

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.462 of 1993

Against the judgment of conviction, dated 8th October, 1993, and the order of sentence, dated 11th October, 1993, passed, by Shri Anil Kumar Sinha, 1st Additional Sessions Judge, East Champaran, Motihari, in Sessions Trial No. 50/47 of 1988/90 arising out of Kalyanpur P.S. Case No. 0154 of 1982

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1. Ram Uchit Rai, son of Late Shital Rai.
 2. Prahlad Rai, son of Late Shital Rai.
 3. Rambabu Rai, son of Shri Indradeo Rai.
 4. Raghunath Rai, son of Late Sonful Rai.
 5. Rameshwar Rai, son of Late Shital Rai.
 6. Ram Balak Rai, son of Late Shital Rai.
 7. Mahendra Prasad, son of Late Bhagwat Mahto.
 8. Beldar Rai, son of Late Sonful Rai.
- All residents of Village- Bakhri, P.S. Kalyanpur (previously Kotwa Police Station), P.O. Bakhri, District- East Champaran.
9. Ram Ayodhya Singh, son of Late Anaka Singh.
- Resident of Village- Bishambharpur, P.S. Kalyanpur (previously P.S. Kotwa) P.O. Bishambharpur, District- East Champaran.

.... Appellants.

Versus

The State of Bihar

.... Respondent.

WITH

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Criminal Appeal (DB) No. 529 of 1993

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1. Ramadhar Rai, son of Shital Rai, resident of Village-Bakhari, Police Station- Kalyanpur, District- East Champaran.
2. Sita Ram Singh, son of Ram Ayodhya Singh, resident of Village- Bishambharapur, Police Station- Kalyanpur, District- East Champaran.

.... Appellants.

Versus

The State of Bihar

.... Respondent.

WITH

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Criminal Appeal (DB) No. 538 of 1993

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Indradeo Rai, son of Tota Rai, resident of Village- Bakhari, Tola Patparia, Police Station- Kalyanpur, District- East Champaran.

.... Appellant.

Versus

The State of Bihar

.... Respondent.

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Appearance :

(In CR. APP (DB) No. 462 of 1993)

For the Appellants : None

For the Respondent : Mr. Ajay Mishra, A.P.P.

Mr. Nilesh Kumar, learned Advocate as *Amicus Curiae*.

(In CR. APP (DB) No. 529 of 1993)

For the Appellants : None

For the Respondent : Mr. Ajay Mishra, A.P.P.

Mr. Amish Kumar Jha, learned Advocate as *Amicus Curiae*.

(In CR. APP (DB) No. 538 of 1993)

For the Appellants : None

For the Respondent : Mr. Ajay Mishra, A.P.P.

Mr. Bindhyachal Singh, learned Advocate as *Amicus Curiae*.

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI

AND

HONOURABLE MR. JUSTICE GOPAL PRASAD

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE GOPAL PRASAD)

Date: 24-04-2015

Three appeals have arise out of the judgment of conviction dated 8th October, 1993 and order of sentence dated 11th October, 1993 by Shri Anil Kumar Sinha, 1st Additional Sessions Judge, East Champaran, Motihari, in Sessions Trial No. 50/47 of 1988/90 arising out of Kalyanpur P.S. Case No. 0154 of 1982 (G.R. Case No. 1778 of 1982) by which appellant, Indradeo Rai has been convicted for offence under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and further convicted for offence under Section 148 of the Indian Penal Code and sentenced to undergo



rigorous imprisonment for two years. Further convicted for offence under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for two years. The appellants, Ramadhar Rai and Sitaram Singh have been convicted for offence under Sections 307 of Indian Penal Code and sentenced to undergo rigorous imprisonment for seven years and further convicted for offence under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for two years each. Further convict Ramadhar Rai and Sitaram Singh have also been convicted for offence under Sections 302/149 of Indian Penal Code and sentenced to undergo rigorous imprisonment for life. Further convict Ramadhar Rai has been convicted for offence under Sections 302/149 of Indian Penal Code, but no separate sentence is awarded for the same. Convict Prahlad Rai, Ram Uchit Rai, Rameshwar Rai, Raghunath Rai and Ram Babu Rai have been convicted for offence under Section 201 of Indian Penal Code and sentenced to undergo rigorous imprisonment for three years and all the appellants have been convicted for offence under Section 148 of Indian Penal Code and sentenced to undergo rigorous imprisonment for a period of two years each and it has been ordered all the sentences shall run concurrently.

