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IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No. 717 of 2010
WITH
Criminal Appeal (DB) No. 760 of 2010

Against the judgment of conviction, dated 03.06.2010, and the order of sentence, dated 05.06.2010, passed, by Shri Dhruwa Narain Yadav, Additional Sessions Judge, Fast Track Court No. 5, Biharsharif at Nalanda, in Sessions Trial No. 296 of 2006, arising out of Bihar Police Station Case No. 61 of 2005

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1. Md. Gulrej, son of Late Md. Hasim
2. Md. Gulfam, son of Late Md. Hasim

Both resident of Mohalla – Chhaju, Police Station Bihar, District – Biharsharif at Nalanda

... . Appellants **(In Cri. Appeal (DB) No. 717 of 2010)**

WITH

1. Naushadun Nabi @ Sayed Naushadun Nabi @ Pappu Khan, son of Late Sayed Fakran Nabi, resident of Mohalla Garhpar, Police Station Bihar, District Nalanda

... . Appellant **(In Cri. Appeal (DB) No. 760 of 2010)**

VERSUS

The State of Bihar .... Respondent **(In both the appeals)**

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Appearance :
(In CR. APP (DB) No. 717 of 2010)
For the Appellants : Mr.Kanhaiya Prasad Singh, Sr. Adv.
Mr. Krishna Narayan Jha, Advocate
For the State : Mr. A. K. Sinha, A.P.P.
For the Informant : Mr. Devendra Kumar Sinha, Sr. Adv.
(In CR. APP (DB) No. 760 of 2010)
For the Appellant : Mr. Surendra Singh, Sr. Adv.
Mr. Chitranjan Sinha, Sr. Adv.
Mr. Md. Abu Haider, Advocate
Mr. Santnu Kumar Singh, Advocate
Mr. Md. Abu chager, Advocate
Mr. Amish Jha, Advocate
Mr. A. Kundu, Advocate
For the State : Mr. D. K. Sinha, A.P.P.
For the Informant : Mr. Devendra Kumar Sinha, Sr. Adv.

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CORAM: HONOURABLE MR. JUSTICE I. A. ANSARI
AND
HONOURABLE MR. JUSTICE VIKASH JAIN

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE I. A. ANSARI)

Date: 14-07-2015

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Investigation into a criminal offence is not a one-way traffic. An investigation requires determination of the veracity, correctness and accuracy of the allegations made against an accused or determination and identification of the offender, when the offender's name is not mentioned in a First Information Report or is not known. A fair investigation is, therefore, *sine qua non* for a fair trial.

2. Thus, when, an investigation means uncovering the truth, the truth would obviously become the goal of a fair investigation so that justice is done.

3. It is, therefore, wholly imperative that an investigator determines not only the veracity, correctness or otherwise of the allegations made against an accused, but also the defence, which the accused may have offered. For instance, if an accused takes the plea of *alibi* during investigation, there can be no excuse, on the part of the investigator, not to determine the veracity, correctness and otherwise of such a defence of the accused so that the truth can emerge.

4. Failure to verify and determine the veracity of the defence would, undoubtedly, make an investigation unfair, unjust and unreasonable.

5. When an investigation suffers from unfairness and unreasonableness or irrationality, truth will remain a *mirage* and justice would remain an elusive dream.

6. Incumbent, therefore, it is that an investigator impartially and dispassionately investigates a case taking into account not only the allegations or materials, which may appear incriminating against the accused, but also those materials, which appear in favour of the accused, or those specific defences, which an accused may take, so that the truth, if we may reiterate, does not remain an elusive dream.

7. When we enter into the merit of the present appeals, it would unravel a serious lapse on the part of the investigating agency inasmuch as a specific defence was taken by the accused-appellants, but what could have been done, and ought to have been done, to verify the correctness, veracity, genuineness or otherwise of the defence plea, was never done. The casualty was, undoubtedly, a fair trial.

8. Under challenge is the present judgment, dated 03.06.2010, passed, in Sessions Trial No. 296 of 2010, by learned Additional Sessions Judge, Fast Track Court No. 5, Biharsharif, at Nalanda, the accused-appellants, Naushadun Nabi @ Sayed Naushadun Nabi @ Pappu Khan, Md. Gulrej and Md. Gulfam, stand convicted under Section 148. Sections 364 and 302 read with Section 149 of the Indian Penal Code and

Section 27 of the Arms Act, 1959. Following their conviction Section 148, Sections 364 and 302 read with Section 149 of the Indian Penal Code, all the accused-appellants aforementioned have been sentenced, under the order, dated 05.06.2010, to suffer imprisonment for life and pay fine of Rs. 10,000/- each and, in default of payment of fine, to undergo rigorous imprisonment for a period of two years. Following their conviction under Section 27 of the Arms Act, 1959, all the accused-appellants aforementioned have been sentenced, under the said order, to undergo rigorous imprisonment for a period of three years and pay fine of Rs. 2,000/- each and, in default of payment of fine, to undergo rigorous imprisonment for a period of three months.

9. The case of the prosecution, as unfolded at the trial, may, in brief, be described as under:

(i) On 24.02.2005, Alok Kumar @ Lokna, son of the first informant, Hiralal Mistri (PW 5), went, in the morning, to the house of Md. Gulrej (PW 7) of Mohalla Chhaju to do wood work. On that very day, at about 08:00/09:00 PM, while proceeding towards his house, the informant (PW 5) heard the sound of firing coming from Chhaju mohalla. The informant proceeded towards Chhaju mohalla and when he reached near the house of Md. Gulrej (PW 7), he saw accused Naushadun Nabi @ Pappu Khan of mohalla Garhpar, along with his

associates, namely, Md. Gulrej, Md. Gulfam and some others, at the gate of Md. Gulrej (PW 7), with cars and motorcycles and they were indiscriminately firing at the house of Md. Gulrej (PW 7). In the mean-time, Lokna came out of the lane located by the side of the house of Md. Gulrej (PW 7) to the main road. On being exhorted by accused Pappu Khan, his associates forcibly put Lokna into one of the vehicles and drove away.

(ii) Besides the informant (PW 5), the occurrence of abduction of Lokna was witnessed by many persons, such as, Tuntun Kumar (PW 1), Shankar Kumar (PW 4), Rajnish Kumar (PW 6), Md. Gulrej @ Nadim Zaffar (PW 7), Md. Afsar Nadim (PW 8) and Pasha (PW 13).

(iii) About an hour of the abduction of Lokna in the manner as mentioned above, police arrived at the house of Nadim (PW 8), who lodged a report about the incident of firing at his house and, based on this report, Bihar Police Station Case No. 59 of 2005 came to be registered against the present appellants and others. In the report so lodged, there was no mention as regards the fact of abduction of Lokna by the accused-appellants nor did PW 8 inform the police at his house or by means of telephone at the Police Station about the abduction of Lokna. In fact, no telephone call was made to the police by any of the persons, who had witnessed the

occurrence of abduction of Lokna.

(iv) On the night of the occurrence itself, the informant (PW 5), accompanied by his son, Mukesh Kumar @ Munna Kumar (PW 2), went to Bihar Police Station to report about the abduction of the son of the informant, Lokna; but, as soon as PW 5 and PW 2 reported to the police officer, who was present at the Police Station at that point of time, about the name of accused Pappu Khan as the person, who had, along with his associates, abducted Lokna, the police officer, according to the informant (PW 5), lost his temper, abused the informant (PW 5) and his son (PW) and asked them to look for Lokna by saying that Lokna would be somewhere around..

(v) On such refusal of the said police officer to act on the information, which PW 2 and PW 5 had given to the police officer at the said Police Station, both of them returned home.

