

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 901 of 2009

Against the judgment of conviction dated 27.08.2009 and order of sentence dated 31.08.2009 passed by Shri Baij Nath, learned Additional Sessions Judge-IV, Aurangabad in Sessions Trial No. 50/02+49/02/473/09 arising out of Daudnagar P.S. Case No. 17 of 2001, G.R. No. 216 of 2001.

- =====
1. Manoj Sharma
 2. Kaushal Sharma,
Both sons of Yogeshwar Sharma, R/O Village - Arai, P.S. Daud Nagar,
Distt. - Aurangabad

.... Appellants

Versus

The State of Bihar

.... Opposite Party

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Appearance :

For the Appellants : Shri Ajay Kumar Thakur, Advocate
Md. Imteyaz Ahmad, Advocate
Shri Nilesh Kumar Advocate
Shri Ravi Ranjan, Advocate
For the Respondent : Shri D. K. Sinha, A.P.P.
Susri Shashi Bala Verma, A.P.P.

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CORAM: HONOURABLE SHRI JUSTICE GOPAL PRASAD

and

HONOURABLE SHRI JUSTICE DHARNIDHAR JHA

C.A.V. JUDGMENT

(Per: HONOURABLE SHRI JUSTICE GOPAL PRASAD)

Date: 20 - 08 - 2015

The appellant Manoj Sharma has been convicted under Section 302 of the Indian Penal Code and Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs.20,000/- and in default of payment of fine has further been directed to undergo simple imprisonment for six months for the offence under Section 302 of the Indian Penal Code and one year rigorous imprisonment for the offence under Section 27 of the Arms Act. The appellant Kaushal Sharma has been convicted under Sections 302/34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment

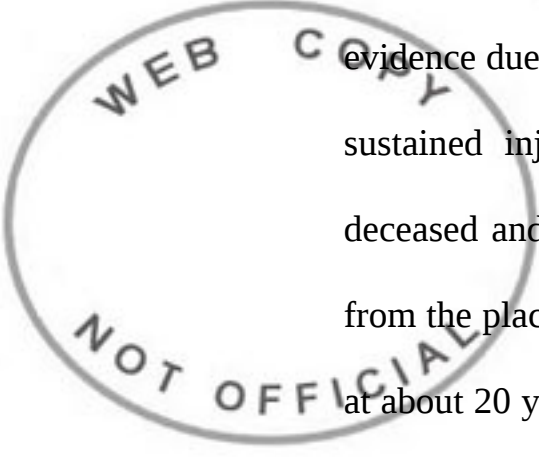
for life and to pay a fine of Rs.20,000/- and in default of payment of fine has further been directed to undergo simple imprisonment for six months.

2. The *fardbeyan* of the informant Ramjee Mauar (P.W. 10) was recorded by Sub-Inspector, Janardan Singh (P.W. 11) at 8:30 P.M. on 12.02.2001 at village Arai where the occurrence took place. The prosecution case, as alleged in the *fardbeyan*, is that the deceased Arvind Mauar, the brother of the informant (P.W. 10) Ramjee Mauar, was teaching the children in his *Dalan* at 7:15 P.M. The informant and his father Janak Deo Mauar (P.W. 3) were sitting in the eastern room, then they heard the sound of abuse from outside the road, on which the informant and his father came out of the room and saw that his brother Arvind Mauar was surrounded by Nand Kishore Mauar @ Nathun, Muneshwar Mauar, Manoj Sharma and Kaushal Sharma. In the meantime, the informant asked as to what had happened, on which Nand Kishore Mauar commanded to shoot on which Manoj Sharma armed with a country made pistol, fired at Arvind Mauar, the brother of the informant on his left chest at the point blank range and started fleeing away towards the west then the informant and his injured brother chased the accused persons for some distance and the injured brother of the informant caught hold of Manoj Sharma, but in the meantime Kaushal Sharma also fired so the informant and his brother left the accused persons and the accused persons fled away and then the

