

(2015) 11 PAT CK 0039

In the Patna High Court

Case No : Death Reference No. 1 of 2014 and Criminal Appeal (DB) Nos. 540, 595, 612, 628, 650, 680, 652 of 2014

The State of Bihar and Others

APPELLANT

Vs

Shamshe Alam and Others

RESPONDENT

Date of Decision : 04-11-2015

Acts Referred:

Arms Act, 1959 — Section 25, 25(1-b), 25(1-b) 1, 25(1-b) a, 26
Criminal Procedure Code, 1973 (CrPC) — Section 161, 162, 173, 313
Delhi Special Police Establishment Act, 1946 — Section 6
Evidence Act, 1872 — Section 134, 19, 20, 21, 24
Penal Code, 1860 (IPC) — Section 147, 148, 149, 201, 299

Citation : (2016) 1 PLJR 590

Hon'ble Judges : V.N. Sinha and Jitendra Mohan Sharma, JJ.

Bench : Division Bench

Advocate : Surendra Singh, Kanhaiya Prasad Singh, Akhileshwar Prasad Singh, Senior Advocates, Ajay Kumar Thakur, Ram Sevak Chaudhary, Prabhu Narayan Sharma, Anil Singh, Shiva Shankar Prasad Singh, Surya Prakash Singh, Pushpendra Priyadarshi, Amrit Anunay, Jitendra Prasad Shaha, Hans Raj, Ravi Ranjan and Anjani Kumar Jha, Advocates, for the Appellant

Judgement

V.N. Sinha, J.—Instant death reference and the seven analogous appeals arise out of judgment of conviction, order of sentence dated 05/24.06.2014, passed by Ad hoc Additional District and Sessions Judge-I, Patna, in Sessions Trial No. 523/04 & S.T. No. 918/04, arising out of Gardanibagh (Shastri Nagar) P.S. Case No. 868/02 dated 29.12.2002, which was transferred to C.B.I. whereafter the case was renumbered as R.C. No. 5(S) of 2003 whereunder Accused No. 1 Shamshey Alam appellant in Criminal Appeal (DB) No. 650 of 2014 has been convicted for the offences under Sections 302 , 148 , 342 and 201 of the Penal Code and Section 27 of the Arms Act, sentenced to suffer capital punishment, Rigorous Imprisonment for 3, 1, 7 years with further direction to pay fine of Rs. 10,000/- each to the family of the three deceased under Sections 302 , 148 , 342 , 201 of the Penal Code respectively, in default of payment of fine to further

undergo rigorous imprisonment for three months. The sentences have been directed to run concurrently. No separate sentence, however, has been awarded under Section 27 of the Arms Act.

Accused No. 2 Arun Kumar Singh, appellant in Criminal Appeal (DB) No. 680 of 2014 has been convicted for the offences under Sections 148 , 342 , 302 /149 and 201 of the Penal Code, sentenced to suffer Rigorous Imprisonment for life till death as also to pay fine of Rs. 10,000/- each to the family of the three deceased under Section 302 /149 of the Penal Code, in default of payment of fine to further undergo Rigorous Imprisonment for three months. He has further been sentenced to suffer Rigorous Imprisonment for 3, 1 and 3 years with fine of Rs. 10,000/- each to family of the three deceased, in default of payment of fine to suffer Rigorous Imprisonment for three months for the offence under Sections 148 , 342 and 201 of the Penal Code respectively. His sentences are also directed to run concurrently.

Accused Nos. 3 to 8, appellant in Criminal Appeal (DB) Nos. 652, 595, 612, 540, 628 all of 2014 have been convicted for the offences under Sections 147 , 342 , 307 /149 and 201 of the Penal Code, sentenced to suffer imprisonment for life till death as also to pay fine of Rs. 10,000/- each to family of the three deceased, in default of payment of fine to suffer Rigorous Imprisonment for three months for the offence under Section 307 /149 of the Penal Code. They have further been sentenced to suffer Rigorous Imprisonment for two, three year with direction to pay fine of Rs. 5,000/- each to family of the three deceased, in default of payment of fine to suffer Rigorous Imprisonment for three months, Rigorous Imprisonment for one year for the offences under Sections 147 , 201 and 342 of the Penal Code respectively. Sentences imposed on Accused Nos. 3 to 8 have, however, been directed to run concurrently.

2. Prosecution case, as set out in the written report of Mukesh Ranjan (P.W. 1) proprietor of Manbhawan Sweets, Ashiyana Road, Patna-14 dated 29.12.2002, addressed to Superintendent of Police, Patna, on the basis of which aforesaid Gardanibagh (Shastri Nagar) P.S. Case No. 868/02 dated 29.12.2002 was registered, is that yesterday i.e. 28.12.2002 his brother Vikash Ranjan got ready around 4:00 P.M. for going to Ara, went with friend Prashant to park his scooter at the residence of Prashant. Both were also accompanied by their friend Himanshu. The three went to the STD booth of Kamlesh Kumar Gautam (Accused No. 3) to telephonically call their another friend, protest was raised on the issue of false bill being raised by the booth owner leading to quarrel between them and booth owner. STD booth owner Gautam with the assistance of the owner of Sammelan Market assaulted the three, the market owner also made the three captive inside the market by locking the grill. Afterwards owner of the hardware shop with the assistance of the owner of Sammelan Market also gave the three good thrashing and telephonically called both Digha, Shastri Nagar police with force. Police force from the two Police Stations came to the market, asked the market people to assault the three as much as they desired assuring the market

people that they shall take care of the consequences. After the shop-keepers of the market left, the three police personnel shot them from close range. In the written report informant further stated that his brother and his friends were simple, law abiding individual, they had no criminal antecedent. In the report it is also stated that at the time of occurrence many persons were present, they shall record their statement at the appropriate time. In the last paragraph of the report informant requested the addressee Superintendent of Police, Patna to take action against the policemen involved in the incident including the person from whose service revolver his brother and his friends have been shot after dismissing him from service, arresting them in connection with the murder of his brother and his two friends. Written report of Mukesh Ranjan (Exhibit-1), though addressed to the Superintendent of Police, Patna, appears to have been received by Sub-Inspector of Police, Shastri Nagar Police Station who forwarded the same on the same day to the Officer-in-Charge, Gardanibagh for registering a case under Section 302 /34 of the Penal Code and 27 of the Arms Act with further endorsement that S.I.G. Ram will investigate the case. Forwarding of Sub-Inspector, Shastri Nagar Police Station is marked Exhibit-14. In the light of the aforesaid written report A.S.I. Kaushleshwar Prasad Singh registered Gardanibagh (Shastri Nagar) P.S. Case No. 868/02 dated 29.12.2002 for the offences under Sections 302 /34 , 307 , 342 , 323 , 341 of the Penal Code and 27 of the Arms Act, sent the First Information Report for perusal by the Court, but Column No. 15 of the First Information Report is kept blank, as such, it is difficult to ascertain the date on which the First Information Report was forwarded for perusal by the Court. From perusal of the 1st page of the First Information Report it, however, appears that the same was perused by the Chief Judicial Magistrate, Patna on 30.12.2002. From the record, it also appears that on 30.12.2002 Incharge Chief Judicial Magistrate, Patna also received the First Information Report of Gardanibagh (Shastri Nagar) P.S. Case No. 867/02 dated 28.12.2002 registered by A.S.I. B. Tiwary for the offence under Section 304 of the Penal Code on the basis of the written report of M. Shamshey Alam (Accused No. 1) dated 28.12.2002 addressed to Chief Judicial Magistrate, Sadar Court, Patna. Perusal of the written report of Accused No. 1 indicates that thereunder he has reported his version of the same occurrence about which Mukesh Ranjan (P.W. 1) submitted his written report dated 29.12.2002 (Exhibit-1) and the circumstances in which Accused No. 1 had to resort to firing injuring the three deceased, who were subsequently assaulted by the irate, violent mob of 1000 unknown present outside Sammelan Market and requested that the 1000 unknown be charged for the offence under Section 304 of the Penal Code. Written report of Accused No. 1 dated 28.12.2002 (Exhibit-1/1) was also received in Shastri Nagar Police Station, forwarded to Gardanibagh Police Station for instituting a case under Section 304 of the Penal Code on the basis of which A.S.I. B. Tiwary of Gardanibagh Police Station registered the formal First Information Report of Gardanibagh (Shastri Nagar) P.S. Case No. 867/02. Perusal of Column No. 13 of the said First Information Report indicates that S.I.N. Prasad will investigate the case. Perusal of Column No. 15 of the said First Information

Report, however, does not indicate the date, time on which the said First Information Report was transmitted to Court for perusal, but from the 1st page of the said First Information Report it appears that the same was received, perused by the Incharge Chief Judicial Magistrate, Patna on 30.12.2002. Records further reveal that on 30.12.2002 Incharge Chief Judicial Magistrate, Patna also received First Information Report of Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 dated 28.12.2002 registered for the offences under Sections 395 /412 , 307 of the Penal Code and Sections 25(1-b) , a/26 /27 /35 of the Arms Act on the basis of the written report of Kamlesh Kumar Gautam (Accused No. 3) addressed to Officer-in-Charge of Shastri Nagar Police Station (marked "X" for identification) whereunder Accused No. 3, who is the owner of Gautam STD booth in Sammelan Market, had given his version of the same occurrence for which the aforesaid two First Information Report(s) of Gardanibagh (Shastri Nagar) P.S. Case Nos. 868/02, 867/02 were registered. Perusal of written report of Accused No. 3 (Exhibit-X) indicates that on 28.12.2002 at about 12.30 P.M. the three deceased had come to his STD booth, there was hot exchange of words over the bill, matter was pacified, the three deceased left the booth, again all of a sudden returned to the booth around 4:15 P.M. with 9-10 young miscreants, resorted to loot of cash, coupon and mobile phone etc. In the meantime, local people and the shopkeepers of the market assembled, three amongst the miscreants plucking the wire of billing machine were apprehended, the others managed to escape resorting to firing terrorising those who assembled there. In the meantime on information being transmitted Officer-in-Charge Shastri Nagar Police Station along with other police personnel arrived. The three miscreants who could not escape were encircled by the police and local public, asked to surrender then the miscreants resorted to firing. In return fire by policemen the three miscreants received bullet injuries and fell down on the ground. The members of the public also brutally assaulted the three injured in spite of effort by police personnel to rescue the injured as a result of which the three died at the spot. In the report Accused No. 3 also stated that the police seized two country-made pistols with fired empties in barrel, five live cartridges, few fired cartridges, three mobile phones, Rs. 1500/- in cash and coin, coupon of mobile phone (articles looted by them) from near the three bodies as also a T.V.S. motorcycle and Bajaj Super Scooter used by the miscreants. Accused No. 3 submitted his written report to the then Officer-in-Charge, Shastri Nagar Police Station (Accused No. 1) at Sammelan Market itself who having returned to the Police Station forwarded the report of Accused No. 3 to Gardanibagh Police Station for instituting a case under Sections 395 /412 /307 of the Penal Code and Sections 25(1-b) 1 /26 /27 /35 of the Arms Act with further endorsement that S.I. Ezajul Haque will investigate the case. In the light of the written report of Accused No. 3 Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 was registered on 28.12.2002 at 23.45 hours (11.45 P.M.) against 3+7 unknown accused persons by A.S.I. B. Tiwary of Gardanibagh Police Station. From the records, it also appears that in the light of the written report of Accused No. 3 (Exhibit-X) investigation of the case had already begun at the place of occurrence itself, as

inquest proceedings over the three dead bodies were conducted at the place of occurrence i.e. Sammelan Market on 28.12.2002 at 17.30 hours (05.30 P.M.), 17.45 hours (05.45 P.M.), 17.55 hours (05.55 P.M.), Exhibits - 15, 15/1, 15/2 respectively. Seizure of the incriminating articles recovered from the place of occurrence were made vide seizure-list prepared by Accused No. 1 on 28.12.2002 at 18.10 hours (06.10 P.M.), 18.25 hours (06.25 P.M.), 18.35 hours (06.35 P.M.) and 18.40 hours (06.40 P.M.), Exhibits 16, 16/1, 16/2, 16/3 respectively. Post mortem of the three deceased was conducted in P.M.C.H., Patna on 29.12.2002 by Dr. Ashok Kumar Yadav, Associate Professor, Department of Forensic Medicine, P.M.C.H. vide Post Mortem Report Nos. 1849, 1850, 1851 all dated 29.12.2002, Exhibits 26, 26/1, 26/2 respectively. Perusal of the three Post Mortem Report(s) indicates that the same was conducted on the basis of the inquest prepared by the Magistrate. Perusal of the Post Mortem Report(s) further indicates that the three deceased were unknown criminals but later on identified through G. Ram of Shastri Nagar Police Station as Vikash Ranjan, Prashant Singh and Himanshu Kumar. While the investigation of Gardanibagh (Shastri Nagar) P.S. Case Nos. 866, 867, 868 all of 2002 continued, State Government of Bihar issued Home (Police) Department notification dated 04.01.2003, corrigendum dated 29.01.2003 granting its consent to the members of Delhi Special Police Establishment to investigate the aforesaid three cases. In the light thereof Cabinet Secretariat, Government of India, New Delhi issued notification dated 14.02.2003 (Exhibit-37) extending the powers and jurisdiction of the members of Delhi Special Police Establishment to the whole of the State of Bihar to investigate the aforesaid three cases registered at Gardanibagh (Shastri Nagar) Police Station. In the light of the Government of India notification dated 14.02.2003 (Exhibit-37) Sri Narayanan S.S.P., C.B.I./SIC. IV, New Delhi registered RC-5(S)/2003 dated 18.02.2003 at 20.30 hours on the basis of the written report of Mukesh Ranjan dated 29.12.2002, directed Sri N.S. Kharayat Dy. S.P., C.B.I./SIC. IV/New Delhi to take up its investigation. Aforesaid First Information Report of RC-5(S)/2003 was perused by the Special Judicial Magistrate, C.B.I. on 21.02.2003. After registration of the said First Information Report Sri Kharayat proceeded with its investigation, submitted charge-sheet No. 2 dated 29.03.2003 against 8 accused persons. Perusal of the charge-sheet indicates that on the date of submission of charge-sheet i.e. 29.03.2003 Accused Nos. 1, 3 were under custody. The other 6 accused persons, namely, Accused No. 2, Accused Nos. 4 to 8 were not under arrest on the date of submission of charge-sheet. The charge-sheet was, however, perused by the Special Magistrate, C.B.I. on 30.03.2003. In the light of the charge-sheet Special Magistrate, C.B.I. took cognizance of the offences found true during investigation under charge-sheet dated 29.03.2003. After supply of police papers to the accused persons the case was committed to the Court of Sessions. From order dated 19.06.2004, passed by Sessions Judge, Patna it appears that the records of the instant case was received in the Sessions Court after commitment of the case on 24.05.2004, the same was transferred to the court of Additional Sessions Judge-XI, Patna, who framed charge under order dated 14.12.2004 to which the

8 accused persons pleaded not guilty, claimed to be tried. The trial proceeded in the court of Additional Sessions Judge-XI, Patna wherefrom the same was transferred to the other courts, ultimately to the court of Ad hoc Additional Sessions Judge, F.T.C.-I, Patna under order dated 21.07.2012.

3. To support the charge, during trial, prosecution examined as many as 33 witnesses.

P.W. 1 Mukesh Ranjan is the informant of Gardanibagh (Shastri Nagar) P.S. Case No. 868/02, brother of the deceased Vikash Ranjan, is neither an eye-witness of the shoot-out nor any other part of the occurrence.

P.W. 2 Jagdish Prakash Gupta @ Jagdish Prasad Gupta is the father of Mukesh Ranjan (P.W. 1), the deceased Vikash Ranjan, is also not an eye-witness of the occurrence.

P.W. 3 Brahmdeo Paswan is a police officer, on the date of occurrence was Incharge of Patna District Armory. He has stated in Paragraphs 3, 17, 26 of his evidence about the arms and ammunitions entrusted to Accused No. 1 for official use by him.

P.W. 4 Anil Kumar Sinha is a Wireless Operator, on the date of occurrence of the instant case served in the Police Information Centre, Patna. He stated in Paragraph 3 of his evidence that Wireless Entry No. 3154/02 dated 28.12.2002 (Exhibit-3) was made by him under his signature at 04:45 P.M. stating that firing is going on between the criminals and the policemen on Digha-Ashiyana Road, police reinforcement be sent. In Paragraph 4 of his deposition P.W. 4 stated that Wireless Entry No. 3156/02 dated 28.12.2002 (Exhibit-6) was made under his signature at 04.51 P.M. stating that 2-3 criminals have been killed. In Paragraph 5 P.W. 4 referred to Wireless Entry No. 3166/02 dated 28.12.2006 (Exhibit-6/2) issued at 05.22 P.M. whereunder D.G.P. wanted to know the identity of the criminals killed. In the same paragraph P.W. 4 further stated that Dy. S.P., Secretariat informed that Ashok, resident of Phulwari, Natwa of Rajwanshi Nagar have been identified amongst the three killed. The identity of the 3rd miscreant is not yet known. In the same paragraph P.W. 4 further stated that from the possession of those killed 2 firearm, 4 live, 6 empty cartridges and 2 looted motorcycles were recovered. In the same paragraph P.W. 4 also accepted that Dy. S.P. also informed that criminals have fired 10-15 rounds. In repeat Paragraph 8 at page 478 of the paper-book P.W. 4 reiterated that 2 out of the 3 deceased were identified by Dy. S.P. Secretariat. In Paragraph 11 P.W. 4 stated that his statement made before the Investigating Officer of C.B.I. is the same as he has deposed in Court today.

P.W. 5 Baldeo Paswan is the tea-shop owner, who had come to Sammelan Market to purchase milk from milk parlour, is said to be an eye-witness of the occurrence, as he claims himself to have seen Accused No. 2 telephonically informing Accused No. 1 that dacoits have been apprehended whereafter Accused No. 1 came, shot the 3 boys in his presence. P.W. 5 also claims to have

identified the 3 accused persons. In Paragraph 6 P.W. 5 stated that he was earlier selling tea in his shop. For the present is serving as a labourer, at times ply rickshaw. In Paragraph 34 P.W. 5 admitted that he does not recognize Officer-in-Charge, Shastri Nagar Police Station. In Paragraph 35 P.W. 5 stated that he did not inform or tell anybody that he is a witness of the occurrence in Sammelan Market. In Paragraph 48 P.W. 5 stated that 10 days prior to the occurrence there was cold wave conditions prevailing, it was extremely cold, there used to be dense fog making the visibility poor throughout the day. In Paragraph 60 P.W. 5 admitted that his statement about the occurrence was recorded by the Investigating Officer of the C.B.I. for the first time after four months of the occurrence. In repeat paragraph 68 P.W. 5 further stated that at the time of occurrence police party arrived, chased away the crowd including him.

P.W. 6 Ajit Kumar Sinha on the date of occurrence served as Dy. S.P., Secretariat, reached Sammelan Market on 28.12.2002 between 5:00-5:15 P.M. His police statement was recorded by the Investigating Officer, C.B.I. on 01.02.2003. In Paragraphs 4, 13 P.W. 6 claimed that after the occurrence Accused No. 1 proclaimed that he killed the three accused in encounter. In Paragraph 58 P.W. 6 stated that he did state before the Investigating Officer, C.B.I. that he learnt the names of 2 deceased Natwa, Ashok from Accused No. 1 and one constable.

P.W. 7 Dr. Anil Kumar Sinha, P.W. 11 Singheshwar Prasad Sinha are the Senior Scientific Officer, Technical Officer serving at Forensic Science Laboratory, Patna, have submitted F.S.L. Report Nos. 55/2003, 56/2003 dated 27.02.2003, 57/2003 dated 04.03.2003 (Exhibits 7, 7/1 and 7/2 respectively). Perusal of F.S.L. Report No. 55/03 (Exhibit-7) indicates that thereunder one 9 mm caliber semi automatic (R.F.I.) pistol bearing No. 15341678 marked "A", three fired cases of 9 mm caliber cartridges marked "A1" to "A3", a small cardboard box marked "B" containing twenty eight 9 mm caliber (K.F.) cartridges marked "B1" to "B28" in the laboratory, a glass phial marked "C" containing a deformed fired bullet, said to have been extracted from the body of victim during the Post Mortem, were compared with four live rounds of 9 mm (K.F.) caliber cartridges marked "B1" to "B4", fired from pistol marked "A" bearing No. 15341678, its fired cases marked "B1(A)" to "B4(A)" in the laboratory and recovered test fired bullets marked "B1(A)" to "B4(A)" in the laboratory with the help of a comparison microscope. The report further indicates that fired cases marked "A1" to "A3" and the test fired cases marked "B1(A)" to "B4(A)" were examined under comparison microscope and concluded that the cartridges marked "A1" to "A3" have been fired from the same firing pin of a weapon which fired "B1(A)" to "B4(A)". The report also indicates that the deformed fired bullet marked "C" and the test fired bullet marked "B1(A)" to "B4(A)" were examined under the comparison microscope, as a result of microscopic comparison the striation on the deformed bullet marked "C" were found similar to those test fired bullets marked "B1(A)" to "B4(A)" and in the light of such finding the report concluded that the deformed bullet marked "C" has been fired from the barrel of the same weapon which fired test fired bullet marked "B1(A)" to "B4(A)".

P.W. 8 Rajiv Kumar is a shoe shop owner in the name, style of Shiva Shoes, his shop is located in Ram Jatan Market located on the crossing of Ashiyana Road. He is a hear-say witness about the occurrence as also witness of seizure as he has put his signature over seizure-list, Exhibits 10, 10/1, 10/2 and 10/3.

P.W. 9 Safir Khalifa is also a police officer, succeeded Accused No. 1 Shamshey Alam, Officer-in-Charge, Shastri Nagar Police Station on 30.12.2002, furnished relevant Station Diary Entry of Shastri Nagar Police Station to the Investigating Officer of the Central Bureau of Investigation on 25.02.2003.

P.W. 10 Gorakh Ram is also a police officer, served as Sub Inspector in Shastri Nagar Police Station on 29.12.2002. He is the first Investigating Officer of the present Gardanibagh (Shastri Nagar) P.S. Case No. 868/02. From Paragraph 2 of his evidence it appears that he came to the place of occurrence Sammelan Market on 28.12.2002 at 4:45 P.M. along with Sub Inspector Nagendra Prasad, Sub Inspector Ejajul Haque and one Assistant Sub Inspector whose name he does not remember and other policemen. From Paragraphs, 12, 15, 17 of his evidence it further appears that he arrived at the place of occurrence after arrival of P.W. 6 Ajit Kumar Sinha, Dy. S.P., Secretariat remained at the place of occurrence until P.W. 6 remained there, by then none of the senior police officers arrived at the place of occurrence. In Paragraph 44 P.W. 10 stated that when he reached Sammelan Market, its gate was open.