2. The case of the prosecution has unfolded by the First Information Report, may, in brief, that the pond of Bishambharpur was settled on bid in the name of Brijesh Ojha



The informant, P.W.6 learnt that the appellant, Indradeo Rai forming an unlawful assembly were fishing the fish in the said pond. The informant along with brother Bishwanath Sah (deceased) and other witnesses Nathuni Baitha (P.W.4), Deonath Sah (P.W.2) and Ramakant Ojha (P.W.1) proceeded to see illegal fishing by Indradeo Rai along with unlawful assembly. The accused persons after illegal fishing has concealed themselves at a distance of about 15 bigha north-east of the pond sitting at the orchard of Ram Babu Singh and adjoining sugarcane field. The prosecution party, the informant along with others reached at the mango orchard of Ram Babu Singh in way to the pond where the alleged fishing going on, all the accused persons appeared with fire armed like country made gun, pharsa, bhala and lathi. Ramadhar Rai instigated his uncle Indradeo Rai that enemies have come, killed them then Indradeo Rai who was holding the gun of Mahendra Prasad fired causing gun shot injury to Bishwanath Sah on his left eye. Mahendra Prasad also standing there. Bishwanath Sah got injured on his left eye and fell down near mango tree in the orchard. Further case that second fire was made by Ramadhar Rai causing injury to Nathuni baitha (P.W.4) on his right thigh and left elbow. The third fire was made by Sitaram Singh which hit Deonath Rai (P.W.2) on his right shoulder. The unlawful assembly consisting Shital Rai armed with rifle, Prahalad Rai armed with Bhala, Rameshwar Rai armed



with Pharsa, Ram Uchit Rai armed with a country made gun, Ram Babu Rai armed with Bhala, Ram Balak Rai and Beldar Rai armed with lathi, Raghunath Rai armed with Bhala and Ram Ayodhya Singh armed with lathi. Further case that Ram Ayodhya Singh (illegible) of Bishambarapur ordered to take the dead body, then Prahalad Rai, Rameshwar Rai, Ram Uchit Rai, Ram Babu Rai and Raghunath Rai lifted the dead body of the deceased and took away the same. When the informant and witnesses wanted to take possession of the dead body of the deceased, accused persons chased them out and latter the dead body was found in the field of Indradeo Rai about 1000 yards South from the place of occurrence i.e. orchard of Ram Babu Singh.

3. The case proceeded on the fardbeyan of Bindeshwari Sah (P.W.6) the informant recorded by the S.I. Shri Tej Narayan Singh (P.W.9) on 08.11.1982 at 14.30 hours. On the basis of fardbeyan, First Information Report was lodged and investigation proceeded. During investigation, dead body of the victim was recovered at 1100 yards south from the orchard where occurrence alleged to have been taken place. Inquest report was prepared and the dead body of Bishwanath Sah was sent for *post mortem*.

4. The police after investigation submitted *charge sheet*. Cognizance was taken, case was committed to the Court



of Sessions and framing of the charge for offence under Sections 302, 302/149, 307, 109 and 148 of the Indian Penal Code as well as Section 27 of the Arms Act. The trial proceeded. During trial ten witnesses were examined by the prosecution, P.W. 1 is brother of the informant, Ramakant Ojha in whose favour the pond was settled, P.W.2 Deonath Sah (injured) P.W. 3 Brijesh Ojha, P.W. 4 Nathuni Baitha (injured), P.W. 5 Sheonath Sah, P.W.6 Bindeshwari Sah, P.W.7 Dr. R.P. Karn, P.W.8 Dr. B. K. Agrawal, P.W. 9 Tej Narayan Singh and P.W.10 Imteyaz Ahmad.