(vi) On the following day, i.e., on 25.02.2005, at about 07:30 AM, Lokna's dead body was seen lying at Chainpura. On receiving the information, in this regard, from chowkidar, Suresh Paswan, that a dead body was lying at Chainpura and having made Station Diary Entry No. 522, dated 25.02.2005, the police arrived at the place, where the said dead body was found lying.

(vii) When the informant came out of his house in the morning, he came to know that a dead body had been

found at Chainpura, whereupon he went, along his sons, to Chainpura and, on noticing that the said dead body was of Lokna, the informant identified the said dead body in presence of the police personnel, who were already present there, and the police recorded there the *fardbayan* of the informant (PW 5) on 25.02.2005 at 09:15 AM. Treating the said *fardbayan* as the First Information Report, Bihar Police Station Case No. 61 of 2005 was registered, on 25.02.2005, at 01:00 PM, against accused Naushadun Nabi @ Sayed Naushadun Nabi @ Pappu Khan, Md. Gulrej, Md. Gulfam and 10-15 unknown persons. Inquest was held over Lokna's dead body, which was also subjected to *post mortem* examination.

(viii) During the course of investigating, the informant (PW 5) filed two protest petitions in the Court of the Chief Judicial Magistrate, Biharsharif, at Nalanda, the first *protest petition* having been filed on 01.03.2005 (Exhibit 22) and the second *protest petition* having been filed on 27.06.2005 (Exhibit 23). Later on, the case was investigated by Crime Investigation Department (CID) and, on completion of investigation, a *charge sheet* was laid, under Sections 147/148/149/364/302 of the Indian Penal Code and Section 27 of the Arms Act, 1959, against the accused aforementioned keeping the investigation pending against rest of the accused.

10. At the trial, charges, under Section 148 and also

under Sections 364 and 302 read with Section 149 of the Indian Penal Code and Section 27 of the Arms Act, 1959, were framed against the accused Naushadun Nabi @ Sayed Naushadun Nabi @ Pappu Khan, Md. Gulrej and Md. Gulfam. To the charges so framed, all the accused pleaded not guilty.

11. In support of their case, prosecution examined altogether 14 (fourteen) witnesses including the doctor (PW 9), who had, admittedly, conducted the *post mortem* examination. The accused were, then, examined under Section 313 (1) (b) of the Code of Criminal Procedure, wherein the accused denied that they had committed the offences, which were alleged to have been committed by them, the case of the defence being, in brief, thus:

(i) Md. Gulrej @ Nadim Zaffar (PW 7) and Md. Afsar Nadim (PW 8) are brothers. One of the brothers of PW 7 and PW 8, namely, Quamar Rizwi, had been defeated by accused Pappu Khan in the Assembly Elections and both the families were rival of each other. This apart, there was existing enmity between accused Gulfam and accused Gulrej, on the one hand, and PW 8, on the other, with regard to their respective rights of fishing and a criminal case had also been registered in this regard. Because of the enmity, which the accused had with the family of PW 7 and PW 8, the accused have been falsely implicated and nobody knew as to who the abductors

and killers of Lokna were and yet the accused aforementioned were falsely implicated in order to harass and ruin them by projecting that the accused had done away with Lokna's life, due to the fact that Lokna had actively worked in support of those, who were rivals of accused Pappu Khan.

(ii) It has also been the case of the defence that when the dead body of Lokna was found lying, the news spread and Dipak Vishwakarma (DW 3), who used to operate a News Channel, known as 'News Today', was present and he had recorded the conversation between PW 5 (father of the said deceased) and PW 12, who is one of the Investigating Officers of this case, and to the query, which had been made by PW 12, as to whether PW 5 knew as to who was behind the abduction and killing of his son, Lokna, PW 5 had responded by saying that he was not aware as to who had killed his son.

(iii) It is the further case of the defence that one of the accused persons, namely, accused Pappu Khan had, on 28.03.2005, handed over a cassette disc (CD) to the Superintendent of Police, Crime Investigating Department, and the said CD contained an audio visual recording made by a news channel 'News Today', on 25.02.2005, and although this CD showed that, till the time the dead body of Lokna was recovered, the informant, Hiralal Sharma (PW 5) was unaware of the circumstances of the death of his son, Lokna, or the

identity of the persons, who were responsible for the abduction and killing of his son, Lokna, no investigation was conducted by the investigating agency to ascertain the veracity of what had been recorded in the CD so as to determine if the accusations, made against the accused aforementioned of having abducting Lokna, were true or not. The investigation, thus, was, according to the defence, wholly unfair, causing serious prejudice to the accused and resulting into serious miscarriage of justice.

(iv) The defence, too, adduced evidence by examining three witnesses.

12. Having, however, found the three accused, namely, Naushadun Nabi @ Sayed Naushadun Nabi @ Pappu Khan, Md. Gulrej and Md. Gulfam, guilty of the offences charged with, learned trial Court convicted them accordingly and passed sentences against them as mentioned above.

13. Aggrieved by their conviction and the sentences, which have been passed against them, all the accused, as convicts, have preferred these appeals. While Criminal Appeal (DB) No. 717 of 2010 has been preferred by the accused-appellants, Md. Gulrej and Md. Gulfam, Criminal Appeal (DB) No. 760 of 2010 has been preferred by the accused-appellant, Naushadun Nabi @ Sayed Naushadun Nabi @ Pappu Khan.

14. The present appeals having, thus, arisen out of

the judgment of conviction, dated 03.06.2010, and the order of sentence, dated 05.06.2010, these appeals have been taken up for hearing together and are being disposed of by this common judgment and order.

15. We have heard Mr. Kanhaiya Prasad Singh, learned Senior Counsel, appearing on behalf of the appellants, Md. Gulrej and Md. Gulfam, and Mr. Surendra Singh, learned Senior Counsel, along with Mr. Chitranjan Sinha, learned Senior Counsel, appearing on behalf of the appellant, Naushadun Nabi @ Sayed Naushadun Nabi @ Pappu Khan. We have also heard Mr. A. K. Sinha and Mr. D. K. Sinha, learned Additional Public Prosecutor, appearing on behalf of the State. Mr. Devendra Kumar Sinha, learned Senior Counsel, appearing on behalf of the informant of the case, has also been heard.

16. While considering the present appeals, it may be noted that according to the evidence of Dr. Mithilesh Kumar (PW 9), on 25.02.2005, at about 02:30 PM, he (PW 9) had conducted *post mortem* examination on the dead body of Lokna and found as follows:

> **"***Rigor mortis found in both superior and inferior extremities.*
>
> ***A.*** *External Examination :- Sinosis of nails of both hands; ligature mark about ½" in breadth at the level of thyroid cartilage and 1½" in circumference, all around the neck; contusion over right tempora-zygomatic area*

2" x 2", and orbital area 2" circumference, contusion left leg 2" x ½", 1 " x ½", 1" x 2; contusion over right elbow 2" x 1" and two linear contusions 3" x ¼" and 2" x ¼"; multiple small contusions over chest of sizes ¼ " x ¼".

Obvious fracture of left clavicle sternum and ribs of both the sides.

There was an incised wound over left side of ear. Oricle hanging by a tag of skin.

B. *On dissection, following injuries were found.*

(i) Over head – Multiple sub-cutaneous and intra-muscular haematoma of temporal area, bones intact, meninges intact, brain congested.

(ii) Neck – Sub-cutaneous and intra-muscular haematoma present on interior surface of neck more on left neuron-vacular bundle. Neuro-vascular bundle means earotid seals with its contents. Hyoid bone was intact, thyroid cartilage was broken. Interior of the airway sore. Oedima and sub-mucosal haematoma were present.

(iii) Thoracic cavity – blood and blood clots were present on both sides of the chest; both the lungs were badly lacerated; fracture of ribs was confirmed; both the chambers of the heart was empty.

