would bring the conduct of P.W. 3 in zone of suspicion and would not leave him to be such an eye witness on whose deposition alone the prosecution could romp its case home. The evidence of P.W. 3 being sketchy in nature as discussed above would therefore require some independent corroboration before it can be relied even on the solitary point of either the place of occurrence or manner of occurrence.

40. Such independent corroboration could have easily come from P.W. 2 Laxuman Mahto, the other professed eye witness brought forward by the prosecution. Unfortunately the emergence of Laxuman Mahto (P.W. 2) at the place of occurrence is itself shrouded in mystery, inasmuch as first of all he has not been named by the informant to be present at the place of occurrence when he had gone first having heard the hullah wherein he had named four other persons but

not Laxuman Mahto, a fact which has been also substantiated by the Investigating Officer in his evidence while explaining contradiction of P.W. 9, the informant. As a matter of fact the entire effort of P.W. 2 to become eye witness to the occurrence has been totally watered down when in paragraph no. 20 he had stated as follows:

41. In view of his aforementioned clear admission that he was not in the company of deceased while latter was going to his house with four persons as named by P.W. 3 or the informant in his F.I.R., it would become clear that P.W. 2 Laxuman Mahto is not an eye witness to the occurrence. Though this Court would not like to comment on his conduct of denying to have ever examined by the police in view of cross-examination of P.W. 10 but then the very fact that he himself had claimed to be a hearsay witness and to have arrived at the place of occurrence after hearing the sound of gun shot injury, this Court will have no difficulty in holding that an independent corroboration to the evidence of P.W. 3 at least cannot be gathered from P.W. 2 Laxuman Mahto. As a matter of fact if the evidence of P.W. 2 even as hearsay witness is to be believed, it would automatically eliminate the presence of P.W. 3, the solitary eye witness, inasmuch as in paragraph 21 he had given an entirely different version even on the point of corroborating of post assault story wherein he had stated as follows:

42. In view of the aforesaid statement it would be clear that P.W. 2 when he had introduced only Rameshwar Paswan (not examined) to have accompanied the deceased from the Chowk to Sirsa Bazar, he has safely eliminated the presence of four persons whose name were divulged by P.W. 3 before the police. It thus becomes clear that the evidence of P.W. 2 also cannot relied even as a trustworthy hearsay witness, much less as an eye witness.

43. Having thus examined and found that the evidence of PW-2 and PW-3 did not inspire confidence much less as an eye witness, this Court will have no difficulty in holding that there is no eye witness to the occurrence, inasmuch as, the other alleged eye witnesses namely PW6 and PW7 have been declared to be hostile.

44. As a matter of fact even the informant PW9 is a hearsay witnesses, inasmuch as, right from the institution of the First Information Report he has claimed that on hearing the news of his brother being shot at, he had first reached at Batraulia Chowk and thereafter when he came to know that his brother in the injured condition was taken on Sirsa Bazar for his treatment, he had immediately rushed on cycle and could met his brother along with PW-3. The evidence of PW-9, however, has already discussed in part while dealing with the evidence of PW-3 and that would also go to show that before his arrival Jagdeo Prasad (PW-4) and Harendra Kishore Yadav (not examined) had already reached over there i.e., at Sirsa Bazar. As a matter of fact, when his source of information in paragraph no-5 of his cross-examination is either Jagdeo Prasad and Harendra Kishore Yadav as well as Rameshwar Mahato and Rameshwar Paswan and neither Harendra Kishore Yadav (PW-1) nor PW-4 who in their examination-in-chief have not claimed to have met the informant or to have disclosed the name of the

assailants and the manner of occurrence to the informant, the version of the informant PW9 itself becomes doubtful.

45. In any event the hearsay evidence of the informant PW9 even otherwise would demolish the prosecution case, inasmuch as, he has categorically stated to have seen the gun-shot injury in the chest of the deceased whereas the Doctor had found such injury in the back portion of the deceased with exit in the chest. He has also stood thoroughly exposed when he has claimed to have named PW-2 before the police whereas his own First Information Report he does not in any way name the presence of PW-2, a fact which has already been asserted by the Investigating Officer, PW-10, in course of their examination. In view of the aforementioned discrepancy in the evidences of the informant PW-9, this court will have no difficulty in holding even the hearsay witnesses in form of PW-1, PW-4 and PW-9 are not in any way reliable witnesses and the prosecution on the basis of their evidence cannot succeed in proving the charge against the appellants.