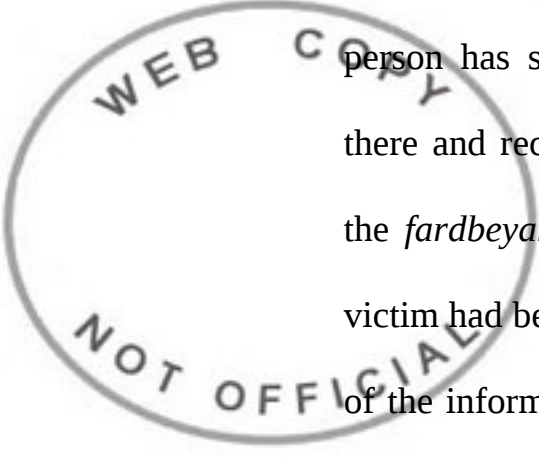
injured brother of the informant Arvind Mauar fell down there. The further case of the prosecution is that the injured brother was taken by his family members to the government hospital Daudnagar, but the informant learnt that his brother died in the way itself.

The motive behind the occurrence is that one Saroj Sharma was killed in village Arai in which the informant and his family members were witnesses and out of the said enmity, the brother of the informant had been killed. The further case is that the woolen cap of Muneshwar Mauar fell down at the place of occurrence while he was fleeing away which was still at the place of occurrence and the informant identified the accused persons in the light of lantern and torch. The said *fardbeyan* was read over and explained to the informant Ram Jee Mauar (P.W. 10) and after finding it correct Ram Jee Mauar signed along with the two witnesses Birendra Singh and Parmeshwar Mauar.

3. After recording the *fardbeyan* of the informant Sub-Inspector Janardan Singh (P.W. 11) proceeded for investigation and inspected the place of occurrence. The place of occurrence is the southern *Darwaza* (door) of the *Baithaka* of the informant which opened towards road. The said *Rasta* (road) goes to Thakur Bigha Kanaf village. The main door of the said *Baithaka* was towards east and there was another door also towards south of the said *Baithaka*. P.W. 11 has stated that the place from where the firing was made on the deceased



was situated near this door. However, this part of the evidence regarding the sustaining the firearm injury by the deceased is not admissible in evidence due to being hearsay. P.W. 11 has stated that where the injured sustained injury was about 50 yards north from the house of the deceased and the house of Natun Mauar was also about 50 yards west from the place of occurrence and there was house of Dineshwar Sharma at about 20 yards from the place of occurrence and there was the village road on the west and east side of the place of occurrence. On the north side of the place of occurrence there was *Baithaka* of the informant and in the south of the place of occurrence there was *Pucca Baithaka* of Rajendra Mauar. P.W. 11 has further stated that where the deceased Arvind Mauar was shot, he found the fodder (*kutti*) scattered and the fodder was blood-stained which was in front of *Baithaka* of Saligram Mauar and was also the main road from Thakur Bigha to Kanap and from the place where the road turns at the place of occurrence, there was house of Manoj Sharma and Kaushal Sharma and this was the place where Kaushal Sharma was allegedly fired at the second time. P.W. 11 also found a cap at the place of occurrence fallen which was seized by preparing the seizure list of the said cap and also prepared the seizure list of the blood-stained fodder (*kutti*). P.W. 11 has also stated that the seizure list of the blood-stained fodder was not on record. Thereafter, he raided the house of accused persons but found them to have absconded. However, taking into consideration the fact that this witness the Officer-



in-Charge of Daudnagar Police Station while on patrolling received an information at about 8:00 P.M. when he was at Thakur Bigha road that a person has sustained fire-arm injury in village Arai then he reached there and recorded the *fardbeyan* of the informant and after recording the *fardbeyan* he inspected the place of occurrence and thereafter the victim had been taken to Daudnagar Hospital though in way, the brother of the informant died and the dead body was lying there at Daudnagar Hospital. P.W. 11 proceeded from village Arai to Daudnagar, Primary Health Centre and prepared three copies of the inquest reports by the same carbon process. He has proved the carbon copy of the inquest report along with signature of Birendra Singh and Parmeshwar Mauar marked as Ext. 4 and then sent the dead body of deceased Arvind Mauar for post-mortem examination to Aurangabad hospital along with the *Challan* prepared by him and thereafter he came to Daudnagar Police Station and lodged the First Information Report which is in his handwriting bearing Daudnagar P.S. Case No. 17 of 2001 and proved the same in the writing of Police Station Munsif Ram Bhagat and proved the formal First Information Report marked as Ext. 2. Thereafter on 13.02.2001 P.W. 11 proceeded to village Arai recorded the statement of the witnesses and thereafter after investigation submitted charge-sheet after procuring the post-mortem examination report and after submission of the charge-sheet, cognizance was taken and the case was committed to the Court of Sessions. Thereafter the charges were framed

