

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No. 1007 of 2012

Arising Out of PS. Case No.-51 Year-2008 Thana- Ram Krishna Nagar District- Patna

Rakesh Kumar son of Late Ram Udit Sao, resident of Village – Bahrapur,
P.S.-Dhanarua, District-Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
Criminal Appeal (DB) No. 941 of 2012

Arising Out of PS. Case No.-51 Year-2008 Thana- Ram Krishna Nagar District- Patna

Sanoj Kumar @ Teni son of Raj Kumar Pandit Resident of Village- Hander,
P.S- Gaurichak, District- Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In Criminal Appeal (DB) No. 1007 of 2012)

For the Appellant/s : Miss Divya Verma, Amicus Curiae

For the Respondent/s : Mr. Shivesh Chandra Mishra (APP)

(In Criminal Appeal (DB) No. 941 of 2012)

For the Appellant/s : Mr. Dhirendra Kumar Sinha

For the Respondent/s : Mr. Ajay Mishra (APP)

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 27-11-2017

Since in both the aforesaid appeals, both the appellants
have been convicted by judgment of conviction and sentence
dated 23rd of July, 2012 and 26th of July, 2012 respectively passed
in Sessions Trial No. 201 of 2009 (arising out of Ram Krishna



Nagar P.S. Case No. 51 of 2008), both the appeals were heard together and are being disposed of by this common judgment.

2. Both the appellants were convicted under Sections 302/34 of the Indian Penal Code and Section 27 of the Arms Act, 1959 by judgment of conviction dated 23-07-2012 and both the appellants were sentenced to undergo rigorous imprisonment for life under Section 302/34 of the Indian Penal Code and a fine of Rs. 5,000/- (five thousand) each and in default, they have been directed to undergo further imprisonment for one year. Both the appellants were further sentenced under Section 27 of the Arms Act, 1959 to undergo rigorous imprisonment for three years. The judgment of their conviction has been passed by Sri Om Prakash Sinha II, learned Additional Sessions Judge – XI, Patna (hereinafter referred to as the ‘Trial Judge’) in Sessions Trial No. 201 of 2009 (arising out of Ram Krishna Nagar P.S. Case No. 51 of 2008) registered for offence under Sections 302/379/34 of the Indian Penal Code, Section 27 of the Arms Act, 1959 and Sections 3 & 4 of the Explosive Substances Act, 1908.

3. Short fact of the case is that on 28-09-2008 at about 7:15 P.M., the S.H.O., Ram Krishna Nagar Police Station namely Sona Prasad Singh recorded *fardbeyan* of Ashok Prasad, son of Yadunandan Sah. The *fardbeyan* was shown to be recorded near



west of Purvi Ram Krishna Nagar chauraha. In the *fardbeyan*, the informant disclosed that he was permanent resident of district Nalanda and presently, he was residing in a rented house in Eastern Ram Krishna Nagar in the house of one Sri Hari Gope. He stated that two years ago, his younger brother Govind Kumar (deceased) with brother-in-law of his second brother (मँझला भाइ) Manohar Prasad namely Rakesh Kumar (appellant in Cr. Appeal DB No. 1007/12) resident of village Bahrapur, Police Station – Dhanarua, District - Patna had jointly opened a jewellery shop in the name and style of 'Payal Jewellers' in eastern village of Jaganpura (Ram Krishna Nagar). Due to some internal dispute, subsequently his brother Govind Kumar (deceased) separated himself from Rakesh Kumar (appellant in Cr. Appeal DB No. 1007/12). Thereafter, the informant and his younger brother Govind Kumar jointly opened a jewellery shop in the name and style of 'Sri Hans Jewellers' near the chowk of Ram Krishna Nagar. The informant disclosed that since his younger brother Govind had separated himself from Rakesh and opened a new shop, Rakesh Kumar (appellant in Cr. Appeal DB No. 1007/12) himself as well as through others was threatening him and asking him to leave Patna and do not run the shop here. However, with great effort, the informant with his brother (deceased) started his