P.W. 12 Ejajul Haque was also posted as Sub Inspector in Shastri Nagar Police Station on 28.12.2002. He is the Investigating Officer of Gardanibagh (Shastri Nagar) P.S. Case No. 866 dated 28.12.2002 lodged by Accused No. 3 Kamlesh Kumar Gautam, before him Accused No. 1 Shamshey Alam also produced his service pistol 9 mm bore bearing No. 15341678, three empties of 9 mm and 28 live rounds of 9 mm cartridges on 28.12.2002 at 23:10 hours (11:10 P.M.) vide Station Diary Entry No. 1108 and Production-cum-Seizure-List (Exhibit-A) drawn in presence of Sub Inspector Nagendra Prasad, Sub Inspector Gorakh Ram. In Paragraph 49 P.W. 12 has further stated that Sub Inspector Prabhu Nath Singh had informed him that the miscreants had shot at him but he somehow saved himself, in return firing resorted to by Accused No. 1 the three miscreants had suffered injury and died.

P.W. 13 Ram Pravesh Prasad is a Home Guard Driver, on the date of occurrence was posted in Shastri Nagar Police Station, it was on the gipsy driven by him Accused No. 1 Shamshey Alam and other police officers reached Sammelan Market after receiving wireless message that dacoits have descended at Sammelan Market. The witness has further stated that he remained in gipsy, Accused No. 1 Shamshey Alam and other police officers went inside the Sammelan Market, thereafter he heard firing sound, after sometime Officer-in-Charge came, informed him that three murders have taken place, whereafter this witness transmitted the message to Police Information Radio (PIR).

P.W. 14 Prabhunath Singh is also a Sub Inspector of police, on the date of

occurrence was posted in Shastri Nagar Police Station. On the date of occurrence he reached Sammelan Market in the afternoon along with Accused No. 1 Shamshey Alam and other police officers on the same gypsy. In Paragraphs 7, 9 the witness has stated that he did not verify that the three injured were alive or dead. In Paragraph 12 P.W. 14 further stated that before his statement was recorded by Investigating Officer of Central Bureau of Investigation, the Investigating Officer of C.I.D. had also recorded his statement. The witness also recorded his 164 Cr.P.C. statement about the occurrence on 27.03.2003. In Paragraph 14 P.W. 14 stated that he does not remember whether his statement was recorded in Gardanibagh (Shastri Nagar) P.S. Case No. 866/02. In the same paragraph he further stated that he also does not remember whether the criminals had shot at him and that he somehow saved himself.

P.W. 15 Jawahar Prasad on the date of occurrence served as Literate Constable in Shastri Nagar Police Station, has claimed that he maintained the Station Diary of Shastri Nagar Police Station.

P.W. 16 Udai Shankar Prasad is a Junior Telecom Officer in B.S.N.L., maternal uncle of deceased Vikash Ranjan. He has claimed that he learnt from his sister that his maternal nephew Vikas Ranjan has been killed by police party.

P.W. 17 Abhay Kumar also served as Sub Inspector in the Rajiv Nagar Housing Camp within Digha Police Station on 28.12.2002, on the same day in the afternoon learnt from 3-4 motorcycle riding men that few miscreants have been apprehended, assaulted in Sammelan Market and the market is surrounded by a violent crowd whereafter he came to Sammelan Market, saw through its gate the three men lying inside the market in injured condition. The violent crowd present outside the market asked him to return saying that Sammelan Market is within the jurisdiction of Shastri Nagar Police Station, they have already been informed about the occurrence whereafter the witness went back. The witness also through mobile informed Shastri Nagar Police Station about the occurrence, learnt that Shastri Nagar Police Station is already aware about the occurrence and force has been sent there.

P.W. 18 Bibhuti Sharan is also a shop owner, his shop is situate in Sanjay Market, P.C.O. of Accused No. 3 Kamlesh Kumar Gautam is also situate near his shop. He has claimed in his evidence that he identified the appellants as the assailants of the three deceased. In Paragraph 3 P.W. 18 further stated that he learnt from his landlord that on 28.12.2002 between 4:00-4:30 P.M. there was altercation between P.C.O. owner and the three boys whereafter crowd collected, alarm was raised that dacoits have come. He further stated in the same paragraph that he went to call his landlord Ajit Kumar who asked him to close the shop, thereafter P.W. 18 closed the shop, went to the adjoining tea shop along with his landlord Ajit Kumar. In the meantime, constable on patrolling duty arrived on a motorcycle, soon thereafter police gypsy of Shastri Nagar Police Station came with Accused No. 1 Shamshey Alam and 4-5 policemen, began to discipline, disperse the crowd. The witness thereafter heard the firing sound, later learnt

that the three boys were killed, their dead bodies removed from the place of occurrence on a tractor trolley.

P.W. 19 Nishant is younger brother of deceased Himanshu Yadav.

P.W. 20 Ajit Kumar is an owner of flour mill located near Sammelan Market. From his evidence it does not appear that he identified any of the assailants. The witness, however, admitted in Paragraph 2 of his evidence that after arrival police party dispersed the crowd, firing took place 10-15 minutes thereafter.

P.W. 21 Ramdutta Yadav is a cultivator, is raising a house 4-5 metres north of Sammelan Market. He also recorded his statement before the C.B.I. after four months of the occurrence, did not identify any of the assailants.

P.W. 22 Lakshman Singh served as Senior Manager in Allahabad Bank, is father of deceased Prashant Singh.

P.W. 23 Dr. Ashok Kumar Yadav at the relevant time served as Associate Professor, Forensic Medicine, P.M.C.H., conducted autopsy on the dead body of the three deceased. From the Post Mortem Reports (Exhibit-26, 26/1 and 26/2) and his evidence it is clear that post mortem on the dead body of the three deceased was conducted on the basis of the Inquest Report prepared by the Magistrate which is not available on record. From the evidence of P.W. 23 as also the three Post Mortem Reports (Exhibits-26, 26/1 and 26/2) it is clear that the three deceased besides suffering one pistol shot injury also suffered multiple injuries caused by hard, blunt substance.

P.W. 24 Sadai Kumar is Divisional Engineer, B.S.N.L., has issued print-out of Telephone Nos. 2589145, 2589175.

P.W. 25 Sushant Kumar Chakraborty is the draftsman in P.W.D. Building Division, Patna, has drawn the sketch map of Sammelan Market (Exhibit-30).

P.W. 26 Gulshan Mohan Ranthi is Inspector in C.B.I., served as Assistant Investigating Officer of the case.

P.W. 27 Nagendra Prasad also served as Sub Inspector in Shastri Nagar Police Station on 28.12.2002. He reached Sammelan Market after Accused No. 1 Shamshey Alam along with Sub Inspector Gorakh Ram, Ejajul Haque, Sub Inspector R.K. Singh, saw the crowd outside the market. The witness entered the market, found in the corridor three dead bodies smeared with blood in front of S.T.D. Booth, Accused No. 1 was also present near the dead body holding two country made pistol, few cartridges. The witness also stated that Shamshey Alam informed him that he has recovered the two country made pistols and the cartridges from near the three deceased.

P.W. 28 Naresh Indaura, P.W. 29 Ranjan Kumar Jha both served as Inspector in C.B.I., assisted the Investigating Officer in the investigation of the present case.

P.W. 30 Mahesh Yadav is a businessman, on the date of occurrence was taking

tea near Sammelan Market.

P.W. 31 Raj Kumar served as Dy. S.P., C.I.D. in Haryana Police, assisted the Investigating Officer of C.B.I. in the investigation of the present case.

P.W. 32 N.S. Kharayat at the relevant time served as Dy. S.P., C.B.I., conducted investigation of the present case. He having found that it was Accused No. 1 who shot the three deceased at the instance of the other accused persons, namely, Accused Nos. 2 to 8 submitted charge-sheet dated 29.03.2003 in the instant case.

P.W. 33 Ram Nath Prasad is Assistant in Law Department of the State Government, is a formal witness as he has identified the signature of Sri Vasudeo Ram, Law Secretary over the order granting sanction for the prosecution of Accused No. 1, 2 in the instant case.

4. Besides the prosecution witnesses defence has also examined 18 witnesses.

D.W. 1 Umesh Prasad Sah is one of the charge-sheet witness of the prosecution. He initially deposed that two boys had come and then said that three boys had come and were quarrelling amongst themselves. On the intervention of other shopkeepers the three boys went away threatening that they are returning within one hour and shall teach the shopkeepers a lesson. After departure of the boys D.W.-1 also went to some other market, came back between 6.30-7.00 P.M. and learnt that the three boys have been killed. In his cross-examination D.W. 1 admitted that half of Sammelan Market is owned by his father and other half is owned by his brother-in-law.

D.W. 2 Ramesh Prasad Sah is also a charge-sheet witness of the prosecution and has also deposed that Sammelan Market belongs to his family. He further deposed that on the date of occurrence between 2.30-3.00 P.M. he heard noise, saw three boys quarrelling with the S.T.D. booth owner over phone bill. The quarrel was pacified, the boys again returned but the witness remained inside his house even after hearing gun shot and came out of the house at 5.15 P.M. to see press reporters to whom Accused No. 1 was saying that the three boys, who are criminals, have been killed in encounter.

D.W. 3 Md. Salam is a social worker and at the time of occurrence was in the office of Labour Development Union, heard sound of firing coming from the side of Sammelan Market, saw a crowd collected in front of the market pelting stones. He also heard Sub-Inspector Abhay Singh exhorting the crowd to assault the dacoits who belong to Natwa, Ashok gang. D.W. 3 further deposed that police party from Shastri Nagar Police Station also came to Sammelan Market and the Sub-Inspector (Accused No. 1) heading the police party went inside the market. He also stated that firing was resorted to from both sides. Later, two more police zypsy came at Sammelan Market. D.W. 3 also identified Ajit Kumar Sinha, who along with some other people including the witness was also called inside the market where he found three dead bodies and policemen. D.W. 3 also saw inside

the market two country-made pistols, few live, empty cartridges, money and papers, which was seized by the police, seizure-list prepared and the persons present put their signature over the same. The witness, however, did not put his signature over the seizure-list but identified the documents (Exhibit-10 series) which were prepared in Sammelan Market soon after the occurrence in his presence.

D.W. 4 Md. Sultan claims himself to be a cycle mechanic. He deposed that on the date, time of occurrence he heard sound of firing from Sammelan Market, closed his shop and went towards the market, saw a crowd of 1000 people saying that those killed belong to the gang of Ashok and Natwa. He saw the police party from Shastri Nagar Police Station coming to Sammelan Market and the two inspectors alighting from the police zypsy went inside the market. The constables alighting from the gypsy began to control the crowd. D.W. 4 also stated that he heard firing sound from both the sides. He also claims that he resides at Bhola Paswan Shastri Bhawan where many other people reside and has been staying there for 20 years. He also claims that none by the name of Baldeo Paswan (P.W. 5) resides in Bhola Paswan Shastri Bhawan. D.W. 4 further deposed that he filed Gardanibagh P.S. Case No. 171/2003 against Surendra Das and others and in that case P.W. 5 of the present case is also one of the accused.

D.W. 5 Kanti Devi deposed that she has not gone with P.W. 5 for recording her police statement before the Investigating Officer, C.B.I. In her cross-examination D.W. 5, however, admitted that there is another Kanti Devi who resides at some distance from her residence.

D.W. 6 Md. Muslim deposed that on the date of occurrence he was at his motorcycle shop, heard gun shot coming from the side of Sammelan Market. After closing the shop he also went towards Sammelan Market, saw a huge crowd outside the market, the members of the crowd were saying about the presence of dacoits and pelting stones. Abhay, a Sub-Inspector of Digha Police Station came at the market and instigated the crowd that the miscreants were men of Natwa gang. Later, police party from Shastri Nagar Police Station also came. There were two Sub-Inspectors and two constables. The Sub-Inspectors went inside the market. D.W. 6 heard from outside firing sound of 10-12 shots from both sides. Dy. S.P. also came at the place of occurrence. Other senior police officers also came there. D.W. 6 saw three dead bodies, two pistols, 12-14 empties, bullets, money and papers scattered on the ground. D.W. 6 also stated that no person by the name of Baldeo Paswan resides at Bhola Paswan Shastri Bhawan. He further deposed that there is only one Kanti Devi who resides there in Flat No. 2. D.W. 6 in his cross-examination admitted that he does not have licence for his motorcycle shop and that the wooden kiosk from which he operates his motorcycle shop is situate on the government land. He also admitted that after the limit and jurisdiction of Shastri Nagar Police Station ends the limit and jurisdiction of Digha Police Station begin. He also admitted that after departure of Digha Police Shastri Nagar Police came to Sammelan Market.

He also admitted that the three dead bodies were not of dacoits but of students. He also admitted that he does not know the name of others who stayed at Bhola Paswan Shastri Bhawan. Having seen the Voter Identity Card of Baldeo Paswan (marked Y for identification) he accepted that the card is of Baldeo Paswan but he does not reside at the address mentioned in the card.

D.W. 7 Rajdeo Ram is a painter and at the time of occurrence was purchasing paint at Ram Nagri More. He heard sound of firing, also saw crowd gathered outside Sammelan Market. He also saw police officer of Digha Police Station asking the crowd to assault. Police force from Shastri Nagar Police Station comprising of two Sub-Inspectors, 3-4 constables also arrived there, Officer-in-Charge, Shastri Nagar Police Station went inside the market. Before firing was resorted to D.W. 7 claims to have left the market for home. He later heard sound of firing and after 1-1 1/2 hour came to know that three dacoits have been killed. He also claims that Investigating Officer, C.B.I. examined him after two months of the incident. He, however, admitted in cross-examination that he is not aware that the three deceased were students and that he had seen their dead bodies.

D.W. 8 Mala Rai is also a chance witness and states that while he was crossing Sammelan Market saw a crowd there, members of the crowd were throwing stones at the market saying that there are dacoits. He also deposed that a Sub-Inspector Abhay Kumar was instigating the crowd to assault the dacoits, meanwhile, Officer-in-Charge, Shastri Nagar Police Station came and the crowd was asked to disperse, Officer-in-Charge Shastri Nagar Police Station went inside the market. D.W. 8 also deposed that he heard firing sound of 10-15 rounds. He also claims that he saw three dead bodies, two country-made pistols, bullet empties, papers and money. He also claims to be a witness of inquest and identified his signature over the inquest report (Exhibits-C to C/2). D.W. 8 also claims that his statement was recorded by Shastri Nagar Police as also by Investigating Officer, C.B.I. In cross-examination D.W. 8 admitted that he is resident of Village Manas and that his brother has a business at Patna and further clarified in the same paragraph that he used to regularly visit Patna. He also admitted that he has not witnessed anyone firing and that he is not aware about the other papers prepared at the place of occurrence after the departure of the dead bodies as he also left after the departure of the dead bodies from the place of occurrence. The witness further admitted that later he learnt that the three deceased were students.

D.W. 9 Jitendra Sao deposed in his evidence that on the date of occurrence at about 4.30 P.M. he learnt that dacoity was going on in Sammelan Market, he went there, saw a huge crowd outside the market throwing bricks inside the market. He also heard that Natwa is inside the market, police force from Shastri Nagar Police Station comprising of two Sub-Inspectors and two constables came there. One of the two Sub-Inspectors went inside the market and stated that Natwa is also inside. According to the witness 10-12 rounds of firing was resorted to in the encounter. Officer-in-Charge came out of the market, almost at the

same time Superintendent of Police also arrived and after arrival of S.P. D.W. 9 left for his home by then nothing was disclosed and later it transpired that in encounter three persons have been killed. He also admitted in cross-examination that later he learnt that the three killed were students.

D.W. 10 Md. Ishak admitted in his evidence that on the date, time of occurrence he was at his residence in Bhola Paswan Shastri Bhawan and that he heard sound of 15-16 rounds of firing, crowd gathered at the Sammelan Market and he also heard that three dacoits have been killed in police encounter. In his cross-examination D.W. 10 admitted that he did not make any enquiry about the noise coming from the market.

D.W. 11 Jhunu Kumar Patel deposed that at about 5.00 P.M. he heard sound of 2-3 rounds of firing coming from Sammelan Market, went there, saw huge crowd, police party from Shastri Nagar Police Station came at the market, 2-3 members of the police party went inside the market and after sometime he heard sound of 10-12 rounds of firing. He also learnt that 2-3 dacoits have been killed and went to his house thereafter. In cross-examination D.W. 11 admitted that he did not see what was going inside the market. He also admitted that he has not seen any sign of firing shot on the wall. The witness further stated that after 2-3 months he came to know that the three killed were students.

D.W. 12 Ram Binay Singh is an Advocate and has proved the complaint petition (Exhibit-A) said to have been filed on behalf of Laxman Singh. The witness identified his signature over the complaint petition (Exhibit-B). In cross-examination D.W. 12 admitted that he did not know the complainant from before, who was introduced to him by another Advocate Sanjay Kumar. D.W. 12 further stated that he is not aware as to who typed the complaint (Exhibit-A) and that the complainant Laxman Singh was ever examined on Solemn Affirmation.

D.W. 13 Rooplal Sah deposed that on the date of occurrence at about 4.30 P.M. he heard that dacoits have entered Sammelan Market, went there, saw a crowd of about 4000-5000 people outside the market, came to know that the three dacoits have been killed in encounter. He also claimed that at Sammelan Market policemen were present. D.W. 13 in cross-examination, however, admitted that he is not aware that the three killed at Sammelan Market were students and that they were killed in encounter.

D.W. 14 Sanjay deposed that he learnt from D.Ws. 3, 13, 9 that three dacoits have been killed at Sammelan Market in encounter with police. He also admitted in his cross-examination that he is aware that policemen and others are accused in the instant case.

D.Ws. 15, 17 Krishna Prasad, Nagendra Prasad Singh are the two homeguards who accompanied Accused No. 1 and other Sub-Inspector of Shastri Nagar Police Station in the same gypsy, reached Sammelan Market along with Accused No. 1 and others in the afternoon of 28.12.2002. Both of them are charge-sheet witnesses. D.Ws. 15, 17 deposed that there was a crowd of 700-800 persons

collected outside the market, there was a fight going on from both sides, both the witnesses were asked to control the crowd. Both heard 8-10 rounds of firing. Many other police officers also reached the place of occurrence and the two heard that three persons have been killed. D.W. 15 thereafter went to police station and others went to P.M.C.H. In his cross-examination D.W. 15 admitted that he personally did not receive any information on the wireless. According to D.W. 15 four policemen had come from Shastri Nagar Police Station, out of whom two were homeguards. D.W. 15 also admitted that he remained at a distance of 200 yards from the entrance gate of Sammelan Market and kept controlling the crowd. D.W. 15 claims to have heard firing sound of two types, one light and the other loud. D.Ws. 15, 17 also admitted that they remained at the market for 15-20 minutes and that they are not aware that those killed were the students.

D.W. 16 Ambika Rai is a cycle mechanic. He deposed that on the date, time of occurrence between 4.00-5.00 P.M. he heard hulla from Sammelan Market side, went there, saw a huge crowd and after sometime heard sound of firing. Next day he heard that three dacoits have been killed. In his cross-examination he admitted that he does not remember the name of the person who told him about the killing of dacoits. He is also not aware about the names of the deceased. He also does not know that the deceased were students and not the dacoits.

D.W. 18 Chaturbhuj Narayan Singh is an Advocate's Clerk and deposed that he knows Accused No. 3. He has identified the signature, writing of Accused No. 3 on the Xerox copy of Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 which has been marked Exhibit-X for identification. In his cross-examination D.W. 18 accepted that he does not know the name of village of Accused No. 3 and his educational qualification. He also accepts that he has never seen the original of the First Information Report.

5. Learned Counsel for Accused Nos. 1, 2, 3 and 8 took us to the evidence of police officers who accompanied Accused No. 1 Shamsey Alam on the date, time of occurrence to Sammelan Market as also of those police officers who came afterwards including Dy.S.P., Secretariat and the gypsy driver who drove the gypsy on which Shamsey Alam and other Sub Inspector came to Sammelan Market as also of the two Home Guards D.Ws. 15, 17 who accompanied Shamsey Alam but not examined by the prosecution. He also took us to the evidence of P.Ws. 5, 18, 20, 21 and 30 who claimed themselves to be the eye-witness of the shoot-out and then submitted that case of the prosecution is that on 28.12.2002 at about 12:30 P.M. the three deceased had come to S.T.D. Booth of Accused No. 3. There was hot exchange of words over the bill amount. The matter was pacified, the three boys (deceased) left the booth, returned at about 4:00 P.M. when they were assaulted by Accused Nos. 3 to 8 with hard, blunt weapons rendering them unconscious. When the assault with hard, blunt substance was in progress, 2-3 motorcycle riders informed Sub Inspector Abhay Kumar (P.W. 17) about the same. P.W. 17 came to Sammelan Market, was asked by the crowd gathered outside Sammelan Market to go back as the market was within the

jurisdiction of Shastri Nagar Police Station and they have already been informed about the occurrence. P.W. 17 though returned from Sammelan Market but intimated Shastri Nagar Police Station about the incident. Accused No. 1 who was on patrolling duty in the afternoon of 28.12.2002 was informed by Shastri Nagar Police Station about the incident, thereafter he accompanied by P.W. 13 Driver Ram Pravesh Prasad, P.W. 14 Sub Inspector Prabhu Nath Singh, Home Guard Krishna Prasad (D.W. 15) and Nagendra Prasad Singh (D.W. 17) came to Sammelan Market. By the time Accused No. 1 reached Sammelan Market Accused No. 2 has also reached there. Accused Nos. 1, 2 and P.W. 14 entered the Sammelan Market, saw three persons lying in the corridor of the market in an unconscious state. Having seen the three injured Accused Nos. 1, 2 and P.W. 14 came out of the market but after sometime Shamsey Alam, Arun Singh again entered the market. Some shots were heard. Shamsey Alam thereafter came outside the market, informed P.W. 6 Ajit Kumar Sinha, Dy. S.P., Secretariat, who had also arrived at the Sammelan Market by then in an euphoric mood that he has killed the three criminals in an encounter. The police immediately took up investigation as Accused No. 3 Kamlesh Kumar Gautam has submitted his written report to Shamsey Alam at the Sammelan Market itself on the basis of which seizure-list of the incriminating articles found in the Sammelan Market was prepared between 6:10 to 6:40 P.M. though Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 for the offence under Sections 395 , 412 and 307 of the Penal Code was registered on the basis of the report of Accused No. 3 later in the same night on 28.12.2002 at 11:45 P.M. Later Shamsey Alam also submitted his report on the basis of which Gardanibagh (Shastri Nagar) P.S. Case No. 867/02 for the offence under Section 304 of the Penal Code was registered on 28.12.2002 at 11:45 P.M. On 29.12.2002 P.W. 1 Mukesh Ranjan submitted his report on the basis of which Gardanibagh (Shastri Nagar) P.S. Case No. 868 was registered on 29.12.2002 at 6:00 P.M. for the offences under Sections 302 /34 , 307 , 342 , 323 and 341 of the Penal Code and Section 27 of the Arms Act.

6. Learned counsel for the appellants submitted that Accused No. 1 Shamshey Alam surrendered his pistol, three empty cartridges and 28 live cartridges on 28.12.2002 before Sub Inspector Ejajul Haque on 28.12.2002 at 11:10 P.M. vide Station Diary Entry No. 1108 in presence of Nagendra Prasad, Gorakh Ram (P.W. 10) vide production-cum-seizure-list (Exhibit-A). During post mortem a deformed bullet was recovered from the body of deceased Prashant Singh. The service pistol of Accused No. 1, three empty cartridge cases and 28 live cartridge cases surrendered by Accused No. 1 as also the deformed bullet recovered from the body of Prashant Singh were sent to Forensic Science Laboratory, Patna for comparison. P.W. 7 Dr. Anil Kumar Sinha, Senior Scientific Officer, P.W. 11 Singheshwar Prasad Sinha, Technical Officer in the Forensic Science Laboratory along with Sri U.K. Sinha, Director Incharge, Forensic Science Laboratory, Bihar, Patna (not examined) examined and compared the three fired cartridge cases, deformed bullet and the test fired cases and bullet with the help of comparison microscope, opined that the three empty cartridge cases and deformed bullets

have been fired through service pistol of Accused No. 1 Shamshey Alam.