5. Documents proved are receipt of arms (Exhibit-1), Exhibit- 2 series are signatures of Sheonath Sah and Hari Kishore Prasad on the inquest report, Exhibit-3 signature of Bindeshwari Sah, Exhibit-4 series are injury report of Deonath Sah and Nathuni Baitha, Exhibit-5 Postmortem Report, Exhibit-6 Fardbeyan, Exhibit-7 Formal F.I.R., Exhibit-8 Seizure list, Exhibit-9 Inquest Report, Exhibit-10 case diary and Exhibit-11 is certified copy of order passed in Cr. Revision No. 78 of 1986. The defence has also adduced two witnesses D.W. 1 Bisu Ram who has proved Exhibit-A and D.W.2 Sunil Kumar who has proved injury on the person. The defence has denied about manner and place of occurrence.

6. The trial court taking into consideration both oral and documentary evidence and considering the submissions of the parties convicted the appellants as mentioned above.



7. The learned counsel for the appellants challenged the order of conviction and sentence. It is submitted that occurrence took place for fishing of fish at the pond, settled to Brijesh Ojha who proceeded to the police station to inform the police about illegal fishing. The Brijesh Ojha came along with police party at the spot immediately but the police neither found any fishing nor any sign of fishing in the pond. Prosecution has neither proved that accused persons were fishing in the pond on the date of occurrence nor the I.O. has found any objective evidence of the fishing in the pond. Further submission on behalf of the appellants that prosecution party has failed to prove the time, manner and place of occurrence and/or has given any valid information about the whereabouts of the dead body when they claim to have seen the occurrence and where present at the place of occurrence when police reached there, though, they claim to be remained all along at the P.O. from the time of occurrence to the time of arrival of police force at the place of occurrence. It is further submitted that the witnesses are at variance about the place and manner of occurrence. Hence manner and place of occurrence has not been established and the depositions of witnesses are at variance. Hence the prosecution has not been able to prove the charges beyond reasonable doubt.

8. Learned counsel for the State however supported

the prosecution case. Further contends that witnesses have deposed and supported the prosecution case and case has been proved as per their evidence worthy or reliance.

9. Hence question for consideration whether prosecution has been able to prove the charges levelled against the accused persons beyond reasonable doubt.

10. The prosecution case as transpired from the evidence of the witnesses that prosecution party Nathuni Baitha, P.W. 4, Bishwanath Sah (deceased) and Deonath Sah (P.W.2) had taken the settlement of Bishambharapur pond in the name of Brijesh Ojha. They learnt from co-villager at about 1.30 to 2.00 P.M. on 08.11.1982, as per evidence of P.W. 1 and 2 that Indradeo Rai forming an unlawful assembly are fishing in the said Bishambharapur pond on 08.11.1982 along with Shittal Rai, Ramadhar Rai, Ram Babu Rai, Beldar Rai, Raghunath Rai, Indradeo Rai, Ram Uchit Ram, Prahlad Rai, Sitaram Singh, Ram Balak Rai, Mahendra Prasad and Rameshwar Rai. On receiving the information the informant along with his brother Bishwanath Sah (deceased) Deonath Sah, Nathuni Baitha and Ramakant Ojha and others proceeded towards Pokhra. They cross Nahar (channel) to the West of village. As soon as they reached at the Mango orchard of Ram Babu Singh to the West of Nahar, the accused persons Indradeo Rai and others came out from sugarcane field at the South-East of Mango orchard where



they had concealed themselves. The said mango orchard is at a distance of 15 Bigha North East of Bishambharapur pond. They were armed with country made gun, Pharsa, Bhala and lathi. Ramadhar Rai commanded that enemies have come and fire, then Indradeo Rai taking the gun of Mahendra Prasad fired causing injury to Bishwanath Sah on his left eye by which Bishwanath fell down and succumbed to injury. Thereafter, the second firing was made by Ramadhar Rai causing injuries to Nathuni Baitha on his thigh and elbow and third fire was made by Sitaram Singh causing injury of Deonath sah on his right shoulder.

11. The further case of prosecution that on receiving injury, Bishwanath Sah fell down and succumbed to injury then accused persons took away the dead body of Bishwanath Sayh tieing his hands and legs with the help of bamboo passing through the tied hands and legs like a pig carried towards West.

