

(2012) 08 JH CK 0037

In the Jharkhand High Court

Case No : Government Appeal (DB) No. 31 of 1998 (P)

State of Bihar (Now Jharkhand)

APPELLANT

Vs

Nimai Ghosh and Another

RESPONDENT

Date of Decision : 02-08-2012

Acts Referred:

Arms Act, 1959 — Section 27

Criminal Procedure Code, 1973 (CrPC) — Section 154, 157, 162, 164

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

Citation : (2013) 1 AJR 117 : (2012) 4 JLJR 96

Hon'ble Judges : R.K. Merathia, J; Dhruv Narayan Upadhyay, J

Bench : Division Bench

Advocate : Ravi Prakash for the State, for the Appellant; B.P. Pandey, Bhola Nath Ojha, Manish Kumar, S.N. Singh, for the Respondent

Judgement

D.N. Upadhyay, J.—Heard the parties. This appeal has been preferred by the State of Bihar (Now Jharkhand) against the Order of acquittal recorded by the Additional Sessions Judge, Pakur in Sessions Case No. 148/120 of 1990/92 whereby the respondents have been acquitted from the charges framed against them u/s 302/ 34 of the Indian Penal Code and also from the charges u/s 27 of the Arms Act framed against the accused Nimai Ghosh and Sonachand Ghosh.

2. The brief facts of the prosecution case is that on 8.7.1989, at about 3:00 p.m., the deceased (Manmohan Ghosh), accompanied by his son Janmajay Ghosh and villagers Meghnath Ghosh and Shankar Ghosh, left home for going Pakur where another house of the deceased was under construction. All of them were going on their bicycles. At about 4:00 p.m. when they reached near the Village-Dadpur Bahiyar (vacant land), accused Nimai Ghosh and Sonachand Ghosh, armed with pistol in their hand appeared and they forcibly took Manmohan Ghosh down towards East to the Railway Line, In the meantime, Gayanath Ghosh, Sridhar Ghosh, Sachin Ghosh and Sambal Ghosh also came out from the West side of rail track. It is alleged that Nimai Ghosh opened fire from his pistol causing injuries on the back of Manmohan Ghosh as a result he fell

down. Thereafter, Sonachand Ghosh also shot fire from his pistol. After having gun shot injuries, while Manmohan Ghosh was writhing on the ground, accused Sambal Ghosh caused further injuries by means of knife.

When the informant, Meghnath Ghosh and Shankar Ghosh tried to intervene, accused persons turned towards them to cause assault and therefore, they went back to a safe distance and witnessed the occurrence. The accused persons after committing murder of Manmohan Ghosh, fled away from the place.

On the following morning i.e. on 9.7.1989, at about 5:30 a.m., fardbayan of Janmajay Ghosh was recorded and case being Pakur P.S. Case No. 127/1989 u/s 302/ 34 of the Indian Penal Code and Section 27 of the Arms Act against all the six respondents was registered.

3. The investigating Officer after completing investigation submitted charge-sheet against all the respondents u/s 302/ 34 of the Indian Penal Code and Section 27 of the Arms Act. Accordingly, charges were framed and the prosecution produced altogether 11 witnesses in support of their case whereas the respondents also examined four witnesses in their defence and proved document as per exhibits. Out of 11 prosecution witnesses Shankar Ghosh (P.W. 2), Meghnath Ghosh (P.W. 5), the informant Janmajay Ghosh (P.W. 8) are the eye witnesses who were accompanying the deceased at the time of occurrence. Manjur Rahman (P.W. 4), Mahadeo Ghosh (P.W. 6) and Saidul Rahman (P.W. 9) are the chance witnesses who had also witnessed the occurrence and supported the prosecution case.

Dr. S.K. Gupta (P.W. 1) had conducted post mortem examination on the dead body of the deceased Manmohan Ghosh on 9.7.1989. Shankar Ghosh (P.W. 3), Vrindavan Ghosh (P.W. 7) are the witnesses to inquest and seizure list. Dinanath Ram (P.W. 10) and Shyama Ram (P.W. 11) are the Investigating Officers.

4. The respondents in their defence had examined four witnesses namely:--

- (i) Narayan Ghosh (D.W. 1);
- (ii) Chandi Ghosh (D.W. 2);
- (iii) Sukumar Ghosh (D.W. 3); and
- (iv) Subodh Kumar Bannerjee (D.W. 4).

5. The appellant/State has assailed the impugned judgment on the ground that the learned Additional Sessions Judge has adopted a different procedure of appreciating the evidence available on record. From the very beginning the Court has considered the evidence of defence witnesses and the plea taken by the respondents to discard and disbelieve prosecution evidence. It was contended that the learned Additional Sessions Judge had failed to appreciate the evidence of six eye witnesses which is fully consistent. Minor contradiction appearing in their statements have been given weightage to disbelieve them.

The defence story adduced by the respondents was accepted without considering other aspects of the prosecution case. The defence had taken a plea that Badal Ghosh, brother of accused Sona Chand Ghosh, was murdered 7-8 months prior to the date of present incident in which the deceased was also an accused and, therefore, the informant had reasons to falsely implicate Sona Chand Ghosh, his family members and relatives. The learned Sessions Judge, instead of admitting it to be a motive behind the murder of Manmohan Ghosh, had considered it to be a probable reason for the false implication of the respondents.