against Manoj Sharma under Section 302 of the Indian Penal Code and Section 27 of the Arms Act and the charges were also framed against Kaushal Sharma and others for the offence under Section 302/34 of the Indian Penal Code and the trial proceeded. During the trial twelve witnesses were examined as prosecution witnesses.

4. P.W. 1 Mantu Mauar is not an eye-witness to the actual occurrence of sustaining fire-arm injury but claimed to have seen the accused persons fleeing away and heard the sound of firing.

5. P.W. 2 Ugeshwar Sharma is again not an eye-witness but only a seizure list witness.

6. P.W. 3 Janakdev Mauar is the father of the informant and the deceased, who claimed to be the eye-witness. P.W. 4 Bhola Paswan is a formal witness who has proved the formal First Information Report which has been marked as Ext. 2.

7. P.W. 5 Maharaja Singh is formal witness who has proved the *fardbeyan* Ext. 3.

8. P.W. 6 Ranvijay Mauar claims to be the eye-witness and at the time of occurrence he was reading at his *Dalan*.

9. P.W. 7 Pintu Mauar is hearsay witness who has deposed that he heard that the accused persons fled away after killing the victim.

10. P.W. 8 Upendra Mauar has stated that he heard the sound of firing, then he came out from the house and saw accused

persons fleeing away and he followed Janakdev Mauar, Ranvijay Mauar, Ramji Mauar and when he reached at the *Darbaza* of Saligram Mauar then saw Arvind Mauar making a cry that Manoj Sharma shot and after making a cry he fell down and though this is further development in the prosecution case which has not been mentioned in the First Information Report. P.W. 8 though is not an eye-witness to the occurrence of firearm shot but has developed the prosecution story creating an evidence of *res gestae* under Section 6 of the Evidence Act as *res gestae*.

11. P.W. 9 Pappu Kumar is also not an eye-witness to the occurrence as he has stated that he heard the sound of firing while he was in grocery shop and then saw the four accused persons fleeing away and Ramji Mauar (P.W. 10), Janakdev Mauar (P.W. 3), Ranvijay Mauar (P.W. 6) were also running and when he came at the *Darwaza* of Saligram saw Arvind Mauar felling down in injured condition and Arvind Mauar was crying to '*Bachao-Bachao*' that Manoj Sharma had shot again. The prosecution story having been developed at the subsequent stage to create *res gestae* evidence. P.W. 10 Ramji Mauar is the informant himself. P.W. 11 Janardan Singh is the Investigating Officer. P.W 12 is the doctor Arun Kumar Gupta who conducted the post-mortem examination on the persons of the deceased and found the blackening tatoo marks oval in shape over the lower side of the chest above the left nipple size 1"x1/2" piercing in nature lacerated injury

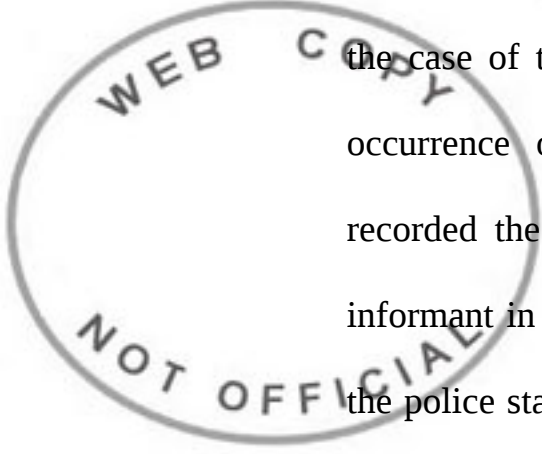
with margin inverted in that area. Fracture of second to fourth ribs on the left side. The bullet found loaded in right lung. Heart both the chambers empty, stomach containing semi digested food and the cause of death was hypovolumic shock leading to death. The weapon used is firearm.