(iv) Abdominal cavity – All viscera as liver, spleen, kidney, gut and omentum were intact and congested. The stomach contained about three to four ounces of semi-digested

food; Bladder was empty."

17. In the opinion of the doctor (PW 9), cause of death was asphyxia, haemorrhage and shock from the above injuries. It is the further opinion of the doctor (PW 9) that the incised wound might have been caused by a sharp-cutting weapon and ligature mark might have been caused by a rope, which resulted in asphyxia, whereas fracture of ribs and laceration of lungs might have been caused by pressure of a human being or by a hard blunt substance and the rest of the injuries might have been caused by hard blunt substance, such as, fist, brick, *danda* (i.e., club), etc.

18. Neither the findings of the doctor (PW 9) nor his opinion, with regard to the cause of death of the said deceased and/or his opinion with regard to the nature of weapon, which might have been used, for causing the death of the said deceased, were disputed by the prosecution or by the defence. This apart, we, too, do not notice anything inherently incorrect or improbable in the evidence given by the doctor (PW 9).

19. So situated, it becomes that Lokna's death was homicidal in nature.

20. The question, however, remains: whether the accused-appellants were the ones, who had caused the death of Lokna in the manner as indicated above?

21. Our search for the answer to the question, posed

above, brings us to the evidence of PW 8 (Md. Afsar Nadim). His evidence is that on 24.02.2005, at about 09:00 PM, having had his dinner, when he was going to bed on the first floor of his house, which had windows on the east, he heard the sound of abuses, shouting and attempt being made to break open the gate of his house and saw, through the eastern window, that accused Pappu Khan, armed with revolver, accused Chand and accused Lallu, armed with gun and rifle respectively, accompanied by 10-15 persons, had arrived in front of his house in cars and motorcycles.

22. On noticing accused Pappu Khan and his associates, PW 8 shouted from his room and accused Pappu reacted by saying his associates as what they were looking at and that they should kill the *rascal*. It is in the evidence of PW 8 that Pappu Khan fired a shot at him (PW 8) and at the same time, accused Lallu and accused Chand also started firing and so did their associates. However, according to PW 8, as he (PW 8) ducked, bullets did not hit him; but the window and the iron-grill were hit by the bullets and the bullets also hit the ceiling of the said room. Firing, according to the evidence of PW 8, continued for about 10-15 minutes and when he heard the noise of the people of the locality, he saw from the verandah of the first floor that the accused had gone and, in the meanwhile, the people of the locality had gathered at the

ground floor of his house. When the police arrived after about an hour of firing, PW 8 came down and took the police to the first floor, where he gave the information, in writing, with a regard to the occurrence of firing and after having taken the written information so given by PW 8, the police came down, along with PW 8, to the ground floor and when PW 8 talked to Safiq Khan (not examined), Saba Akhtar (not examined), Pasha (PW 13) and other people of the locality, they told him (PW 8) that they had witnessed the occurrence of abduction of Lokna by the accused aforementioned and, on the following day, at about 08:30 AM, PW 8 came to know from his elder brother that Lokna's dead body had been recovered.

23. In his cross-examination, PW 8 has admitted that on the basis of the case, which he had lodged, recording of evidence, at the trial, had commenced and, while lodging the said case, he had not mentioned that Lokna had been working in his house till before the occurrence. PW 8 also admits that in his written information to the police, he had not stated about the work done by Lokna at his house. PW 8 also admits that he had enmity with accused Gulfam and accused Gulrez for a long time on the issue of fishing rights and a case was also lodged in this regard. He further admits that accused Pappu Khan had been elected as a member of the Legislative Assembly by defeating his (PW 8's) brother, namely, Quamar

Rizwi.

24. Thus, though PW 8 had admitted that people of the locality had told him that Pappu Khan, Md. Gulrej and Md. Gulfam had taken away Lokna by their car, he (PW 8) did not mention this fact in his written information, which had become the First Information Report in connection with Bihar Police Station Case No. 59 of 2005 (Sessions Trial No. 649 of 2007).

25. Mr. Surendra Singh, learned Senior Counsel, appearing on behalf of the appellant, Pappu Khan, has pointed out that PW 8 has deposed that when the police arrived, he came down and took them to the first floor and gave his report and when he, again, came down, the witnesses informed him about the abduction of Lokna and, hence, there was no reason for PW 8 to have not included in his written report, which became the basis of Bihar Police Station Case No. 59 of 2005, about the abduction of Lokna; more so, when it is the evidence of PW 8 that when he came down to the ground floor of his house, Safiq Khan (not examined), Saba Akhtar (not examined), Pasha (PW 13) had reported to him about the abduction of Lokna by the accused-appellants.

26. Reacting to the above submissions made on behalf of the accused-appellants, Mr. Devendra Kumar Sinha, learned Senior Counsel, appearing on behalf of the informant, submits that police arrived at the house of PW 8 after an hour

of the firing, he (PW 8) came down from the first floor and took the police to the upper floor, where he submitted his report, and when he, again, came down to the ground floor, the witnesses informed him about the abduction of Lokna and, hence, there was no occasion for PW 8to include in the First Information Report which PW 8 had lodged, the fact that Lokna had been forcibly taken away by the accused-appellants.

27. Before we determine the correctness of the rival submissions made with regard to why PW 8, while informing the police about the firing having been resorted to by accused-appellants, remained silent with regard to the abduction of Lokna at the hands of the accused-appellants, let us consider the evidence of PW 13 (Pasha).

28. Coming to the evidence of PW 13, we notice that according to him (PW 13), at about 08:30-09:00 PM, when he was at the shop of Hira Dhobi (not examined), he saw two vehicles, followed by some motorcycles, stopping near the house of Quamar Saheb (i.e., PW 8) and the accused-appellants, along with others, armed with fire-arms, got down from their vehicles, they started abusing Afsar Nadim (PW 8) and also started firing, which continued for about 15-20 minutes. It is the evidence of PW 13 that he saw accused Gulrej and Gulfam sitting on the rear seat of the vehicle

catching hold of Lokna and going towards Nai Sarai and after the accused persons had gone away, he (PW 13) went to the house of Gulrej (PW 7).

29. It is important to note, while considering the evidence of PW 13, that he (PW 13) does not claim to have seen any of the prosecution witnesses at the place of occurrence. In fact, it is also his evidence that police did not enquire from him about the occurrence nor did he give information to the police with regard to the abduction of Lokna.

30. The question, therefore, remains as to how the police came to know that PW 13 was one of the witnesses to the alleged occurrence of abduction of Lokna. The evidence adduced by the prosecution provides no answer to this vital question.

31. The above aspect of the evidence on record also belies the evidence of PW 8 inasmuch as it is the evidence of PW 8 that PW 13 had come to his house on the very night of the occurrence and reported to him about the abduction of Lokna by the accused-appellants; whereas PW 13 has, nowhere, deposed that he informed PW 8 that he had seen Lokna having been taken away by the accused-appellants.

32. Interestingly enough, PW 13 has deposed that police came on 24.02.2005 at night; but nobody disclosed to

the police about the abduction of Lokna.

33. What, thus, clearly transpires from the above evidence on record is that though the police arrived at the house of PW 8 after about one hour of firing, which is claimed to have taken place, and though, on the basis of the written information, which PW 8 had provided in this regard, a First Information Report came to be registered with regard to the occurrence of firing in front of the house of PW 8, the fact remains that no mention was made by PW 8, in his written information handed over to the police, about the abduction of Lokna at the hands of the accused-appellants despite the fact, if we may reiterate, that the police had arrived after about one hour of the occurrence.