The prosecution witnesses i.e. P.Ws. 2, 5 and 8 were disbelieved only because they are relative of the deceased and they have been termed as interested witnesses. Likewise, P.Ws. 4, 6 and 9, who had also given actual accounts of the incident, had been disbelieved on the only ground that they are chance witnesses.

6. The Court has also considered minor discrepancy appearing in the statements of Shyama Ram (Investigating Officer-P.W. 11) and also laches committed on his part and did injustice with the prosecution. The fardbayan was also viewed with a doubt on the ground that the eye witnesses had not gone to the Police Station during night to report the incident. It was not considered that after the incident the informant went back to his village, informed his family members and again came back to the place of occurrence and stayed whole night near the dead body. The Investigating Officer had also stated in his deposition that he had gone to the place of occurrence during night, saw the dead body and recorded the fardbayan in the early morning at 5:30 a.m. It was not unusual in any manner and such human conduct is always probable in such situation but the Court had failed to consider all these aspects of the prosecution case and given much weightage to the defence version and recorded the order of acquittal which was unwarranted.

7. On the other hand the respondents have supported the impugned Judgment as well as finding of the learned Additional Sessions Judge. It was submitted that none of the so-called eye witness was present at the spot nor they had seen the incident.

D.W. 1, D.W. 2 and D.W. 3 have clearly stated that after hearing sound of firing when they went to the place of occurrence they found Manmohan Ghosh lying dead having injuries on his person. They did not see any of the witness what to say about the informant, at the place of occurrence at the relevant point of time. The defence witnesses have further stated that they informed the informant and the other family members about the murder of Manmohan Ghosh whereafter they reached to the place of occurrence after 1? hours. In this context the statement of P.W. 11 (Para-7) was also referred in which the Police Officer has stated that he had been to the place of occurrence during night and seen the dead body. He had further deposed that Chowkidar was present near railway track but no fardbayan of Chowkidar was recorded to lodge F.I.R. P.W. 11 had not stated about the presence of so called eye witnesses near the dead body at the relevant time. The learned Sessions Judge has rightly considered that F.I.R. was

not recorded in time and the fardbayan given by P.W. 8 was not free from doubt.

The Court has also rightly discarded the evidence of chance witnesses because the fardbayan did not indicate their presence at the spot rather the fardbayan supports presence of defence witnesses who were grazing their animal in the pasture (Bahiyar) land.

The informant as well as P.Ws. 2 and 5 had shown their ignorance with regard to involvement of the deceased in the murder case of Badal Ghosh and that was also a reason to discredit those witnesses because they had not come with fair hand.

The further contention of the respondents is that the medical evidence does not corroborate the ocular evidence as disclosed by the eye witnesses. The Doctor did not find two gun shot injuries on the person of the deceased.

The place of occurrence as well as the manner of occurrence as disclosed by the witnesses were inconsistent. Dinanath Ram (P.W. 10) had admitted in his deposition that he had inquired about the incident from Narayan Ghosh (D.W. 1) and Sukumar Ghosh (D.W. 3) but had not recorded their statements in the case diary because the statement was hearsay. This also indicate that no fair investigation was done.

Lastly it was contended that presence of defence witnesses was accepted by the Court and, therefore, the evidence adduced by them was rightly relied upon. According to the statement of P.W. 11, so called eye witnesses were not present near the dead body at the relevant point of time and the learned Sessions Judge has rightly disbelieved their statement. Taking into consideration all these aspects, the learned Sessions Judge had acquitted the respondents and the impugned judgment needs no interference.

8. After having heard rival submissions, we feel inclined to discuss the settled principles which is accepted in criminal jurisprudence. In criminal jurisprudence, it is most fundamental that a person arrayed as an accused is presumed to be innocent unless that presumption is rebutted by the prosecution by production of evidence which may show him to be guilty of the offence charged. The burden of proving the guilt of the accused is on the prosecution and unless it relieves itself of the burden, the Court cannot record a finding of guilt of the accused. Another golden thread which runs to the administration of criminal justice is that if two views are possible on the evidence--one proving guilt of the accused and another innocence, the view which is favourable to the accused, should be accepted. Fact that the case put up in defence is unreasonable, does not absolve the prosecution from proving the case to the hilt. What we wanted to bring on record is that the onus lies on the prosecution to prove its case beyond shadow of all reasonable doubt against the accused. Therefore, the evidence adduced by the prosecution is to be discussed with care and caution. We do not mean that less weight is to be given to the evidence adduced by the accused in his defence in rebuttal to the charges levelled against them. We can say that the evidence

adduced on behalf of the prosecution as well as defence are of same weight and importance in the eyes of law. In ordinary course of criminal trial, it is the prosecution who comes up with certain facts raising allegations against the accused with intention to get the wrongdoer punished. The adversarial judicial system prevailing in our country give equal right to the accused to adduce evidence in his defence to rebut the charges. Thus, it is indicated that aggrieved is to be given opportunity first to prove its case.