7. It is further submitted that data and photograph of the striations being not indicated in the report, lands and grooves cannot be the basis for the expert to render his finding that the two objects compared by him under microscopic comparison is identical. It is submitted that it is well known that one and the same model of barrel of the arms produced by the same company contains same number of lands and grooves and their twist. The distinguishing feature of the barrel is the width of lands and grooves, degree of twist and the depth of groove, which is to be measured by micrometer and other measuring device. Opinion rendered without indicating such measurement is mere ipse dixit, cannot be accepted by any court much less High Court.

8. Learned counsel for Accused Nos. 1, 2 3 and 8 further submitted that an expert is not a witness of fact. His evidence is really of an advisory character. The duty of expert is to furnish the Judge with the necessary scientific criteria for testing the accuracy so as to enable the Judge to form his independent judgment by the application of the criteria to the facts proved by the evidence of the case. Reliance in this connection is placed over the judgment of the Supreme Court in the case of State of Himachal Pradesh Vs. Jai Lal and Others, and also on the case of Ramesh Chandra Agrawal Vs. Regency Hospital Ltd. and Others, in which reliance has been placed on the judgment of the Allahabad High Court in the case of Mt. Titli Vs. Alfred Robert Jones--> and the passage from the judgment of the High Court of Allahabad has been quoted with approval by the Supreme Court that the real function of the expert is to put before the Court all the materials together with reasons which induce him to come to the conclusion so that the Court although not an expert may form its own opinion after perusing those materials. Further it has been held in Paragraph 17 that the evidentiary value of the opinion of expert depends on the facts upon which it is based and also validity of the process by which the conclusion is reached. Thus, according to learned counsel for the appellants, the idea that is proposed in its crux means that the importance of an opinion is decided on the basis of the credibility of the expert and the relevant facts supporting the opinion so that its accuracy can be cross-checked. Therefore, the emphasis has been given on the data on the basis of which opinion is formed which is clear from the following observation:

"mere assertion without mentioning the data or basis is not evidence, even if it comes from the expert. Where the expert gives no real data in support of the opinion, the evidence even though admissible, may be excluded from consideration as affording no assistance in arriving at the correct conclusion."

Reference in this connection is also made to the judgment of the Supreme Court in the case of Kalua Vs. The State of Uttar Pradesh, , quotation that an absolute conclusion about the origin of the shells, however, can be reached only after a photo micrographic examination of the markings from the breech block on the rear of the shell. In the light of the aforesaid judgment of the Supreme Court it is submitted that in the present case no material has been laid before this Court on

the basis of which the opinion of Ballistic Expert (P.W. 7, 11) can be cross-checked as they have neither taken micro photographs nor has furnished any data on the basis of which their opinion can be accepted and in this background it is submitted that both F.S.L. Report Nos. 55, 56/03 dated 27.02.2003 (Exhibit - 7, 7/1) and the evidence of P.Ws. 7, 11 is unworthy of any credit.

9. In this connection learned counsel for the appellants also submitted that there cannot be two First Information Reports for the same incident as the first written report about the incident was lodged by Accused No. 3 on the basis of which First Information Report of Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 (Exhibit-C) was registered in the light of the written report of Accused No. 3, the investigation commenced vide inquest of the three deceased made between 5:30-5:55 P.M. and thereafter seizure-list (Exhibit-16 to 16/4) made between 6:10-6:50 P.M. Shamsey Alam produced his service pistol entrusted to him along with the empties to P.W. 12 at 11:10 P.M. and thereafter submitted his written report on the basis of which Gardanibagh (Shastri Nagar) P.S. Case No. 867/02 was registered which is hit by Section 162 Cr.P.C. Reliance in this connection has been placed over the judgment of the Supreme Court in the case of B. Subba Rao and others Vs. Public Prosecutor, High Court of Andhra Pradesh at Hyderabad, , T.T. Antony Vs. State of Kerala and Others, . Moreover, learned counsel for the appellants also submitted that Supreme Court in the case of Chirra Shivraj Vs. State of Andhra Pradesh, has held that there cannot be a second First Information Report in respect of same incident, which is impermissible as per the judgment as Supreme Court in the case of Amitbhai Anilchandra Shah Vs. The Central Bureau of Investigation and Another, and submitted that if the gravamen of the charges in two written reports, first and the second, is in substance, the same registration of the second First Information Report, making fresh investigation, forwarding the report under Section 173 Cr.P.C. will be irregular and the Court cannot take cognizance of the same. In such situation subsequent First Information Report in respect of the same cognizable offence of the same occurrence or incident can only be treated as statement under Section 161 Cr.P.C. as both the written reports submitted by Accused Nos. 3, 1 state about the same incident which occurred in Sammelan Market and further state that the miscreants looted the traders and also referred to the First Information Report made by the police party and in this background it is submitted that the written report submitted by Accused No. 1 (Exhibit 1/1) is inadmissible. In this connection reliance has been placed over the judgment in the case of Prakash Vs. State of Karnataka, .

10. Learned counsel for the appellants further submitted that the prosecution in order to bring home charge levelled against these appellants though examined 33 witnesses but placed effective reliance on the evidence of five public witnesses, namely, P.W. 5 Baldeo Paswan, P.W. 18 Bibhuti Sharm, P.W. 20 Ajit Kumar, P.W. 21 Ramdutta Yadav and P.W. 30 Mahesh Yadav. Amongst the police personnel and officers prosecution placed reliance on the evidence of P.W. 13 Ram Pravesh Prasad, the gypsy driver, P.W. 14 Sub Inspector Prabhu Nath Singh,

P.W. 17 Sub Inspector Abhay Kumar and one defence witness D.W. 15 Home Guard Krishna Prasad.

11. Learned counsel for the appellants submitted that the defence of Accused No. 1 as is appearing from the trend of cross-examination of the prosecution witnesses and his statement under Section 313 Cr.P.C. is that he did not cause gun shot injury to the three deceased but stated that the deceased were killed in an encounter. The defence of Accused Nos. 2 to 8 as is appearing from the trend of cross-examination of the prosecution witnesses and their statement under Section 313 Cr.P.C. is one of denial and false implication. In this connection learned counsel for the appellants submitted that there is no admissible evidence on record to prove that Accused Nos. 2 to 8 caused any injury to the three deceased. Learned counsel for the appellants further submitted that there is no admissible evidence on record to prove that Accused No. 1 caused fire-arm injury to the three deceased. In this connection it is submitted by learned counsel for Accused No. 1 that the written report submitted by Accused No. 1 on 28.12.2002 Exhibit 1/1 and his statements made therein are inadmissible being hit by Section 162 of the Cr.P.C. and Section 25 of the Evidence Act.

12. Learned counsel for the appellants next pointed out that prosecution case as stated by the prosecution witnesses in court came into being after about three months of the occurrence when investigation was taken over by the Central Bureau of Investigation, as such, no credence can be given to the case stated by the witnesses belatedly after three months.

13. Learned counsel for the appellant Accused No. 1 finally submitted that even if Accused No. 1 caused fire-arm injuries to the three deceased, there is no proof that the deceased were alive when they were shot and the requirement of Section 299 of the Penal Code is not made out, therefore, his conviction under Section 302 of the Penal Code cannot be sustained.

14. Learned counsel for the appellant further submitted that so far assault on the three deceased by hard, blunt substance is concerned, no solitary witness has named Accused No. 2 as the one who assaulted the three with hard, blunt substance. In this connection learned counsel also pointed out that it is also not the prosecution case that Accused No. 2 caused fire-arm injury to the three deceased or that he abated Accused No. 1 to shoot the three deceased. In the background of the aforesaid submission according to learned counsel Accused No. 2 is liable to be acquitted.

15. Learned counsel for the appellants next pointed out that Accused No. 3 Kamlesh Kumar Gautam, Accused No. 8 Anil Kumar have been identified by P.W. 5 Baldeo Paswan and P.W. 30 Mahesh Yadav as the one who assaulted the three deceased with hard, blunt substance. Accused No. 4 to 7 have only been identified as the one who assaulted the three deceased with hard, blunt substance by P.W. 5 Baldeo Paswan. It is submitted that both P.W. 5 Baldeo Paswan and P.W. 30 Mahesh Yadav were not present at the scene of occurrence

and have been manufactured by Central Bureau of Investigation to bolster a false case after three months of the incident. According to learned counsel the evidence of P.W. 5 Baldeo Paswan is liable to be rejected for the reason that he has stated in his evidence that one Daroga, one Constable and one Mukul participated in the assault which is not even the prosecution case. He further assailed the evidence of P.W. 5 as P.W. 5 asserted that it was Accused No. 2 who telephonically intimated Shastri Nagar Police about the presence of the miscreants in Sammelan Market whereafter Accused No. 1 came to the Sammelan Market in gypsy whereas the prosecution case is that intimation to Shastri Nagar police was given by P.W. 17 Abhay Kumar.

16. Learned counsel for the appellants also assailed the evidence of P.W. 5 on the ground that he has not stated that Accused Nos. 3 to 8 were armed with any weapon or that as a result of assault by them the deceased had fallen on the ground. Similarly he has not stated that Accused No. 1 shot the three deceased while they were lying senseless on the ground. According to learned counsel for the appellants P.W. 5 has not given any detail about the assault. In this connection learned counsel pointed out that because of aforesaid infirmity, the trial judge himself discarded his testimony regarding Accused No. 1 shooting the three deceased. Learned counsel for the appellants also submitted that P.W. 5 have not informed the local police that he is an eye-witness but disclosed for the first time after about four months to the C.B.I. that he is an eyewitness of the occurrence. It is also submitted that P.W. 5 being a tea vendor, a labourer and a rickshaw puller can easily be prevailed upon by the C.B.I. to give false evidence and submitted that trial judge was right in rejecting his evidence about the shoot out and this Court may also not rely on him.

17. Learned counsel for the appellant Nos. 1, 2, 3 and 8 also assailed the evidence of P.W. 30 Mahesh Yadav on the ground that he has not been able to establish that he resides in the vicinity of Sammelan Market as also for the reason that he has not stated in his evidence that 10-12 persons including Accused Nos. 3, 8 were armed with any weapon or that the three deceased after being assaulted have fallen on the ground and did not point out to the Investigating Officer of the C.B.I. the spot from where he witnessed the occurrence. His evidence is also liable to be rejected as he has not indicated as to how he is acquainted with Accused Nos. 3, 8.

18. Learned counsel for the appellants also submitted that P.W. 30 did not disclose before the local police that he is an eye-witness of the occurrence and stated for the first time before the Investigating Officer of the Central Bureau of Investigation after three months of the occurrence that he is an eye-witness of the occurrence and in consideration of such fact his evidence is also liable to be rejected on the ground of delay. Learned counsel with reference to the judgment of the Supreme Court in the case of Ganesh Bhavan Patel and Another Vs. State of Maharashtra, and Surajit Sarkar Vs. State of West Bengal, submitted that police statement of the eye-witness recorded after a lapse of about three months

is liable to be rejected on the ground of delay and submitted that placing reliance on such decision evidence of P.W. 5 and 30 who recorded their first police statement before the C.B.I. after three months be rejected for their failure to record the statement before the Investigating Officer of Shastri Nagar Police Station and the C.I.D., Patna.

19. Learned counsel for the appellant as regards Accused No. 1 submitted that not a single witness except P.W. 5 Baldeo Paswan has stated that he had seen Accused No. 1 causing fire-arm injury to the three deceased. So far Baldeo Paswan (P.W. 5) is concerned the learned trial judge has already rejected his claim that he is a witness of shoot out, as such, according to learned counsel this Court may also choose not to rely on the evidence of P.W. 5.

20. According to learned counsel for Accused No. 1 the only other witness who creates strong suspicion against Accused No. 1 that he caused fire-arm injuries to the three deceased is P.W. 14 Sub Inspector Prabhu Nath Singh. According to learned counsel the evidence of P.W. 14 is also liable to be rejected as he has contradicted his own statement recorded by P.W. 12 Sub Inspector Ejajul Haque in connection with investigation of Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 in the night of 28.12.2002 that miscreants had shot at him but he was some-how saved and in the return firing resorted to by the then Officer-in-Charge Shastri Nagar Police Station Accused No. 1 the three miscreants suffered injury and referred to the evidence of P.W. 12 Sub Inspector Ejajul Haque in Paragraph 49 and the evidence of P.W. 14 Sub Inspector Prabhu Nath Singh in Paragraph 14 that he does not remember that he made any such statement to P.W. 12 in the night of 28.12.2002.

21. In support of the submission that the written report submitted by Accused No. 1 dated 28.12.2002 on the basis of which Gardanibagh (Shastri Nagar) P.S. Case No. 867/02 was registered on the same night at 11:45 P.M. and the contents whereof is inadmissible in evidence as such report was made by Accused No. 1 during investigation of Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 registered on the basis of written report of Accused No. 3 submitted soon after the occurrence at the place of occurrence itself which is evident from endorsement made on the report, learned counsel relied on the judgment of the Supreme Court in the case of S. Subba Rao and others (supra) Paragraph 13. In this connection learned counsel also submitted that any confession made to a police officer is inadmissible by virtue of Section 25 of the Evidence Act and a confessional written report is also inadmissible and placed reliance on the judgment of the Supreme Court in the case of Aghnoo Nagesia Vs. State of Bihar, , Inder Singh Vs. Gurdial Singh, and Bandlamuddi Atchuta Ramaiah and others Vs. State of Andhra Pradesh, .

22. Learned counsel assailed the evidence of P.W. 7 Dr. Anil Kumar Sinha, Senior Scientific Officer and P.W. 11 Dr. Singheshwar Prasad Sinha, Technical Officer, both serving in Forensic Science Laboratory, Patna on the ground that they have not supplied any data to support their opinion recorded in F.S.L. Report No.

55/03 dated 27.02.2003 that three 9 mm fired cases seized by Accused No. 1 from the vicinity of Sammelan Market on 28.12.2002 at 6:10 P.M. vide Exhibit-7 and produced before P.W. 12 at the police station in the same night at 11:10 P.M. vide production-cum-seizure-list (Exhibit-A) and the deformed bullet recovered from the body of one of the deceased Prashant Singh were similar to the test fired cases and bullet as the same was compared with a comparison microscope. It is submitted that the experts were required to have stated in their report that the two objects were identical and similar as also to have taken the photograph while comparing them in comparison microscope so that this Court having seen the photograph could have satisfied itself that the three cases recovered from the place of occurrence and the deformed bullet recovered from the body of one of the deceased Prashant Singh were identical to the test fired cases and the bullet. In this connection learned counsel pointed out that as the experts have not stated in their evidence that the objects compared under the comparison microscope were identical, and that the experts have not taken photographs while comparing the two objects, their evidence is fit to be rejected. Reliance in this connection is placed over the judgment of the Supreme Court in the case of *The State of Gujarat Vs. Adam Fateh Mohmed Umatiya and Others*, , *Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi)*, .

23. Learned counsel for the appellants also submitted that there is no proof that the service pistol of Accused No. 1 was fired on 28.12.2002 as neither P.W. 6 Ajit Kumar Sinha, Dy. S.P., Secretariat who saw Accused No. 1 soon after the shoot out holding his service pistol in his hand smelt the same nor P.W. 12 before whom Accused No. 1 produced the pistol in the night of 28.12.2002 at 11:10 P.m. smelt the weapon and thereby according to learned counsel it is difficult for the prosecution to establish that firing was made from the service pistol of Accused No. 1 on 28.12.2002. In this connection he also referred to the finding recorded in F.S.L. Report No. 55/03 dated 27.02.2003 that it is not possible to ascertain the exact date of firing made from the service pistol of Accused No. 1. Reliance in this connection has been placed by learned counsel for the appellants on the judgment of the Supreme Court in the case of *Nachhattar Singh and Others Vs. The State of Punjab*, . According to learned counsel there being no reliable evidence to establish that Accused No. 1 caused fire-arm injury to the three deceased and the evidence of the ballistic expert P.Ws. 7, 11 being unworthy of credence the overt act attributed to Accused No. 1 of causing fire-arm injury to the three deceased is not proved, he is entitled for grant of benefit of doubt.

24. Learned counsel for the appellants finally submitted that assuming but not admitting that Accused No. 1 caused gun shot injuries to the deceased there is no proof that at the time he caused gun shot injury to the three deceased they were alive. In this connection he referred to the evidence of P.W. 14 Sub Inspector Prabhu Nath Singh that the three deceased had fallen on the ground and that there was no movement in their bodies. It is submitted that when P.W. 14 saw the three deceased fallen on the ground he should have ascertained as to

whether the deceased were dead or alive. Serious injuries suffered by the deceased with hard, blunt substance was sufficient to cause their instantaneous death. It is submitted that there is no iota of evidence to prove that the three deceased were alive when they sustained gun shot injuries. Consequently according to learned counsel there is no proof that Accused No. 1 caused the death of the three deceased as contemplated under Section 299 of the Penal Code. Hence his conviction under Section 302 of the Penal Code according to learned counsel is bad in law. In this connection learned counsel also referred to the opinion of the autopsy surgeon P.W. 23 Dr. Ashok Kumar Yadav and submitted that he has opined that the gun shot injuries are ante mortem in nature. It is submitted that if injuries are caused on a dead body within two hours of the death then it is not possible to state that the injuries are post mortem or ante mortem in nature. According to learned counsel it is not possible to differentiate between ante mortem and post mortem injuries caused on a body within two hours of death. Reference in this connection is made to Page 761 of the Modi's Medical Jurisprudence Toxicology, 23rd Edition, Page 761.

25. Learned counsel for the C.B.I. submitted that P.W. 5 Baldeo Paswan is an eye-witness of the occurrence as he has seen the firing/killing of the three boys and besides him there are two more eye-witnesses of the occurrence i.e. P.Ws. 21, 30. Besides the three eye-witnesses there are as many as 13 circumstances which shall prove the complicity of the appellants in killing of the three boys.

A. The three deceased boys were students and not criminals:

The prosecution has established from the evidence on record that the three deceased were students and not dacoits as projected by the defence and in this connection referred to Exhibits-2 to 23 in case of deceased Vikash, Exhibits 17, 17/1, 18, 19, 20, 21 in case of deceased Himanshu and Exhibits 22, 25 in case of deceased Prashant, which according to learned counsel for the C.B.I. indicate that the three deceased were students. Apart from the aforesaid documentary evidence the prosecution has also adduced cogent, reliable and oral evidence of P.Ws. 1, 2, 19 and 22 to establish that the three deceased were students and had no criminal antecedent and there is no cogent material on record to establish that the three deceased were notorious criminals Ashok, Natwa or their associate. In this connection learned counsel for the C.B.I. also referred to the evidence of P.W. 9 Safeer Khalifa and P.W. 26 G.M. Ranthi and submitted with reference to the requisition (Exhibit-13) and its reply from Shastri Nagar Police Station (Exhibit-9) that the three deceased boys had no criminal antecedent. It is also submitted that even some of the defence witnesses have admitted that they came to know that the three deceased were students and not criminals.

B. The defence cannot take the plea that the deceased were killed under mistaken identity:

It is submitted that once it is established that the three deceased were students and had no criminal antecedent the defence cannot, in any manner, take shelter

of the plea that the three boys were killed under mistaken identity that they were criminals and as such recovery was made from them. According to learned counsel defence is not available to the appellants because such defence is afterthought only to cover up the cold-blooded murder committed by the accused persons. It is also submitted that the defence was aware about the status of the three deceased that they were boys, yet wholly unmindful of the consequences committed the crime for which they had mens rea and criminal intention, which is evident from the evidence of P.Ws. 7, 11, according to which the three deceased were fired from close range, which belies the claim of the defence that the criminals were killed in police encounter. Moreover, the country-made pistols and fired cartridges alleged to have been recovered from the deceased boys and from that they fired at the police also loses its sanctity in the light of expert evidence that the so called fired bullets from the country-made pistols were not fired from those pistols. It has also come on record that the three deceased were initially severely bitten up by the shopkeepers with hard, blunt weapon like rod, pipe etc. due to which the deceased became motionless and thereafter they were shot by Accused No. 1 and constable Arun Kumar Singh (Accused No. 2) who was all the while present when the incident happened.

C. Evidence of close relatives/family members

It is submitted that out of the 33 prosecution witnesses four witnesses happened to be the close relatives of the three deceased. There is nothing on record to show that the relatives of the three deceased have deposed falsely. Nothing has been shown to point out that there was enmity between the deceased or their family members and the accused persons. On the contrary their evidence has been very much convincing and free from doubt. It is submitted that though the defence has put several questions to the family members of the three deceased but in vain. In this regard reference is made to the evidence of P.W. 22 Laxman Singh father of deceased Prashant. The defence has attempted to show that P.W. 22 had filed complaint against P.W. 17 Abhay Kumar Sub-Inspector, Digha Police Station and Accused No. 1 alleging therein that they were involved in the murder of his son, which fact this witness has denied stating that he does not remember such fact. In this connection learned counsel referred to the judgment of the Supreme Court in the case of Bipin Kumar Mondal Vs. State of West Bengal, and submitted that in the reported case reliable evidence of a close relative, the sole witness of the occurrence in a murder trial was accepted as no reason could be pointed out for the false implication of the accused persons. In the said judgment Apex Court further observed that even if the genesis, motive of the occurrence is not proved the ocular testimony of the witness as to the occurrence could not be discarded only for the reason that the motive has not been proved provided the ocular evidence about the occurrence is otherwise reliable. Learned counsel also placed reliance on Paragraph 20 of the judgment which is quoted hereinbelow for ready reference:

"20. In a case relating to circumstantial evidence, motive does not assume great

importance, but to say that the absence of motive would dislodge the entire prosecution story is giving this one factor an importance which is not due. Motive is in the mind of the accused and can seldom be fathomed with any degree of accuracy. (vide Ujjagar Singh Vs. State of Punjab,)."

D. The three deceased were unconscious/motionless when the police arrived at Sammelan Market:

P.W. 14 Prabhunath Singh, Sub-Inspector posted at Shastri Nagar Police Station has categorically stated in his evidence that when he, Accused Nos. 1, 2 and one another constable went inside Sammelan Market found the three boys lying on the ground as if they were almost dead (Marnasan) and there was no movement in their bodies, blood was also oozing out from their bodies. P.W. 14 and three others having seen the condition of the three boys came out of the market. Accused Nos. 1, 2 again went inside the market and thereafter P.W. 14 heard firing sound from inside the market. In view of the statement of P.W. 14 learned counsel for the C.B.I. submitted that it will not be out of place to conclude that the three deceased were motionless when P.W. 14 first saw them and thereafter he heard the firing sound, as such, the only plausible conclusion that can be drawn is that the three deceased were initially beaten mercilessly by the shopkeepers and later the accused police officer shot them. It is submitted that by no stretch of imagination it can be argued that the deceased had initially fired at the police officer. According to learned counsel there is no iota of doubt that the story developed by the accused persons/appellants of dacoits and mistaken identity is merely a hoax and to cover the heinous act committed by the one who have been given the authority to protect the life of common people. In this regard reference is also made to the evidence of P.W. 5 Baldeo Paswan, P.W. 14 Prabhunath Singh, P.W. 21 Ramdutt Yadav and P.W. 30 Mahesh Yadav with specific reference to P.W. 21 that the three boys were being assaulted by rod, stick and pipe and the boys were crying for help.