46. At this stage this Court without entering into the repetition must note the evidence of the solitary eye witness, PW-3 that the appellants riding on the motorcycle had shot at the deceased who was going towards his house by turning the motorcycle so the assailants could face the front of the deceased. In other words the prosecution case as per PW-3 was that the gun-shot injury on the deceased was caused from the front but the Doctor, PW-8 had in his evidence in the Court had given an entirely different version as would be apparent from the contents of the post mortem report, relevant portion whereof reads as follows:-

1. Wound & Entry

One circular lacerated wound with black insulated margin 1 cm in diameter situated on the lower portion of right side back of chest one inch right to the mid line.

2. Wound & Exit

One oval lacerated wound with --- margin 1" X 1/2" situated on the front of the chest in sixth interposal space three in chest right to the midline.

47. In the cross-examination the Doctor PW8 had further explained about the nature of injury in the following words:-

Both injuries are received of one gunshot. The deceased might have received that shot on his back from behind. The wound & entry is near lower-- right side of the chest of the deceased and the wound of exit is near his nipple.

A person receiving such type of injury may walk for a few steps and thereafter he will fall on the ground. The said injury cannot be caused when the injured and the assailant are face to face. Such injury usually bleeds profusely.

48. The aforesaid medical evidence would therefore completely demolish the

manner of occurrence as suggested by the prosecution and such contradiction in the ocular and medical evidence is further exposed when it is found that the Investigating Officer did not find the blood on the suggested place of occurrence. The question, therefore, would be that once the Doctor had stated that such injury would lead to copious outburst of blood from the person of the deceased but the Investigating Officer did not find even a drop of blood at the place of occurrence. The explanation given that there was rain in the night would also not inspire confidence, inasmuch as, when the investigating officer had prepared the inquest report at 1 a.m. in the night itself he did not find even a trace of any mud or stains of mud on the clothes of the deceased so as to suggest the possibility of rain. In fact when the inquest report is in conformity with the injuries found by the Doctor as recorded in the post mortem report namely, the entrance injury in the back portion of the deceased and the exit injury in the front of the chest, the ocular evidence with regard to manner of occurrence itself is wholly discredited by the Investigating officer, PW10.

49. What really makes the investigation also perfunctory and vitiated is the conduct of the investigating officer, inasmuch as, in paragraph no. 15 of his cross-examination he had admitted that he could get clues against Punyadeo Jha but he did not submit the chargesheet against him because nothing specific material could be gathered against him. The question would be if the investigation was still continuing against Punyadeo Jha when the first chargesheet was submitted against the appellants, was it not necessary for the investigation officer who had continued the investigation even after submission of the first chargesheet to have interrogated Punyadeo Jha before filing the final form against Punyadeo Jha. The manner in which the investigating officer has left the clues of Punyadeo Jha unattended in a half hearted manner and had also made no attempt to record the statement of the Richshaw puller, Mathura Mahto as also the so called eye witness Rameshwar Paswan(not examined) and the Gumti owner Kedar Sah in front of which the occurrence is said to have taken place by themselves either individually or collectively will go to show that the investigating officer had made no sincere and serious efforts to investigate the case in an impartial manner.

50. In fact the fatal blow to the prosecution case of the appellant Rajendra Prasad of being the so called bodyguard of the appellant Rajendra Prasad Chaurasia has been given by the investigating officer himself in course of his cross-examination, who had himself stated that he could not get any evidence of the appellant Rajendra Prasad to be the bodyguard of the appellant Rajendra Prasad Chourasia. It is here that the version of all the five defence witnesses assumes importance because they have sought to establish that the appellant Rajendra Prasad was not the bodyguard of Rajendra Prasad Chourasia.

51. Thus on an over all analysis of the evidence on record, this Court will have no difficulty in holding that the prosecution has not been able to prove its case against either of the two appellants and therefore, both of them are entitled to be acquitted of their charges. In the result, this appeal is allowed and the

impugned judgment of conviction and sentence is set aside. Since, the appellants are already on bail they would now also stand discharged from the liability of their respective bail bonds.