34. As regards the contention of Mr. Devendra Kumar Sinha, learned Senior Counsel, appearing on behalf of the informant (PW 5), that according to the evidence of PW 8, on arrival of the police, he came down from the upper floor of the house and took the police to the upper floor, where he gave a written information as regards the occurrence of firing and when he, again, came down, he came to know from the witnesses about the abduction of Lokna at the hands of the accused-appellants and PW 9 could not have, therefore, included, in his First Information Report, the fact of abduction of Lokna, we need to point out that apart from the fact that

there is no legally admissible evidence on record including that of PW 13 (Pasha) that anyone had reported PW 8 about the abduction of Lokna, what cannot be ignored, and must not be ignored, is the fact that if PW 8 had received from any source the information with regard to the abduction of Lokna on the very night of the occurrence, there was no reason for him not to have informed the police, particularly, when Lokna had not only been working in his house, but was also a dedicated supporter of the brother of PW 8 and had, admittedly, worked against the accused-appellant, Pappu Khan.

35. In the face of what have been indicated above, there can be no escape from the conclusion that as far as PW 8 was concerned, he had not been informed about the abduction of Lokna by PW 13 and others in the night of the occurrence and the evidence of PW 8 that he was told about the abduction of Lokna on the very night of the occurrence is false. This also falsifies the evidence of PW 13 that he had seen Lokna's abduction and had gone to the house of PW 8 after firing seized. No wonder, therefore, that PW 13 does not claim to have reported the occurrence of abduction of Lokna to PW 8 and not surprising it is, therefore, that none reported to the police about Lokna's abduction by the accused-appellants.

36. Bearing in mind the fact that though the police had arrived at the place of occurrence after an hour of the

occurrence and according to the evidence of PW 8, the information was available with him that Lokna had been abducted by the accused and witnesses to the abduction of Lokna were also available on the night of the occurrence itself, neither any information was given to the police before the police arrived at the house of PW 8 nor did they inform the police, when the police arrived at the house of PW 8. No explanation also exists as to why PW 8 did not inform the police even if the information with regard to Lokna's abduction had been received by him after the police had left his house. Nothing had, or could have, really stopped PW 8 from telephoning the police and informing them about the abduction of Lokna. Why did PW 8 not inform the police about Lokna's abduction? To the question, which has so arisen, no answer is discernible from the evidence on record.

37. The above aspect of the evidence on record appears to have been completely ignored by the learned trial Court.

38. Bearing in mind the nature of the evidence, which has been adduced by the prosecution with the help of PW 8, let us, now, turn to the evidence of PW 5, who is father of the deceased Lokna and also the informant of the present case.

39. According to the evidence of PW 5, deceased Alok @ Lokna was his son and on the day of the occurrence, Lokna

left his house at about 08:00-09:00 AM to work at the house of Qamrul Mian (i.e., father of PW 8), where Lokna had been doing some wood work. It is in the evidence of PW 5 that when he returned home at about 08:00-09:00 PM from his shop, his wife informed him that Lokna had not returned home and at that time, he (PW 5) heard the sound of firing coming from Chhaju mohalla and, having heard the sound of firing, he (PW 5) went to Chhaju mohalla and when he reached the house of one Jariwa Kasai, he saw two cars, followed by motorcycles, arriving in front of the house of Qamrul Mian and from the vehicles, the accused appellants, along with others, alighted and started firing on the windows and doors of Qamrul Mian's house.

40. According to the evidence of PW 5, the firing continued for about 15 minutes and at that point of time, he (PW 5) saw his son, Lokna, coming out of the lane located by the side of the house of Qamrul Mian and as soon as Lokna came out, accused Pappu Khan, Gulrej and Gulfam caught hold of Lokna and made Lokna sit inside a maruti car and drove away followed by motorcycles.

41. It is also in the evidence of PW 5 that though he was standing near the place, where Lokna had been abducted from, he did not raise any *hulla,* because he was afraid that he might be killed.

42. It is the further evidence of PW 5 that besides him (PW 5), Tuntun (PW 1), Rajnish (PW 6), Gulrej (PW 7) and many others had seen the occurrence.

43. PW 5 has deposed that he, then, left for his house and informed his family about the abduction of Lokna and his (PW 5's) son, Shankar Kumar (PW 4), told him (PW 5) that he (PW 4) had seen Lokna being carried in a vehicle by the three accused aforementioned.

44. Let us, momentarily, pause here and turn to the evidence of PW 4 (Shankar Kumar), son of the informant and brother of the deceased. We notice that it is in the evidence of PW 4 that at about 09:00-09:30 PM, he was at Nai Sarai More and saw a maruti car coming from the side of Chhaju mohalla, followed by another car and some motorcycles, all going towards southern direction. It is also in the evidence of PW 4 that he (PW 4) saw accused Pappu Khan sitting on the front seat of the car; whereas accused Gulrej and accused Gulfam were sitting on the rear seat of the car and his brother, Lokna, was sitting between accused Gulrej and accused Gulfam.

45. It is the further evidence of PW 4 that when he reached home, his father (PW 5) informed him that Lokna was abducted by accused Pappu Khan, Gulfam and Gulrej from Chhaju mohalla near the house of Qamrul Mian and, on receiving this information, PW 4 told his father (PW 5) to

report this matter to the police and, then, his father (PW 5), accompanied by his brother (PW 2), went to Police Station and when they returned home, PW 5 told him (PW 4) that the Police Officer had told them to look for Lokna by saying that his son might have gone somewhere.

46. It is of immense importance to note that it is not in the evidence of PW 4 that he informed his father (PW 5) that he (PW 4), too, had seen Lokna being taken or going away with the accused-appellants in their vehicles.

47. Clearly, therefore, the evidence given by PW 5 that his son, Shankar (PW 4), told him (PW 5) that he (PW 4) had seen Lokna, being carried away in a vehicle by the three accused-appellants aforementioned, cannot be believed and this, in turn, constrains us to infer that PW 4 was not an eye-witness to the occurrence.

48. What, now, needs to be point out is that though PW 5 has deposed that Tuntun (PW 1), Rajnish (PW 6), Gulrej (PW 7) and others had seen the occurrence , this evidence is completely vague inasmuch as the evidence so given does not even faintly disclose as to how PW 5 had come to know that Tuntun (PW 1), Rajnish (PW 6), Gulrej (PW 7) had witnessed the occurrence of abduction of Lokna, for, it is not the evidence, if we repeat, that it is not the evidence of PW 5 that he had met Tuntun (PW 1), Rajnish (PW 6), Gulrej (PW 7) at

or near the place of occurrence and/or had seen there any of the three witnesses aforementioned.

49. It is also not in the evidence of PW 5 that any of the three witnesses aforementioned had told him (PW 5) that they, or anyone of them, had witnessed Lokna being taken away by the accused-appellants. The learned trial Court appears to have merely recorded the evidence without making the evidence intelligible and has accordingly appreciated the evidence without noticing the infirmities inherent in the evidence adduced by the prosecution.

50. Proceeding with the evidence of PW 5, we notice that PW 5 has deposed that accompanied by his son, Mukesh (PW 2), he went to Police Station and reported to the Police Officer about the occurrence, but the Police Officer started abusing by saying that how he (PW 5) could accuse Pappu Khan for his son's abduction and the Police Officer also, according to PW 5, asked him (PW 5) to look for Lokna, because, according to the Police Officer, Lokna might have been somewhere around. PW 5 deposes that though he looked for Lokna, he did not find him and returned home.

51. From the above evidence of PW 5, what transpired to be, in effect, the evidence of PW 5 is that he was a witness to the occurrence of abduction of his son, Lokna, and so were witnesses to the said occurrence not only

Shankar(PW 4), but also Tuntun (PW 1), Rajnish (PW 6) and Gulrej (PW 7).