shop and on 28-09-2008 at about 6:45 PM, while he alongwith his younger brother Govind was in the shop, there was heavy rain and as such, Govind said for closing the shop. The informant, after allowing his brother for closing the shop, came down from the shop. His brother, after completion of closure of shop, while was shutting down the shutter, the informant reached to an egg shop. In the meanwhile, he noticed that the brother-in-law of his second brother (मँझला भाइ) i.e. Manohar, with two persons talking on mobile phone reached there and gave two shots of firing. Thereafter, all the persons started fleeing away to save their life. The informant started to run towards his house. He noticed that behind him, Rakesh Kumar (appellant in Cr. Appeal DB No. 1007/12) with other two persons was chasing his brother Govind Kumar (deceased) and all the three accused persons jointly lobbed bomb and fired on his younger brother Govind Kumar, whereby he received serious injuries and died at the place of occurrence itself. All the three accused persons, while fleeing away, had taken away the hand bag from his younger brother, in which, there were keys, ornaments total 3 ₹ amounting to about rupees thirty nine thousand and a Samsung mobile. The informant claimed that his brother was killed by Rakesh Kumar (appellant in Cr. Appeal DB No. 1007/12) with two other accused persons by means of lobbing



bomb & firing and in the said killing, they also took ornaments and mobile. The *fardbeyan* was read by the informant and thereafter, he put his signature. The *fardbeyan* was also identified by Manohar Kumar (P.W.-1).

4. After recording fardbeyan, on 28-09-2008 at 22.30 hrs. (10:30 PM), a formal F.I.R., vide Ram Krishna Nagar P.S. Case No. 51 of 2008, was registered for the offence under Sections 302/379/34 of the Indian Penal Code, Section 27 of the Arms Act, 1959 and Sections 3 & 4 of the Explosive Substances Act, 1908 against Rakesh Kumar (appellant in Cr. Appeal DB No. 1007/12) and two unknown accused persons.

5. During investigation, police noticed complicity of other more accused persons and finally, on 07-01-2009, chargesheet was submitted against six accused persons including both the appellants. After submission of chargesheet, on 30-01-2009, the case was committed to the court of sessions and finally, on 20-05-2009, charges were framed against all the six accused persons for offence under Sections 302/34, 394/397 & 120(B) of the Indian Penal Code, Section 27 of the Arms Act, 1959 and Sections 3/4 of the Explosive Substances Act, 1908. Since the accused persons denied charges and claimed to be tried, the prosecution, to establish its case, examined altogether five



witnesses. Out of five witnesses, P.Ws.-1, 2 and 3 were full brothers of the deceased. P.W.-1 Manohar Prasad, P.W.-2 Pradeep Kumar and P.W.-3 Ashok Kumar (informant) have claimed to be eye-witnesses to the occurrence, whereas, P.W.-4 Dr. Radha Raman Singh had conducted *post-mortem* examination on the dead-body of the deceased and P.W.-5 Ram Prasad Paswan was the investigating officer of the case.

6. After completion of the prosecution evidences, the circumstances and evidences, which were collected during the trial, were explained to the accused persons and their statement under Section 313 of the Cr.P.C. was got recorded on 29-07-2011, in which, they denied charges. In the present case, to demolish the prosecution case, defence also examined two witnesses namely Raghunath Ram (D.W.-1) and Devendra Prasad (D.W.-2). Surprisingly, those witnesses were shown to be seizure and inquest witnesses, but they were not examined from the prosecution side, rather they were examined as witnesses from defence side.

7. Miss Divya Verma, learned counsel who has appeared as *Amicus Curiae* in Cr.Appeal (DB) No. 1007 of 2012, after placing entire evidences, has argued that it is out-and-out a case of false implication by the informant in connivance with the



investigating officer. She submits that the informant in his *fardbeyan* had disclosed that occurrence had taken place at 6:45 PM on 28-09-2008 and his brother was done to death on road near the chowk, which was surrounded by the number of shops and according to the prosecution, there was heavy rain and within few minutes after the occurrence, police arrived at the place of occurrence and recorded his *fardbeyan* at 7:15 PM at the place of occurrence itself, however; in the evidence of investigating officer (P.W.-5), inquest report in respect of dead body of deceased was shown to be prepared at 6:00 AM in the morning on 29-09-2008. Besides inquest report, a seizure list was also shown to be prepared on 29-09-2008, but by way of making interpolation, time & date in seizure list as well as inquest report were changed and it was shown, as if, inquest report as well as seizure list were prepared on 28-09-2008 at 8:00 PM. The investigating officer in his evidence has accepted that he has not noticed any remains of bomb or cartridges, save and except, recovery of a खोखा (used cartridge) from the place of occurrence. Though, the seizure list in respect of खोखा was shown to be prepared, but the investigating officer himself has admitted that the said खोखा (used cartridge) was not sealed and during trial, he himself produced that खोखा which was marked as material Ext. 1. She further submits that