9. In the case at hand, as we have observed in the preceding paragraphs that the learned Sessions Judge had started scrutinizing the evidence and evaluated the same in the light of the evidence adduced by the accused in their defence. He should have discussed the evidence of the prosecution witnesses first, either to believe or to disbelieve and then the next probable story brought on record by the defence should have been considered. It is true at the time of evaluating the evidence for the purpose of giving findings, the Court has to keep in mind all sorts of evidence available on record, may be adduced by the prosecution or by the defence.

10. Considering all these aspects which are appearing in the case at hand, we feel inclined to scrutinize the evidence afresh because it is an appeal against acquittal and the Court in such situation should always be cautious in scrutinising the evidence.

11. Now coming to the prosecution case, we find that fardbayan was lodged by Janmajay Ghosh (P.W. 8) on 9.7.1989 at 5:30 a.m. at Bahiyar within Village-Dadpur where dead body of Manmohan Ghosh was lying. The facts adduced by the informant is that the deceased was going to Pakur on 8.7.1989 at 3:00 p.m. along with informant (P.W. 8), Meghnath Ghosh (P.W. 5) and Shankar Ghosh (P.W. 2). When they reached near railway bridge at about 4:00 p.m. situated at Bahiyar, accused Nimai Ghosh and Sonachand Ghosh appeared with Pistol in their hand and they forcibly dragged the deceased down towards the railway track. In the mean-time other respondents namely Gayanath Ghosh, Sridhar Ghosh, Sachin Ghosh and Sambal Ghosh also appeared from the West. Nimai Ghosh and Sonachand Ghosh caused injury to the deceased by means of firearms whereas Sambal Ghosh inflicted blows by means of dagger. The informant and his companion tried to intervene but threatened by the respondents.

The informant has fully supported the prosecution case as made out by him in his fardbayan. He has specifically stated that Nimai Ghosh caused gun shot injuries on the back of the deceased after which the deceased fell down. Thereafter, Sonachand Ghosh opened fire from his Pistol. Sambal Ghosh inflicted 3-4 knife blows whereafter he died at the spot.

The informant has developed the story in Court to the extent that Daya Ghosh and Sridhar Ghosh were having Lathi in their hand and they were instigating the former accused to kill the deceased. He has supported that empty cartridges, bicycle and the blood stained earth were seized by the Police.

In his cross-examination he had shown his ignorance about the involvement of his father Manmohan Ghosh (deceased) in the murder of Badal Ghosh, who was the elder brother of the respondents Sona Chand Ghosh and Sridhar Ghosh. On being questioned, it was said that no cow boys appeared at the place even on Hulla because they were at a distance of about 11/2 Kms. After the incident, he stayed at the place of occurrence for about half an hour and then returned back to his village to inform his family members. Later he could learn that somebody had telephoned the Police from Tilbhitha Railway Station. He informed Kinkar Ghosh and Vrindavan Ghosh about the incident and again came back to the place of occurrence with his family members. When the Police arrived at the place of occurrence the informant, his family members and Vrindavan Ghosh, Kinkar Ghosh and other villagers were present. The informant was further cross-examined with regard to the position in which the dead body was lying at the place of occurrence.

12. P.W. 2 Shankar Ghosh and P.W. 5 Meghnath Ghosh were also accompanying the deceased and the informant. They had supported the prosecution case and deposed that on 8.7.1989 on Saturday at about 4:00 p.m. While they were going to Pakur alongwith deceased and reached near a Railway Bridge situated within the Village-Dadpur Bahiyar, accused namely Nimai Ghosh and Sona Ghosh armed with Pistol appeared at the place and forcibly took the deceased down towards the Railway Bridge. In the meantime remaining appellants also appeared.

Gayanath Ghosh instigated his companion to kill the deceased after which Nimai Ghosh opened fire from his pistol causing injury to the deceased on his back and the deceased fell down. Thereafter, accused Sonachand Ghosh fired from his pistol. Manmohan Ghosh died at the spot. When these witnesses tried to intervene, they were threatened by the accused persons. It is also disclosed that 3-4 persons were moving from the place and they had also witnessed the occurrence. These two witnesses have not stated about the knife blows inflicted by accused Sambal Ghosh.

13. Manjoor Rahman (P.W. 4), Mahadeo Ghosh (P.W. 6), Shaidur Rahman (P.W. 9) had also witnessed the occurrence while they were returning home from Sangrampur. They have repeated the same fact as disclosed by P.Ws. 2 and 5.

Manjoor Rahman (P.W. 4) has further stated that the occurrence was witnessed by Saidur Rahman and Mahadeo Ghosh too. In his cross-examination, P.W. 4 has described the incident like manner of occurrence, the weapon used by the accused persons. It is also stated that bicycle on which Manmohan was riding, left remained on the Railway Track when he was taken by accused persons down from the track. Due to fear, he remained stuck at the place where he was and saw the incident. After the accused persons fled away, he also went home.