12. The defence of the accused as is apparent from the suggestion as well as the seven witnesses induced on behalf of the defence D.W. 1 to D.W. 7 that the deceased Arvind Mauar was a veteran criminal and was accused in several cases and had no moral character and was murdered by extremist in the orchard to the west of the village and the family members were seen coming with the dead body of Arvind Mauar and the accused persons have no hand in the killing. One Siddarth was also murdered in Thakur Bigha by the extremist and not by the co-villager.

13. The trial Court taking into consideration the evidence of P.W. 3 Janakdev Mauar, P.W. 6 Ranvijay Mauar and P.W. 10 Ramji Mauar that they have supported the prosecution case about the firing by Manoj Sharma on the chest of the deceased and subsequent firing by Kaushal Sharma and brushing aside the argument that a person sustaining firearm injury on the chest of the nature cannot run to chase the accused and disbelieved the story as improbable and rejected with objection that a person preparing for appointment in military may be hit chased and caught hold of the assailant and held the appellants guilty

and sentenced as mentioned above.

14. The learned counsel for the appellants submits that the case of the prosecution is that the police reached at the place of occurrence on receiving the information while on patrolling and recorded the *fardbeyan* of the informant in the village itself but the informant in his evidence has stated that his statement was recorded at the police station as per his evidence in paragraph 3 in his examination in chief as well as in paragraph 15 in the cross-examination that he gave statement at the police station and signed after the same being read over to him and which he understood and in paragraph 15 after registering the written report at the police station, he returned to his village. He has specifically stated that he came in his jeep and the police came by their own jeep to the village and hence, submits that the First Information Report drawn at the police station has been suppressed. Hence, the original version recorded by the Police Officer at the police station has been substituted by a subsequent statement of the informant implicating the accused persons and hence, the First Information Report is not reliable and requires to be out rightly rejected. It has further been contended that no sufficient blood-stained has been found at the place of occurrence when there is allegation that there was gun shot injury on the chest of Arvind Mauar, the brother of the informant and he fell down and further the prosecution has developed the story from stage to stage that the deceased was making a cry that Manoj Sharma has killed him.

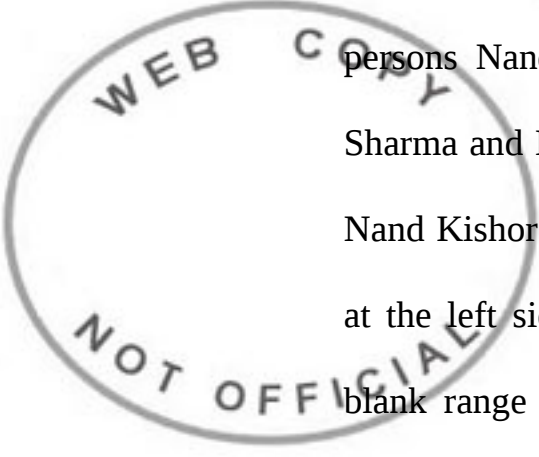


Further, the prosecution story is not reliable that the person receiving injury on the chest will run to chase the accused and catch hold of him and further the disclosure of the blood at a distance of 50 yards. Further there is development in the prosecution story and hence, is not acceptable and no independent witnesses are eyewitness to the occurrence and their evidence is not acceptable and hence, the prosecution has not been able to prove the charges leveled against them.

15. Learned counsel for the State, however, contended that the prosecution has proved the charges as there is evidence of firing.

16. However, taking into consideration the respective submissions of the parties the question for consideration is as to whether the prosecution has been able to prove the charges beyond reasonable doubt by cogent, reliable and unimpeachable evidence and whether the First Information Report is reliable and acceptable piece of evidence to be relied upon.