interpolation in the seizure list and inquest report was even accepted by the investigating officer in his evidence. It has been argued that though alleged occurrence had shown to be taken place at 6:45 PM in the market area, during trial, not even single witness had come forward to support the prosecution case. No independent witness has come forward even to say as to whether he heard any sound of firing or lobbing of bomb, whereas in the evidence of informant (P.W.3) as well as his two brothers (P.Ws.1 & 2) they have stated that in the occurrence, besides firing, number of bombs were lobbed at the place of occurrence itself. It has been argued that if it was a case of throwing bomb in the occurrence and injury received by the deceased, there was no reason to not notice any remains of the bomb at the place of occurrence. She has raised suspicion on the prosecution case regarding recording of *fardbeyan* at the place of occurrence taking clue that informant himself had stated that his brother (deceased) immediately before the occurrence had asked him to close the jewellery shop since there was heavy rain. If there was heavy rain, certainly there was no possibility of recording *fardbeyan* at the place of occurrence and had it been recorded, then the investigating officer would have mentioned something about the heavy rain or difficulty being faced in recording *fardbeyan* due to



heavy rain, however; in the *fardbeyan*, there is neither any indication nor investigating officer in his evidence has said that at the time of recording *fardbeyan*, there was heavy rain or not. By way of referring to evidence of P.W.-1, it has been argued that P.W.-1 (Manohar Prasad) without any explanation has come to be a witness to the F.I.R., but in the F.I.R., he has signed as Manohar Kumar, not as Manohar Prasad. Similarly, P.W.-2 Pradeep Kumar, who is also brother of the informant, has stated as if at the time of occurrence, he was at his resident and after hearing a firing sound, he came out and he noticed that accused Rakesh (appellant in Cr.Appellant DB No. 1007/12) was carrying a pistol in his hand.

8. Highlighting the fact that F.I.R. was anti-dated, Miss Verma, learned *Amicus Curiae* has argued that though *fardbeyan* was shown to be recorded at 7:15 PM on 28-09-2008 and formal F.I.R. was shown to be recorded on the same date i.e. on 28-09-2008 at 8 PM, without any explanation, the said F.I.R. was received in the court on 1st of October, 2008. She submits that there was no long distance between the police station and civil court, Patna. It has been argued that even in the inquest report, it appears that interpolation was made and this was the reason that during trial, original inquest report was not produced, instead the fact in respect of inquest report, which was got recorded in



paragraph – 22 of the case diary, was itself got exhibited, which has been marked as **Ext. 7**. Normally, paragraph of the case diary was not required to be marked as exhibit, but purposely, it appears that the investigating officer, since had committed interpolation in the inquest report also, had not produced original inquest report or even carbon copy of the inquest report. It has also been argued that the investigating officer has made false statement during the court proceeding, which has been noticed by the learned Trial Judge, and the investigating officer had also accepted that cuttings were made in the seizure list and date & time in the seizure list was changed. The investigating officer himself has admitted that he had not found any material in respect of the occurrence or even not found dead body at the place of occurrence. This fact has been stated in paragraph – 15 of the cross-examination of P.W.-5 (investigating officer).

9. Learned *Amicus Curiae*, by way of referring to evidences, submits that it is clear-cut case of interpolation committed by the investigating officer to implicate the appellant and due to his false evidence, the appellant is languishing in jail since long. By way of referring to a recent judgment of the Supreme Court reported in **2014 (5) Supreme Court Cases 108 (State of Gujarat vs. Kishanbhai and others)**, she submits that



in such circumstances, it is necessary to direct for taking appropriate action against the concerned investigating officer. She further submits that since false statement has been made during the trial and the investigating officer has also accepted the said mistake, in this case, there is no requirement to direct the trial court to conduct an enquiry under Section 340 of the Code of Criminal Procedure, 1973 (for short "Cr.P.C."), but direct the trial court to lodge a complaint against the investigating officer for committing such offences, particularly; the offence under Section 195 of the I.P.C.