12. P.W. 9 is I.O. Tej Narayan Singh as per his evidence, he received the information at 1.20 P.M. on 08.11.1982 on written report of Brijesh Ojha (P.W.3). He recorded Sanha on the basis of the report of Brijesh and went to alleged Bishambharapur pond. He has further stated that there he learnt about the firing and injury to Bishwanath and others. He recorded the Fardbeyan of informant Bindeshwari Sah at the orchard of Ram Babu Singh and read over to him and



Bindeshwari Sah (P.W.6) signed. He proved Fardbeyan as Exhibit-6. The time of recording the Fardbeyan is 2.30 P.M. on 08.11.1982. He sent the Fardbeyan to O/C Kalyanpur and has proved the formal F.I.R. Exhibit-7 and then proceeded for investigation after recording Fardbeyan of informant. During investigation, he recorded further statement of the informant and inspected the place of occurrence. He found the dead body of Bishwanath Sah in the paddy field. He found the blood at the paddy field where he found the dead body of Bishwanath Sah. He prepared seizure list of blood found at the paddy field where dead body of Bishwanath Sah found. He also found blood at tree in the orchard and prepared seizure list (Exhibit-8) for it. He prepared inquest report (Exhibit-9) at 3.30 P.M. on 08.11.1982. He inspected the place of occurrence and given the description of the place of occurrence as per disclosure by the informant.

13. As per the description of the place of occurrence is the mango orchard of Ram Babu Singh and Prabhu Singh in the village Bishambharapur to the West of the Nahar. The mango orchard is North-South in length having mango trees in four lines North to South. The Eastern most line contains five mango trees. He found blood in two cubits at the second mango tree from North in the Eastern line which he seized. To the East of the orchard there is one plot in which there is paddy crop of Dhruv Singh and other plot of sugarcane. To South of the



sugarcane field of Dhruv Singh and to the East of orchard there is sugarcane field of Shiv Mangal Thakur. To the West of orchard there is mango orchard of Ramanand Singh and Rameshwar Singh. To the North of the orchard there is Road running East to West and across the road there is Siswani of Jagdish Singh and Most Sathi, wife of Late Ram Ratan Singh. To the South of the orchard after its boundary in the East there is Khatal and by the side East there is sugarcane field from where it is stated to have firing was made. To the East of the orchard of Ram Babu Singh, there is paddy field of Dhruv Singh and Mangal Thakur and to further East there is Nahar. The Bishambharapur pond is about seven hundred yard South from the mango orchard of Ram Babu singh. The paddy field of Indradeo Rai where the dead body was found is about four hundred yards South from the Bishambharapura pokhar (Pond).

14. P.W. 9 in his evidence stated that he inspected the Pokhra. He did not find any sign of the fishing. He did not mention the name of person whose house is nearest to the pond whereas house of Indradeo Rai is about 1/1/2 kilometer from the pond. He has not mentioned that in between the said paddy field and orchard there is no description of field of crops. He has not mentioned the description of the place where dead body was found as to whether it contain the standing paddy crop or the paddy crop was harvested at the place where dead body was

found. He has not mentioned whether the field where dead body was found, was dry or wet. However has mentioned that both hands and legs were opened straight over the field and face upward.

15. From the evidence of the prosecution witnesses, it is apparent that prosecution party learnt about fishing in the pond at about 1.30 to 2.00 P.M. It has come in evidence that witnesses learnt from the villagers as per in the evidence of P.W.2 in paragraph 11 that person who informed about fishing in the pond was a co-villager, but P.W. 2 is unable to disclose the name of the co-villager. He is unable to say at what time he got information, though, stated after he learnt he proceeded to the place of occurrence. In paragraph 1 he stated that he learnt about fishing about 1.30 to 2 P.M. P.W. 1 stated that he learnt about 1.45 P.M. However, P.W. 6 has also stated that he got information about fishing in the village by the villagers, but he did not know the name of the person who disclosed him as per evidence in paragraph 10 of his evidence. P.W.2, 3, 4, 5 and 6 have stated they do not saw the accused persons fishing but they asserted that accused persons had fished, though, P.W.1 has stated that he saw fishing from his own eyes about 600 persons were fishing. He has further stated that fishing was done by net, though, stated that he did not saw how much net were there, though, this witness proceeded from the village with