17. I proceed to consider the case of the prosecution that the Investigating Officer (P.W. 11) while on patrolling received an information that a person had sustained a firearm injury in village Arai and then he proceeded to the village Arai and recorded the *fardbeyan* of Ramjee Mauar (P.W. 10) the informant who is nonelse than the brother of the deceased and his statement in the *fardbeyan* that he was in the eastern side of the room along with his father and his brother deceased

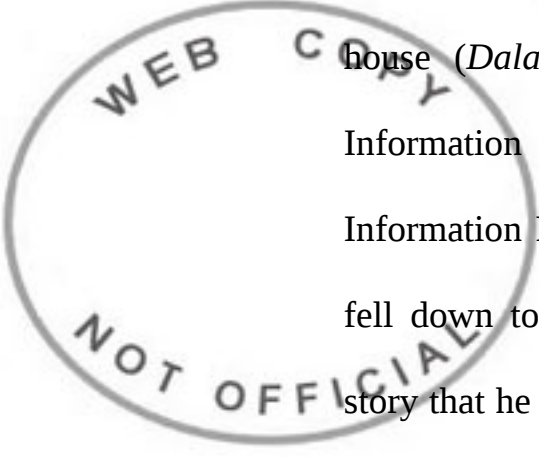


Arvind Mauar was teaching the children and on hearing the sound of abuses he along with his father came out and saw the four accused persons Nand Kishore Mauar @ Nathun, Muneshwar Mauar, Manoj Sharma and Kaushal Sharma surrounding his brother and on his asking Nand Kishore Mauar commanded to kill on which Manoj Sharam fired at the left side of the chest of his brother Arvid Mauar from a point blank range and he started fleeing away towards the west. Here the emphasis is that the victim after assault fled towards the west. However, his further case is that he and injured brother chased for some distance and Manoj Sharma was caught by his injured brother Arvind Mauar but he stated that in the meantime Kaushal Sharma fired another round and on the said firing he released the accused and accused fled away and thereafter his brother fell down. The witnesses who have been named as witnesses on the *fardbeyan* are Birendra Singh and Parmeshwar Mauar. However, these two witnesses of the First Information Report have not been examined as witnesses during the trial. Hence, from the prosecution case, it is apparent that there was two firing. The first firing hit the deceased and the second firing did not hit anyone and as per the evidence of the doctor there is only one firearm injury on the left side of the chest and it was the first firing which hit the deceased.

18. However, as per the evidence of Mantu Mauar (P.W.1) he was sitting at his *Dalan* when he heard the sound of '*Bachao-Bachao*' then he came outside with a torch and at that time he

heard the sound of firing. He saw that Ramjee Mauar and his father Janak Deo Mauar were running towards the sound of firing and when he lit the torch then saw Manoj Sharma, Kaushal Sharma, Nand Kishore Mauar @ Nathun and his father Muneshwar Mauar were running away. He saw that Arvind Mauar had received a firearm injury on the chest and was lying there. On inquiry Ramjee Mauar disclosed that Manoj Sharma has shot. However, this witness is not the eye-witness to the occurrence and has stated that Ramjee Mauar and Arvind Mauar were running towards the west.

19. P.W. 2 is not an eye-witness to the occurrence but he is only seizure list witness. P.W. 3 is the father of the deceased and his evidence is that while he was sitting in room he heard the sound of *Hulla* and then Manoj Sharma shot at Arvind Mauar causing injury in his chest and the accused persons started fleeing away and then Ramjee Mauar the informant and he himself after chasing 100 yards Arvind Mauar caught hold of Manoj Sharma then Kaushal Sharma fired and Arvind Mauar fell down there. However, this story of chasing for 100 yards itself is improbable in view of the injury on the person of the deceased and is not acceptable and is development in prosecution story. Though the Investigating Officer has found blood in between the first shot and second shot and has stated that at the place where the first shot was allegedly fired, there was no blood whereas in between the first and second shot there was some blood. However, he has proved the seizure



list of the blood-stained fodder. Moreover, the prosecution has developed the prosecution story that the victim was first taken to the house (*Dalan*) but this fact has not been mentioned in the First Information Report rather the prosecution story as in the First Information Report that the victim was taken from the place where he fell down to the hospital whereas the prosecution has developed the story that he was taken to the house where he was kept on a *Chauki* but the said *Chauki* was not shown to the Investigating Officer when the Investigation Officer came. Informant has reached the place just after the occurrence. However, though it is argued that the First Information Report was drawn just after the occurrence and hence, the authenticity of the First Information Report should not be doubted. Mere lodging of the First Information Report immediately does not lend assurance that the allegation made are true unless it stands proved during the trial. However, the prosecution has developed the story that Janak Deo Mauar (P.W. 3) ran along with the deceased after receiving the first shot on his chest whereas the First Information Report mentioned that it was only the informant and deceased who ran to chase the accused. As per the First Information Report the first place is just out side the *Dalan* where the firing was made.