10. Sri Dharendra Kumar Sinha, learned counsel appearing on behalf of the appellant in Cr. Appeal (DB) No. 941 of 2012 submits that the appellant has also falsely been fixed by the investigating officer as well as the informant and other two witnesses, who were none else, but full brother of the informant and deceased. He submits that in the *fardbeyan*, the informant had only named Rakesh Kumar as an accused with two other unknown persons. After recording *fardbeyan*, in the case diary, re-statement of informant was also recorded and even in re-statement, the informant had not named the appellant and two witnesses, who have come forward as eye-witness. In his statement recorded under Section 161 of the Cr.P.C. he had not whispered against the



appellant, but to the reasons best known to the prosecution, the appellant Sanoj Kumar @ Teni has been fixed. Sri Sinha has also adopted the argument advanced by Miss Divya Verma, learned *Amicus Curiae*, who has appeared in Cr. Appeal (DB) No. 1007/12.

11. Sri Shivesh Chandra Mishra as well as Sri Ajay Mishra, both learned Addl. Public Prosecutor appearing in both the appeals respectively have opposed the appeals. Both have argued that it was a brutal murder in the heart of the town and while committing murder, the accused persons had snatched a hand-bag of deceased containing jewellery and mobile. They further submit that in town area, it is difficult to get any independent witness and this was the reason that no shop-keeper or any other independent witnesses has come forward to depose in favour of the prosecution. Sri Shivesh Chandra Mishra, learned Addl. Public Prosecutor, by way of referring to cross-examination of the investigating officer, submits that the investigating officer appears to have not committed any offence, but due to some ignorance, he accepted regarding correction of the date and time in respect of preparation of the seizure list and inquest report. He submits that since the investigating officer before the trial court himself had admitted his mistake, this Court may not take any



serious view against the investigating officer, however; both the Addl. Public Prosecutors were not in a position to satisfy the Court as to why the prosecution had not got examined any of the witnesses, other than the family members of the deceased to at least say that they heard the sound of firings or sound of the bomb, whereas, in the occurrence, it was alleged that number of firing was made and number of bombs were lobbed.

12. Besides hearing learned counsel for the parties, we have minutely perused the materials available on record. Before discussing evidence, it would be necessary to firstly examine the evidence of P.W.-3, who is informant of the case.

13. Sri Ashok Prasad (P.W.-3), who is informant of the case and own brother of the deceased in his evidence, has stated that in the evening of 28-09-2008 i.e. the date of occurrence, there was heavy rain & storm and about 6.00 in the evening, since there were least number of customers, his brother Govind (deceased) asked for closing the shop. While he was completing the closure, the informant came down from the shop and was standing near a *Gumti* (गुमटी), which was in the side of his shop, from where he noticed that Rakesh (appellant in Cr.Appeal DB No. 1007/12) with two unknown talking on mobile reached near his brother Govind. He stated that Rakesh was carrying a झोला (bag). He



further stated that the appellant Rakesh, after some discussion with his brother Govind, gave one shot of firing on Govind, thereafter, his brother Govind started raising hulla “बचाओ बचाओ” and ran towards the informant and thereafter, the P.W.-3 and his brother (deceased) started fleeing away. P.W.-3 after some distance concealed himself near a boundary wall, which was of an under-construction house. He stated that in the vapour light, which was ON near the said house, he seen that his brother Govind was caught by accused Teni (appellant in Cr.Appeal DB No. 941/12) and he gave firing shot on his chest, whereupon his brother fell down on the road. Then, the appellant Rakesh from the close range fired on his temporal region and Teni lobbed bomb. Teni also took the hand bag of his brother, in which, there were ornaments and keys of his shop and Rakesh took mobile. The P.W.-3 further deposed that all the three accused persons throwing bomb fled towards the eastern side and his brother died at the place of occurrence itself. In paragraph – 2, he stated that within one or two minutes, his brothers Manohar (P.W.-1), Satya Narayan (not examined) and Pradeep Kumar (P.W.-2) arrived there. At the place of occurrence itself, the police of Ram Krishna Nagar Police Station arrived and recorded his *fardbeyan*, which was read by him and he put his signature. As a witness, his brother Manohar