52. We, therefore, consider it necessary to ascertain the veracity of the evidence given by PW 5 that he had witnessed the occurrence of abduction of Lokna and that not only he, but his son, Shankar (PW 4), and also Tuntun (PW 1), Rajnish (PW 6) and Gulrej (PW 7) had witnessed the said occurrence.

53. While considering the evidence of PW 5, it may be noted that in the light of the evidence of PW 5, he (PW 5), nowhere, deposed that he had reported to his family members that the police had refused to record the report of the occurrence, which he had made; whereas the evidence of PW 4, son of PW 5, is that when PW 5 returned home, he enquired from his father and his father told him that the Police Officer had told him that his son (i.e., Lokna) might be somewhere around.

54. Close on the heels of the evidence of PW 4, PW 5 and PW 8, is the evidence of PW 1 (Tuntun Kumar). This witness's evidence is that on 24.02.2005, at about 08:00-09:00 PM, he, along with PW 6, was going to Shekhana mohalla and when he reached near the house of one Gazala Parveen, he saw two vehicles and some motorcycles and accused Pappu Khan, Md. Gulrej and Md. Gulfam alighted from

the vehicles along with some others and started abusing the family members of Gazala Parveen and the accused aforementioned caught hold of Alok Kumar (i.e., the said deceased), while Alok, i.e., Lokna, was coming out of the lane situated on the east of Gazala Parveen's house and made Alok Kumar (i.e., Lokna) sit in a maruti car and drove away.

55. It is in the evidence of PW 1 that besides him (PW 1), Rajnish Kumar (PW 6), Hiralal Sharma (PW 5) and Md. Gulrej (PW 7) had also witnessed the occurrence.

56. Lending support to the evidence of PW 1, PW 4, PW 5 and PW 8, it is the evidence of PW 6 that on 24.02.2005, he had gone to Shekhana with PW 1 to the house of Ward Commissioner, Nazir Saheb, as PW 1 (Tuntun) had some work with Ward Commissioner and when they were returning from the house of Ward Commissioner and reached near the house of Gulrej, at about 09:00 PM, he saw two cars, followed by some motorcycles, coming from the side of Nai Sarai and all the vehicles stopped near the house of Gulrej and accused Pappu Khan, Gulrej and Gulfam got down from one of the vehicles and started pushing the door of the house of Gulrej and, then, they resorted to firing, which continued for about 10-15 minutes and when firing stopped, Lokna came out of the southern side of the house of Gulrej to the road, the accused aforementioned caught hold of him and made Alok

(i.e., Lokna) sit in one of the vehicles forcibly and drove away.

57. It is also in the evidence of PW 6 that besides him (PW 6), Tuntun (PW 1), Hiralal (PW 5), Gulrej (PW 7) and many others had witnessed the occurrence.

58. It is the evidence of PW 1, PW 5 and PW 6 that Gulrej (PW 7) had also seen the occurrence. However, it has been elicited by the defence, while cross-examining PW 1, that there are many telephones and telephone booths in Chhaju mohalla; but neither he (PW 1) nor Rajnish (PW 6) and/or Hiralal (PW 5) informed the police on telephone that Lokna had been taken away. It is the evidence of PW 1 that he did not accompany Hiralal (PW 5) to the Police Station nor did he or Rajnish (PW 6) tell Hiralal (PW 5) that police should be informed.

59. Interestingly enough, it is the evidence of PW 1 that while he (PW 1) and Rajnish (PW 6) left the place of occurrence and returned home, Hiralal (PW 5) remained there. When this piece of evidence given by PW 1 is considered in the light of the evidence of PW 5, it becomes abundantly clear that as far as PW 5 is concerned, he has, nowhere, deposed that he had met/seen/talked to PW 1 and/or PW 6 and/or that they were present at or near the place of occurrence with him (PW 5) and/or that while PW 1 and PW 6 left the place of occurrence, he (PW 5) remained there.

60. At any rate, what transpires from the evidence of PW 1 is though he claims to be a witness to the alleged occurrence of abduction of Lokna at the hands of the accused-appellants, he made no attempt to inform the police nor did he suggested to PW 5 and/or PW 6 that police should be informed; rather, without giving any information to anyone, both, PW 1 and PW 6, returned home.

61. We may pause here and point out that though PW 1 and PW 4 have alleged in their evidence to the effect that when the occurrence was reported to the Police officer, the police officer refused to record the information given to the police with regard to the accused-appellants having been taken away Lokna, the identity of the police officer has also not been established.

62. PW 1 has deposed that besides him (PW 1), Rajnish Kumar (PW 6), Hiralal Sharma (PW 5), Md. Gulrej (PW 7) and other persons had seen the occurrence. His (PW 1's) evidence, too, however, does not give any clue as to how he (PW 1) came to know that Hiralal (PW 5) and Md. Gulrej (PW 7) had also witnessed the occurrence inasmuch as it is not his evidence that he met and/or seen and/or talked to Hiralal (PW 5) or Gulrej (PW 7) at or near the place of occurrence.

63. From the cross-examination of PW 6, it also clearly transpires that he had no work with the Ward

Commissioner, Nazir, and that prior to 24.02.2005 (i.e., the day of occurrence), he had never gone to the residence of the Ward Commissioner.

64. It is, thus, for the first time, on the day of the occurrence that PW 6 had the occasion to visit the house of Ward Commissioner, Nazir inasmuch as he (PW 6) had deposed that he had no concern with the Ward Commissioner.

65. The evidence of PW 6 cannot be readily believed as it has also become evident that he (PW 6) did not inform the father of Lokna or his family members by visiting their house that the accused were taking away his son forcibly nor did he inform the police about the occurrence; rather, he returned home directly. It is also important to note in this regard that though PW 1 and PW 6 came together and PW 1 says that leaving PW 5 near the place of occurrence, he (PW 1) and PW 6 returned to their respective houses, the evidence of PW 6 gives no indication, at all, if he had seen and/or met and/or talked to PW 5 at or near the place of occurrence before he (PW 6), accompanied by PW 1 returned to their respective houses.

66. When the evidence of PW 5 does not indicate as to how he had come to know about the fact that PW 1 and PW 6 had witnessed the occurrence and when the evidence of PW 1 and PW 6 do not indicate as to how they came to know that

Hiralal (PW 5) had witnessed the occurrence, it is strange that in the information, which has been lodged by PW 5 with the Police, where Lokna's dead body was found, PW 5 mentioned the names of PW 1 and PW 6 as witnesses to the occurrence.

67. Keeping in view the above aspect of the evidence adduced by the prosecution, when we turn to the evidence of PW 7 (Md. Gulrej @ Nadim Zaffar), brother of PW 8, we find that according to him (PW 7), he, on 24.02.2005, at about 09:00 PM, was present at the biscuit shop of one Maksood Bhai and saw two cars, followed by some motorcycles, stopping near his house and from the said vehicles, accused Pappu Khan, Gulrej and Gulfam got down and 10-12 other persons also got down from the vehicles, who were armed with fire-arms.

68. It is in the evidence of PW 7 that the accused began to push the door of the house of PW 7, started abusing them and also started firing at his house, which continued for about 10-15 minutes and, in the meantime, Lokna, who had been working in his house for the last 1-2 days, came to the road through the lane situated by the side of the house of PW 7 and accused persons aforementioned caught hold of him and made him sit inside the maruti car and drove away. It is the further evidence of PW 7 that out of fear, he did not go to his house; rather, he went to his friend's house.

69. From the evidence of PW 7, what also clearly emerges is that Lokna had actively participated in the election against accused Pappu Khan and this was, according to the evidence of PW 7, the reason for his abduction and killing. This shows that Lokna had actively participated in the election against accused Pappu Khan and, hence, there was no reason that his disappearance or abduction could not have been intimated to police by PW 7,

70. In fact, PW 8 admits, as we have already pointed out above, that Lokna's abduction by the accused-appellants had been intimated to him on the very night of the occurrence; yet, no such information was given by PW 8 to the police. Why? There is no answer.