E. Accused No. 1 Shamshey Alam has admitted that he killed the three boys:--

According to learned counsel for the C.B.I. Accused No. 1 has not denied the fact that he killed the three deceased, which fact, according to learned counsel for the C.B.I., stands admitted, however, attempt is being made on his behalf to misguide the court by taking a plea that the three deceased came with a purpose to commit dacoity. In order to give weight to the aforesaid false story Accused Nos. 1, 2 also planted the evidence and went on to show false recovery from the three boys. Reference in this connection is made to the case of Brijala Prasad Sihna @ Braj Lala Prasad Sinha, Dinesh Singh and Deo Narain Ram Vs. The State of Bihar [Alongwith Criminal Appeal Nos. 459, 488 and 495], in which the police officer was awarded death sentence. In the present case also learned counsel for the C.B.I. relied on Paragraphs 21, 31, 33, 34, 69, 71 to 77, 83, 84, 85 and 90 of the aforesaid case and submitted that the present case is on better footing than the aforesaid reported case and referred to Paragraph 90 where the Hon"ble Judge observed that before concluding, I may say that the present case is an

example of adage and then observed "who will guard the guard" and then awarded death penalty to the appellant of the said case, who killed innocent persons and then raised false plea of police encounter. Learned counsel for the C.B.I. also referred to the judgment of the Supreme Court in the case of Brijlala Pd. Sinha Vs. State of Bihar, and referred to Paragraph 10 which deals with fake encounter when the police indiscriminately fired on their Maruti Van, which is quoted hereinbelow for ready reference:

"10. So far as accused Dudh Nath Ram is concerned, he was the officer in-charge of Barachatti Police Station and he made several fabrications and manipulations which the High Court itself has found and his own statement which is Exhibit 25/1 clearly indicates that the police personnel resorted to firing when the occupants of Maruti Van started firing at them. The statement that occupants of Maruti Van started firing at the police personnel has been falsified by the fact that the police vehicle did not have a single mark of bullet on its body. Then again the two country made pistols which were supposed to have been seized from the Maruti Van by Dudh Nath Ram under Exhibit 17/1 had been sent to the ballistic expert for examination and the report of the expert Exhibit 19/2 was that it was not at all in fit condition to be used. It is further established on examination of the cartridges which had been sent to Forensic Science Laboratory supposed to have been used from the country made pistols by the occupants of the Maruti Van that those cartridges have not been fired from the country made pistols which clearly falsifies the statement of Dudh Nath Ram that occupants of Maruti Van had opened fire at the Police party which necessitated the opening of fire by the police party itself. That part of the statement of Dudh Nath thus having been falsified the further admission of Dudh Nath that police party fired at the Maruti Van remains and can be utilised as against Dudh Nath as an admission, though the other accused persons will not be bound by any such admission of Dudh Nath. Cloths seized from the Maruti Van as well as the cloths of the deceased from their person had been sent to Forensic Science Laboratory for being examined and the report Exhibit 16/2 indicates user of copper bullets and lead bullets which corroborates the statement of Dudh Nath that police party had resorted to fire at the Maruti Van. When the police personnel left the Police Station with arms in their hands and returned to the Police Station with three dead bodies, it was for them to explain under what exact circumstances three people were killed. The exact circumstances pleaded in defence by Dudh Nath Ram to the fact that when occupants of Maruti Van started firing at the police party the police party also fired at them has been relied as already discussed. Non-explanation of the members of the police party indicating the circumstances under which three people were killed is an additional link in the chain of circumstances completing the chain to indicate that three people were killed on account of firing by the police party. In this connection it would be appropriate of notice that the post mortem examination held by P.W. 1 through the post mortem reports Exhibit-1 series as well as the oral evidence of P.W. 1 and his findings unequivocally indicates that the police party resorted to firing at the

three deceased persons from a very close range. This also runs counter to the defence case that it is an encounter in which the police personnel resorted to firing when the occupants of the Maruti Van started firing at the police personnel".

F. The Evidence of forensic, autopsy surgeon:

Learned counsel for the C.B.I. referred to the evidence of two expert witnesses as also the autopsy surgeon and submitted that if the evidence of two forensic experts and autopsy surgeon is read together then it may be noticed that P.Ws. 7, 11 have categorically stated that:

a. the report with respect to one 9 mm regular semi-automatic pistol revealed that the three test cartridges were fired from the same weapon from which the test fired cartridge was fired.

b. the four fired shells that they have been fired from four different country-made fire-arm and these shells on being matched with the test-fired shells on the country-made pistols revealed that they were not fired from those country-made fired firearms.

c. on examination of the clothes it was revealed that the clothes of all the three deceased had the presence of nitrite and lead. It has been caused due to the passage of fire-arm projectile fired from close range.

ii. Therefore, in the light of the above opinion of the expert, it is palpable that the so called country-made pistol that has been shown by the police officials who are accused in the present case to have been recovered from the deceased boys and which was used by them against the police force at the Sammelan market on 28.12.2002 was not the actual weapon from which the bullets were fired at the police. As per the report of the expert the bullets shown to be recovered from the site were not fired from the country-made pistol. This gives weight to the fact that the accused persons have planted both the weapon and the bullets only to cover up their wrongful act and give the whole episode the look of dacoity, firing at the police force and encounter.

The second point for consideration from the report of the ballistic expert is that the bullets recovered from the body of one of the deceased Prashant and the fired cartridges matched with the test fired cartridge that was fired from the 9 mm pistol that belonged to the accused/appellants Shamshe Alam Accused No. 1. At the cost of repetition it is submitted that the accused Shamshe Alam has himself admitted to have fired and killed the three deceased persons.

Another important thing that has emerged from the report of the expert that the examination of the clothes of the deceased persons has revealed the presence of nitrate and lead on it which has been caused because of the passage of projectile fired from the close range. Thus, as per the evidence of this witness it will be clear that the deceased persons were fired from close range. This would stand contradictory to the defence story of encounter, since it is a common understanding that in case of an encounter there will be no firing from close

range.

iii. As per the evidence of P.W. 23 Dr. Ashok Kumar Yadav it was stated that:

a. He noted five injuries/wounds on the body of Vikash Ranjan. It was opined by him that injuries were anti-mortem in nature. Injury No. 1 was simple. But injuries Nos. 2 to 4 were grievous and dangerous to life in ordinary course of nature and all were caused by hard and blunt objects. The 5th injury was grievous and dangerous to life in ordinary course of nature and was caused by firearm.

b. In case of Prashant found six injuries/wounds on his body. He has opined that the injuries were ante-mortem in nature. Injury No. 1 was simple. But injuries Nos. 2 and 4 were grievous and dangerous to life in ordinary course of nature and all were caused by hard and blunt objects. The 5th & 6th injuries were grievous and dangerous to life in ordinary course of nature and were caused by firearm.

c. In the case of third deceased Himanshu it was deposed by this witness that the injuries were ante-mortem and Injuries Nos. 1 to 4 were simple in nature caused by hard and blunt objects. Injuries Nos. 5 and 6 were grievous and dangerous to life in ordinary course of nature and caused by firearm.

iv. It is further submitted that from the reading of the medical evidence of P.W. 23 it is apposite to conclude that the injuries that were caused on the person of the deceased were of two types one caused by hard and blunt weapons and the other caused by firearms. Further there were bruises, abrasions and laceration found on the bodies of the three deceased persons. In the case of Vikash Ranjan and Prashant it has been opined that injuries due to hard and blunt weapons as well as the firearm were grievous and dangerous to life in ordinary course of nature while in case of deceased Himanshu the firearm injuries were grievous and dangerous to life in ordinary course of nature. It is also relevant to mention here that the post mortem report reveals that on the body of all the three deceased persons BLACKENING CHARGE was found. Therefore, it will be safe to conclude that all the deceased persons were severely beaten up by the shopkeepers including Anil Kumar which will be evident from the abrasions and bruises that were there on the bodies of the deceased persons. After this the deceased boys were then shot from a very close range because of the presence of blackening charge as is shown in the post mortem report of all the three deceased persons.

v. It will be relevant to draw the attention of this Court to Modi's Medical Jurisprudence & Toxicology, 22nd Edition (Student) and in Chapter XII -- Injuries by Mechanical Violence-- at 354 it has been stated that:

If a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches round the round of entrance are lacerated and the surrounding skin is usually scorched and

blackened by smoke and tattooed with unburnt grains of gunpowder or smokeless propellant powder.

This authority in Medical Jurisprudence has also stated that:

Blackening is found, if a firearm like a shotgun is discharged from a distance of not more than three feet and a revolver or a pistol discharged within about two feet.

This must be read along with the evidence of P.W. 7 who has deposed that he had found lead and nitrate on the clothes of all the three deceased persons. As such, it will be enough to conclude that the three deceased were shot from a very close range which discards the story of encounter created by the accused persons.

In the case of *Hori Lal and Another Vs. State of U.P.*, the Apex Court has relied on medical jurisprudence on the point of close range firing and blackening:

"27. In the instant case, all the accused persons came heavily armed. They were seen by Balbir Singh. He was not only chased, a shot was fired at him resulting in his sustenance of an injury on his right arm. He still ran and informed others. Before others could conceal themselves, the appellants reached the spot and started firing. Hazarilal was done to death by a shot fired from a close range. The autopsy surgeon did not say what would be the distance from which shot was fired. It would depend upon the nature of the weapon used. The distance in case of a pistol may be 2 feet, whereas in case of a shot gun, it may be 3 feet. But, undoubtedly the injury resulted from a shot fired from a short distance. In Modi's "Medical Jurisprudence and Toxicology", 23rd Edition at page 721, it is stated:

If a firearm is discharged very close to the body or in actual contact, subcutaneous, tissues over an area of two or three inches around the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt grains of gunpowder or smokeless propellant powder. The adjacent hairs are singed, and the clothes covering the part are burnt by the flame. If the powder is smokeless, there may be a grayish or white deposit "on the skin around the wound. If the area is photographed by infrared light, a smoke halo round the wound may be clearly noticed. Blackening is found, if a firearm like, a shotgun is discharged from a distance of not more than three feet and a revolver or pistol discharged within about two feet. In the absence of powder residue no distinction can be made between one distance shot and another, as far as distance is concerned. Scorching in the case of the latter firearms is observed within a "few inches, while some evidence of scorching in the case of shotguns may be found even at one to three ft. Moreover, these signs may be absent when the weapon is pressed tightly against the skin of the body, as the gases of the explosion and the flame smoke and particles of gunpowder will all follow the track of the bullet in the body. Wetting of the skin or clothes by rain reduces the scorching range.

Blackening is not affected by wet surface although it can easily be removed by a wet cloth. Blackening with a high power rifle can occur up to about one ft. Usually if there are unburnt powder grains, the indication is that the shot was fired from a revolver or a pistol and shorter the barrel of the weapon used the greater will be the tendency to the presence of unburnt or slightly burnt powder grains.

28. In Major Sir Gerald Burrard's "The Identification of Firearms and Forensic Ballistics" at Page 59, it is stated:

Both scorching and blackening prove definitely that the shot was fired from very close quarters, in which case an assertion by the suspected person that the deceased fired the shot himself, cannot be disproved if the weapon used was a pistol or revolver. But if it is possible to establish that the range of the shot must have been greater than the length of the deceased's arm the matter assumes a somewhat different complexion, and the evidence may be of great use in bringing a murderer to book. The extreme limit of the blackening range is well within any normal person's arm's length, and so the absence of blackening is no proof that the shot was fired from sufficiently far away to have made it impossible for the deceased to have been clutching either the weapon, or the individual who is suspected of having held the weapon. However, the presence or absence of unburnt or partially burnt powder grains may indicate a range which is either just within or just without this critical distance; and on this account the investigation into the question of unburnt powder grains may become a matter of primary importance.

G. The three deceased had both firearm and injuries caused by hard and blunt objects:

It is submitted that as per the post mortem report of all the deceased (Exhibits 26 to 26/2) it will appear that the three deceased were inflicted both firearm injury as also injuries caused by hard and blunt substance. It has also been opined by P.W. 23 that all these injuries i.e. the one caused by hard, blunt objects and the firearm injuries were sufficient in ordinary course to cause death of the three deceased. According to learned counsel for the C.B.I. medical evidence gives credence to the prosecution story that the deceased were beaten by the shopkeepers and then shot by Accused No. 1.

H. Evidence of eye-witnesses:

According to learned counsel for the C.B.I. presence of P.W. 5 at the place of occurrence and his deposition as eye-witness cannot be doubted, as he has categorically deposed that he has a tea shop near Sammelan Market for the past 15 years from the date of incident and that at the time of occurrence when he went to Sammelan Market saw Accused No. 7 Rakesh, Accused No. 4 Sonu, Accused No. 5 Soni, Accused No. 3 Kamlesh, Accused No. 8 Anil assaulting the three boys inside the market and the grill gate of the market was closed. He further stated that Accused No. 2 told Accused No. 1 that the dacoits have been

caught and Accused No. 1 shot the three boys who died at the spot. It is submitted that presence of P.W. 5 at the scene of occurrence cannot be doubted as he has his tea shop in the vicinity and the same was in existence for the past 15 years from the date of incident. Besides P.W. 5 in his cross-examination has given detailed description of the surroundings of the market and nothing tangible appears to discredit his testimony. In support of the aforesaid submission learned counsel for the C.B.I. placed reliance on the Division Bench judgment of Madhya Pradesh High Court in the case of Ramswaroop and Another Vs. State of M.P., where the Court observed that it cannot be held that eye-witness is by chance witness and his presence was doubtful on scene of occurrence. Though statements of witnesses were recorded in court after gap of near about two years, even then there is nothing adverse on record which shows that evidence of prosecution is either manufactured or concocted. No bar on conviction of accused recorded on the basis of solitary eye-witness. It is true that in such circumstances, evidence of solitary eye-witness should be scrutinized carefully and that should not only corroborated, but also cogent, reliable and should inspire confidence. In the present case, evidence of solitary eye-witness inspires confidence and there is nothing on record to disbelieve his testimony. Witness of circumstantial evidence is also reliable and supports evidence of eye-witness that incident took place at the place where it is narrated by him. In this connection, learned counsel also pointed out that it is well settled that where the direct evidence of assault is worthy of credence it can be relied, the question of motive becomes more or less academic. Sometimes the motive is clear and can be proved and sometimes, however, the motive is shrouded in mystery and it is very difficult to identify, prove the same. It is submitted that if evidence of the eye-witness is creditworthy the courts are required to place implicit reliance over the same and question of motive becomes wholly irrelevant. Learned counsel further submitted that there is hardly any legal impediment in not convicting a person on the sole testimony of a single witness, which is the logic of Section 134 of the Evidence Act. It is submitted that if there is doubt about the testimony of the sole eye-witness then only the court will look for corroboration. It is submitted that it is not the number but the quality of the evidence which is material. According to learned counsel the time-honoured principle is that the evidence is to be weighed and not counted. Reliance in this connection is placed on the judgment of the Supreme Court in the case of *Namdeo Vs. State of Maharashtra*, wherein it has been held:

".....It is the quality and not the quantity of evidence which is necessary for proving or disproving a fact. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence."

Same view has been taken by the Supreme Court in the case of *Kunju @*

Balachandran Vs. State of Tamil Nadu, and with reference to the said judgment it is submitted that it is important to mention that apart from P.W. 5, who is the eye-witness to both beating and the firing there are other prosecution witnesses who have seen the deceased being assaulted by the shopkeepers. Reference in this connection is made to the evidence of P.Ws. 21, 30, who in unequivocal terms deposed that the three deceased were being assaulted inside the market with lathi, rod, stick by the accused persons and they also identified the accused persons who were present in court, as such, according to learned counsel for the C.B.I. the presence of the accused persons at the spot is free from any doubt whatsoever. It is submitted that learned trial judge wrongly held that P.W. 5 is not an eye-witness of the occurrence of actual shooting on the basis of Paragraph 68 of his cross-examination where P.W. 5 has stated that when police arrived at the scene the police party dispersed the crowd, which had collected in front of Sammelan Market and on that basis trial court recorded the finding that if the crowd was made to disperse by the police party then P.W. 5 being the member of the crowd could not have remained present to see the actual shooting but such finding of the trial court may not persuade this Court to hold that P.W. 5 is also not an eye-witness of assault on the person of the three boys by Accused Nos. 7, 4, 5, 3, 8 and others with hard and blunt substance.

I. Circumstantial Evidence:

Learned counsel for the C.B.I. further submitted that the case of the prosecution apart from the evidence of P.W. 5 also finds support from the circumstantial evidence brought on record with reference to the evidence of P.Ws. 1, 6, 12, 13, 14, 21, 22, 27, 30 and D.W. 2. In this connection it is submitted with reference to the evidence of aforesaid witnesses that the three deceased were going to Ara. It also appears from the aforesaid evidence that the deceased Prashant along with his father P.W. 22 on the date of occurrence in the afternoon had gone to Shastri Nagar Police Station for police verification and even met Accused No. 1. The three boys had gone to Sammelan Market where a quarrel ensued with Accused No. 3 in relation to false billing. The deceased boys initially came back to return after sometime when the quarrel again ensued in relation to false billing. From the evidence of P.Ws. 21, 30 it appears that the boys were mercilessly beaten by the shopkeepers and others and they cried for help. From the evidence of P.Ws. 6, 12, 13, 27 it appears that in the meantime police party from Shastri Nagar Police Station headed by Accused No. 1 arrived at Sammelan Market, other police officials also arrived, due to beating the three boys became motionless. From the evidence of P.W. 14 it appears that due to beating the three boys became motionless and blood was coming out of their bodies, the firing sound was heard and the Accused No. 1 is said to have told everyone that the deceased were Ashok, Natwa and associate. It is submitted with reference to the aforesaid evidence that the conclusion of guilt of accused persons is clearly established from the circumstances which are conclusive in nature and the facts established above consistently prove the hypothesis of guilt of the accused persons. Reference in this connection is made to the judgment of the Supreme

Court in the case of *Rabu Sk. @ Jainuddin Sk. Vs. State of West Bengal*, and reliance is placed on the following paragraph:

"In the case, such as the present one, where the prosecution was not able to produce any eyewitness it was the duty of the prosecution to prove that the evidence so came up at trial makes a complete chain of circumstance which would raise the pointer to the accused and the accused only. It would also suggest that no one else could have been involved in the incident."

J. Motive - Gallantry award a driving force for accused Shamshey Alam:

Learned counsel for the C.B.I. submitted that in the case in hand one of the motive that can be attributed is the desire of Accused No. 1 to get award for killing criminals in police encounter which perhaps weighed in the mind of Accused Nos. 1, 2 and persuaded them to kill the three boys projecting them to be the notorious dacoits.

K. No so called recovery made in presence of any of the prosecution witnesses and Accused Nos. 1, 2 camouflaged the recovery:

It is submitted that no recovery was made from the three deceased boys in presence of any of the prosecution witnesses even P.W. 12, who made seizure memo, had denied that any arms, ammunitions, empties were seized in his presence. He has only stated that when he went inside the market he saw the three boys lying dead and the seized items were lying scattered. He also admitted that he prepared the seizure-list on the dictation of Accused No. 1. In view of the aforesaid evidence it is submitted that the seizure-list was prepared later only with a view to suppress the truth as Accused Nos. 1, 2 and other accused persons were conscious that they have killed the three innocent boys and to save their neck planted the weapon, camouflaged a fake encounter.

L. Minor contradictions, if any, not material and shall not prejudice the case of prosecution:

It is submitted that the defence attempted to concentrate on minor contradictions if any in the prosecution version/deposition of witnesses but the same is of no avail to the defence. The testimony of the witness(es) has to be seen as a whole and the defence cannot take advantage of the minor contradictions to subvert the thrust of the evidence of the witness. It is now well settled that for the flaws in investigation the eye-witness account and the prosecution version as a whole cannot be discarded if otherwise on a careful and circumspect examination of the evidence it is found to be reliable and trustworthy. Reference in this connection is made to the judgment of the Supreme Court in the case of *Ambika Prasad and Another Vs. State of (Delhi Administration, Delhi)*, *Mritunjoy Biswas Vs. Pranab @ Kuti Biswas and Another*, and *Gangabhavani Vs. Rayapati Venkat Reddy and Others*, .

M. The defence raised by accused persons is not plausible and contradictory to the evidence on record:

It is submitted that the evidence brought on record by the defence is totally nonest, has no legal standing and deserves to be ignored.

i. It has come on record through some of the defence witnesses that the people from crowd were pelting stones inside the market. It is important to note that if such a huge crowd threw stones/bricks inside the market then there ought to be some damage done to the market and the shops therein. Moreover, there should have been such huge number of bricks/stones at the place of occurrence but no such thing has appeared in the prosecution case and even in the case that was set up by the accused person through the two written reports lodged by them. Moreover, the defence has even failed to point out any suggestion about the presence of bricks and stones at the place of occurrence to the prosecution witnesses.

ii. It is further submitted that the defence has failed to show that the injuries that were received by the deceased could have been received by the bricks, which according to the defence were thrown on them. No suggestion has been given to the prosecution witnesses by the defence in this regard.

iii. It is also important to mention that it has specially come in the evidence of most of the defence witnesses and they have admitted in their cross-examination that the deceased were students.

iv. D.W. 8 Mala Rai in his deposition has claimed that he has signed the inquest report. It is also worthwhile to mention that the prosecution in this regard has brought on record the evidence of P.W. 12 Ejazul Haque who has categorically stated that instead of Mala Rai one Ramesh Prasad had signed the inquest report. A naked eye view of the said inquest report will also reveal that the story put forward by the said defence witness is totally baseless and self contradictory. In this regard the prosecution drew the attention of this Court on the signature of D.W. 8 on his deposition and then it is requested to compare the same with that on the inquest report. There is manifest difference between the two signatures, as such, the defence is trying to prove that this witness was one of the inquest report witness but that claim has no force and is shattered through the deposition of the said witness itself.

v. The defence has made unsuccessful attempt to dislodge the testimony of P.W. 5 by bringing on record the witness who has stated that he does not reside at Bhola Paswan Bhawan. In this regard it is important to bring the attention of this Court to the evidence of D.W. 6 Md. Muslim who has stated in his cross-examination that Voter Identity Card of Baldeo Paswan (marked Y for identification) indicates his place of residence as Bhola Paswan Bhawan. D.W. 6 further admits that Voter Identity Card belongs to P.W. 5, yet sticks to his stand howsoever contrary that P.W. 5 does not reside in that building.

vi. It is also submitted that none of the defence witnesses have seen the actual incident and have admittedly said that they went to Sammelan Market after hearing sound of firing. The defence witnesses have also not seen who fired at

whom but the prosecution witnesses have successfully seen that initially three boys were mercilessly beaten and later shot dead by the accused persons.

vii. Another point the defence has tried to raise in the examination of the witnesses is that it was actually P.W. 17 S.I. Abhay Kumar of Digha Police Station who instigated the crowd by identifying the boys inside Sammelan Market as the members of Ashok and Natwa gang, which does not appear to be true in view of the evidence of the prosecution witnesses.