(P.W.-1) also put his signature on the *fardbeyan*. He stated that his statement was recorded by Sub-Inspector of Police Sri Sona Prasad Singh of Ram Krishna Nagar Police Station. He proved the *fardbeyan*, which was marked as **Ext. 2**. Regarding the reason for the occurrence, he stated that prior to the said occurrence, appellant Rakesh Kumar and his brother Govind Kumar in partnership had opened a jewellery shop and they were jointly running the shop. Subsequently, Rakesh thought to run the business solely, thereafter, his brother Govind separated from him after completing accountancy. He requested P.W.-3/informant for opening the shop, thereafter, a shop jointly with informant and deceased was opened. The P.W.-3 further deposed that after the shop was separated by the deceased, the appellant Rakesh started threatening him to leave Patna. In paragraph – 11 of his cross-examination, this witness stated that when after closing the jewellery shop his brother moved towards egg shop, all the three accused persons started firing on him and lobbing bomb. Bomb also exploded there. There was some scuffle. Thereafter, his brother started fleeing away. While he was moving upon his brother firing was made as well as bomb was lobbed, but same did not hit him. Number of other persons also started fleeing away. While moving, the deceased was behind informant (P.W.-3) and



they were running. His brother (deceased) was about 15-20 feet behind the informant. He stated that near boundary wall of an under-construction house, which was just before the house of the informant, he sat and concealed himself. He stated that he only heard the sound of bomb and he did not hear the sound of firing. After about five minutes from the sound of firing, he came out and reached to the place of occurrence, where his brother was found dead. On examination of his evidence, it appears that the informant since had concealed himself beside the boundary wall, he could not see as to who fired on his brother, which was accepted by him in paragraph – 11 itself that after about five minutes of the sound of bomb, he came out and reached to the place of occurrence, where his brother was lying dead. He stated that at the place of occurrence, he had seen the blood and there he had noticed one खोखा (fired cartridge). He reiterated that while police arrived he was at the place of occurrence itself and police thereafter had prepared paper relating to seizure of the dead body and he had also signed on the paper, on the fardbeyan he and his brother had also signed. In paragraph 14 of his cross-examination, he stated that the dead body was carried by the police to the police station at about 9-10 in the night and for the whole night, the dead body was lying in the police station. He has stated that leaving the



dead body in the police station, he had returned back to his house and again at about 5.00 – 6.00 in the morning, he reached to the police station and in the morning at about 7:00 AM, he alongwith other two brothers followed the dead body up-to the hospital. His attention was drawn to his statement before the police on the point as to whether before the police, he had said regarding vapour light at the place of occurrence or not. He stated that he had stated to the police officer that vapour light was ON at the place of occurrence. In paragraph – 24 of his cross-examination, he has accepted that Teni (i.e. Sanoj Kumar @ Teni appellant in Cr.Appeal DB No. 941/12) was his co-villager and in paragraph – 25, he stated that his re-statement was recorded after 2 – 2 ½ hours by the police at the place of occurrence itself and he accepted that in his re-statement also, he had not disclosed the name of Sanoj @ Teni. In paragraph – 28, he reiterates that he had never disclosed the name of Sanoj @ Teni before the police.

14. P.W.-1 Manohar Prasad has stated that at about 6:45 in the evening on the date of occurrence, he was inside house, which was house of Hari Babu in the mohalla – Ram Krishna Nagar, where he was a tenant. He stated that with him in the said house, his younger brother Pradeep Kumar (P.W.-2), Satya Narayan and his son Shivam were residing, at that very time, he