14. Mahadeo Ghosh (P.W. 6) has said that he was returning from Vikrampur after purchasing of "Ox". When he reached near Dadpur Railway Bridge, he saw Manmohan Ghosh going on his bicycle. He has named Nimai Ghosh and pointing

towards Sonachand Ghosh, has stated that these two persons forcibly pulled Manmohan Ghosh from his bicycle and took him towards down. In the meantime, Daya Ghosh, Sachin Ghosh, son of Sachin Ghosh also appeared. At the instigation of Daya Ghosh, accused Nimai opened fire causing injuries on the back of Manmohan after which he fell down.

Sonachand Ghosh opened another shot from his pistol and Sambal Ghosh caused further injuries to Manmohan by means of knife.

15. Shaidur Rahman (P.W. 9) has said that he was returning from Bikrampur. When he reached near Dadpur Railway Bridge, he saw some persons who pulled down a person from his bicycle. He had identified Manmohan Ghosh as a person who was pulled and Nimai Ghosh and Sonachand Ghosh as the persons who were dragging Manmohan. Thereafter, Nimai Ghosh inflicted firearm injuries to Manmohan. 3-4 more persons namely Sridhar Ghosh, Sachin Ghosh, Sambal Ghosh and Gayanath Ghosh also appeared and they were saying to kill the deceased. Sambal Ghosh inflicted knife blows on the person of the deceased. He further says that son of deceased Manmohan Ghosh due to fear, did not dare to intervene to save his father.

Manmohan Ghosh died at the spot. The accused persons fled away. The above three witnesses i.e. P.Ws. 4, 6 and 9 were cross-examined in details with regard to their relations with the deceased and also about the time and place from where they were returning.

16. The defence counsel has also tried to bring on record some grudge prevailing between Mahadeo Ghosh and accused Dayanath Ghosh.

17. P.W. 1-Dr. S.K. Gupta had conducted post mortem examination on the dead body of Manmohan Ghosh and found following injuries:--

(i) One injury having 1" diameter round shaped with burn periphery on the angle of left scapula (entrance wound).

(ii) One injury in continuation to the injury no. 1 on the left side of the chest triangular shaped, 4" above medial 5" and lateral 6" forming a cavity fracturing the corresponding ribs and puncturing the lungs, aorta, heart and surround structures (wound of exit).

(iii) One injury in the back by the side of vertical column 2" above the waist size ?" x ?" with lacerated margin.

(iv) One incised wound on the left side of neck measuring 2" x ?" x muscle deep.

(v) One incised wound on the face by the side of nose right side measuring ?" x 1/6" x 1/6".

(vi) One incised wound on the left side of crest 1?" x ?" X skin deep.

According to the Doctor, the cause of death was due to the ante-mortem injuries noted by him. The death was homicidal. Injury Nos. 1 and 2 were caused by

single shot firearms. Injury Nos. 4, 5 and 6 were caused by sharp cutting weapons such as knife and the time elapsed since death till post mortem examination was about 24 hours.

18. Kinker Ghosh (P.W. 3) is a witness to seizure list. In his presence blood stained soil and empty cartridges were seized from the place of occurrence and he has also given hearsay account of the incident.

Brindavan Ghosh is another witness to seizure and inquest and he has proved his signature on those documents.

Dina Nath Ram (P.W. 10) was posted as Office Incharge at Pakur Muffassil Police Station at the relevant point of time and he is the part Investigating Officer and he has proved the formal F.I.R. and the Inquest Report. After completing investigation, he had submitted charge-sheet against the accused persons named in the F.I.R.

In his cross-examination he says that he had recorded statement of Shaidur Rahman but he had not inspected the place of occurrence. He had been to Village-Dadpur where Kashi Ghosh, Bhim Ghosh, Shibu Ghosh, Sukumar Ghosh, Sahdeo Ghosh, Narayan Ghosh were present and they were disclosing hearsay account of the incident and, therefore, he had not recorded their statement in the Case Diary. He has denied the suggestion that statement of those witnesses was not recorded only because they were giving the true account of the incident which was in favour of the accused persons.

Shyama Ram (P.W. 11) is another Investigating Officer. He has stated that on 8.7.1989 he was posted at Pakur Muffassil Police Station and on that date in the evening, after receiving message on Telephone that a person has been killed at Village-Dadpur, he proceeded there. He had recorded Fardbayan of Janmajay Ghosh (informant) on 9.7.1989 in the early morning and admits Exhibit-5 (Fardbayan) when referred to him. After taking charge of the investigation, the Inquest Report was prepared in presence of witnesses and dead body was sent for its Post mortem Examination. The place of occurrence, as described by the witnesses was Bahiyar (open land) is situated at a distance of about ? Kms. from Village-Dadpur. There was a Railway track having bridge no. 24 and Kms. Post No. 575. He deposed that blood stained soil and empty cartridges were seized from the place and accordingly seizure list was prepared in presence of witnesses. He had recorded evidence of other witnesses whereafter the charge of investigation was handed over to P.W. 10. He has written paras-1 to 17 of the Case Diary.

In his cross-examination, he admits that no site plan or sketch map of the place of occurrence was prepared. He says that he received Phone Call but he did not know the name of person who telephoned. After receiving telephonic message, he proceeded for the place of occurrence on motorcycle but he did not remember whether he was alone or anyone else was accompanying him. He had seen the dead body in night and recorded Fardbayan in the morning. He had not recorded

the statement of Chowkidar Kishori Ram and Badal Rajwanshi. The distance of Village-Malaypur is about 5-7 Kms. from the place of occurrence and the deceased was the resident of that village.