other witnesses but claimed to have seen fishing, though, other has not. He has further stated that he saw from the Bandh that fishing was done from the morning till 1 P.M. P.W. 5 has stated that he did not heard about fishing in the village (paragraph 14) and has stated that he proceeded on hulla by the witnesses. P.W. 6 in paragraph 9 has stated that he had not seen fishing by his own eye, but on that day fishing has been done in the pond since 10.00 to 11.00 A.M. However, I.O. in his evidence has stated he received information at 1.20 P.M. and reached the place of place of occurrence and he inspected the pond but there was no sign of fishing in the pond. He has stated that was there was no sign of fishing mentioned in the case diary and he has inspected Bishambharapur pond. Hence from the evidence of witnesses, it is apparent that prosecution has not been able to prove by cogent and reliable evidence either about fishing or even about any information they received about fishing so there is genesis of the occurrence regarding fishing in the pond, is missing and found to be palpably false. but except P.W.1 none have stated that fishing was made on that day. Hence it goes to the root of the prosecution story as genesis has not been established, though, the prosecution story is that they proceeded from their houses from the village having learnt that fishing was done in the Bishambarapur Pokhra has not been established as neither fishing is established nor the person from whom they got

the information is named nor that person has come to depose and the prosecution story is cock and bull story.

16. Further case that prosecution party, P.W. 1,2,3,4,5 and 6 learnt about fishing at about 1.30 to 2.00 P.M. They proceeded towards Bishambharapur Pokhra and after crossing the canal they reached near mango orchard of Ram Babu Singh where alleged firing was made and occurrence took place. However, it has been asserted that firing was made causing injury and death of Bishwanath Sah and accused persons chased and grab the dead body of Bishwanath Sah. P.W. 2 Deonath Sah and P.W. 4 Nathuni Baitha received injury and got injured, but accused persons chased them and they tied the hands and legs of Bishwanath Sah and carried the dead body of Bishwanath Sah with the help of bamboo like carrying a pig. However, at the juncture witnesses claimed they remained near the P.O. and dead body was taken by the accused persons to the West, but they did not try to locate where the dead body was being taken. They show their inability to say where the dead body was taken. They claimed however that death was by fire arm before them and accused persons took the dead body but the dead body is found within 1000 yards South in the field of Indradeo Rai.

17. Taking into consideration the evidence that they learnt about the occurrence about 1.30 to 2.00 P.M. and



thereafter, they proceeded from the village and came to Bishambharapur Pokhra where occurrence took place and the accused persons fired causing injury by fire arm and when prosecution party tried to take the injured Bishwanath Sah thereafter they chase the prosecution party. Thereafter, they tied the hands and legs of the dead body of Bisahwanath Sah and took the dead body to the West. However the I.O. P.W. 9 in his evidence has stated that he learnt about the occurrence at 1.20 P.M. from Brijesh Ojha and recorded Sanha and proceed to the Bishambharapur Pokhra and reached Bishambharapur Pokhra, there he learnt about the occurrence from Bindeshwari Sah and recorded his Fardbeyan at 2.30 P.M. at orchard of Ram Babu Singh. As per the prosecution case that occurrence took place in between 2.00 to 2.30 P.M. as case of prosecution they proceeded from village at 1.30 P.M.to 2.00 P.M. and occurrence took place when they reached the mango orchard of Ram Babu Singh and during the period the I.O. was also around the place of occurrence as he reached Pokhra after recording Sanha on statement of Brijesh Ojha at 1.20 P.M. and recorded Fardbeyan of Bindeshwari Sah at 2.30 P.M. in the orchard indicate the presence of I.O. at the place of occurrence at about the time of occurrence, though, I.O. states that learnt about the firing and injury to Bishwanath sah at the Bishambharapur Pond and the Fardbeyan Exhibit-6 shows the Fardbeyan recorded at orchard at

2.30 P.M. Prosecution witness deposed that they remain stayed at orchard or at and Nahar after the occurrence till Fardbeyan recorded.

18. Hence from the evidence of witnesses, it is apparent that time of occurrence as disclosed by the prosecution that witnesses proceeded from their houses at 1.45P.M. to 2.00 P.M. reached at place of occurrence where fishing was done. Bishwanath Sah received injury and then prosecution party seen the dead body was tied in hands and legs and taken by accused. Whereas the I.O. on information at 1.20 P.M. reached the place of occurrence and recorded statement at 2.30 P.M. at orchard when he received the Bishambharapur Pokhra first, but did not seen or heard the firing and taking the dead body cast a serious doubt about the time of occurrence as stated by the prosecution witnesses, particularly the evidence of P.W.3 Brijesh Ojha stated that he proceed to P.S. at 3.00 P.M. but I.O. says he recorded the written statement of Brijest Ojha at 1.20 P.M. and Sanha recorded on that basis. However, the said Sanha has also not brought on record cast a serious doubt on prosecution case.