71. PW 7 has deposed, in his cross-examination, that besides him (PW 7), his brother, Quamar, Munawer (dead) and six others persons are accused in Bihar Police Station Case No. 316 on accusation of hurling bomb over the informant near his house, the informant of the said case being accused-appellant, Gulfam.

72. It is further in the evidence of PW 7 that his sister-in-law, Gazala Parveen, was Ward Commissioner on the day of the occurrence and also Vice-Chairman of Bihar Municipality and that his brother, Quamar Rizvi, was a candidate against the accused in the Bihar Assembly Election,

2000. There was, therefore, no convincing reason for the failure of PW 7 to get the information, with regard to the abduction of Lokna, conveyed to the police by his sister, Gazala Parveen, or brother, Quamar Rizvi, or Afsar Nadim (PW 8) and/or any other person.

73. Interestingly enough, it is the evidence of PW 7 that when he returned home on the following morning, his younger brother, Afsar Nadim (PW 8), informed him that the latter (i.e., PW 8) had given information to the police about the occurrence. No such information, as we have already indicated above, was given to the police. In fact, PW 8 has not even claimed that he had given any information to the police with regard to the occurrence of Lokna's abduction.

74. It is the evidence of PW 7 that his statement was recorded by the police after many days of the occurrence. PW 7 was, thus, belatedly examined and no explanation exists for such belated examination of PW 7 nor is there any explanation as to how the police came to know that PW 7 had also witnessed the occurrence. Such missing links are galore in this case; but the same appear to have not been noticed and taken into account by the learned trial Court.

75. When we come to the evidence of PW 2 (Mukesh Kumar @ Munna Kumar), son of the informant and brother of the deceased, we find that on 24.02.2005, his brother, Lokna,

had gone to work at the house of Gulrez and at 09:00 PM, when his brother, Lokna, did not return home, his father (PW 5) went to the house of Gulrej at Chhaju mohalla and when he (PW 5) returned home, he (PW 5) told the members of his family that the accused-appellants aforementioned had taken away Lokna on a vehicle towards Nai Sarai and that he (PW 5) had witnessed the occurrence. It is in the evidence of PW 2 that when he (PW 2), along with his father (PW 5), went to Police Station and informed the occurrence to the Police Officer, the police officer lost his temper, abused him and his father and told them to go and search for Lokna and, then, he (PW 2), along with PW 5, went in search of his brother, but they could not find Lokna.

76. It is further in the evidence of PW 2 that his brother, Lokna, had actively participated in the election supporting the candidate of Bhartiya Janata Party and his brother, Lokna, had also given evidence against accused Gulfam and accused Gulrej in the case of looting of fish.

77. It is admitted by PW 2, in his cross-examination, that he had not witnessed the occurrence and his father (PW 5) and his brother, Shankar Kumar (PW 4), had told him (PW 2) about the occurrence. Broadly in tune with the evidence of PW 2 is the evidence of PW 3. None of them was, however, a witness to the occurrence.

78. For the purpose of, therefore, proving the occurrence, the prosecution places reliance on the evidence of PW 1, PW 4, PW 5, PW 6, PW 7, PW 8 and PW 13. We have already marshaled the evidence of these witnesses carefully and all of them clearly transpired to be chance witnesses. This apart, their evidence, so far discussed, do not, as we have already point out above, prove beyond doubt the abduction of Lokna by the accused-appellants.

79. Coming to the recovery of Lokna's dead body, it may be noted that according to the evidence of the first Investigating Officer (PW 10), on 25.02.2005, at about 08:00 AM, it was reported to Bihar Police Station by Suresh Paswan that dead body of an unknown person was lying in a ditch over railway track near Chainpura village and on the basis of the information so received and having made Station Diary Entry in this regard, police proceeded for Chainpura village and found dead body of a man lying there with hundreds of people having gathered there and when the police made enquiry from the people, who had gathered there, no one could identify the said dead body. In the mean-while, however, Hiralal (PW 5) came near the dead body and identified the said dead body as the dead body of his son, Lokna, and, thus, near the place, where the dead body was found, Hiralal (PW 5) gave statement on 25.02.2005, at 09:15 AM, which was recorded in

the form of his *fardbayan.* This is the *fardbayan,* which has been treated as the First Information Report of the present case, namely, Biharsharif Police Station Case No. 61 of 2005 and, thereafter, the dead body was sent to the hospital.

80. It is in this First Information Report that Hiralal (PW 5) has, for the first time, mentioned the fact that Lokna was abducted by the accused-appellants aforementioned and it was in this First Information Report that Hiralal (PW 5) had mentioned the names of Tuntun Kumar (PW 1), Rajnish Kumar (PW 6) and Md. Gulrej @ Nadim Zaffar (PW 7), as the persons who, too, had witnessed the occurrence.

81. We may, however, hasten to add, as we have already pointed out above, that the evidence given by Tuntun Kumar (PW 1), Rajnish Kumar (PW 6) and Md. Gulrej @ Nadim Zaffar (PW 7) did not give any indication as to how Hiralal (PW 5) came to know that these persons had witnessed the occurrence.

82. It is submitted, on behalf of the appellants, that the First Information Report is *ante dated* and *ante timed* inasmuch as the *fardbayan* (Exhibit 6) was recorded on 25.02.2009 at 09:15 AM, the First Information Report was drawn after a delay of 4 (four) hours, and the First Information Report reached the Court not on 25.02.2005, but on 26.02.2005, though the Police Station and the Court is,

admittedly, separated by a wall.

83. Thus, though Section 157 of the Code of Criminal Procedure warrants a police officer to send *forthwith* the police report to a Magistrate empowered to take cognizance of such offence upon a police report; obviously, this has not been done and no explanation is either offered or is discernible from the materials on record; rather, the evidence, adduced by the prosecution, indicates that there has been belated disclosure of the name of the accused-appellants as the abductors and killers of Lokna.

84. Situated thus, we are unable to rule out the possibility of the names of the appellants as well as the names of the eye-witnesses having been mentioned in the First Information Report after due deliberations.

85. PW 10 (Arjun Prasad) is the first Investigating Officer of this case. From a close scrutiny of the evidence of first Investigating Officer, Arjun Prasad (PW 10), it clearly transpires that during his examination-in-chief, it was not suggested by the prosecution that Hiralal (PW 5) had come to his Police Station on the very night of the occurrence, but the occurrence, which Hiralal (PW 5) had reported to the police, was not recorded.

86. Mr. Surendra Singh, learned Senior Counsel, is, therefore, correct in submitting that even if, for a moment, the

explanation, given by Hiralal (PW 5), with regard to the delay in lodging of the First Information Report, is not ignored, there is no explanation as to why the First Information Report was not sent, *forthwith*, to the Magistrate in terms of the requirements of Section 157 of the Code of Criminal Procedure.

87. Even the first Investigating Officer (PW 10) has clearly admitted, in his evidence, that no information had been given to his Police Station that a person had been abducted from near the house of Nadim Zaffar (PW 7). No doubt, police came to the house of PW 8 on the night of 24.02.2005, but no information about the abduction of Lokna was given to the police. It is the evidence of PW 10 (the first Investigating Officer) that no information, with regard to the abduction, was given to his Police Station.

88. It was, thus, for the first time, on 06.08.2008, i.e., after more than three years, that PW 5 came out with an explanation, at the trial, that he had gone to the Police Station on the very night of the occurrence and reported the occurrence to the Police Officer, but the Police Officer abused him and told him to look for Lokna, who might been somewhere around. This assertion of PW 5, in the light of what have been discussed above, cannot, but be treated as subsequent or afterthought. At any rate, no credence can be

given to the explanation of PW 5 for belated disclosure of the names of the accused-appellants.