19. Narayan Ghosh (D.W. 1), Chandi Ghosh (D.W. 2) and Sukumar Ghosh (D.W. 3) have stated that Manmohan Ghosh was killed by some persons and the occurrence took place in the month of Asadh and the time of occurrence was about 3:00 or 3:30 p.m. The place of occurrence is near the Railway Bridge situated within Bahiyar of Village-Dadpur. The exact place of occurrence is about 5-6 hand away East to the Railway bridge. They were present at about a distance of 100 yards from the place of occurrence and after hearing sound of firing, they rushed to the place and found Manmohan Ghosh lying dead. They did not see any person present over there. They did not see who killed to whom. After the incident they informed the family members of deceased Manmohan Ghosh who reached to the place of occurrence after 11/2 hours.

20. Subodh Kumar Bannerjee (D.W. 4) has proved formal F.I.R. of a case which has been marked Ext.-A and a Fardbayan as Ext.-B. The accused persons have proved those documents in order to show that the deceased and some of the eye witnesses were accused in the murder of Badal Ghosh and said Badal Ghosh was the brother of accused Sridhar Ghosh and due to previous enmity the accused persons have been falsely roped in this case.

D.Ws. 1, 2 and 3 were examined to show that none of the eye witness was present at the time of incident.

21. The learned Sessions Judge has disbelieved P.W. 8 (informant), P.W. 2 Shanker Ghosh and P.W. 5 Meghnath Ghosh on the following grounds:--

- (i) That they are relatives of the deceased and highly interested witnesses;
- (ii) That they tried to conceal involvement of deceased in the murder of Badal Ghosh, who was the brother of accused Sridhar and that incident had taken place about 7-8 months prior to the present incident.
- (iii) That none of them were present at the place of occurrence when P.W. 11 had seen dead body during night and they had not gone to the Police Station to lodge information.
- (iv) There are contradictions in the statement of aforesaid three eye witnesses.
- (v) That according to defence witnesses, none of them were present at the place of occurrence at the relevant point of time.

In this context we have carefully gone through the evidence of these witnesses and also carefully scrutinised the evidence of D.Ws. 1, 2 and 3. We have also observed that the learned Sessions Judge instead of discussing the evidence of these eye witnesses, had taken help of the statement of D.Ws. to disprove the presence of eye witnesses at the place of occurrence and discarded their evidence on the ground that they are relatives of the deceased and highly

interested witnesses. But the learned Sessions Judge has forgotten or did not take note of this fact that D.Ws. 1, 2 and 3 are also the relatives of the accused and they had been examined only to save the accused persons and they have also succeeded in their mission.

22. We did not find these D.Ws. reliable on the ground that they had stated--after hearing sound of firing they rushed to the place of occurrence and saw deceased Manmohan Ghosh lying dead and according to them, at that point of time, they were hardly at a distance of 100 yards from the place of occurrence. Had it been so, it was always expected that at least they should have seen the miscreants fleeing from the place because the place of occurrence is an open land used as pasture and there was a Railway track passing through it. What we mean to say is that if the aforesaid D.Ws. were present, there was every occasion for them to see the miscreants at least fleeing from the place. The place of occurrence was not having any residential house or market or anything in which disappearance of the miscreants could be possible. Therefore, the grounds to disbelieve the presence of eye witnesses, as taken by learned Sessions Judge, do not appear to be sound and reasonable and we have left with no option but to discard such reasoning.

23. The next ground on which the eye witnesses were disbelieved, is also not proper because the Police has submitted final form against the deceased and other accused who were allegedly named by Sridhar Ghosh and this fact is apparent from Ext.-10, the Final Form submitted by the Police in the case of murder of Badal Ghosh. This is no ground to disbelieve testimony of the eye witnesses who were otherwise reliable and had given consistent statement about the incident. The previous enmity which the accused persons have admitted is the motive behind the murder of Manmohan Ghosh and, therefore, the accused persons had designed to plot the murder of Manmohan Ghosh at a place which was about 6-7 Kms. away from the village.

We have also reproduced the evidence of P.Ws. 2, 5 and 8 in the preceding paragraphs. They all have consistently deposed that they were accompanying the deceased who was going to Pakur to see his house which was under construction and that place from Village-Malaipur was about 10-12 Kms. Janmajay Ghosh (P.W. 8) is the son of deceased and he has clearly stated that he was accompanying his father. The other two witnesses i.e. P.W. 5 and P.W. 2 were also with the deceased at the time of occurrence. They all have stated that the place of occurrence was a down land having water logging nature and, therefore, the Railway Track was constructed on certain height from that land. It was a rainy season. Since the deceased and the witnesses were going on their bicycle, they were following each other and the deceased was ahead. The presence of these witnesses could not be discarded only on the ground that they are either relatives or having cordial relations with the deceased.