19. The police reach at Pokhra on information by Brijesh Ojha in between 1.20 P.M. to 2.30 P.M. at Pokhra then reached to orchard and records the statement of informant at 2.30 P.M. when as per the prosecution the occurrence took place in between 2 to 2.30P.M. Then the fact that accused took the

dead body from orchard to paddy field but none seen them taking to paddy field of Indradeo, South of orchard in serious infirmity in prosecution case both for time and place of occurrence. When the witnesses deposed that they remain at place of occurrence and the dead body found at a distance of 1000 yards South from the orchard.

20. Now taking into consideration the evidence of witnesses of P.W. 1,2,4, 5 and 6 who claimed to the witnesses of the occurrence of the firing. In this context of the topographical feature of the place of occurrence has well been mentioned in evidence of I.O. P.W. 9 as well as in evidence of witnesses as disclosed that on receiving information of fishing at 1.30 to 2.00 P.M. they proceeded from their houses after crossing the canal they reached on road to the north of the mango orchard of Ram Babu Singh while at a distance of 2 lagga they saw accused persons coming out from the sugarcane field.

21. However, P.W. 1 has stated that he reach at the orchard of Ram Babu Singh then Ramadhar Rai said to Indradeo Rai, uncle that enemy have come and shot then Indradeo Rai taking the gun of Mahendra Prasad shot causing injury to Bishwanath Sah on his left eye. Thereafter, Ramadhar Rai fired from nalkutta by which Nathuni Baitha got injured on his thigh and elbow and Sitaram Singh fired from nalkutta causing injury to Deonath Sah on his shoulder. Thereafter, Shital Rai



commanded to proceed with the dead body to dispose of and they tried to take the dead body, but prosecution party chased and they stand up after going some distance saw accused persons taking the dead body towards west. Thereafter, Officer-in-charge Tej Narayan Singh came. However, in his cross-examination, he has stated in paragraph 13 that before they reached to the orchard at a distance 2-3 lagga away they saw accused persons for the first time they were going towards South from the west of the orchard then accused persons came out from the sugarcane field from the South-West corner of the orchard at a distance of one lagga, there was a 'Bandh' in between orchard and sugarcane field which was knee deep. Thereafter they remain standing at the place then they fired. He emphatically stated that at the time occurrence accused persons were facing north and Bishwanath Sah Sah standing on the road facing south and on receiving injury he fell down on the road. He stated that a Rasta adjoining North to the orchard. He has further stated Deonath was also standing facing south and person who assaulted was also facing North. He has also stated that where he got injury there blood has fallen and blood was fallen on the body of Bishwanath Sah and blood has not fallen on the ground. Further he has stated that accused persons came and carried dead body carried of Bishwanath Sah.

22. However, P.W. 2 in his evidence has stated that



he saw the accused persons came out from south-east of the orchard. he has further emphatically stated that he had not seen the accused persons came out from south-west, though, he has further stated that one accused persons came out from the west from the paddy field of Ram Babu Singh and hence evidence of P.W. 2 is in contrary to the evidence of P.W. 1 with regard to the fact that P.W. has stated that accused persons came out from the south-east corner of the orchard from sugarcane field whereas P.W. 2 has stated that accused persons came out from the South-West corner of the orchard which is also contrary to the evidence of P.W. 1. P.W. 2 emphatically has stated in paragraph 21 that they saw accused persons inside the orchard by the side of the orchard is again in contradiction to the evidence of P.W.1.

23. P.W. 3 is not eye witness to the occurrence. P.W.4 has stated that they reached inside the orchard and they saw accused persons were sitting armed with gun and then they commanded and in the command Indradeo Rai fired. In his cross-examination in paragraph 5 he has stated as soon as they entered into the orchard they saw accused persons sitting in the orchard, two accused persons came from the west and all were sitting at the same place and fired seeing them and at the time of firing only distance 2-4 lagga. He has further stated that accused persons remained in the orchard from the intitial stage

to the end and hence evidence of this witness is quite contradictory to the evidence of P.W. 1 and 2.