heard the sound of firing i.e. at about 6:45 P.M. on 28-09-2008, thereafter, he alongwith his brother came out from his house and reached on the stair. He stated that his elder brother Ashok (P.W.3) followed by Govind Kumar (deceased) was coming running and behind them, there were three accused persons, who were also running and chasing. He stated that in the electric light, he had seen Ashok, who after scaling boundary wall, had concealed himself, but Govind Kumar was caught by Tenia (appellant in Cr.Appeal DB No. 941/12), Rakesh (appellant in Cr.Appeal DB No. 1007/12) and one another and Teni gave shot of firing on the chest and thereafter, he fell down. Subsequently, Rakesh Kumar gave a gun shot on temporal region of Govind. Teni took out a bomb from his झोला (bag) and lobbed on Govind, which exploded with sound. He stated that said bomb hit the face of Govind Kumar. This witness further stated that one another accused also started to throw bomb. In paragraph – 3, he gave specific description that bag of Govind Kumar containing ornaments amounting to Rupees thirty nine thousand was taken by Teni (appellant in Cr.Appeal DB No. 941/12) and mobile (Samsung) was taken by Rakesh (appellant in Cr.Appeal DB No. 1007/12). He also stated that the reason for dispute was running of jewellery shop. In paragraph – 5, this witness reiterated that *fardbeyan* of his



brother Ashok Prasad was recorded at the place of occurrence itself, on which, his brother and he also put signature. He identified the signature of Ashok Prasad, which was marked as **Ext. 1** and his own signature, which was marked as **Ext. 1/1**. He stated that police also prepared inquest report at the place of occurrence itself, on which, he put his signature. In cross-examination, he accepted that he was not regularly residing in the house with his brother, but stated that often he used to live with his brother Govind & Ashok and he stated that he was coming to Patna in the interval of a week or ten days to meet his brother. He was a jewellery workman and accepted that he was resident of *Karai Parshurai*, which is about 45 km away from Patna, where he alongwith his wife and children was residing. It is necessary to indicate that appellant Rakesh is own brother-in-law of this witness. In paragraph – 9 of his cross-examination, he has stated that mother of the appellant (Rakesh) had given a land measuring one katha in Dhanarua, which was given to him as “बख्शीशनामा”. In paragraph – 15 of his cross-examination, he stated that after hearing the sound of firing, he came out from his house and reached to the place of occurrence and he noticed that his brother and deceased were closing the shop. This statement is directly in conflict with his earlier statement, where he stated that after



hearing the sound, he came out from his house and from a stair he noticed that both brothers were being chased by three accused persons. He further stated in paragraph – 1 that about 10 to 15 minutes after the death of his brother, police arrived and inquest report was prepared, which was signed by him and police also seized a खोखा (used cartridge) from the place of occurrence. On being asked regarding statement before the police, he stated that before the police, he had stated that on the shop his elder brother Ashok and younger brother Govind were present and he further stated that before the police on 28-09-2008 about 6:45 PM, he had heard the sound of firing and thereafter, he and his brother (Pradeep) came out from his house and reached on stair and thereafter, he seen that his brother Ashok and behind him Govind were running and behind them, three accused persons were running. They were identified in the electric light and Ashok had crossed the boundary wall. At this stage, it is necessary to examine the evidence of investigating officer (P.W.-5). P.W.-5 the investigating officer in paragraph – 25 of his cross-examination has stated that P.W.-1 Manohar Prasad before him had not claimed to be eye-witness and he had stated before the investigating officer that regarding the occurrence, he was informed by Ashok Kumar (P.W.-3). Meaning thereby that during investigation, this P.W.-1



Manohar Prasad, brother of the deceased, had not claimed to be eye-witness to the occurrence, but subsequently during the trial, he developed a story as if he had seen the occurrence and even in entire evidence, he had not given consistent evidence, but there was some contradictions and this was the reason that attention of this witness to his previous statement recorded under Section 161 of the Cr.P.C. was drawn to the investigating officer, who had clarified that P.W.-1 was not eye-witness to the occurrence.

15. Similarly, P.W.-2 Pradeep Kumar, who is another brother of the informant and deceased in his evidence, has stated that on the date of occurrence, he was in his house and after hearing the sound of firing, he came out from his house and from railing of his house, he had seen that Rakesh Kumar (appellant in Cr.Appeal DB No. 1007/12) was carrying a pistol in his hand and there were two unknown persons. He came out from the rented house and he seen the dead body of his brother lying on the road. He stated that he was informed by Ashok (P.W.-3) that his brother Govind was killed by Rakesh and other two accused persons. In his cross-examination, he has stated that his brother Manohar (P.W.1) was given some land from his in-laws side. It is clarified that the appellant Rakesh is own brother-in-law (साला) of Manohar Prasad. Regarding the statement of this P.W.-2 recorded under