20. P.Ws. 4 and 5 are again not the eye-witnesses to the occurrence but they are only formal witnesses who have formally proved the document.

21. P.W. 7 is the hearsay witness and has stated that he heard that the accused persons had shot Arvind Mauar and he come to say that he took the deceased to *Dalan* and then he was taken on jeep to Daudnagar hospital. This evidence is again a development in the prosecution case to explain the blood in between the first shot and second shot that this witness has said while taking the victim from the place of occurrence where he was fallen down to *Dalan* the blood trickled down and has developed new story that Arvind Mauar was kept on a *Chauki* and was kept for half and hour there and that *Chauki* was also stained with blood and has stated that after two hours of receiving the firearm injury the victim died. However, the occurrence took place as per the prosecution story at about 7:15 P.M. and the *fardbeyan* was recorded at 8:30 P.M. at the village itself but at that time the informant was in the village and had received the information about the death of the victim while on way to hospital and this is contrary to the evidence of P.W. 7.

22. P.W. 8 has also come to depose that he heard *Hulla* thereafter the sound of firing then he came out from his house and saw the accused persons fleeing away. However, he has developed the story of the prosecution by stating that when he reached at the place where Arvind Mauar had fallen down, he was crying that Manoj Sharma had shot him and after making a cry he fell down and was taken to *Darwaza* and hence, the prosecution has developed a further story that not only

that he was taken to *Darwaza* but he was shouting taking the name of Manoj Sharma as his assailant. This is again a development in the prosecution story to create an evidence of *res gestae* which is a further development in the prosecution case.

23. P.W. 9 has also stated that he after hearing the sound of firing saw four accused persons fleeing away and he also claims to have heard that Arvind Sharma was shouting '*Bachao-Bachao*' and that Manoj Sharma had killed him. This is an attempt to create an evidence of *res gestae* under Section 6 of the Evidence Act and also to create an evidence of dying declaration under Section 32 of the Evidence Act and it is a further development in the prosecution story where in the First Information Report there is no mention that Arvind Sharma was making either shouting or making any disclosure when the informant claims that he all alone chased the accused and was present right from the time when the first shot was fired and when the second firing was alleged to have been made. However, the evidence of P.W. 9 is not palpable in view of his evidence in paragraph 9 in cross-examination that at the time when he heard the sound of firing he was sitting in a grocery shop and on hearing the sound of firing he was in the shop for about 10-15, minutes but he did not return to his house and remained sitting. But again said that at the time of second firing he was in the way and it was a dark night though he claims to have seen the accused persons fleeing away hence his evidence is completely unreliable.

24. P.W. 6 though claims that he was reading at the time of occurrence and had come to depose that he heard the sound of 'Bachao-Bachao' then Arvind Mauar came out and on the command of Nand Kishore Mauar @ Nathun, Manoj Sharma shot causing injury on the chest and while chasing the accused the blood oozed out from the body of the deceased and fell on the ground and Arvind Mauar on chase caught hold of Manoj Sharma even after receiving gun shot injury and he has also developed the story of taking the victim to *Dalan* and blood fell down on earth.

25. P.W. 10 has also supported the prosecution case as alleged in the *fardbeyan*. However, merely because the witnesses have supported the prosecution case, it is itself is no ground to accept them as reliable witnesses. It is alleged that the deceased ran and caught hold of the accused Manoj Sharma and as per the evidence of P.W. 3, the deceased chased up to a distance of 100 yards to catch the accused and in this regard it is proper to quote paragraph 6 of the decision in the case of ***Tej Bahadur Singh v. State of U.P.*** reported in ***AIR 1990 SC 431***.