24. P.W. 5, though witness of the inquest has stated that when first time he saw the accused persons standing at the ridge of the sugarcane field, but fire was made from inside the field and distance about 3 and half lagga. However, stated that he did not see firing hit to Bishwanath Sah, but he see the injury. However, name of this witness does not find place in the First Information Report, though, he claims to be eye witness and has stated that on day there was hullah at about 12 Noon about fishing by Indradeo Rai and others. Brijesh Ojha went to police station to inform. The informant along with his brother Bishwanath Sah, Nathuni Baitha, Deonath Sah and Ramakant Ojha were goint to see Pokhra and he followed behind them maintaining a distance of 2-3 lagga. He also saw Prahalad Rai standing there. Thereafter, accused persons were remained at the place of occurrence and when police came then F.I.R. lodged at 2.30 P.M., but his name has not been mentioned in the First Information Report. Hence his evidence is doubtful.

25. P.W. 6 is the informant. However, he in his evidence stated that it was more than 1 P.M. he was going from his house to see fishing at the pond which was taken by Nathuni Baitha, and Bishwanath Sah and when he reached the orchard then Ramadhar Rai commanded uncle that enemy has come and



shoot him. Thereafter, Mahendra Prasad who was standing with gun fired at his brother Bishwanath sah which hit on his left eye. He has further stated that Ramadhar Rai fired which hit Nathuni Baitha on his elbow and thigh. Thereafter, Sitaram Singh fired from his Nalkutta. However, this witness is informant, though, in the first information report, he stated that Indradeo Rai took the gun of Mahendra Prasad from the hand of Mahendra Prasad and fired and Mahendra Prasad was standing by his side. However, in the evidence he has stated that Mahendra Prasad fired causing injury to Bishwanath Sah. However, this witness neither has been declared hostile nor attention has been drawn and his evidence is quite contrary to the prosecution case in the F.I.R. However, in his cross-examination in paragraph 11 stated that he when he reached in the orchard then he did not meet any one and accused persons surrounded and start assaulting. He has further stated that in the orchard, accused persons were there along with 4, 5 and 7 unknown persons. Hence taking into consideration the evidence of this witness his evidence is contrary to the prosecution case as well as in the first information report.

26. Taking into entire evidence of witnesses on the point of firing and injury, it is apparent that witnesses are at variance with regard to the firing and position of the accused and the victim. Some has stated that accused persons surrounded



the victim in the orchard thereafter they fired. P.W. 4 and 6 have stated that accused persons were in the orchard and they surrounded and fire. Further they have stated at the same time fire was made from 100 yards. However, it is absurd that fire was made from 100 yards when other accused persons surrounded the prosecution party in orchard which resulted in injury. However, P.W. 1 has stated that firing was made from south-east corner and firing was made from the same place where accused persons facing North-East. P.W. 2 has stated that accused came out from the South-West of the orchard and one accused person came from the West and fired. So the evidence of P.W. 1 and 2 are contradictory, though, P.W. 1 and 2 stated that firing was made outside the orchard whereas P.W.4 and 6 have stated that accused persons entered into the orchard they were sitting in the orchard and they surrounded the accused persons in the orchard then firing was made. Hence evidence of the witnesses are at variance with regard to position of the accused while firing and position of injured and manner of occurrence.

27. However with regard to firing, P.W.6 is the informant and has stated in Fardbeyan that Indradeo took the gun of Mahendra and fired at Bishwanath Sah by which he succumbed to injury whereas in his evidence as P.W.6 has stated that Mahendra fired at Bishwanath sah by which Bishwanath Sah

succumbed to injury and this is a serious contradiction to the root of prosecution case and the P.W.6 has neither been declared hostile nor attention drawn to discard this point of evidence which give a fatal blow to prosecution case.

28. However, though, the witnesses have stated about the firing by accused by fire arm causing injury to Bishwanath Sah, Nathuni Baitha and Deonath sah, but they are at variance about the place from where the accused persons fired as well as the place where the victim received injury. Witnesses are not consistent on the manner of occurrence as discussed above. Some says firing from South but some says from South-West and some says from inside the orchard and hence the witnesses at the manner of occurrence not corroboration.