89. PW 11 (Lakshman Prasad Singh) is the third Investigating Officer of this case and he took the charge of investigation of Bihar Police Station Case No. 61 of 2005 on 29.11.2005. It is in the evidence of PW 11 that after taking charge of the investigation, he took down the statements of the prosecution witnesses, took photographs of the place of occurrence and also prepared three sketch maps of the place of occurrence.

90. PW 11 (Shravan Kumar Singh) is the second Investigating Officer of this case and he took the charge of investigation of Bihar Police Station Case No. 61 of 2005 on 10.03.2005, when the case was transferred to the CID. It is the evidence of PW 12 that it is a fact that he had enquired from Hiralal (PW 5) as to why he had not gone to Police Station, which is very close to his house, to report about the abduction, but Hiralal (PW 5) gave no satisfactory reply. PW 12 has also deposed that it is true that when he enquired from PW 5 as to why he (PW 5) had not informed the police when the police reached the place of occurrence, which took place at the house of PW 8, on the very night of the occurrence, PW 5 gave no reply.

91. As already indicated above, the *fardbayan* lodged

by Hiralal Sharma (PW 5) is wholly silent and gives no indication that he or anyone else had knowledge or information and/or had reported as regards the occurrence of abduction of Lokna to the police on the very night of the occurrence and/or that police had refused to record the report of the occurrence.

92. Clearly, therefore, it is, for the first time, on 25.02.2005, at about 09:15 AM that PW 5 disclosed to the police that the accused-appellants had abducted the deceased, Lokna, from outside the house of Md. Afsar. Even, in this belatedly lodged information about the abduction of Lokna by the accused-appellants, it was not even faintly indicated by PW 5 that he had, on the previous night, gone to the Police Station and though he had reported the occurrence of abduction of Lokna to the police officer there, the police officer abused him and did not record the information, with regard to the abduction of Lokna, which he had given to the Police.

93. Coupled with the above, it is noteworthy that two *protest petitions* were filed by PW 5 in the court of Chief Judicial Magistrate, Biharsharif, at Nalanda, on 01.03.2005 (Exhibit 22) and on 27.06.2005 (Exhibit 23). In these two *protest petitions*, though PW 5 made allegations that the police had not been properly investigating the case, there was no accusation made, nor even faint indication was given, that

on the night of the occurrence, the police were reported about the occurrence of abduction, but the police had refused to record the report of the occurrence of abduction of Lokna.

94. The cumulative effect of the evidence, which we have pointed out above, makes it not only frightfully dangerous, but wholly unsafe to place reliance upon the evidence of PW 2, PW 4 and PW 5 that the occurrence had been reported, on 24.02.2005 itself, to the police.

95. What logically follows from the above discussion is that PW 2, PW 4 and PW 5 did not even know that Lokna had been abducted by anyone and/or the accused-appellants were behind the occurrence of abduction of Lokna. The evidence of PW 2, PW 4 and PW 5 give no indication at all that they were afraid of the accused-appellants and that was the reason why they had not reported the occurrence to the police on the very night of the occurrence. Contrary thereto, PW 5 has asserted that accompanied by PW 2, he (PW 5) went, within the knowledge of the members of their family, to the Police Station and claims to have reported the occurrence to the police. Despite such a bold report having been given to the police, had the police not recorded the occurrence, there was no reason for PW 5 not to mention this fact in the *fardbayan,* which has been treated as the First Information Report in this case, nor is there any rational reason for the omission to

mention this fact in the two *protest petitions*, which PW 5 had filed in the Court.

96. In fact, filing of the *protest petitions* gives a clear indication that PW 5 was not scared of making accusations against the accused-appellants and/or against the police, because he (PW 5) made clear accusations both against the police as well as the appellants, by saying that there was collusion between the two and, therefore, the case was not being properly investigated. Had, therefore, what has been alleged in the two *protest petitions*, been true, it would have appeared not only in the *fardbayan*, but also in the *two protest petitions* that PW 5 had reported the occurrence to the police on the very night of the abduction, i.e., on 24.02.2005, but the police had refused to record the information.

97. If the police had refused to record the information with regard to the abduction of Lokna, as PW 5 seeks the Court to believe, there was no reason why PW 5 could not have reported the matter to PW 8 at whose house Lokna had been working and from around whose house, Lokna had been abducted, while returning from his house.

98. Considered thus, we are constrained to infer that neither PW 4 nor PW 5 had witnessed the occurrence of abduction of Lokna by the accused appellants and that was the reason why the *fardbayan,* which has been treated as the First

Information Report, as well as the subsequent *protest petitions* filed by none other than PW 5, is completely silent that PW 5 had reported the occurrence of abduction to the police on the very night of the occurrence.

99. The above inference gets reinforced from the fact that it was, for the first time, at the trial, that PW 5 came out with an explanation that he had reported the occurrence of abduction of Lokna to the police on the very night of the occurrence, but the police refused to record the report of his son's abduction.

100. Consequently, we are constrained to further infer that since PW 4 and PW 5 cannot be confidently hold to have witnessed the occurrence of abduction of Lokna, question of their having been seen PW 1, PW 6 and/or PW 7 at or near the place of occurrence, when Lokna was being allegedly taking away by the accused-appellants in their vehicles, did not arise. It naturally further follows that even the evidence of PW 1, PW 6, PW 7 and PW 13 are nothing, but a bundle of lies.

101. Coupled with the above, it is noteworthy that PW 12, in his deposition, has deposed that on 28.02.2005, appellant, Pappu Khan, had handed over a CD to the Superintendent of Police, CID, which contained audio visual recording, made by a news channel 'News Today' on 25.02.2005, claiming to have recorded the conversation

between the police officers and Hiralal (PW 5), when they were present near the dead body at village Chainpura. According to the defence, the said CD contained the response of Hiralal (PW 5) on the queries made by the police officer, which indicate that till that time, he (PW 5) was unaware of the circumstances of the death of his son or as regards identity of the person, who was responsible for the abduction and killing of his son. It is for the reason, according to the defence, that the abductors and killers of Lokna were not known, the First Information Report has been *ante dated* and *ante timed* and, therefore, presented before the Chief Judicial Magistrate, Biharsharif, at Nalanda, not on 25.02.2005, but on 26.02.2005, though the First Information Report has been claimed to have been recorded on 25.02.2005 at 09:15 AM. This CD was seized and retained with the police. At a later stage of the investigation, PW 12, too, seized the CD from the maker thereof. Surprisingly enough, the investigating agency has not sent the CD to be analyzed or to get verified its authenticity or accuracy.

102. Situated thus, we find immense force in the submission made by Mr. Surendra Singh, learned Senior Counsel, the CD, in question, would have, if true, completely belied the case of the prosecution. However, the investigating agency, at no stage, made any effort to get the veracity,

correctness or authenticity of the CD examined.

103. We find considerable force in the submission of Mr. Surendra Singh, learned Senior Counsel, that examination of the CD, in question, was imperative for a *fair investigation* of the case. It is not only unjust and unfair, but illegal, not to examine and verify the defence of an accused. It is a mystery why the police did not carry out any investigation to determine if what had been contained in the CD aforementioned were or were not true; more so, when it has, admittedly, surfaced from the evidence on record that the said CD was not only run and viewed by the Investigating Officer, but also by the Superintendent of Police of the district.