24. In catena of judgment, the Hon''ble Supreme Court has observed that on the ground that the eye witnesses are related to the deceased, their testimony

cannot be doubted. For example, in the judgment reported in Dharnidhar Vs. State of U.P. and Others, it has been observed as under:--

12. There is no hard-and-fast rule that family members can never be true witnesses to the occurrence and that they will always depose falsely before the court, it will always depend upon the facts and circumstances of a given case. In Jayabalan vs. UT of Pondicherry, this Court had occasion to consider whether the evidence of interested witnesses can be relied upon. The Court took the view that a pedantic approach cannot be applied while dealing with the evidence of an interested witness. Such evidence cannot be ignored or thrown out solely because it comes from a person closely related to the victim. The Court held as under: (SCC p. 213, paras 23-24)

23. We are of the considered view that in cases where the court is called upon to deal with the evidence of the interested witnesses, the approach of the court, while appreciating the evidence of such witnesses must not be pedantic. The court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the court must not be suspicious of such evidence. The primary endeavour of the court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.

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13. Similar view was taken by this Court in Ram Bharosey vs. State of U.P., where the Court stated the dictum of law that a close relative of the deceased does not, per se, become an interested witness. An interested witness is one who is interested in securing the conviction of a person out of vengeance or enmity or due to disputes and deposes before the court only with that intention and not to further the cause of justice. The law relating to appreciation of evidence of an interested witness is well settled, according to which, the version of an interested witness cannot be thrown overboard, but has to be examined carefully before accepting the same.

14. In the light of the above judgments, it is clear that the statements of the alleged interested witnesses can be safely relied upon by the court in support of the prosecution's story. But this needs to be done with care and to ensure that the administration of criminal justice is not undermined by the persons, who are closely related to the deceased. When their statements find corroboration by other witnesses, expert and the circumstances of the case clearly depict completion of the chain of evidence pointing out to the guilt of the accused, then we see no reason why the statement of so-called "interested witnesses" cannot be relied upon by the court.

25. The time of occurrence and the place of occurrence as disclosed by these three witnesses found full support from the evidence of D.Ws. 1, 2 and 3 and we can say that more or less the defence has admitted this fact that Manmohan Ghosh, who was going on a bicycle, was intercepted near Dadpur Railway Bridge,

Bahiyar and he was shot at. So far manner of occurrence as disclosed by P.W. 8, found full support from the seizure of empty cartridges from the place of occurrence and the post mortem report also supports the injuries caused by means of firearm as well as by means of knife. Even the number of knife blow inflicted stood supported by the postmortem report.

26. In the judgment of Dharnidhar (*supra*), it was also observed that only because the eye witnesses did not intervene to save the deceased, their testimony cannot be disbelieved.

27. So far the contradictions appearing in the statement of these three witnesses are concerned, it is only to the extent that P.Ws. 2 and 5 have not stated about the knife blows, inflicted by Sambal Ghosh. One can visualize that if four persons are going together and one out of them, if suddenly overpowered by some miscreants with an intention to kill and the miscreants were having firearm in their hand, the persons accompanying the victim would first try to take a safe shelter instead of intervening. It is not expected that they would sit together at one place to watch the incident like movie rather it would be a natural human conduct that they would scatter to the places of their choice to save themselves. Therefore, the evidence of P.Ws. 2 and 5 cannot be thrown away on the ground that they did not explain the knife blows inflicted by Sambal Ghosh. It is also there in the evidence of P.W. 8 that in the first part of incident, the deceased had sustained gun shot injuries caused to him by accused Nimai Ghosh and then another shot was fired by Sonachand Ghosh. At that time, the deceased was lying on the ground after receiving injuries. Thereafter, Sambal Ghosh had inflicted knife blows. The knife blows were inflicted at the end of the incident and, therefore, the two eye witnesses namely Meghnath Ghosh and Shankar Ghosh could not be disbelieved on this account alone if the said part of incident was not explained by them. Both of them have clearly stated how the deceased was overpowered by Nimai Ghosh and Sonachand Ghosh and how he was taken down from the Railway track and shot at.

28. The learned Sessions Judge has wrongly disbelieved and discarded the evidence of P.Ws. 4, 6 and 9. There is no hard and fast rule that chance witnesses cannot be relied upon. It depends upon the facts and circumstances of each and every case. If the presence of such witnesses at the place of occurrence is probable, in the given facts and circumstances of the particular incident, their testimony cannot be doubted. P.W. 4 has stated that he was returning home from Sangrampur and that was the way for him to reach home. This witness has fully corroborated the evidence adduced by the informant P.W. 8. Not only that, he has also identified P.Ws. 6 and 8, who had been coming with their ox. The account of incident given by the informant corroborated by P.Ws. 2 and 5 found full support from the evidence of these three witnesses namely Manjoor Rahman (P.W. 4), Mahadeo Ghosh (P.W. 6) and Saidur Rahman (P.W. 9). The nature of enmity prevailing between Mahadeo Ghosh and one of the relatives of accused Gayanath Ghosh has been brought on record but we do not feel that

the degree of enmity was so high for a person to give false evidence. Even for arguments sake, if the evidence of Mahadeo Ghosh is excluded from consideration, we cannot discredit remaining five eye witnesses.