29. P.W. 7 is the doctor who conducted the post mortem examination of dead body of Bishwanath Sah and found the following injuries;

"(1) One fire arm wound 1" x 1/2" x cavity deep over left eye - on dissection extravasation of blood was present underneath the wound. The bone of left orbit was fractured. The left cerebral hemisphere was lacerated wound contused. There was extravasation of blood over brain. The scalp bone over left occipital region was fractured and a bullet was dissected out and preserved.

(2) Blood clot over nose, mouth and left

ear.

(3) Abrasion 2" x 1" over front of neck.

(4) Abrasion 3" x 1/4" over right arm.

Weapon used in respect of injury No. (1), may be gun and in respect of injury No. 2 and (4), the weapon may be like lathi. The time elapsed since death may be within 36 hours. In my opinion death was due to shock and hemorrhage as a result of injury No. (1). The injury No. (2) is consequential injury of injury no. (1).

There is only one gun fire injury found in the person of dead body. I cannot say the presence of bullet in the brain inspire firing of gun with low velocity. The injury so caused likely to bleed profusely, it is possible. The injured with such injury may indulge in "Chatpatahat". If there be "Chatpatahat", the blood may flush out."

30. P.W. 6 is the doctor who examined Deonath Sah found the following injuries on his person.

"Abrasion of 1/2"x1/3" on his right arm. It is simple in nature caused by hard and blunt weapon may be like lathi."

31. Hence from the evidence of this witness, injury by fire arm is ruled out on the person of Deonath Sah. Hence the prosecution case about firing and Deonath Sah receiving injury by fire arm is ruled out. However, he has found two injuries on the person of Nathuni Baitha. Injury no. 1 has



shown as scratch 1/2"x1/2" on left thigh, nature simple. Injury No. 2 has shown as pellet injury of 5 MM x 4 MM. However, it has been opined that both injuries within twenty four hours, but injury no. 2 may be caused by country-made fire-arm and with regard to injury no. 2 depth is not mentioned and further opined pellet injury on Nathuni may be pellet, but size of pellet has not been mentioned. Further he has opined that injury no. 1 on the person of Nathuni Baitha may be caused by pointed or sharp weapon. Hence the injury on the person of Nathuni Baitha is also not corroborated fully as per the prosecution.

32. However having regard to the fact, though, injury found on the person of Bishwanath Sah, but dead body was not at the place where firing was made and explanation given that accused person took away the dead body by tieing the hands and legs just after occurrence. However, the injury report does not show or indicate injury on his hands and legs as per the evidence his both hands and legs were tied and he was carried with the help of bamboo in between his legs and hands like carrying a pig, but the injury report does not show the mark of tying the hands and legs. The manner in which the occurrence alleged in taking the body of Bishwanath Sah that the probability of the mark on hands and legs must have been found, but the post mortem report does not indicate any mark as such to corroborate the prosecution version. However the

body was taken from the orchard to paddy field, the body found in the paddy field as well as found blood oozing from body but no blood found in between the paddy field and the orchard from where the body is alleged to be recovered and hence the medical evidence does not corroborate the oral evidence and the prosecution case about the manner of occurrence.

33. Hence taking into consideration the entire fact and circumstance of the case, it is apparent that prosecution has not been able to prove that they proceed on informant of fishing by accused in pond as neither the fishing has been established nor it is proved they proceeded on information received from co-villagers about fishing. Hence the genesis of the case itself has not been established the time of occurrence, the place of occurrence and manner of occurrence as stated above has not been established as discussed above. The medical evidence also not corroborates the oral evidence. The witnesses are at variance on the manner of occurrence and about the place from where firing was made and injured person received injury.

34. Hence taking into consideration the entire fact and circumstance of the case, the prosecution has not been able to prove the charges beyond reasonable doubt about the time, place and manner of occurrence and are entitle to benefit of doubt. Hence I give the appellants benefit of doubt. Hence the order of conviction recorded by the trial court is set aside and

accused persons are acquitted of the charges. All the appeals are allowed.

35. All the appellants are discharged from the liability of their bail bonds.

36. Let the *Amicus Curiae* be paid a fee of Rs.5000/-.

37. Send back the Lower Court Records with a copy of this judgment and order.

(Gopal Prasad, J.)

I. A. Ansari, J. : I agree.

(I. A. Ansari, J.)

m.p./ NAFR

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