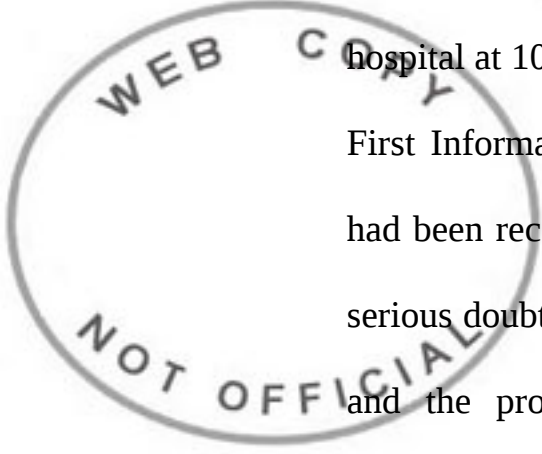
“Learned counsel for the appellant was at pains to re-read the statements of Raisuddin (PW 1) the complainant, Ghulam Mohammad (PW 2) a government servant, who was called to the police station by a Constable to be a trap witness and Kazim Hasan (PW3) an employee of a private company, who also was called to the police station for the same purpose and that of Shri Srivastava (PW 4) the trap leader, laying stress on minor discrepancies with regard to the incident. Such effort was, however, futile for we remained unimpressed with such approach; more so, because of the scope of Art.136 of the Constitution. The narration of the prosecution case as

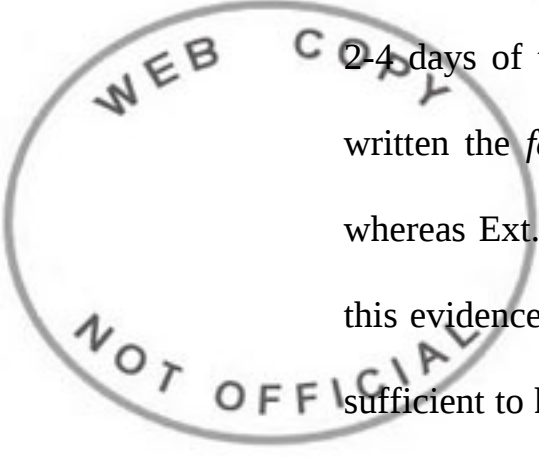


is given by the prosecution witnesses, to say the least, was foolproof inasmuch as none of the witnesses faulted anywhere in his respective statement. On that basis, we could have dismissed the appeal, yet we do not. Rather the foolproof narration given by the prosecution witnesses' has left us with the impression that the story put forward is lifeless and mechanical and does not stand scrutiny when tested on the preponderance of probabilities, having regard to human behaviour in the day-to-day happenings when moving on the road of life and on that analysis, some doubts have entered our mind which we express hereafter."

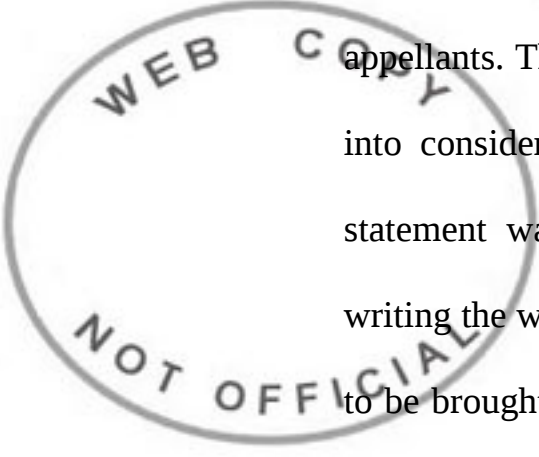
26. However, the whole prosecution story and the evidence of the witnesses are required to be tested on the basis of the First Information Report. The First Information Report as per the prosecution case and the evidence of the Investigating Officer was recorded at 8:30 P.M. on 12.02.2001 at village Arai and the Investigating Officer had stated that on receiving the information while on patrolling duty, he immediately rushed to village Arai and recorded the statement of the informant at village Arai and as per Ext. 3 proved by the prosecution and the statement of the informant in the *fardbeyan* apparently appears that it was recorded at village Arai when the informant had stated that he received information that the victim has died while being taken to hospital in way. But the informant in his evidence has stated that he gave statement in the police station as stated in his *fardbeyan* and further statement was recorded at the police station. However, to the contrary the First Information Report Ext. 3 has been proved as statement made at the village. Again, it is highly improbable that the informant who is the brother of the deceased