26. Learned counsel for the C.B.I. further submitted that the defence has failed to show from the opinion of the ballistic expert that the bullets have been fired from the country-made pistol recovered from the place of occurrence, as has been asserted by the accused persons, which cast doubt on the story of the defence and it appears that the defence is trying to build up a false story to cover up their misdeeds. At the cost of repetition it is further submitted that from the medical evidence of P.W. 23 it will appear that out of the three deceased boys two, namely, Vikash Ranjan and Prashant had injuries which were grievous and dangerous to life and the same was caused by hard, blunt weapon as well as firearm, therefore, the submission of the prosecution is that the other non-police accused persons, who have initially assaulted the three deceased boys, cannot argue that their assault was not the cause of death, as such, the non-police accused persons were also equally responsible for the death of the deceased boys.

27. Learned counsel for the C.B.I. further submitted that it is important to draw the attention of this Court to the fact that P.W. 14 Prabhunath Singh stated that after he heard the gun shots Accused No. 2 came, send a message that encounter was going on but as per the deposition of P.W. 14 the three deceased boys were already frozen when he saw them, as such, according to learned counsel the reasonable, most probable and the only inference is that the boys could not have ever fired. Aforesaid submission is in addition to the submission that the deceased boys were the students and had no criminal antecedent. They did not have any firearm with them when they went to the market at the S.T.D. booth. Furthermore, what prompted Accused No. 2 to send wireless message after the three deceased boys were already killed remains to be justified by the defence. On the other hand, it would be fair enough to conclude that the only reason that Accused No. 2 sent a wireless message after the three boys were killed is that he wanted to give a false message to the others that there was an encounter taking place inside the market place wherein reality there was none. By the aforesaid fact he wanted to cover up the fake encounter of the three deceased boys to show them as dacoits. In support of the aforesaid submission learned counsel placed reliance on the judgment of the Supreme Court in the case of Prakash Kadam and Vs. Ramprasad Vishwanath Gupta and Another, in which the Supreme Court has expressed its anguish on the fake encounter and the police were held responsible in following words:

"25. We are of the view that in cases where a fake encounter is proved against

policemen in a trial, they must be given death sentence, treating it as the rarest of rare case. Fake "encounters" are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law. In our opinion if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties."

28. It is further submitted that the circumstances leading to this occurrence are most unfortunate for a civilized society and the police force is meant for protecting the law abiding citizens from anti-social elements and to conic to the rescue of the citizens of onslaught from the mighty and influential persons but the role of police in this case appears to have been reversed. They have by their acts coupled with that of the other accused persons have taken away the life of three bright young students and left their families to suffer the agony and pain for whole of their lives.

29. In the light of the above discussions, it is submitted that the prosecution has been successful in proving the guilt of all the accused persons beyond all reasonable doubt and they have been convicted under Sections 302 /149 , 342 , 307 /149 , 147 , 148 , 201 of the Penal Code and Section 27 of the Arms Act.

30. Learned counsel for the C.B.I. next submitted that investigation of the present case revealed that Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 was a false case as the three boys were neither dacoit nor armed nor caused any injury to anyone nor any looted articles were recovered from them. They were students without any criminal background and that Kamlesh Kumar Gautam (Accused No. 3) and others were the real culprits, accordingly, they were charge-sheeted and closure report was submitted by C.B.I. in RC 3(S) of 2003/SIC-IV/ New Delhi. After filing of closure report in RC 3(S) of 2003/SIC-IV/New Delhi a notice was issued to Accused No. 3 by Special Judicial Magistrate, C.B.I., Patna, who filed protest-cum-complaint petition vide Complaint Case No. 1C/2003 in the court of Special Judicial Magistrate, C.B.I., Patna with prayer to accept the protest-cum-complaint case and reject the final form, closure report submitted by the C.B.I. According to learned counsel for the C.B.I. the aforesaid complaint case was filed with oblique motive and with a view to create evidence in his defence in RC 5(S) of 2003/SIC-IV/New Delhi in which he was charge-sheeted as one of the accused. The learned Special Judicial Magistrate, C.B.I., Patna committed no illegality or irregularity in dismissing the protest-cum-complaint petition under order dated 10.09.2003 against which Accused No. 3 filed Cr. Misc. No. 34800/2003 before this Court which was also dismissed under order dated 17.05.2004. Accused No. 3 assailed the order dismissing his protest-cum-complaint petition by filing S.L.P.(Cri) No. 4117/2004 before the Supreme Court, which was converted into Criminal Appeal No. 478/2007 and was dismissed by the Supreme Court under order dated 28.01.2011.

31. Learned counsel for the C.B.I. further submitted that after investigation of the present case closure report was also filed by the C.B.I. in respect of RC 4(S)

of 2003/SIC-IV/New Delhi, arising out of Gardanibagh (Shastri Nagar) P.S. Case No. 867/02 on 30.04.2003, which was assailed by Accused No. 1 by filing Cr. Misc. No. 34186 of 2003 but the said petition was dismissed for default under order dated 21.06.2006.

32. Learned counsel further submitted that it is pertinent to mention here that on 28.12.2002 three deceased boys were brutally assaulted by Accused No. 3 and other shopkeepers within the premises of Sammelan Market, Asiana Road, within Shastri Nagar Police Station and shot by Accused Nos. 1, 2 for which a written report was filed by P.W. 1 Mukesh Ranjan on 29.12.2002 on the basis of which Gardanibagh (Shastri Nagar) P.S. Case No. 868/02 for the offences under Sections 302 , 341 , 342 , 307 , 323 /34 was registered against Accused No. 1 and others. Accused No. 3 is the owner of the S.T.D. booth situate in Sammelan Market which was the place of occurrence. Accused No. 3, in order to create defence for himself lodged Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 on 28.12.2002 for the offences under Sections 395 , 412 , 307 of the Penal Code and Sections 25(1-b) a /26 /27 /35 of the Arms Act asserting therein that three dacoits along with others had committed dacoity in his P.C.O. On the same day another written report was submitted by Accused No. 1 on the basis of which Gardanibagh (Shastri Nagar) P.S. Case No. 867/02 was registered for the offence under Section 304 of the Penal Code. It is further submitted that subsequently all the three cases were entrusted to C.B.I. by the Government of India after issue of notification under Section 6 of the Delhi Special Police Establishment Act. During investigation of the aforesaid three cases closure report submitted by the C.B.I. in Gardanibagh (Shastri Nagar) P.S. Case Nos. 866, 867 both of 2002. In the 3rd case i.e. Gardanibagh (Shastri Nagar) P.S. Case No. 868/02 charge-sheet was submitted by the C.B.I. against eight accused persons, but in the earlier two cases registered with respect to the same occurrence closure report was filed. It is submitted that from the evidence on record it will appear that Accused No. 3 and other shopkeepers of Sammelan Market including Anil Kumar brutally assaulted the three innocent boys who were shot from close range by Accused No. 1 in presence of Accused No. 2.

33. It is also submitted that Accused No. 3 filed Cr.W.J.C. No. 836/2007 to stay further proceeding in Sessions Trial Nos. 523, 918 both of 2004, arising out of Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 until disposal of S.L.P.(Cri) No. 4117/2004 but the said writ petition was dismissed under order dated 26.09.2008. It is submitted that Accused No. 1 filed Cr. Revision No. 500/2009 before this Court assailing the order dated 18.11.2008 but the said revision was also dismissed under order dated 11.07.2010. It is submitted that Accused No. 1 filed Cr.W.J.C. No. 650/2010 before this Court praying inter alia to stay further proceedings in Trial No. 523/2004 until disposal of Criminal Appeal No. 478/2007 pending before the Supreme Court, but the said writ petition was also dismissed under order dated 12.08.2010.

34. Learned counsel for the C.B.I. further submitted that the judgment of the

Supreme Court in case of *The State of Gujarat Vs. Adam Fateh Mohmed Umatiya and Others*, is not applicable to the facts of the present case and the same is distinguishable in view of the judgment of the Supreme Court in the case of *Ramanathan Vs. The State of Tamil Nadu*, and *State of Madhya Pradesh and Others Vs. Paltan Mallah and Others etc.*, .

35. Learned counsel for the C.B.I. further submitted that the Supreme Court judgment in the case of *Sidhartha Vashisht @ Manu Sharma Vs. State (NCT of Delhi)*, is also not applicable to the facts of the present case on the ground that the two ballistic expert report is not involved in the present appeal. Similarly, the judgment of the Supreme Court in the case of *State of H.P. v. Jai Lal and others* (supra) Paragraphs 17, 20 is distinguished, as is evident from the case of *Safi Mohd. Vs. State of Rajasthan*, . Similarly, case of *Prakash v. State of Karnataka* (supra) Paragraphs 44, 63 and *T.T. Antony Vs. State of Kerala and Others*, is also not applicable to the facts of the present case.

36. Learned counsel also submitted that judgment of the Supreme Court in the case of *Aghnoo Nagesia Vs. State of Bihar*, , *Bandlamuddi Atchuta Ramaiah & Ors. v. Stae of A.P.* (supra) and *S. Subba Rao and others v. Public Prosecutor, High Court of Andhra Pradesh at Hyderabad* (supra) Paragraph 13 are also not applicable to the facts of the present case, as according to him the present case is fully covered by the judgment of the Supreme Court in the case of *Brijlala Prasad Sinha* (supra), as according to him written report submitted by Accused No. 1 is admissible under Section 24 of the Evidence Act and further relied on the judgment of the Supreme Court in the case of *Brajendrasingh Vs. State of Madhya Pradesh*, and *Faddi Vs. The State of Madhya Pradesh*, .

37. Learned counsel for the C.B.I. further placed reliance on the judgment of the Supreme Court in the case of *State of Bihar Vs. Hanuman Koeri (Singh)*, and submitted that taking into account 20 years experience of the ballistic expert at the time of submitting the report as also the fact that he was not cross-examined by the defence the appellants ought not raise the question of infirmities in the report of the expert at the stage of final argument in appeal before the High Court. In this regard he also submitted that the reliance placed by the counsel for the appellants on the Modi's Medical Jurisprudence & Toxicology 23rd Edition cannot be used in appeal in the light of the judgment of the Supreme Court in the case of *Piara Singh and Others Vs. State of Punjab*, as the contents of the book was not put to P.Ws. 7, 23 the two expert witnesses and thereby the defence is prevented from raising the plea with reference to the text of the book. Similarly, P.Ws. 7, 23 were not put any question regarding microscopic comparison made by him of fired bullet, the weapon and other circumstances mentioned in their evidence to conclude that Accused No. 1 had killed the three innocent, hence, the plea of learned counsel for Accused No. 1 that there is no proof that Accused No. 1 inflicted firearm injury on the three deceased when they were alive cannot be raised for the first time during the course of final argument before this Court. It is also submitted that natural corollary of the said

argument is that appellant Shamshe Alam admits that he shot the three deceased, which is again contradictory to his own stand taken in his written report, as well as the stand taken during trial that the three deceased were shot by Shastri Nagar police in encounter and then the crowd assaulted them with hard, blunt substance.

38. Learned counsel for the C.B.I. further submitted that the case of Naval Kishore Vs. State of Maharashtra is not applicable to the facts of the present case, as from Paragraphs 1 to 3 of the said judgment it will appear that there were ante-mortem injuries but from Paragraph 11 it would appear that injury No. 4 was post-mortem, but in the present case there is no post-mortem injuries found on the three deceased, as such, the said case is not applicable to the facts of the present case.

39. Learned counsel also placed reliance on the following operative portion of the judgment of the Supreme Court in the case of Rameshbhai Chandubhai Rathod Vs. The State of Gujarat, :

"We accordingly, commute the death sentence awarded to him to light but direct that the life sentence must extend to the full life of the appellant but subject to revision or commutation at the instance of Government for the good and sufficient reason".

40. It is also submitted that the judgment of the Supreme Court reported in AIR 1976 SC 95 Paragraph 16 is not applicable to the facts of the present case on the ground that Accused No. 1 admitted that he killed the three deceased boys in his written report as well as before media and P.W. 13 Ram Prakash Prasad, the driver and D.W. 2 Ramesh Prasad Sah that the three boys have been killed in encounter as also for the reason that the defence has not cross-examined the two experts P.Ws. 7, 23 on the point of smell of the barrel of the pistol. Learned counsel placing reliance on the evidence of P.W. 30 Mahesh Yadav submitted that from his evidence it will appear that the three deceased boys were alive as at that point of time they were asking the people to save them but the shopkeepers and the accused persons, namely, Accused Nos. 2, 8 have not saved their lives. Accused No. 3 and other shopkeepers including Accused Nos. 8, 2 closed the grill of Sammelan Market when they were alive. The three boys were caught and put under closed grill, Accused No. 1 fired on the three when they were alive and the trial court has rightly convicted him for the overt acts attributed to him. Other accused (Accused Nos. 2 to 8) have also been rightly convicted and sentenced.

41. Learned counsel for the C.B.I. further submitted that the prosecution case, as stated in the written report of Accused No. 1, may be confession or admission, brings out the following facts:

- i. Three persons killed were criminals
- ii. There was no encounter
- iii. Recovery of weapon from the possession of three boys

iv. Gardanibagh (Shastri Nagar) P.S. Case No. 867/02 registered on the basis of written report of Accused No. 1 addressed to Chief Judicial Magistrate, Patna when he was not an accused in this case

v. Accused No. 1 fired and injured three criminals and thereafter mob killed them

42. Learned counsel placing reliance on the aforesaid aspect submitted that written report of Accused No. 1 is not a confession but admission of facts indicating that the story of three injured criminals gets falsified from the evidence of prosecution and defence witnesses that they were students. The story of encounter gets falsified that firearm injury from close range as stated by P.W. 23 as well as ballistic expert P.W. 7 has been found. The story of encounter further gets falsified as the prosecution witnesses have not supported the recovery of firearm from the deceased persons and it was prepared subsequently by Accused No. 1 to save himself. Further there is no mark at the place of occurrence that firing by the deceased was also made. The story of encounter gets further falsified from the evidence of P.W. 7 that recovered firearm from the deceased and the fired bullets were not fired from the two country-made pistols found near the three injured. The written report of Accused No. 1 is not the statement before the police and reliance in this connection is placed on the judgment of the Supreme Court in the case of Faddi v. State of Madhya Pradesh (supra) Paragraphs 15, 18. It is submitted that the case registered by a person who subsequently becomes an accused, hence, the First Information Report registered by him when he was not an accused is not a confession, as such, it was held that the First Information Report is admission. It is further relevant under Section 6 of the Evidence Act and taking into account the aforesaid facts that there is ample circumstantial evidence to suggest that there was no encounter.

43. Learned counsel for the C.B.I. further submitted that initially the three cases were handed over to Bihar C.I.D. on 01.01.2003 and thereafter as per the recommendation of the State Government contained in notification dated 04.01.2003 and corrigendum dated 29.01.2003 entrusted to C.B.I. for further investigation under notification dated 14.02.2003 whereafter RC 3, 4, 5(S)/2003 SIC-IV/New Delhi was registered, hence, Indu Bhushan Prasad is not charge-sheet witness of C.B.I.

44. Learned counsel for the C.B.I. next submitted that the case of Mt. Titli v. Alfred Robert Jones (supra), T.T. Antony v. State of Kerala and others (supra) Paragraph 13, Chirra Shivraj v. State of Andhra Pradesh (supra) and Amitbhai Anilchandra Shah v. Central Bureau of Investigation and Anr. (supra) are not applicable to the facts of and circumstances of the present case as the present case is fully covered by the judgment of the Supreme Court in the case of Brijlala Prasad Sinha (supra) in which D.W. 2 registered First Information Report of Barachatti P.S. Case No. 146/93 on the basis of which investigation was taken up by the police whereas after five days of the occurrence family members of the deceased registered Barachatti P.S. Case No. 148/93, hence, this case is on

similar footing as that of Brijlala Prasad Sinha (supra).

45. Learned counsel for the C.B.I. finally submitted that the written report of Accused No. 1 is relevant under Sections 6 , 21 , and 32(2) of the Evidence Act as the same will not come within the purview of Section 162 Cr.P.C. and under Sections 24 , 25 of the Evidence Act.

46. In view of the submissions noted above, learned counsel for the C.B.I. submitted that the prosecution has successfully proved the guilty of the accused persons beyond all reasonable doubt and they have been rightly convicted and sentenced by the trial court and in appreciation of such fact reference is required to be answered in affirmative and the appeals filed by the appellants are fit to be dismissed.

47. Learned counsel for the informant submitted that the appellants have caused death of the three deceased and then made a false story that the three deceased were dacoits i.e. Ashokwa, Natwa and associate who came to Sammelan Market to commit dacoity in the shop of Accused No. 3, after being surrounded by the police and asked to surrender they fired on the police party enabling Accused No. 1 to resort to firing in self defence which caused injury to the dacoits and subsequently the mob came inside the market where the three deceased were lying and killed them. According to learned counsel Accused No. 1 got planted country-made kattas and ammunition to give the look of encounter and accordingly, transmitted wrong information through PIR. In this connection learned counsel for the informant has posed the following submissions:

1. The three deceased were students and there is nothing on record to establish that they were criminals:

The three deceased i.e. Vikash, Prashant and Himanshu were students and had no criminal antecedent. In order to substantiate the aforesaid claim prosecution has relied on the testimony of P.W. 1 Mukesh Ranjan, P.W. 2 Jagdish Prasad Gupta, P.W. 16 Uday Shankar Prasad brother, father, maternal uncle of deceased Vikash, P.W. 19 Nishant brother of deceased Himanshu, P.W. 22 Laxman Singh father of deceased Prashant. It is submitted that as the appellants have taken specific stand that the three deceased were dacoits the onus was on them to prove the said fact which they have failed to do so. In support of the aforesaid submission learned counsel for the informant has placed reliance on the evidence of P.W. 1 Mukesh Ranjan Paragraph 6 where he has stated that Vikash was studying electronics from A.N. College and was preparing for competition. In Paragraph 7 P.W. 1 proved the marksheet and admit card of Vikash (Exhibit-2 series). In Paragraph 8 P.W. 1 stated that Prashant was in Delhi undergoing swimming training. He was selected in Navy and had come to Patna on 27.12.2002 just prior to the incident. In Paragraphs 9, 10 P.W. 1 stated that deceased Himanshu was student at Zakir Hussain Institute and the three were law abiding citizens. In Paragraphs 38, 39, 41 P.W. 1 denied the suggestion that the three deceased had demanded

Rangdari, criminal cases were filed against them and that they had gone to Sammelan Market to commit dacoity. While referring to the evidence of P.W. 2 Jagdish Prasad Gupta Paragraph 5 learned counsel submitted that in the said paragraph P.W. 2 proved Exhibit 3 series educational certificates of deceased Vikash. In Paragraph 10 P.W. 2 denied the suggestion that the three deceased had gone to Sammelan Market to commit dacoity. P.W. 16 in Paragraph 4 deposed that Munna (Vikash) was student. P.W. 19 Nishant in Paragraph 2 proved the certificates of Himanshu (Exhibits 17, 17/1, 18, 19, 20, 21). P.W. 22 in Paragraph 1 deposed that deceased Prashant was selected in Indian Navy, Cochin and had to live in Kochin on 06.01.2003 and in this connection proved documents Exhibits 22 to 25. In Paragraph 2 P.W. 22 stated that on 28.12.2002 he had come to the office of Superintendent of Police and then went to Shastri Nagar Police Station with him and met Accused No. 1, who asked them to meet Literate Constable. After submitting the form with the constable P.W. 22 and Prashant again met Accused No. 1 on the same day. In this connection learned counsel for the informant has also referred to the evidence of D.W. 3 Md. Salam Paragraph 7, D.W. 4 Md. Sultan Paragraph 6, D.W. 6 Md. Muslim Paragraph 5, D.W. 11 Jhunu Kumar Patel Paragraph 3 and submitted that all the aforesaid defence witnesses admitted that they came to know that the three deceased were students. With reference to the aforesaid evidence learned counsel for the informant submitted that even the defence witnesses have admitted the fact that the three deceased were students and not criminals.

(a) Learned counsel for the informant next referred to the evidence of P.W. 9 Sammer Khalifa and P.W. 26 G.M. Rathi as also to Exhibit-13 and material Exhibit-9 and submitted that P.W. 9 had asked for the criminal history of the three deceased vide requisition Exhibit-13 and the reply to the requisition is marked material Exhibit-9 which bears the seal of Shastri Nagar Police Station. With reference to the evidence of P.W. 26, the author of Exhibit - 13 it is submitted that perusal of reply, material Exhibit-9 would categorically indicate that there was nothing against the three deceased in the police record to suggest that they were dacoits. In view of the aforesaid evidence, it is submitted that once prosecution has discharged its burden that the three deceased boys were the students and had no criminal antecedent, the onus shifted to the accused persons to prove that the three deceased were criminals specially Ashokwa, Natwa and associate which they have miserably failed to do so which cast serious doubt on the legitimacy of the case/defence set up by the accused persons and even the two First Information Report(s) lodged by them.

2. The defence of Accused No. 1 that there is no proof that he caused firearm injury to the deceased has been taken for the first time during the course of final argument before the High Court and as such is liable to be rejected.

In this connection it is submitted that Accused No. 1 for the first time during the course of final argument raised the point that he did not fire at the three deceased persons. Aforesaid plea was never raised by him during trial and even

in the memo of appeal. On the contrary it was the case of Accused No. 1 throughout the trial that he fired upon the three deceased from his service pistol but they were killed in encounter, which is evident from the following circumstances which taken together are sufficient indicators of the fact that the three deceased were killed by Accused No. 1:

i. Contents of the written report submitted by Accused No. 1 coupled with the circumstance that he never raised the plea during trial or even in memo of appeal that he did not resort to firing, according to learned counsel, is sufficient indicator of the fact that Accused No. 1 fired at the three deceased causing firearm injury to them.

ii. P.W. 12 Ezazul Haque in Paragraph 50 stated that Accused No. 1 recorded statement during investigation of Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 before him that he shot the boys which is almost in the same language as is contained in the written report of Gardanibagh (Shastri Nagar) P.S. Case No. 867/02 submitted by Accused No. 1.

iii. Statement made by Accused No. 1 that he shot the three deceased in encounter to other police personnel and before media.

iv. Section 6 of the Evidence Act : P.W. 6 Ajit Kumar Sinha, Dy. S.P., Secretariat deposed that when he reached the place of occurrence he saw Accused No. 1 in victorious mood with pistol in his hand stating that he shot the three deceased in encounter and becomes admissible as spoken in the same transaction.

v. Learned counsel for the informant with reference to Paragraph 9 of the impugned judgment submitted that thereunder court below has observed that it is admitted fact on behalf of the accused that he entered into encounter with the deceased and the bullet fired by him hit the three deceased. The appellants, however, denied to have intentionally killed the three deceased. No rebuttal was ever made to the aforesaid finding of the court below but at the stage of argument Accused No. 1 has taken a total contradictory stand of having not killed the deceased at all.

vi. Learned counsel for the informant with reference to the memo of appeal of Accused No. 1 submitted that he has admitted that a specific plea has been made that the three deceased were killed by Accused No. 1 from his service pistol in encounter. It is not open to Accused No. 1 to take contrary stand i.e. approbate and reprobate at the stage of argument.

vii. Order-sheet dated 18.06.2005 of the court below referred to by the counsel for the informant to establish that while arguing the bail plea of Accused No. 1 it was submitted on his behalf that the three deceased were killed in self defence.