104. Moreover, the fact that PW 5 is a witness, who must be treated to be wholly unreliable, becomes evident from the fact that it is the evidence of PW 12 that he had questioned Hiralal (PW 5) as to why he had not disclosed the names of the persons, when the news channel was recording the events aforementioned and it is the deposition of PW 12 that Hiralal gave no explanation. This assertion of the second Investigating Officer (PW 12) has not been paid requisite attention, though ought to have been paid, by the learned trial Court.

105. Admittedly, the appellants had moved an application, as the order, dated 15.10.2009, passed by the

learned trial Court indicates that the CD was, now, with the CID and that the said CD be directed to be produced and displayed in the Court and Hiralal (PW 5) should be called for further cross-examination with regard to the contents of the CD. Though the learned trial Judge ordered the CID to produce the CD and several similar orders were made on 20.11.2009, 23.11.2009, 26.11.2009, 03.12.2009, 05.12.2009 and 14.12.2009 and on the production of the CD, though the CD was viewed, the trial Court did not take the contents of the CD on record on the ground that the said CD had not been sealed. True it is that the CD was not sealed by the Investigating Officer; but this did not, however, relieve the prosecution of their responsibility to ensure that if the CD had not been tempered, its contents be brought on record, when the Investigating Officer's evidence that he had seized the CD has not been disputed by the prosecution.

106. The contents of the CD, as rightly submitted on behalf of the appellants, could have established the innocence of the appellants if the first informant, Hiralal (PW 5), was found to have said that he was unaware of the circumstances, whereunder his son had been abducted and killed and/or expressed his ignorance regarding the identity of the abductors and murderers.

107. It was, therefore, wholly incumbent, on the part

of the investigating agency, to verify the authenticity and correctness of the CD. We need to clarify that we are, in the context of the CD, not on the question of admissibility of the contents thereof into the evidence, but on the fairness of investigation.

108. The failure, on the part of the investigating agency, to verify the authenticity of the said CD and the materials contained thereunder, undoubtedly, cast, as pleaded on behalf of the accused-appellants, serious prejudice to the defence and it would cause serious miscarriage of justice if the result of this unfair investigation is to be acted upon by the Court.

109. However, even if, for a moment, we do not take into account this failure of the investigating agency to get the CD examined and analyzed by an expert, the fact remains that *dehors* the fact of the evidence of CD, the ocular evidence on record, with regard to the occurrence, i.e., the evidence of PW 1, PW 4, PW 5, PW 6, PW 7, PW 8 and PW 13, do not, for the reasons discussed above, inspire confidence of the Court.

110. To put it a little differently, even if one were to ignore the unfairness with which the investigation is clothed, one ignores this aspect of the appeals and the consequential prejudice caused to the appellants, the fact remains that the evidence, otherwise also, adduced by the prosecution, have

failed, in the light of what we have discussed above, to bring home the charges against the accused-appellants beyond reasonable doubt inasmuch as the learned trial Court, while marshalling the evidence, made the error of not correctly appreciating the weaknesses of the prosecution's case, which, during the progress of the trial, emerged from the evidence on record. This aspect would become clearer as proceed further.

111. Moreover, we find it difficult to readily believe the evidence of the so-called eyewitnesses that Lokna came out of the lane located by the side of the house of PW 8, he was apprehended and taken away by the accused-appellants, for, the assertions of these witnesses, if true, is to the effect that there was firing for 10-15 minutes and when everyone of them was trying to hide himself including PW 5 and so did PW 1, PW 4, PW 7 and PW 8, there was no reason for Lokna to be so daring as to come out of the lane to the road, where the accused-appellants, who were, admittedly, inimical to PW 8 and also Lokna, were present. This unnatural conduct, in the face of the evidence on record, cannot be ignored or brushed aside.

112. It would, therefore, follow that PW 1, PW 4, PW 5, PW 6, PW 7, PW 8 and PW 13 have not witnessed the occurrence and there is, in fact, no convincing, reliable and safe evidence to show that Lokna had been abducted in the

manner as has been alleged by the prosecution witnessed.

113. What crystallizes from the above discussion is that the evidence, adduced by the prosecution, was nothing, but an admixture of half-truth and untruth and since the truth, if any, is so inextricably mixed with the falsehood that it is wholly impossible to disengage the truth from the half-truth and untruth, the prosecution's case has to be held as wholly unsafe to believe in or rely upon.

114. Even if, therefore, the evidence of PW 1, PW 4, PW 5, PW 6, PW 7, PW 8 and PW 13 is not rejected outright, as evidence of wholly unreliable witnesses, their evidence would fall, at best, in the category of those witnesses, who are neither wholly reliable nor wholly unreliable.

115. It is trite that the witnesses, ordinarily, fall into three distinct categories, namely, (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly reliable nor wholly unreliable. If the witness is wholly reliable, his evidence can be implicitly relied upon and such a witness's testimony can be made basis for conviction of an accused. Similarly, when a witness is found to be wholly unreliable, no reliance can at all be placed on his evidence and his evidence has to be rejected outright. When, however, a witness is found to be neither wholly reliable, nor wholly unreliable, his evidence cannot be accepted as true unless his evidence is found to have been corroborated by some

credible independent evidence, direct or circumstantial.

116. The evidence of PW 1, PW 4, PW 5, PW 6, PW 7, PW 8 and PW 13, which the prosecution has adduced in the present case, cannot be safely relied upon unless the same is found to have been corroborated by some credible independent evidence, direct or circumstantial.

117. It is also an undisputed proposition of law that one infirm witness cannot be treated to have corroborated the evidence of another infirm witness meaning thereby that witnesses of same brand cannot be taken to have corroborated each other. Thus, when a witness is neither wholly reliable nor wholly unreliable, his evidence cannot be taken to have been corroborated by a witness of the same brand, namely, a witness, who is neither wholly reliable nor wholly unreliable, for, evidence is not to be counted, but weighed. It is not the number of the witnesses, which determines the outcome of a trial; rather, it is the inherent falsity or truth of the evidence given by the witness, which decides the outcome of trial. If each one of a large number of witnesses is found to be wholly unreliable, their evidence cannot become acceptable as true merely because a large number of similar brand of witnesses has corroborated each other.

118. A reference, with regard to the above position of law, may be made to the case of **Muluwa, S/o Binda and**

others Vs. The State of Madhya Pradesh, [AIR 1976 SC 989], wherein the Supreme Court has observed as follows :

> *"It is elementary that the evidence of an infirm witness does not become reliable merely because it has been corroborated by a number of witnesses of the same brand; for, evidence is to be weighed not counted. Since the evidence of P.Ws. 5 and 6 suffered from the same infirmities as that of Smt. Jugatia, it cannot be said that the trial Judge had no basis, whatsoever, for stigmatising it as unreliable."*

119. Situated thus, it becomes clear that merely because the witnesses, whom the prosecution examined as eyewitnesses to the occurrence, have given evidence corroborating each other's evidence, their evidence cannot be made basis for holding them truthful witnesses, when each one of them is a witness, who is neither wholly reliable nor wholly unreliable, for, one infirm witness cannot be treated to have corroborated the evidence of another infirm witness.

120. In the circumstances indicated above, we are clearly of the view that in the facts and attending circumstances of the present case, the accused-appellants ought to have been acquitted.

121. In the result and for the forgoing reasons, we allow these two appeals. The impugned conviction of the

accused-appellants and the sentence passed against them by the judgment and order, under appeal, are hereby set aside. The accused-appellants are held not guilty of the offences, which they stand convicted of, and they are hereby acquitted of the same.

122. Since the accused-appellants are in custody, they are directed to be released forthwith if not required to be detained in connection with any other case.

123. Registry shall, forthwith, send a copy of this judgment and order to the learned trial Court along with the Lower Court Records.

(I. A. Ansari, J.)

(Vikash Jain, J.)

Prabhakar Anand/AFR

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