remained at the village when the victim was being taken to the hospital. He proceeded to the hospital and inquest report was prepared at the hospital at 10:30 P.M. mentions the police station case number when the First Information Report was drawn and the First Information Report had been recorded at about 23:30 P.M., i.e., 11:30 P.M. and it casts a serious doubt about the prosecution case in the First Information Report and the probability of the First Information Report having been manufactured cannot be ruled out that the *fardbeyan* recorded at 8:30 P.M. The inquest report was prepared at 10:30 P.M. and the First Information Report was lodged at 11:30 P.M. i.e. 23:00 hours on 12.02.2001 itself creates a doubt about the First Information Report. Moreover, in view of the evidence of the informant that after recording the First Information Report he proceeded after giving his statement in the *fardbeyan* after giving the report at the police station. He returned back on his own jeep and the police also came to the village on his own jeep. This evidence is sufficient to create a doubt regarding the evidence of the Investigating Officer that he on information while on patrolling came to the police station rather from the evidence of this witness in paragraph 5, it is apparent that the report was written at the police station. The written report was written at the police station and the police also reached along with the informant in the village after the *fardbeyan* was recorded in paragraph 25. This witness has again stated that for the first time his statement was recorded at the police station but





none was examined there and his first statement was recorded on 12.02.2011 and his second statement was recorded at his *Baithaka* after 2-4 days of the occurrence. He has further stated that he himself had written the *fardbeyan* and he was in full, fair, balance state of mind, whereas Ext. 3 points out that it was written by the Police Officer and this evidence is apparently without any doubt and can be held that it is sufficient to hold that the First Information Report was manipulated and has been changed and hence, taking into consideration the entire evidence, the probability of changing the *fardbeyan* or the earliest version is not ruled out and within all probabilities it has been changed further and as per the evidence of the informant that the First Information Report was in his writing at the police station whereas the First Information Report proved as Ext. 3 is in the writing of the police officer and recorded at the village Arai. The two witnesses named as the witness on the *fardbeyan* Birendra Singh and Parmeshwar Mauar have not been examined in this case, who are also the witnesses of the inquest, casts a serious doubt and further the witnesses of the prosecution case are neither reliable nor worthy of credence nor can be tested on their evidence and the prosecution has changed the version and they have developed the story to take the victim from place of occurrence to *Dalan* and then to hospital and further developed the story that the deceased prior to his death was taking the name of the accused Manoj Sharma that he had killed him. It is a serious development to



falsely implicate and get the appellants convicted and hence, on the basis of the same, it is neither proper nor reasonable to convict the appellants. The trial Court did not go into this question and did not take into consideration the evidence of P.W. 10 who had stated that his statement was recorded at the place of occurrence and he gave in writing the written report, but the same was suppressed and was allowed to be brought on record rather a police version making out case that he got information while on patrolling to reach the place of occurrence to record the First Information Report whereas the evidence of the informant that he gave a written report at the police station and after recording the written report at the police station the police proceeded with him to the place of occurrence while he was on his jeep and police was following him on their own jeep. This creates a serious doubt in the prosecution story and further the prosecution developed the story of creating an evidence of *res gestae* and dying declaration which is not at all acceptable under the facts and circumstances of the case.

27. Hence, we find and hold that the prosecution has not been able to prove the charges beyond reasonable doubt and the judgment of conviction dated 27.08.2009 and the order of sentence dated 31.08.2009 passed in Sessions Trial No. 50/02+49/02/473/09 arising out of Daudnagar P.S. Case No. 17 of 2001, G.R. No. 216 of 2001 by the learned Additional Sessions Judge-IV, Aurangabad is hereby set aside and the appeal is allowed. Appellant No. 2 Kaushal

Sharma is on bail. He is discharged from the liability of his bail bond.

Appellant No. 1 Manoj Sharma, who is in custody, be released forthwith

if not wanted in any other case.

(Gopal Prasad, J.)

Dharnidhar Jha, J.:- I Agree.

(Dharnidhar Jha, J.)

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