3. Plea that there is no proof that when Accused No. 1 caused firearm injury then the deceased were alive is raised for the first time during the course of final argument before the High Court:

i. The plea/argument that there is no proof that the three deceased were alive when they were shot by Accused No. 1 has also been taken for the very first time during the stage of argument before this Court although by the aforesaid argument the appellants do admit that the three deceased were first assaulted and then fired upon, which is contradictory to their own stand taken in Shastri Nagar P.S. Case No. 866/02 as well as the stand taken in the trial that the three deceased were first shot by Shastri Nagar Police in encounter and then the crowd assaulted them with hard, blunt weapons.

ii. In support of the aforesaid submission 23rd Edition Modi's Medical Jurisprudence and Toxicology was relied upon but according to learned counsel for the informant the same cannot be relied upon as the said book was not placed before the witness. Reliance in this connection is placed on the judgment of the Supreme Court in the case of Piara Singh and others v. State of Punjab (supra) and State of Bihar v. Hanuman Koeri (Singh) (supra).

iii. P.W. 23, autopsy surgeon has opined that all the injuries found on the person of the three deceased were ante-mortem in nature and no suggestion to the contrary has been given to him.

4. The three deceased were fired from very close range:

It is submitted that the three deceased were not killed in encounter and fired from very close range. The theory of encounter has been propounded by the appellants. There is nothing on record to dislodge the same. It nullifies the story of encounter. Reference in this connection is made to the evidence of P.W. 7 Dr. Anil Kumar Sinha, FSL expert and P.W. 23 autopsy surgeon, which is indicative of the fact that the three deceased were shot from close range. Exhibit-7 series, especially Exhibit 7/2 and post mortem report, Exhibit 26 is indicative of the fact that the three deceased were shot from close range as there was blackening and charring around the firearm wound which is possible if the shot has been fired from the firearm from close range. Reference in this connection is made to Modi's Medical Jurisprudence and Toxicology 22nd Edition (student) and to Chapter XII injuries by mechanical violence and reference is made to the following paragraph:

"If a firearm is discharged very close to the body or in actual contact, subcutaneous tissues over an area of two or three inches round the wound of entrance are lacerated and the surrounding skin is usually scorched and blackened by smoke and tattooed with unburnt grains of gunpowder or smokeless propellant powder."

In this connection, it is also submitted that it is important to notice that there is no injury on the person of the police party or any public, if at all there was any encounter.

5. It is the case of the defence/appellants throughout that the deceased were killed in encounter and now at the stage of final argument the aforesaid

argument has not been pressed especially on behalf of Accused Nos. 1, 2, 3 and 8.

(i) It is submitted that during the entire trial appellants/accused persons have taken specific stand that the three deceased were Ashok, Natwa and associate who had come to the S.T.D. booth of Accused No. 3 to commit dacoity and after being surrounded by Shastri Nagar Police and asked to surrender the dacoits fired upon them. Shastri Nagar Police in self defence resorted to firing in which the three deceased were injured and thus during the entire trial the defence relied on the theory of encounter, which will be evident from the suggestion given to P.W. 1 in Paragraph 38, 39, 41, P.W. 2 Paragraphs 33, 43, 48, 49 and now at the appellate stage, that too in course of argument, the appellants have given up the encounter theory and taken a new stand which is self-contradictory.

ii. Even the defence witnesses have endorsed the encounter theory that there was firing from both sides and reference is made to the evidence of D.Ws. 3, 4, 6, 9, 13, 15, 17

iii. It is submitted that an important aspect which needs consideration is that there is no injury on the side of police party or crowd. There is no bullet mark found at the wall of Sammelan Market.

iv. The two country-made kattas and ammunition, which is said to have been recovered from the place of occurrence, were sent to F.S.L. for examination but from the evidence of P.W. 7 and report No. 56/13 it does not appear that there was firing from the country-made katta recovered from the place of occurrence. Thus, the only plausible conclusion is that they were planted by Accused No. 1 to give the occurrence a look of encounter. Though it has been argued that no one saw the country-made katta being planted by Accused No. 1. In this regard it is submitted that since it was Accused Nos. 1, 2 who propounded the encounter theory and spread the same across through the radio, as such, the plantation was done at the behest of Accused No. 1. P.W. 12 in Paragraphs 4 to 7 has stated that the four seizure-list (Exhibit - 16 series) was prepared on the dictation of Accused No. 1 which was handed over to Accused No. 1 and he has no knowledge of the seized items, rather he had only written the seizure-lists. P.W. 12 further told the C.B.I. that two country-made katta and scooter as well as motorcycle were not seized before him.

v. Another important point which appears (if read along with the list of dates and events) that it was P.W. 2 who met Laluji and when he came to Shastri Nagar Police Station along with I.G. Ashish Ranjan between 10.30-11.00 P.M. the accused persons got in motion and in order to save themselves got lodged Gardanibagh (Shastri Nagar) P.S. Case Nos. 866/02, 867/02 at 11.45 P.M. Though it has been argued that written report of Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 was lodged by Accused No. 3 much before relying on S.D. Entry No. 1107 which is not exhibited but one more argument could be that everything was in the control of Accused No. 1 and at that point of time on

28.12.2002 and realizing the serious turn the matter had taken (I.G. himself along with P.Ws. 2, 22 was at Shastri Nagar Police Station and Laluji himself was aware of the incident), the accused persons in order to save their skin got the false case lodge first by Accused No. 3.

6. The statement made by Accused No. 1 after the incident that he had shot the deceased in encounter is not hit by Section 25 of the Evidence Act

The statement of Accused No. 1 made to police officer immediately after the incident is not hit by Section 25 of the Evidence Act for the following reasons:

i. Section 6 of the Evidence Act takes within its sweep the conduct of Accused No. 1 i.e. the act done in same transaction and as such the statement so spoken will be a relevant fact. P.W. 6 further deposed that Accused No. 1 was in victorious mood after the incident and the said assertion has gone unchallenged. It would, thus, appear that Accused No. 1 killed the three deceased.

ii. Statement made in presence of media and crowd, it is admitted that during the incident besides the police there was huge crowd gathered near the place of incident and the media also arrived. P.W. 6 deposed in Paragraph 2 that Accused No. 1 was in victorious mood. P.W. 14, D.W. 2 both deposed in Paragraph 1 that Accused No. 1 made statement to media that he killed the deceased, as such, the bar of Section 25 does not arise at all coupled with Section 6 of the Evidence Act.

iii. To buttress the aforesaid submission learned counsel for the informant placed reliance on the judgments in the case of Rohidas Manik Kasrale Vs. The State of Maharashtra, (At the instance of Kalwa Police Station in C.R. No. 78 of 2003), and Mihir Adhikary Vs. The State, wherein it has been held that if the extra-judicial confession is made by an accused to a third person in presence of police officer then it would not be hit by Section 25 of the Evidence Act. In the present case a huge crowd collected outside Sammelan Market, Accused No. 1 made statement in presence of police officials who were part of the crowd as well as in presence of media that he killed the three deceased in encounter.

7. The FIR lodged by Accused No. 1 is not hit by Section 162 Cr.P.C. rather it is his Admission

i, iv. Reliance in this regard is placed on the judgment of Patna High Court in the case of Brijlala Prasad Sinha @ Braj Lala Prasad Sinha (supra) Paragraphs 23, 33, 34 and of the Supreme Court in the case of Brij Lala Prasad Sinha v. State of Bihar (supra) wherein it has been clearly laid down that in a case like the present one First Information Report of Shastri Nagar P.S. Case No. 867/02 is reliable and can be used as admission of the maker and not his confession as in the aforesaid case both High Court and the Supreme Court held that First Information Report is not confession but admission and the circumstances shown in the First Information Report which has been falsified by the evidence regarding encounter and killing of criminals was found false and the Officer-in-charge on

his own admission was convicted by both the Courts.

ii, iii. Further reliance is placed in this regard is in the case of *Faddi v. State of Madhya Pradesh* (supra) wherein it has been held that a case registered by a person who subsequently becomes an accused, hence, the FIR registered by him when he was not an accused is not confession but admission and relevant under Section 6 of the Evidence Act. There is circumstantial evidence to establish that the appellants in the cover of encounter committed a heinous offence of killing the three innocent students.

v. It has been conclusively proved through oral as well as circumstantial evidence that admission made by accused persons regarding two different version of the occurrence is falsified and the matter was taken up to Supreme Court by Accused No. 3 Kamlesh Kumar Gautam with regard to filing of final form in his First Information Report in relation to killing of criminals, story of encounter, recovery of weapons from the deceased got falsified and the Apex Court upheld the filing of final form, as such, the only conclusion is that the deceased were killed by the appellants which is fully proved by the circumstantial evidence.

vi. Moving one step ahead, it is the statement of relevant facts wherein Accused No. 1 has stated that the deceased persons fired at him and he in order to save himself fired 7 rounds from his service pistol which hit the three deceased, although Accused No. 1 thereafter says that the crowd then entered the market and assaulted the three injured who were then killed.

vii. Later part of the First Information Report of Accused No. 1 is contradictory to the earlier stand that he had fired at the three persons when they were dead.

viii. The remaining part of the First Information Report of Accused No. 1 becomes material wherein he has stated that the three deceased fired on the police party and in this regard Accused No. 1 has got seized two desi kattas and some ammunition, although the irony is that even as per Accused No. 1 there were three criminals and two kattas, so one of the deceased was still unarmed even if the defence case was to be remotely accepted but P.W. 7 in his report (Ext. 7/1) has opined that the ammunitions so seized were not fired from the desi kattas which were seized, which is coupled with the fact that there was no injury on police side or any mark over the wall of the market.

ix. Further it is evident from Exhibit 36 page 866 that Accused No. 1 was given 35 cartridges and he fired 7 on the three deceased, returned 28 live cartridges (vide P.W. 10 paragraph 7) and thereby accounted for 35 cartridges given to him.

x. One reason for lodging Shastri Nagar P.S. Case No. 867/02 by Accused No. 1 can be seen from the deposition of P.W. 3 Paragraph 5 wherein this witness has stated that if a person to whom the ammunitions have been issued uses them then he has to lodged an First Information Report and if the use is found to be justified then he is issued fresh ammunitions otherwise the amount is recovered.

xi. Moreover, Exhibit 1/1 i.e. Shastri Nagar P.S. Case No. 867/02 is addressed to

C.J.M., Patna and not to a police officer, as such, the bar of Section 25 of the Evidence Act will not apply. Reliance in this connection is made to the judgment of the Supreme Court in the case of Sita Ram Vs. State of Uttar Pradesh, . In the said case the later was found admissible even though it was addressed to police officer but in the instant case it has been addressed to C.J.M., Patna, as such, the case is in better position and the First Information Report of Accused No. 1 is admissible.

xii. Further the First Information Report of Accused No. 3 i.e. Shastri Nagar P.S. Case No. 866/02 is not hit by Section 162 Cr.P.C. and the same can be used against him in the present case since he has also alleged that the three deceased along with their other associates has come to his shop for committing dacoity. They fired at the police and then the police returned the fire as a result of which they were injured and then the crowd assaulted them which resulted in their death. The admitted position is that Accused No. 3 lodged the aforesaid First Information Report and final form was submitted in the same which was upheld up to Supreme Court.

8. Prosecution witnesses are reliable and trustworthy and the prosecution case was not conceived after 3 months of the incident

In this regard, it is to be seen that the date of incident is 28.12.2002. The C.I.D. took up the investigation of the case from Shastri Nagar police on 01.01.2003 and the State Government notification for CBI investigation was issued on 04.01.2003 (Exhibit 37), CBI came in picture on 18.02.2003. In the circumstances, there is no basis that the prosecution case was conceived after three months coupled with the fact that Shastri Nagar P.S. case No. 868/02 was lodged wherein Accused No. 3 was one of the named accused apart from the fact that there were allegations on others as well. P.W. 5 Baldeo Paswan was running his tea shop near the place of occurrence and he has categorically answered to the defence questions as to the topography of the area. He has named all the shopkeepers who used to run road side shops. This could only be possible when P.W. 5 was resident of that area and was running his shop which he actually was. Further, with regard to the identity of shopkeepers Kamlesh, Rajiv, Soni and Rakesh as the one who were assaulting the three deceased could not be dislodged by defence. Even the name of Accused Nos. 1, 2 were taken to have reached the place of occurrence. He has also deposed that he had gone to purchase the milk from the milk booth, which was in front of Sammelan Market when he could hear the sound coming from the market and then he went there. P.W. 14 P.N. Singh is another reliable witness. He has categorically deposed that the deceased were alive (marnasan) when he saw them and after that Accused Nos. 1, 2 entered the market and then gun shots were heard. Later on Accused No. 1 said that he killed the deceased. Although, it has been argued that he is not reliable witness but it has to be seen that his so called earlier statement recorded by P.W. 12 said to be recorded in Shastri Nagar P.S. Case No. 866/02 is not worth consideration since in that case final form has been submitted and the

same was upheld till Apex Court. Further, it is surprising that P.W. 12 who was investigating Shastri Nagar P.S. Case No. 866/02 could record statement of so many witnesses supporting the encounter theory while P.W. 10 who became the Investigating Officer of Shastri Nagar P.S. Case No. 868/02 admits that he did not investigate the case (P.W. 10 Paragraph 24) which shows that the police officials were initially acting in a manner to support Accused No. 1 and the accused persons and only when the matter went out of their hands that the truth could be revived.

Another circumstance which can be considered at this juncture is that the same witness i.e. P.W. 12 in cross-examination in Paragraph 50 has deposed that he took the statement of Accused No. 1 in Shastri Nagar P.S. Case No. 866/02 and he has admitted that he had killed the three deceased from his service pistol.

P.Ws. 21 and 30 are also local witnesses whose presence cannot be doubted and they have also deposed about the deceased being assaulted by the shopkeepers.

In view of the aforesaid submission, it is submitted that there was ample reason for the witnesses to be present near the place of occurrence and in the case of Vikram Singh and Others Vs. State of Punjab, the Apex Court has deprecated the use of expression chance witness. All the witnesses mentioned above were the residents of the locality and thus gone to the spot.

9. Ample proof that the shopkeepers caused injuries on the person of the three deceased with hard and blunt weapons.

In this regard evidence of P.Ws. 5, 14, 21 and 30 assumes importance. Since the combined reading of these witnesses goes on to show that the three deceased were initially severely beaten up by the shopkeepers with hard and blunt weapon like rod, pipe etc. due to which the deceased became motionless and thereafter they were shot by Accused No. 1 while Accused No. 2 also took active part in flashing massage of encounter taking place. This has come on record in the deposition of P.W. 14.

10. The FSL expert and his opinion is reliable and the argument that P.W. 7 is not an expert is liable to be rejected

It has been argued that the report of P.W. 7 is not reliable and the same is fit to be discarded. In support of the submission the appellants have argued that:

- i. P.W. 7 is not an expert
- ii. His report was not complete in absence of photographs
- iii. Exhibit 7 uses the word similar and not identical while comparing the test fired cartridges with the empty bullets.
- iv. The basis on which the comparison was to be made were not spelt out in Exhibit 7 to establish a link between the firearm of Accused No. 1 and the fired cartridges as well as test fired cartridges.

The FSL report is primarily advisory in nature and it is upon the court to accept it or not. In the present case, the report has been prepared by a team of expert which includes the Director of FSL, Senior Scientific Officer (P.W. 7) and Technical Officer (P.W. 11). Sufficient materials were supplied before this Court that P.W. 7 has all the basic requirement to become expert in ballistic and he has 20 years of experience at the time of submitting the report. It is submitted that the aforesaid submissions have no basis for the following reasons:

i. P.W. 7 was expert and the same has been shown during the course of argument that he had enough experience and the basic requirement was M. Sc. in any subject and the said witness is M. Sc. in Physics.

ii. Accused No. 1 has himself admitted that he shot the three deceased and as such after his admission the defect so pointed out by the appellants have no basis.

iii. With regard to the argument that photographs were required and in absence of the same it is just the objective finding of the expert, it is submitted that the photograph is not an essential requirement. The comparison carried out by the expert through comparison microscope is enough and in this regard reliance is placed on the judgment of the Supreme Court in the case of Ramanathan v. The State of Tamil Nadu (supra)

iv. The appellants have placed reliance on the judgment of the Supreme Court in the case of Kalua v. State of Uttar Pradesh (supra), State of H.P. v. Jai Lal and others (supra). In response whereunto learned counsel for the informant submitted that in the first case there is no finding that in all the cases of ballistic examination photograph is must.

v. The report is based on the weapon surrendered by Accused No. 1, 28 live cartridges, 3 empties and one deformed bullet recovered from the body of one of the deceased. The report is based on microscopic examination of 9 mm pistol, the cartridges, percussion cap and firing pin of the weapon. Further it has been found that there were 6 lands and 6 grooves twisted towards right and the expert came to a conclusion that all these cartridges were fired from the same pistol of Accused No. 1. Apex Court in number of cases has approved the microscopic examination (Ramanathan Vs. The State of Tamil Nadu, .

vi. There is nothing much which can turn out from the use of word similar and identical.

11. No so called recovery made in presence of any of the prosecution witnesses- Instead the accused have camouflaged the incident

It is submitted that the recovery that has been shown by the accused persons from the deceased was never made in presence of any of the prosecution witnesses. Even the person who has made the said seizure memo P.W. 12 Ejajul Haque has denied that anything was seized in his presence. He has only stated that when he went inside the market he saw that the three deceased boys were

lying dead and the seized items were lying scattered. He has also admitted that he prepared the seizure list on the dictation of Accused No. 1 Shamshey Alam. In addition to this the Court must take note of this fact against the accused persons. In order to suppress the truth and to cover up the truth the seizure list was prepared later on as an afterthought which indicates the guilty mind of the accused persons. The police personnel in this case were very much conscious of the fact that innocent persons have been killed and in order to save their neck, they started making preparation of their defence at that very stage and they have camouflaged the fake encounter into a real encounter.

The Apex Court has deprecated the fake encounter at the instance of policemen in the case of Prakash Kadam and etc. etc. v. Ramprasad Vishwanath Gupta and Anr. (supra) and the learned counsel for the informant placing reliance on the aforesaid judgment has expressed its anguish on the fake encounters and the policemen responsible for it in the following words:

25. We are of the view that in cases where a fake encounter is proved against policemen in a trial, they must be given death sentence, treating it as the rarest of rare cases. Fake "encounters" are nothing but cold blooded, brutal murder by persons who are supposed to uphold the law. In our opinion if crimes are committed by ordinary people, ordinary punishment should be given, but if the offence is committed by policemen much harsher punishment should be given to them because they do an act totally contrary to their duties.

In the light of the above submissions, counsel for the informant submitted that it is crystal clear that the accused persons/appellants have caused death of the three deceased who were students and committed heinous offence. They were not deterred by it and even misguided the whole machinery of the State by spreading false messages and planted weapons to give it a shape of encounter, which they have miserably failed to prove and the most disturbing part is that the men who were given the authority to protect the life of the citizens were the one who took it, as such, the sentence awarded by the learned lower court is correct and requires no interference.

48. In view of the rival submissions, I have to consider the points relied/raised by the prosecution in Paragraph 11 of the written submission filed by the counsel for the Investigating Agency C.B.I. and Informant in Paragraphs 1 to 12.

49. The three deceased boys were the students, not criminals and were not shot under mistaken identity. From the evidence of P.W. 1 Mukesh Ranjan, who is the younger brother of deceased Vikash it appears that in Paragraph 6 he has stated that at the relevant time Vikash was student of Electronics in A.N. College, Patna. Reference in this connection is also made to Exhibit-2 series. Exhibit-2 is the mark-sheet of Bihar School Examination Board, Patna indicating the marks obtained by Vikas in Secondary School Examination, 1998 wherefrom it appears that he passed the said examination in 1st Division. Exhibit - 2/1 is the marks statement of Annual Intermediate Science Examination, 2000 indicating that he

passed the said examination also in 1st Division. Exhibits - 2/2, 3 is the Admit Card of deceased Vikas Ranjan for appearing in Bihar Combined Entrance Competitive Examination, 2001, 1st, 2nd stage. Reference is also made to the evidence of P.W. 1 in Paragraph 8 wherefrom it appears that at the relevant time deceased Prashant was also undergoing training as a Swimmer in Delhi as he was selected for admission in a Naval Institute and he had come to Patna from Delhi on 27.12.2002. P.W. 1 in Paragraph 9 deposed that deceased Himanshu at the relevant time was a student of B.Sc. (Information Technology) in Zakir Hussain Institute, Patna. In Paragraph 10 P.W. 1 also certified that the three deceased were law abiding citizens, had no anti-social tendency. P.W. 1 in Paragraphs 38, 39, 41 has categorically denied the suggestion that the three deceased had come to Sammelan Market to extort money and to commit dacoity. P.W. 2 Jagdish Prasad Gupta, father of deceased Vikas Ranjan in Paragraph 10 has denied the suggestion that the three deceased had come to Sammelan Market to commit dacoity. P.W. 16 Uday Shankar Prasad, maternal uncle of deceased Vikas Ranjan in Paragraph 4 deposed that Munna was a gentle and social boy. P.W. 19 Nishant, brother of deceased Himanshu has proved Character Certificate (Exhibit-17) issued by Principal, Rose Public School, Darbhanga bearing Serial No. 183 though undated indicating that Himanshu, son of Surendra Prasad Yadav appeared in annual examination of 10th Standard in the year 1998 and secured 77.08% marks. He also proved another character certificate bearing No. 922 dated 09.05.2001 (Exhibit-17/1) issued by Principal, B.N.M.V. College, Sahugarh, Madhepura, Bihar wherefrom it appears that deceased Himanshu was a student of I.Sc. in Session 1998-2000. He also proved Admit Card, Mark Sheet of Himanshu dated 14.09.2009, 15.06.1998, issued by Bihar Intermediate Education Council, Patna for Intermediate Science Examination, 2000, Central Board of Secondary Education for Secondary School Examination, 1998 (Exhibits-18, 19). He has also proved provisional certificate (Exhibit-20) issued by Bihar Intermediate Education Council, Patna dated 03.07.2000, wherefrom it appears that deceased Himanshu passed Intermediate examination in Science of the year 2000 held in April, 2000 in 1st Division. P.W. 22 Lakshman Singh, father of deceased Prashant stated in Paragraph 1 of his evidence that Prashant was selected in Indian Navy Institute, Kochin and had to leave Patna on 06.01.2003 to join the Institute at Kochin. In Paragraph 2 P.W. 22 stated that on 28.12.2002 he went to the office of Superintendent of Police, Patna for obtaining police verification and was directed to fill up a form and submit in Shastri Nagar Police Station. On the same day at around 2:00 P.M. he along with Prashant visited Shastri Nagar Police Station and met Officer-in-Charge, Accused No. 1 with connected documents who instructed them to hand over the papers to literate constable. In compliance of the instructions of Accused No. 1 P.W. 22 and Prashant met the literate constable and handed over the papers to him who told P.W. 22 that certificate shall be issued tomorrow whereafter P.W. 22 gave such information to Accused No. 1 and left the Police Station. In this connection evidence of P.W. 26 G.M. Rathi, Inspector, C.B.I., Assistant Investigating Officer and P.W. 9 S.I. Saffir Khalifa who took charge as

Officer-in-Charge, Shastri Nagar Police Station with effect from 30.12.2002 is also relevant as P.W. 26 vide requisition dated 25.02.2003 (Exhibit-13) asked the Officer-in-Charge, Shastri Nagar Police Station to submit report about the antecedent of the three deceased in Shastri Nagar Police Station in response where to P.W. 9 submitted report dated 25.02.2003 (Material Exhibit-IX) indicating that the three deceased had no criminal antecedent in Shastri Nagar Police Station. Besides, D.W. 3 Md. Salam in Paragraph 7, D.W. 4 Md. Sultan in Paragraph 6, D.W. 6 Md. Muslim in Paragraph 5, D.W. 8 Mala Rai in Paragraph 8, D.W. 9 Jitendra Sao in Paragraph 5, D.W. 11 Jhunnu Kumar in Paragraph 3 have also admitted that the three deceased were students. Having considered the aforesaid ocular, documentary evidence of both prosecution and defence, I am of the opinion that the three deceased were not Ashokwa, Natwa and associate but were students without any criminal antecedent in the records of Shastri Nagar Police Station.