29. In view of the discussions made above, we do not find that the reasonings given by the learned Sessions Judge to disbelieve the evidence of aforesaid eye witnesses is acceptable.

30. The learned Sessions Judge has relied upon the fact that none of the witnesses had gone to lodge information to the Police Station. He has also taken note that Shyama Ram (P.W. 11) after receiving telephonic information that a person, in Village-Dadpur has been killed, when reached to the place of occurrence, did not find any of the witnesses present there. Shyama Ram (P.W. 11) met with the Chowkidar near the Railway track but he did not record his statement to lodge F.I.R.. This P.W. 11 has also admitted that before recording Fardbayan of Janmajay Ghosh (P.W. 8) that he had seen the dead body. So according to the learned Sessions Judge, the statement given by P.W. 8 should not have been considered as F.I.R. In this regard we have carefully gone through the evidence of P.W. 11 and verified this fact from the Case Diary whether he had been to the place of occurrence during night before he had recorded the Fardbayan. The paragraph-1 of the Case Diary which reads as follows:--

DINANK 8.7.1989, SAAT BAJE SANDHYA TELEPHONE PAR SUCHNA MILNE KE BAAD GRAM DADPUR, BAHİYAR MAIN AANE PAR BAYEIN (left) ANKIT TITHI WA SAMAY MAIN ISS KESH KE WADI JANMAJAY GHOSH, PE. MANMOHAN GHOSH, SAKIN-MALAIPUR, THANA-PAKUR MUFFASSIL, ZILA (District)-SAHEBGANJ, APNA BAYAN DIYA JO NIMN PRAKAR HAI.

Thereafter, the Fardbayan of Janmajay Ghosh commenced and in the margin, it is written "DINANK 9.7.1989/5:30 BAJE".

31. The aforesaid contention of the Investigating Officer recorded in the Case Diary indicates that he received information at 7:00 p.m. on telephone that a person has been killed in Dadpur Bahiyar and, thereafter, he proceeded to the place of occurrence and recorded the Fardbayan of the informant at 5:30 a.m. on 9.7.1989. It was also argued that the information received by P.W. 11 should have been treated as F.I.R. because it was the information received first in time.

32. It is true that the information regarding commission of a cognizable offence must be earliest in time without being influenced from any corner but then the Police Officer who has visited the scene of occurrence on a vague or cryptic or an incomplete information, should at least be given an opportunity to verify the name of the deceased, or the name of assailant or the names of witnesses and for that the time consumed by him in collecting such informations should not be viewed with doubt. These informations are the basic need to proceed with the investigation. But it is also necessary to keep in mind that such exercise is required to be done within a reasonable limited earliest time without causing unexplained delay in instituting the F.I.R.

33. It is not expected from a Police Officer or a Chowkidar who had reached to the place of occurrence on telephonic information and found a dead body whose identity is not disclosed or known to him, to draw his self statement immediately to lodge F.I.R. Therefore, the preliminary enquiry regarding commission of such offence is needed.

34. An issue, whether preliminary inquiry shall be permissible or not before institution of FIR, was taken up by the Hon''ble Supreme Court in the case of Lalita Kumari Vs. Government of U.P. and Others, but considering the divergent views, the matter has now been referred to the Constitution Bench. The circumstances and situation as well as the facts available in the case of Latika Kumari (supra) is not very much relevant to the case in hand before us but the issue involved is relevant to some extent.

35. Now coming to the facts and circumstances appearing in the case at hand, we feel that the observations made by their Lordships in the case of Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi), in the context of Sections 154 and 157 of Cr.P.C., are more relevant which are being reproduced as under:--

113. The information about the commission of a cognizable offence given "in person at the police station" and the information about a cognizable offence given "on telephone" have forever been treated by this Court on different pedestals. The rationale for the said differential treatment to the two situations is, that the information given by any individual on telephone to the police is not for the purpose of lodging a first information report, but rather to request the police to reach the place of occurrence; whereas the information about the commission of an offence given in person by a witness or anybody else to the police is for the purpose of lodging a first information report. Identifying the said objective difference between the two situations, this Court has categorically held in a plethora of judgments that a cryptic telephonic message of a cognizable offence cannot be treated as a first information report under the Code.

114. It has also been held in a number of judgments by this Court that merely because the information given on phone was prior in time would not mean that the same would be treated as the first information report, as understood under the Code. This view has been reiterated in Ramesh Baburao Devaskar vs. State of Maharashtra, that a cryptic message given on telephone by somebody who does not disclose his identity may not satisfy the requirement of Section 154 of the Code of Criminal Procedure.

115. In view of the above discussion, the three telephonic messages received by the police around 2.25 a.m. on 30.4.1999 did not constitute the First Information Report u/s 154 of the Code and the statement of Shyam Munshi, PW-2 was rightly registered as the FIR.

Further, the Hon''ble Court has observed in para 303(3) as under:--

303(3) The phone calls made immediately after an incident to the police

constitutes an FIR only when they are not vague and cryptic. Calls purely for the reason of getting the police to the scene of crime do not necessarily constitute the FIR. In the present case, the phone calls were vague and therefore could not be registered as the FIR. The FIR was properly lodged as per the statement of Shyan Munshi, PW-2.