50. Now, I examine the submission of the prosecution that Accused No. 1 has admitted in his Written Report dated 28.12.2002 (Exhibit-1/1) on the basis of which First Information Report of Shastri Nagar P.S. Case No. 867 of 2002 has been registered that while he was on patrolling duty in the afternoon of 28.12.2002 received information from the passers-by that occurrence of loot, firing is happening in Sammelan Market, Ashiana Road, Patna, alerted the force and officer accompanying him in the mobile gypsy, speedily proceeded towards the market, at the Sammelan Market was informed by the crowd assembled outside the market that dacoity is in progress inside the market, few of the miscreants have, however, succeeded in making good their escape resorting to firing and still there is chance that few of them may be holed up in the market. Accused No. 1 again alerted the officer, force accompanying him, took out his service pistol and to verify the information moved forward to enter the market. No sooner he reached near the market gate, the miscreants concealed inside the market shot at the police force. Accused No. 1 positioned himself by the side of the market gate wall and asked the miscreants to surrender as they were already surrounded by the police force from all sides but the miscreants did not respond and continued to fire on Accused No. 1 and other police force. Accused No. 1 in self defence as also in the defence of other police personnel fired seven rounds from his service pistol causing injury and fall of the three miscreants. No sooner the miscreants fell on the ground, crowd, thousand in number, became violent and not only entered the market but also assaulted the three with lathi, stick, rod and stone causing grievous injury to the miscreants resulting in their instantaneous death in the corridor/passage of Sammelan Market. Accused No. 1 forwarded his report in the night of 28.12.2002 to Gardanibagh Police Station for instituting a case against one thousand unknown crowd assembled outside the market for the offence under Section 304 Indian Penal Code vide Station Diary Entry No. 1107 at 23:05 hours which fact would appear from Exhibit 12/5, attested copy of the Station Diary. Further perusal of Station Diary (Exhibit-12/4) indicates that in the same night vide Entry No. 1106 made at 23:00 hours

Accused No. 1 noted the contents of Written Report of Accused No. 3 received by him at Sammelan Market itself and the steps taken after receipt of the report at the market i.e. seizure of arms, ammunition made from the passage of the market lying near the deceased and their pocket including two wheelers two in number from outside the market in the evening and dispatch of three dead bodies through Constable Shambhu Prasad Singh, Paras Nath Singh. Accused No. 1 also forwarded the Written Report of Accused No. 3 dated 28.12.2002 submitted about the same occurrence to Gardanibagh Police Station in the same evening on 28.12.2002 on the basis of which Gardanibagh (Shastri Nagar) P.S. Case No. 866 of 2002 was registered at 11:45 P.M. together with First Information Report of Gardanibagh (Shastri Nagar) P.S. Case No. 867 of 2002 on the basis of written report of Accused No. 1 also at 11:45 P.M. In this connection it is relevant to point out that Xerox copy of the report of Accused No. 3 (Exhibit-X for identification) is in four sheets, Accused No. 3 has put his signature on all the four pages, just beneath the signature, date of the report at Page-4, following is the endorsement made by Accused No. 1

"On return to P.S. forwarded to O/C, G. Bagh P.S. for instituting a case under Sections 395 /412 /307 I.P.C., 25(1-b) a /26 /27 /35 of the Arms Act. S.I. Ezazul Haque will please investigate the case."

Just below the aforesaid endorsement of Accused No. 1 over Page 4 Exhibit "X" there is further endorsement made by Sri B. Tiwari, A.S.I. dated 28.12.2002 on behalf of Officer-in-Charge indicating registration of Gardanibagh (Shastri Nagar) P.S. Case No. 866 of 2002 dated 28.12.2002 for the offences under Section 395 /412 /307 I.P.C., 25 25(1-b) a /26 /27 /35 of the Arms Act and that the said case is being investigated by S.I. Ezajul Haque of Shastri Nagar Police Station. Records further reveal that inquest proceeding of the three deceased was conducted at Sammelan Market on 28.12.2002 at 17:30, 17:45, 17:55 hours vide Exhibits - 15, 15/1, 15/2 respectively drawn by P.W. 12 Ezajul Haque. It further appears from the record and the evidence of P.W. 12 that he inspected place of occurrence on 28.12.2002 at 5:05 P.M., made seizure of incriminating articles i.e. two country made pistols, seven live cartridges from the three deceased in the corridor of Sammelan Market as also T.V.S. Victor Motorcycle bearing Registration No. BR 1U-1910 and Bajaj Super Scooter bearing Registration No. BR 01-S-2955 from the vacant open land available in front of Sammelan Market on 28.12.2002 between 18:10-18:40 hours vide seizure-list (Exhibits - 16-16/3) drawn by P.W. 12 at the dictation of Accused No. 1. Seizure-list (Exhibits - 16/4) though has been drawn by P.W. 12 on the dictation of Accused No. 1 but has been authenticated by P.W. 27 S.I. Nagendra Prasad at Sammelan Market as has been stated by P.W. 12 in Paragraph 63 of his evidence.

51. It would thus appear from the records including Xerox copy of the First Information Report of Accused No. 3 (Exhibit-X) that he submitted his Written Report to Accused No. 1 soon after the occurrence at Sammelan Market itself on the basis of which investigation proceeded i.e. inquest of the three dead bodies

and seizure of incriminating articles was made at Sammelan Market soon after the occurrence in the evening until 18:50 hours, Accused No. 1 and other police officers accompanying him at Sammelan Market, thereafter returned to the Police Station at 23:00 hours and made Entry No. 1106 in the Station Diary at 23:00 hours and thereafter recorded his Written Report (Exhibit - 1/1) as would appear from Entry No. 1107 of the Station Diary. The Written Report of Accused No. 1 has been submitted after investigation in connection with the occurrence at Sammelan Market has already begun pursuant to the Written Report of Accused No. 3. The Written Report of Accused No. 1 is his signed statement under Section 161 Cr.P.C. which he has submitted after investigation in connection with the occurrence committed in Sammelan Market on 28.12.2002 in the afternoon has already begun. As such, there is legal bar under Section 162 Cr.P.C. to rely upon the contents of the report (Exhibit - 1/1) as the admission of Accused No. 1. Reliance placed by the counsel for the C.B.I. and informant over the Division Bench judgment of this Court in the case of Brijlala Prasad Sinha v. State of Bihar (supra) Paragraph 31 and other paragraphs is wholly misconceived. In the said case Officer-in-Charge, Barachatti Police Station Dudh Nath Ram having received information that criminals were probably moving in a Maruti Van entered the information in Station Diary (Exhibit-26/2), reached place of occurrence, challenged the criminals who resorted to firing and in return fire police party headed by Officer-in-Charge also shot killing the miscreants and returned to the Police Station with three dead bodies and the damaged Maruti Van in which miscreants were moving whereafter Station Diary entry (Exhibit-26/4) was made and Dudh Nath Ram recorded his fardbeyan (Exhibit-17/1) on the basis of which case was registered. Later the relatives of the three deceased came to Barachatti, made enquiries at the place of occurrence and recorded their fardbeyan. This Court in the said case held that entries made in Station Diary Entry Nos. 26/2, 26/4 being public document become admissible under Section 35 of the Evidence Act and the version of the occurrence recorded by Dudh Nath Ram that the three deceased were killed in return fire by the police party is the admission of Dudh Nath Ram as there was no legal bar in accepting the contents of Exhibit-17/1 in evidence. Paragraph 31 of the said judgment is quoted hereinbelow for ready reference:--

"31. So far as the relevancy and admissibility of the fard beyan of Dudh Nath Ram (Ext. 17/1) is concerned, it was seriously challenged by the learned counsel for the appellants and it was submitted that it cannot be looked into for getting support to the prosecution case. But such F.I.R. is admission of the maker and is admissible. There are two station diary entries also (Ext. 26/2 and 26/4). This view finds support from the observation and findings of their Lordships in the case of Ram Prasad Sharma Vs. The State of Bihar, . It has been thus observed in the case:

"In this case it has not been proved that entry in question was made by a public servant in the discharge of his official duty. As observed by this Court in Brij Mohan Singh Vs. Priya Brat Narain Sinha and Others, , the reason why an entry

made by a public servant in a public or other official book, register or record stating a fact in issue or relevant fact has been made relevant is that when a public servant makes it himself in the discharge of his official duty, the possibility of its being truly and correctly recorded is high."

Thus, both the fard beyans (Ext. 17/1) and the station diary entries (Ext.-26/2 and Ext. 26/4) having been made by public servants in discharge of their official duty become admissible, in view of the provisions of Section 35 of the Evidence Act. In another case, *Keshoram v. State of Assam* (AIR 1987 SC 1096) also it has been held by their Lordships that it is well settled that where a confession or admission is separable, there can be no objection taking one part into consideration which appears to be true and reject the other part which is false. Therefore, it has been contended on behalf of prosecution that so far those parts of the F.I.R. and the two entries in the Station diary that the appellants left for the P.O. on being informed by appellant Jaikaran Yadav that criminals were probably moving in a Maruti Van opening fire and thereafter they returned to the P.S. with three dead bodies and the damaged vehicle is admissible. The similar entries in the station diary Exts. 26/2 and 26/4 are also admissible to this effect that the police personnel had gone to chase the Maruti Van in which criminals were suspected to be moving and thereafter they returned to the P.S. with three dead bodies and the damaged vehicle. This part of the statement in the Fard beyan (Ext. 17/1) also becomes admissible that the three persons were killed in an encounter by the police. In the case of *In Re: Natesan*, , it was held by their Lordships of the Madras High Court that:

"If a statement contains admission of an offence, not only that admission, but also every other admission of incriminating fact containing in the statement is part of confession. If the first information given to a public Officer amounts to a confession, any incriminating fact mentioned therein, if it has got a bearing directly or indirectly with the confession, such fact, even though it may be of admission will be inadmissible. If the first information does not amount to a confession, any admission made therein can be proved against the maker under Section 21 of the Evidence Act."

In this view of the matter, it becomes clear that the admission of appellant Dudh Nath Ram in his fardbeyan (Ext - 17/1) is admissible in evidence against him, though not against other appellant. In this connection it can be said that even if the fardbeyan of appellant Dudh Nath Ram is not taken into consideration, the other material as discussed above go to prove beyond doubt the participation of other appellants in the crime. The statement made by appellant Dudh Nath Ram in the fardbeyan is in the nature of admission and that can be used also against the other appellants, as there is no legal bar in relying upon the same. A reference may be made to the Sarkar on Evidence, 1993 Edition wherein while discussing the scope of Section 21 of the Evidence Act it has been said:--

"The section does not say that the admission may not be used against the persons other than maker, and is evidently not intended to be exhaustive. The

statements which are admissions within Sections 19 and 20 are relevant and may clearly be proved against the persons other than the makers of them, and similarly it appears that admissions by persons who have a proprietary interest in certain property may be used against other persons interested in the same property, although the later are not representatives in interest of the persons by whom the admissions were made."

(Emphasis supplied)

52. In the instant case Written Report of Accused No. 1 has been submitted after investigation in the occurrence which took place at Sammelan Market in the afternoon of 28.12.2002 has already begun pursuant to Written Report of Accused No. 3, as such, there is legal bar under Section 162 Cr.P.C. to rely over the same. Any statement made during investigation of a case can only be used to contradict the maker if the maker of the statement has chosen to come to the witness-box. In the instant case, Accused No. 1 having not been examined as witness, his written report cannot be looked into and read into evidence in the case. In the circumstances, I am of the view that the contents of Exhibit - 1/1 cannot be read as his admission as we are precluded in terms of Section 162 Cr.P.C. from looking into the contents thereof.

53. In this connection further reference be made to the judgment of the Supreme Court in the case of S. Subba Rao & Ors. v. Public Prosecutor, High Court of Andhra Pradesh at Hyderabad (Supra), Paragraph 13. In the aforesaid case occurrence of murder took place in the evening in the office of P.W. 4 who having seen the occurrence ran away to the field and thereafter went to the house of village servant at 11.00 P.M. and gave written report to the village servant with direction to hand over the same to Kani Giri Police Station next morning at 8.30 A.M. P.W. 10 Sub-Inspector Kani Giri Police Station recorded the following evidence:

"prior to P.W. 1 giving Exhibit-P1 to me, I had no information about this crime, none of the persons acquainted with the crime appeared before me prior to Exhibit-P1 ---- after registering this crime and I issued Exhibit-P14 F.I.R. I received a report from P.W. 4 through village servant".

In the light of the aforesaid evidence of P.W. 10 in the reported case Supreme Court in Paragraph 13 held that the evidence of P.W. 10 clearly indicate that the report sent by P.W. 4 through village servant was received by him only after investigation was taken up. In other words report sent by P.W. 4 would be a statement recorded under Section 162 Cr.P.C. and consequently it could not be admitted in evidence.

54. In the case of T.T. Antony (supra), Paragraph 28 on 25.11.1994, Minister of the Government came to visit Alakkandy Complex at Kuthuparamba Telicheri Road (Kannur District) for inauguration of Evening Branch of Co-operative Urban Bank. The events that developed there led to firing by police at two place (i) in the vicinity of Town Hall for which First Information Report Crime No. 353/94 and

another (ii) in the vicinity of Police Station Kutthuparamba for which First Information Report Crime No. 354/94 was registered. While the investigations on the basis of the aforesaid First Information Report(s) was pending Mr. K. Padmanabhan Inquiry Commission submitted its report about the police firing resorted to on 25.11.1994 in connection with the visit of Minister to Alakandi Complex at Kutthuparamba Tellicheri Road to the Government. In the light of the findings in the report First Information Report Crime No. 268/97 was registered in the same Police Station Supreme Court held that registration of First Information Report Crime No. 268/97 for the same police firing resorted to on 25.11.1994 was irregular and a fresh investigation by the investigating agency in the subsequent First Information Report was unwarranted and illegal as all other information made orally or in writing after the commencement of the investigation into the cognizable offence disclosed from the facts mentioned in the first report and entered in the Station House Diary by the police officer will be statement falling under Section 162 Cr.P.C. In the light of the said finding the subsequent First Information Report of Crime No. 268/97 was quashed.

55. In the case of Chirra Shivraj v. State of Andhra Pradesh (Supra) First Information Report No. 46/99 was recorded on 21.4.1999 after wife of the appellant suffered burn injuries and admitted to Government Civil Hospital, Nizamabad in the light of her statement. Subsequently wife of the appellant suffered septicemia which was due to burn injuries and she died on 01.08.1999. Husband reported the factum of death for which police authorities recorded First Information No. 152/99 on 02.08.1999. Supreme Court having considered the contents of both First Information Reports held in Paragraph 17 of the judgment that it was not necessary to record the subsequent First Information Report after the death which was result of septicemia due to burn injuries.

56. In the case of Amitbhai Anilchand Shah v. Central Bureau of Investigation and Anr. (Supra) Supreme Court considered its earlier judgment in the case of Upkar Singh Vs. Ved Prakash and Others, and T.T. Antony (Supra) in Paragraph 48 and then concluded in Paragraph 52(H) that in the case on hand initially the C.B.I. took stand that the third person accompanying Soharabuddin and Kausharbi was Kalimuddin but with the aid of further investigation it unveiled that the third person accompanying Soharabuddin and his wife Kausharbi at the time of their murder was Tulsi Ram Prajapati. Therefore, as a result of further investigation the C.B.I. gathered information that the third person accompanying the husband and wife at the time of their murder was Tulsi Ram Prajapati. Thus, a second First Information Report after the murder of Tulsi Ram Prajapati is unwarranted instead filing of supplementary charge-sheet in this regard in the case of murder of Soharabuddin and Kausharbi will suffice and in Paragraph 54 of the judgment quashed the First Information Report registered after murder of Tulsi Ram Prajapati.

57. Now, I proceed to consider the evidence of experts (P.Ws. 7, 11) with reference to Forensic Science Report Nos. 55, 56, 57, all of 2003 (Exhibits 7, 7/1,

7/2). It appears from the seizure-list (Exhibits 16, 16/1, 16/2, 16/3 and 16/4) that soon after the occurrence two loaded country-made pistols, with one cartridge of .315 bore each, five live cartridges were recovered from the corridor/passage of Sammelan Market lying by the side of the three dead bodies in front of S.T.D. Booth of Accused No. 3. The five cartridges were recovered from pant, shirt, jacket pocket of the three deceased respectively. Three fired cases of 9 mm. were also recovered from the gallery, vacant space outside Sammelan Market in the evening after the occurrence. Accused No. 1 also surrendered his official pistol bearing No. 15341678 and 9 mm. live cartridge 28 in number entrusted to him for official use in the same night at 11:10 P.M. to P.W. 12 vide seizure-cum-production list (Exhibit-A), one deformed 9 mm. bullet was extracted from the body of one of the deceased. The seized fire-arm, ammunition together with the fire-arm surrendered by Accused No. 1 as also deformed bullet was sent to Forensic Science Laboratory for examination. Experts P.Ws. 7, 11 compared the three fired shells of 9 mm recovered from Sammelan Market with four test fired shells fired from the pistol surrendered by Accused No. 1. They also compared the four test fired bullets with deformed bullet extracted from the body of one of the deceased under comparison microscope. In paragraph (a) of the result of examination in Report No. 55/2003 (Exhibit-7) the experts noted that the 9 mm. caliber semi automatic pistol bearing No. 15341678 marked A is in perfect working order and can be used as an effective fire-arm as a result of chemical analysis the gun shot discharge residues could be detected in the barrel indicating sign of previous firing. Opinion on exact date of firing is, however, not possible. In Paragraph (d) the examiners stated that deformed fired bullet of 9 mm. caliber contain six lands and six grooves twisted towards right. In Paragraph (e) the Experts stated that fired cases marked A1 to A3 and test fired cases marked B1(A) to B4(A) were also examined under comparison microscope, the striker and breech face markings on the percussion caps of fired cases (Exhibit A1 to A3) were found similar to those on test fired cases B1(A) to B4(A). In the same paragraph the Experts concluded that the test fired cases marked A1 to A3 have been fired from the same firing pin of a weapon which fired test fired cases B1(A) to B4(A) viz. pistol marked A noted in Item (1) 9 mm. caliber semi automatic pistol bearing No. 15341678 of Accused No. 1. In Paragraph (f) the experts noted that the deformed fired bullet marked C and the test fired bullet marked B1(A) to B4(A) were also examined under the microscopic comparison and the striation found on the deformed bullet were similar to those found on test fired bullets B1(A) to B4(A) and it is concluded that the deformed bullet has been fired from the same barrel which fired test fired bullet B1(A) to B4(A) i.e. semi automatic pistol of Accused No. 1.

58. From the evidence of two Experts (P.W. 7, 11) as also the findings recorded by them in the report (Exhibit-7 series) it does not appear that the experts have furnished any data in support of their opinion. While comparing the fired cases A1 to A3 with test fired cases B1(A) to B4(A) under comparison microscope the experts did not take photograph of the striker and the breech face markings on

the percussion caps of fired cases A1 to A3 and test fired cases B1(A) to B4(A) so as to enable the court to come to the conclusion that the striker and the breech face markings on the percussion caps of both the objects are identical. Similarly, they have also not taken photographs of the striation mark on the deformed bullet and test fired bullet B1(A) to B4(A) so as to enable the court to conclude that the striation mark on both the objects were identical. In absence of the photographs of the breech face markings on the percussion caps and the striation on the bullet it is not possible to verify and confirm that the fired cases and test fired cases as also the deformed bullet and test fired bullet were fired from similar object i.e. Pistol No. 15341678. If the markings are in the same position in relation to one another and their general appearance is the same, one may conclude that they have been fired from pistol of the same make but the photographs are necessary to notice the individual difference in each weapon. In this connection a three Judge Bench of the Supreme Court in the case of *Kalua v. State of Uttar Pradesh* (supra) quoted with approval the extract from the book *Modern Criminal Investigation* authored by Sodderman and O'Connel at Page 200.

"Identification, with the aid of the enlargement, should not prove difficult. The characteristic scratches can be easily seen. A photograph of the incriminating shell and one of a comparison shell should be pasted side by side on cardboard, and the characteristic marks should be recorded with lines and ciphers, following the same method as that used in the identification of finger prints."

Similar view is taken by the Supreme Court in the case of *The State of Gujarat v. Adam Fateh Mohmed Umatiya and others* (supra) and it is held that the evidence of identification unsupported by photograph is nothing more than an expression of opinion. The evidence does not establish that test cartridges and empty cartridges were fired from the same weapon or that the misfired cartridge was fired from the same weapon. The bulj marks on test cartridges and bulj marks on the empty cartridges were similar but not the same, cannot establish that the empty cartridges were fired from the same weapon. The bulj marks on the empty cartridges were of the shape of an eye. The expert witness did not take composite photograph of the empty cartridges superimposed by the test cartridges. The photographs taken were not in the same condition of light. If identification marks were different at the face of the cartridge that would show that they were not fired from the same weapon, the evidence of the Expert in absence of the photograph cannot be relied upon.

59. Aforesaid view of the Supreme Court in the case of *The State of Gujarat v. Adam Fateh Mohmed Umatiya* (Supra) was distinguished by a two Judge Bench of the Supreme Court in the case of *Ramanathan v. State of Tamil Nadu* (Supra) without taking note of the earlier three Judge Bench decision in the case of *Kalua v. State of Uttar Pradesh* (Supra) approving the authoritative text in the Book *Modern Criminal Investigation* by Sodderman and O' Connel requiring the Expert to take photograph of the objects while doing microscopic comparison of the

objects.

60. Opinion of the Expert is relevant under Section 45 of the Evidence Act. Expert is not a witness of fact. His evidence is really of an advisory character. The duty of expert witness is to furnish to the Court the necessary scientific criteria, all the materials together with reasons which induce him to come to the conclusion so as to enable the Judge to form his independent judgment by the application of the criteria to the facts found so as to test the conclusion arrived by the Expert. The scientific opinion if intelligible, convincing and tested becomes a factor and often an important factor for considering the other evidence of the case. The credibility of the expert witness depends on the scientific data, materials and the reasons which he has furnished in support of the conclusion. Reference in this connection may be made to the judgment of the Supreme Court in the case of *State of H.P. v. Jai Lal and others* (Supra) and *Ramesh Chandra Agrawal v. Regency Hospital Ltd. & Ors.* (Supra).

61. In the instant case neither the contents of the report (Exhibit 7 series) nor the evidence of the two expert witnesses (P.Ws. 7, 11) furnish any scientific data or the photograph in support of the conclusion that the markings on the three fired cartridges and four test fired cartridges were identical nor does it indicate that the markings on the test fired bullet and the deformed bullet were identical. In the circumstances, it may not be appropriate for me to rely on the contents of the report and the evidence of P.Ws. 7, 11 to hold that deformed fired bullet (Material Exhibit-C) and the three fired cases recovered from Sammelan Market and vacant land outside the market was fired from the service pistol of Accused No. 1 bearing No. 15341678.

62. Now I proceed to consider the evidence of eyewitness of the occurrence Baldeo Paswan (P.W. 5), a tea shop vendor. He has deposed that the occurrence took place 2 1/2 years earlier. On the date of occurrence around 3:15 P.M. he had come to the milk booth situate in front of Sammelan Market to purchase milk but the milk was not available, he returned to his shop situate 150-200 yards away from Sammelan Market. P.W. 5 again came to the milk booth around 4:00 P.M. but at that time also milk was not available. Meanwhile, violence had begun in Sammelan Market. Hearing the alarm P.W. 5 went to the market, saw the shopkeepers assaulting the three boys after locking the grill gate from inside in the corner of the market where also there are 10-12 shops. P.W. 5 also identified those who assaulted the three boys namely, Accused No. 7 Rakesh, Accused No. 4 Sonu, Accused No. 5 Soni, one Sub Inspector, Constable and Mukul who resides in Central Excise and is engaged in repair of radio, musical system and television sets, Accused No. 3 Kamlesh, Accused No. 8 Anil. P.W. 5 further deposed that he is not aware about the name of the Sub-Inspector, Constable of Digha Police Station. Constable called Arun ji (Accused No. 2) who is also a constable attached to Shastri Nagar Police Station. Arun telephonically contacted Shastri Nagar Police Station whereafter Sub Inspector from Shastri Nagar Police Station Salam (whose full name the witness is not aware) came. Arun ji informed

the Sub Inspector that the dacoits have been apprehended and thereafter Sub Inspector of Shastri Nagar Police Station shot the three boys who died at the spot. According to P.W. 5 besides the shopkeepers of Sammelan Market the three boys were also assaulted by one Sub Inspector, Constable and Mukul who resides in Central Excise Colony and is engaged in repair of radio, musical system and television sets. P.W. 5 further deposed that Accused No. 2 Arun Singh made telephone call to Shastri Nagar Police Station giving information about the incident whereafter Accused No. 1 came to Sammelan Market in gypsy whereas the evidence of another eye-witness P.W. 30 is that P.W. 17 Abhay Kumar telephonically informed Shastri Nagar police about the occurrence whereafter Accused No. 1 along with 3-4 officers, policemen came to Sammelan Market in gypsy, Constable Accused No. 2 came on a cross mobile motorcycle. P.W. 5 has also not stated that Accused Nos. 2 to 8 were armed with any weapon or that as a result of assault the deceased fell down. He has also not stated that Accused No. 1 shot the deceased while the three were lying motionless in the corridor/ passage in fact he has not furnished any detail about the manner of assault. P.W. 5 did not record his police statement before Shastri Nagar Police or the C.I.D. until the case was investigated by them and made his first police statement before Investigating Officer, C.B.I. after four months of the occurrence as an eye-witness of the occurrence. In the circumstances, the trial court, in my opinion, has rightly rejected his testimony as a witness of the shoot-out by Accused No. 1. His evidence about the participation of other co-accused in the assault on the three deceased also appears to be doubtful as according to him before the three deceased were shot by Accused No. 1 they were assaulted by Accused No. 7 Rakesh, Accused No. 4 Sonu, Accused No. 5 Soni one Sub Inspector, Constable and Mukul of Central Excise engaged in repair of radio, musical system and television sets, Accused No. 3 Kamlesh, Accused No. 8 Anil but the Investigating Agency has not found his version true about the complicity of one Sub Inspector, Constable and Mukul in the first part of assault before Accused No. 1 shot the three deceased. From Paragraph 2 of the evidence of P.W. 5 it, however, appears that the accused whom P.W. 5 described in Paragraph 1 as Mukul on being asked disclosed his name as Kumud (Accused No. 6) still the version put forth by P.W. 5 that Sub Inspector and Constable also joined the shop-keepers in assaulting the three deceased prior to the arrival of Accused Nos. 1, 2 has not been found true by the Investigating Agency as during investigation the identity of the Sub Inspector, Constable who were seen by P.W. 5 assaulting the three deceased along with the shopkeepers prior to arrival of Shastri Nagar Police i.e. Accused Nos. 1, 2 has not been established. It is further relevant to notice that in Paragraph 48 P.W. 5 himself has admitted that at the time of occurrence there was cold wave condition in the town and dense fog suspended in the area. In such circumstances it may not have been possible for P.W. 5 to have seen, identified the miscreants assaulting the boys from outside Sammelan Market as the assault was being made in the corner of the passage/corridor inside the market. In the circumstances, it may not be safe to rely on the identification of the shopkeepers of Sammelan Market made by P.W. 5 who according to him were

assaulting the three deceased inside the market prior to arrival of Accused Nos. 1, 2 at Sammelan Market.

63. P.W. 30 Mahesh Yadav is also an eye-witness according to the counsel for the informant. He has stated in his evidence that the occurrence took place on 28.12.2002 around 4:00 P.M. and at that time he was in a tea shop taking tea near Sammelan Market and having heard quarrelling noise came to the market, saw inside the market three boys between 22-24 years of age being assaulted by 10-12 men after closing the market gate. Amongst those who were assaulting the boys P.W. 30 identified Accused Nos. 3, 8 and thereafter went on the road. From the road P.W. 30 saw Sub Inspector of Digha Police Station Abhya Singh (P.W. 17) and one constable. According to P.W. 30 Abhay Singh made telephone call to Shastri Nagar Police Station informing the police that miscreants have been apprehended whereafter Accused No. 1 came on a jeep with 3-4 police constables. Accused No. 2 Arun Singh Constable came on a cross mobile motorcycle. There was stampede. Policemen went inside the market gate and this witness went away and heard firing sound. After two hours P.W. 30 again came and saw the three dead bodies being taken on a tractor trolley. Later P.W. 30 learnt that the deceased were students.

64. From the evidence of P.W. 30 it is evident that he identified amongst the shopkeeper assailants only Accused No. 3 and his brother-in-law Accused No. 8 without indicating his prior acquaintance with them which enabled him to know their name. This witness has not identified any other shop-keeper. He also did not record his police statement before Shastri Nagar Police and C.I.D. and recorded his first police statement before the Investigating Officer, C.B.I. after about three months of the occurrence. In the circumstances, his deposition is also required to be rejected as he has not given any reason as to why did he not record his statement before the Investigating Officer of Shastri Nagar Police and the C.I.D. and failed to explain as to how he could know that case is being investigated by the C.B.I. and he should record his statement.

65. P.W. 21 Ramdutta Yadav according to the counsel for the informant is an eye-witness stated in his evidence that the occurrence took place on 28.12.2002 between 4:30-5:00 P.M., his house was being constructed at a distance of 400-500 metres north of Sammelan Market. At the time of occurrence many persons were standing in front of Sammelan Market. Alarm was raised, he also went there, stood up and saw from the market gate three boys calling him (uncle) to save their life. P.W. 21 further deposed that he saw the three boys being assaulted with stick, rod, pipe by those who were inside the market but he could not clearly identify the assailants, meanwhile gypsy from Gardanibagh Police Station arrived and at the same time policemen from Digha Police Station also came by motorcycle. The onlookers were asked to disperse. P.W. 21 while coming back to his site heard 5-6 rounds of firing. P.W. 21 also deposed that while he was going to Khajpura, reached near Ramvilas Paswan Bhawan someone informed him that the grandson of Kishori has been killed. He went to

the house of Kishori and informed him about the incident.

66. From the evidence of P.W. 21 it appears that the three boys were being assaulted by the shopkeepers inside Sammelan Market but he could not see the assault clearly and identify the assailants. According to him both police officers from Gardanibagh (Shastri Nagar) Police Station and Digha Police Station arrived together which is also not the prosecution case. In the circumstances, it may not be safe to rely on his evidence. In any case he has not identified any of the appellants as the assailants as such his evidence is hardly of any assistance to the prosecution so far it relates to the complicity of the accused persons.

67. Delay of few hour simplicitor in recording the police statement of witness may not itself amount to a serious infirmity in the prosecution case but it may assume such a character if there are concomitant circumstances to suggest that the investigator was deliberately marking the time with a view to decide about the shape to be given to the case and the eye witnesses to be introduced. Reference in his connection may be made to the judgment of the Supreme Court in the case of Ganesh Bhavan Patel and Another Vs. State of Maharashtra, and in the case of Surajit Sarkar Vs. State of West Bengal, . In the instant case P.Ws. 5, 30 have not recorded their statement at all before the Investigating Officer of Shastri Nagar Police Station, C.I.D. and it is not explained by the Investigating Officer, C.B.I. (P.W. 32) or his assistant P.W. 28 Naresh Indaura about their source of information to reach P.Ws. 5, 30 for recording their statement. In the circumstances, both P.Ws. 5, 30 appear to have been procured by the Investigating Officer, C.B.I. to buttress the prosecution case. Even otherwise if P.W. 21 could not clearly identify the assailants amongst the shopkeepers as the occurrence has taken place in the evening of 28.12.2002 between 4:30-5:00 P.M. it may not have been possible for P.Ws. 5, 30 to identify them at the same time because of suspension of fog in the area.

68. From the evidence of P.W. 1 Mukesh Ranjan and P.W. 22 Lakshman Singh, it appears that aunt of Vikas Ranjan expired in Ara on 12.12.2002, her Shradh ceremony was performed on 26.12.2002 also at Ara. Parents of Vikas attended the Shradh but he could not attend the same. Vikas, Prashant and Himanshu decided to go to Ara on 28.12.2002 to pay respect to his aunt. Prashant and Himanshu came to the shop of Vikas at Ashiyana More and decided to take their another friend with them and came to the P.C.O. Booth of Accused No. 3 in Sammelan Market. Heated argument took place between the three friends and Accused No. 3 due to false bill, other shopkeepers of the market pacified the three friends and they went away. The three friends again returned to Sammelan Market between 4:00-4:30 P.M., there ensued another quarrel with Accused No. 3 who with the help of his brother-in-law Anil Kumar (Accused No. 8) and other accused shopkeepers assaulted the three friends with hard, blunt substance, as would appear from the evidence of P.Ws. 5, 21, 30. In the meantime Shastri Nagar Police, led by Accused No. 1, arrived, other police officials also arrived after they came to know that the encounter was going on in Sammelan Market.

In this regard reference is made to the evidence of P.W. 6 Dy. S.P. Secretariat, P.W. 10 Sub Inspector Gorakh Ram, P.W. 12 Sub Inspector Ezajul Haque, P.W. 27 Sub Inspector Nagendra Prasad who further deposed that due to assault by the shopkeepers the three friends became motionless. From the evidence of P.W. 14 it also appears that the three friends not only became motionless but blood also kept oozing out from their bodies. P.W. 14 also stated that the firing sound was heard and soon thereafter Accused No. 1 claimed before those present that the deceased were Ashok, Natwa and associate.

69. The counsel for the C.B.I. and the informant submitted that the aforesaid evidence establish the circumstance that it is Accused No. 1 who with due assistance from Accused No. 2 shot the three boys, which is not established beyond reasonable doubt as it was Accused No. 1 who claimed before the police official witnesses and others that the three deceased were Ashok, Natwa and associate. Aforesaid circumstance was put to Accused No. 1 while his statement under Section 313 Cr.P.C. was recorded and he categorically stated that the three deceased were shot in the police encounter. Had the written report of Accused No. 1 Exhibit 1/1 been legally admissible in evidence, I could have come to such conclusion but as I have already held above that the written report is hit by Section 162 Cr.P.C. and its contents cannot be looked into, it may not be possible for me to rely on the report to corroborate the aforesaid circumstance.

70. Now I proceed to consider the submission of the counsel for the C.B.I. and the informant that the recovery of arms and ammunition from the three deceased boys have been camouflaged/planted at the instance of Accused Nos. 1, 2 as P.W. 12 Ezajul Haque, the scribe of the seizure-list (Exhibits 16-16/3) has asserted in his deposition that the arms and ammunition has not been seized in his presence and he only scribed the seizure-lists on the dictation of Accused No. 1. I have already held that the written report of Accused No. 3 was submitted before Accused No. 1 at the place of occurrence at Sammelan Market itself. From the evidence of P.W. 12 it further appears that he reached the place of occurrence along with Sub Inspector Nagendra Prasad (P.W. 27), Sub Inspector Gorakh Ram (P.W. 10) and Assistant Sub Inspector R.K. Singh (not examined) and police force at 5:05 P.M., by that time written report of Accused No. 3 was received by Accused No. 1 and Accused No. 1 instructed P.W. 12 to take up the investigation. P.W. 12 inspected the market, recorded the statement of the eye-witness Ramesh Prasad, son of Jodhi Lal (D.W. 2), as would appear from Paragraph 48 of his evidence and then conducted the inquest proceedings on the three dead bodies at 5:30, 5:45 and 5:55 P.M. and thereafter became the scribe of the four seizure-list drawn at 6:10, 6:25, 6:35, 6:40 P.M. on the dictation of Accused No. 1 which has been signed by Accused No. 1 himself. In case seizure as is reflected from Exhibits 16-16/3 was not made before him and he only took dictation from Accused No. 1 which fact he disclosed before the Investigating Officer, C.B.I., as claimed by P.W. 12 in Paragraph 7 of his evidence then what prevented him from disclosing the same fact to Inspector General of Police Ashish Ranjan who visited Shastri Nagar Police Station on 28.12.2002 between

10:30-11:00 P.M. along with P.W. 2 on the instruction of Lalu Ji, as has been claimed by the informant in Paragraph (v) at page 11 of the written submission even after Accused No. 1 was made to surrender his official pistol and ammunition entrusted for official use to P.W. 12 in the same night at 11:10 P.M. as would appear from seizure-cum-production list (Exhibit-A) or to P.W. 9 the successor of Accused No. 1 who took charge of Shastri Nagar Police Station from Accused No. 1 on 30.12.2002, even after arrest of Accused No. 1 on 01.01.2003. In the circumstances, the claim of P.W. 12 that the seizure of arms, ammunition from the three deceased was not made in his presence as is reflected from the seizure-list and has been manipulated by Accused No. 1 after departure of Inspector General of Police Ashish Ranjan from the Police Station in the night of 28.12.2002 does not inspire confidence.

71. From the evidence of P.W. 12 in Paragraph 48 it appears that on 28.12.2002 he came to Sammelan Market at 5:05 P.M. and found bullet marks and thereafter recorded the statement of Ramesh Prasad Sahu (D.W. 2), son of Jodhi Lal Sahu, resident of Sammelan Market. D.W. 2 further stated before P.W. 12 that on the same day at 4:15 P.M. 9-10 miscreants came to Gautam S.T.D. Booth in the market, resorted to loot, firing and tried to run away meanwhile passersby assembled and police came to the market, miscreants also resorted to firing on the police party, in return fire three miscreants suffered injury, whereafter the members of the crowd, thousands in number, attacked them causing grievous injury and death of three miscreants who could not succeed in making good their escape from the market. P.W. 12 further stated that from the three deceased pistol, empties, live cartridges, coupon, Rs. 1500/- in cash and change recovered. On the seizure-list D.W. 2 and one Rajiv Kumar are the witnesses. D.W. 2 also identified the motorcycle, scooter belonging to the miscreants parked outside Sammelan Market which was also seized and on that seizure-list also D.W. 2 and Rajiv Kumar put their signature. In Paragraph 49 P.W. 12 stated that he recorded the statement of P.W. 14 who came to Sammelan Market along with Accused No. 1 and two Home Guards. P.W. 14 stated before P.W. 12 that after his arrival in Sammelan Market miscreants shot at him but he had narrow escape and that the three deceased suffered grievous injury in the return fire resorted to by the Officer-in-Charge. The three miscreants after receiving fire-arm injury fell down whereafter the collected crowd assaulted them with rod, lathi, stick, bricks, stones and they died because of such injury. P.W. 14 also stated before P.W. 12 that arms, ammunition, coupon, cash, motorcycle, Bajaj Scooter was also recovered from the miscreants in presence of witnesses. P.W. 14 further stated that other miscreants resorted to firing managed to escape. Attention of P.W. 14 was invited towards his aforesaid police statement recorded in Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 but he stated in Paragraph 14 of his evidence that he does not remember to have made any statement in the said case. P.W. 14 further stated in Paragraph 14 that he does not even remember that he had a narrow escape in the firing resorted to by the miscreants. From the evidence of two Police Officers i.e. P.W. 12, first Investigating Officer of

Gardanibagh (Shastri Nagar) P.S. Case No. 866/02 and P.W. 14 who came to Sammelan Market along with Accused No. 1, it is evident that on 28.12.2002 at 4:15 P.M. 9-10 miscreants had descended on the telephone booth of Accused No. 3, resorted to loot, firing and few of the miscreants succeeded in making good their escape but the three deceased suffered injury in the return fire by Shastri Nagar Police and such fact was disclosed by D.W. 2 Ramesh Prasad Sahu, son of the owner of Sammelan Market and P.W. 14 who came to Sammelan Market along with Accused No. 1. In view of the aforesaid police statement of D.W. 2 noted in Paragraph 48 of the evidence of P.W. 12 that he (D.W. 2) is a witness of firing resorted to by the miscreants including the three deceased at the booth of Accused No. 3 on 28.12.2002 at 4:15 P.M., his deposition in court as D.W. 2 that he is only a witness to the first part of the occurrence i.e. quarrel in the afternoon of 28.12.2002 between 2:30-3:00 P.M. and that he again came to the place of occurrence at 5:15 P.M. on the same day does not inspire confidence.

72. Before parting with the judgment I would like to observe that the medical evidence in the instant case i.e. post mortem report (Exhibit 26 series) and the evidence of Autopsy Surgeon (P.W. 23) clearly establish that the three deceased were shot by fire-arm from a close range notwithstanding such medical evidence and evidence of P.W. 14 that Accused No. 2 first announced on the police wireless that Accused No. 1 shot the three criminals in encounter and thereafter Accused No. 1 himself disclosed to the media persons in presence of Dy.S.P., Secretariat (P.W. 6) that he has killed the three criminals in encounter, cannot be accepted as such statement was not made by P.Ws. 6, 14 in his police statement before P.W. 12. In his police statement P.W. 14 has stated before P.W. 12 that the three deceased became injured in return fire resorted to by the Officer-in-Charge after the miscreants first resorted to firing and he (P.W. 14) narrowly escaped fire-arm injury, the remaining miscreants managed to escape. Evidence of P.W. 14 as deposed in court is not being corroborated by his police statement cannot be acted upon to conclude that Accused No. 1 shot the deceased. Similarly, evidence of P.W. 6 Dy.S.P., Secretariat that he was informed by Accused No. 1 that he has shot the three deceased in encounter may not inspire confidence in me as such fact was disclosed to P.W. 6 by Accused No. 1 in presence of not only P.W. 12 but also other police officers but none of them has disclosed such fact in their police statement. The changed stand taken in court may not inspire confidence even Investigating Officer, C.B.I. deposed that he recorded the police statement of P.W. 6 and other officers but did not elaborate about their contents.

73. Now coming to the evidence of D.Ws. 3, 6. It appears they have been examined by the defence to support the encounter theory and that the stones were being pelted by the crowd assembled outside the market as was the police statement of P.W. 14 and further to implicate P.W. 17 Sub Inspector Abhay Kumar of Digha Police Station who perhaps came to Sammelan Market prior to Accused No. 1 and others. D.Ws. 4, 9 have also been examined to support the police encounter and that the stones were being pelted by the crowd assembled outside the market. D.W. 13 is a hearsay witness. He has himself neither seen

pelting of stones nor has deposed about the firing from either side. D.Ws. 15, 17 are the two Home Guards who came to Sammelan Market along with Accused No. 1 and were entrusted by him to control, discipline the crowd assembled outside the market. Both have deposed that they heard firing sound from both sides. None of the prosecution, defence witnesses has deposed that it was Accused No. 1 who opened fire and shot the deceased though Accused No. 1 had come to Sammelan Market along with P.W. 14, Gypsy Driver P.W. 13, and the two Home Guards (D.Ws. 15, 17), in the circumstances, it may not be justified to maintain his conviction only because while depositing his service pistol with P.W. 12 in the night of 28.12.2002 at 11:10 P.M. he surrendered 28 live rounds, 3 empties and three other empties were seized by P.W. 27 Sub Inspector Nagendra Prasad at 6:50 P.M. that too ignoring the police statement of P.W. 14 that miscreants holed up in Sammelan Market resorted to firing and he narrowly escaped the shot and that in return fire by Officer-in-Charge Accused No. 1 the miscreants suffered injury, particularly when P.Ws. 7, 11 while making microscopic comparison of the three seized empties with four test fired empties and deformed bullet with four test fired bullet did not take photographs of the markings on the objects under comparison and concluded that there were six lands and six grooves with twist towards right on the deformed bullet and that the breech face markings on the percussion caps of the seized empties and test fired empties were similar, which conclusion of the experts could not be verified in absence of the photographs.

74. In view of the findings recorded in Paragraph 50 onwards, Accused Nos. 1, 2 are granted benefit of doubt. Identification of Accused Nos. 3 to 8 as the one who assaulted the three deceased with hard, blunt substance prior to arrival of Accused Nos. 1, 2 and other police officers at Sammelan Market by P.Ws. 5, 30 also does not appear to be satisfactory and render confidence in view of discussion made in Paragraphs 62 to 68 above. They are also granted benefit of doubt. Reference is answered in negative, appeals filed by them are allowed. Impugned judgment of conviction, order of sentence is set aside. Appellants Shamshe Alam @ Md. Shamse Alam, Arun Kumar Singh and Kamlesh Kumar Gautam are in jail custody, are directed to be released forthwith, if not wanted in any other case. Other appellants are on bail, they are discharged from the liability of their respective bail bonds.

75. The three deceased have been found to be students in Paragraph 49 above without any criminal antecedent in the record of Shastri Nagar Police Station, their parents deserve grant of compensation and the State is directed to grant compensation to the parents of each of the three deceased a sum of Rs. 10 lacs from the Victim Compensation Fund referred to under Government of India, Ministry of Home Affairs letter No. 24013/94/Misc./2014-CSR.III dated 14th October, 2015 issued under the signature of Joint Secretary to the Government of India and the guidelines appended therewith. The amount be paid by the competent authority within 30 days from the date of the judgment.

76. Let a copy of this judgment be served on Home Commissioner, Bihar and Member Secretary, Bihar State Legal Services Authority for the needful.

Jitendra Mohan Sharma, J.

I agree.