36. Therefore, we find that the telephonic message received by P.W. 11 was to the extent of bringing the Police to scene of occurrence and it was insufficient to fulfill the requirement of Section 154 Cr.P.C. In fact the statement given by P.W. 8 fulfills the requirements of Section 154 Cr.P.C. after which the investigation commenced.

37. Learned Sessions Judge as well as the learned counsel appearing for the respondents/accused have given much stress on the point that no family member was there to save the deceased. No witness was present there when the Police arrived at the place. When we examined the statement of P.Ws. 8, 2 and 5 and also other witnesses i.e. P.Ws. 7 and 3, we find that after the incident they went back to their village, informed other family members about the incident and returned back to the place of occurrence after about 1? hours and they remained present near the dead body when Police arrived at.

Again we feel it necessary to mention that the place, of occurrence is open field situated at about 6-7 kms. away from the Village-Malaipur of which the informant is resident.

38. We have carefully examined the statement of P.W. 11. He had not mentioned or disclosed the exact time when he reached to the place of occurrence. This witness has also performed other formalities recording the Fardbayan such as seized blood stained soil and the empty cartridges lying at the place.

39. In view of the discussions and the judgments referred to above, we do not find that Fardbayan of Janmajay Ghosh is hit by Section 162 Cr.P.C. and earlier to that Fardbayan, there was another information available to constitute F.I.R. as required u/s 154 Cr.P.C. We find no reason to disbelieve the recording of Fardbayan at the time and place pointed out therein.

40. Learned counsel for the respondents has raised the point that injuries found by the doctor did not corroborate the ocular evidence given by the so-called eye witnesses. It was deposed that two shots were fired but the deceased was having only one gun shot injuries.

41. We have examined the post mortem report and the statement of P.W. 1. The Doctor has found altogether six injuries on the person of the deceased out of which injury nos. 4 to 6 were incised wound caused by sharp cutting weapon and suggestion is accepted by the Doctor that those injuries are possible by knife.

42. The Injury Nos. 1 and 2 are wound of entry and exit caused by firearm. There was injury no. 3 noted by the Doctor on the back by the side of VE.-2" above the waist measuring ?" x ?" with lacerated margin. Though it is not clearly

opined how that Injury No. 3 was caused but the eye witnesses had given statement that one shot was fired from the back and another was fired when the deceased was writhing. Therefore, the statements of eye witnesses is consistent on the point that one shot was fired by Nimai Ghosh and second shot was fired by Sonachand Ghosh. The first shot was fired on the back of the deceased when he was standing and the second shot was fired by Sonachand while the deceased was writhing on the ground and then knife blows by accused Sambal Ghosh were inflicted. This minor discrepancy appearing in the medical report is not sufficient to throw away the consistent evidence of the eye witnesses and, therefore, we have no option but to believe the ocular evidence deposed by the witnesses.

43. The evidence on record sufficiently indicates the old enmity prevailing between the family of the accused and the deceased. The contention made in the Exhibit-C [statement of Gurupado Ghosh recorded u/s 164 Cr.P.C. in connection with Pakur (M) Case No. 217/1988] indicates that Badal Ghosh (brother of accused Sridhar Ghosh) was killed in retaliation to murder of one Nagen Ghosh and in that murder case, deceased was initially made accused in the F.I.R. It is experienced that in such type of blood shed prevailing between two groups, there is a tendency to implicate more and more persons than the actual culprits involved.

44. In the instant case, names of accused Gayanath Ghosh, Sridhar Ghosh and Sachin Ghosh are appearing in the Fardbayan and statement of witnesses but no witness has stated that any of the aforesaid accused in any manner participated in the assault. Therefore, we feel that they should be given benefits of doubt and accordingly, we do not find and hold them guilty but the consistent evidence on record is sufficient to prove that Manmohan Ghosh was killed by Nimai Ghosh, Sonachand Ghosh and Sambal Ghosh and specific weapon used by them to cause injuries is clearly spoken by the witnesses and, therefore, we find and hold them guilty for the offence punishable u/s 302/ 34 of the Indian Penal Code. The accused namely Nimai Ghosh and Sonachand Ghosh are also held guilty for the offence punishable u/s 27 of the Arms Act.

45. Since the case does not come under the purview of rarest of the rare case, the convicts namely Nimai Ghosh, Sonachand Ghosh and Sambal Ghosh are sentenced to undergo R.I. for life for the offence u/s 302/ 34 of the Indian Penal Code and to pay a fine of Rs. 5,000/- each and in default of payment of fine, they are further sentenced to undergo R.I. for six months. Convict Nimai Ghosh and Sonachand Ghosh are further sentenced to undergo of R.I. for two years u/s 27 of the Arms Act. All the sentences shall run concurrently.

46. The aforesaid convicts are directed to surrender before the convicting/ successor court within one month from the date of this order to serve out the sentences failing which, the Court below shall take all coercive steps to secure attendance of aforesaid convicts and after securing their attendance, conviction warrants, as indicated above, be also issued. Accordingly, the appeal stands partly allowed.

R.K. Merathia, J.

I agree.