Section 161 of the Cr.P.C. during investigating, attention of investigating officer i.e. P.W.-5 was drawn and he stated that during investigation, under Section 161 of the Cr.P.C., this witness (P.W.-2) Pradeep Kumar had stated that on getting information, he came to the place of occurrence and seen the dead body of his brother Govind Kumar, which was lying at the place of occurrence. Rather, this information was given by Ashok Kumar. The investigating officer clarified that P.W.-1 had not stated in his statement under Section 161 of the Cr.P.C. that at the time of occurrence, he was in the house of Hari Babu as tenant and after hearing the sound of firing, he came out of his house and from railing, he had seen that Rakesh Kumar was carrying a pistol in his hand and he was not knowing in respect of two unknown persons and when he came out from the rented house, he had seen the dead body of his brother lying on the road.

16. P.W.-5 Ram Prasad Paswan (investigating officer) in paragraph – 27 of his cross-examination has stated that Ashok Prasad (P.W.-3) before him had not stated that Rakesh was carrying a bag in his hand and he came near to Govind and talked with him and thereafter, Rakesh gave one shot of firing on his brother and Govind Kumar started fleeing away by raising alarm “बचाओ बचाओ”. The investigating officer further stated that the



informant/P.W.-3 in his statement recorded under Section 161 of the Cr.P.C. had not stated that there was a vapour light in running condition near the under-construction house, where there was a wall and he himself had concealed beside the boundary wall and he had not said that Teni had caught his brother and gave shot of firing on his chest and his brother fell down on the road and thereafter, Rakesh had fired on his temporal region and thereafter, Rakesh and Teni both had lobbed bomb. Meaning thereby that even informant during the trial has stated many things, which were never stated during investigation in his statement recorded under Section 161 of the Cr.P.C.

17. P.W.-4 Dr. Radha Raman Singh on 29-09-2008 was posted as Assistant Professor in the N.M.C.H., Patna and had conducted *post-mortem* examination on the dead body of Govind, brother of the informant, and found following injuries:-

“On External Examination

1. Lacerated wound of 15cm x 8 cm x oral cavity deep on left side of face, left ear and scalp. Fracture of mandible, which was exposed, Lt. Maxilla upper jaw and bony margin of Lt. Eye. Margin and base of injuries were impregnated with carbon particles and it was blackened.

2. Lacerated wound with hole in right maxilla was found on area 3 cm x 1 ½ cm x oral cavity deep



with fracture of Rt. Maxilla. The margin contains abrasion collar. This was wound of entrance.

3. Perforating wound on left base of nasal bridge was found on area 4 cm x 2 cm and through and through to injury no.2. Nasal bone was fractured. This wound was wound of exit.

4. Perforating wound of size 3 cm x 2 cm x chest cavity deep on Rt. Side of upper half of back situated 1 cm right from mid vertebral line. Blackening was found on area 9 cm. X 9 cm including wound. This wound was wound of entrance.

5. Perforating wound of size 2.5 cm x 1 cm x chest cavity deep on Rt. Side of chest situated 8 cm medial from Rt. Nipple and 5 cm lateral from mid thoracic line. This was wound of exit.

6. Multiple abrasions on forehead ranging from 4 cm x 2 cm to 1 cm x 1 cm in size.

On Internal Examination:

1. One hole was found in 2nd I.C.S on Rt. Side of chest and another hole was found at level of 4th and 5th thoracic vertebra. Blood was found in thoracic cavity. Rt lung was perforated through and through. Pericardial Membrane and right atrium were perforated through and through. 4th and 5th vertebra were fractured with laceration of spinal cord.

2. Frontal bone was fractured with extra and subdural haemorrhage.

3. All viscera were pale. Heart chambers were empty, bladder was empty, stomach content was thick mucoid matter.



He proved the *post-mortem* examination report, which was marked as **Ext. '3'**. On examining the injuries on the person of the deceased, he suggested that injuries were caused by fire-arm, bomb-blast and hard & blunt substance.

18. Though, P.W.-3, ofcourse doubtfully, had claimed to be eye-witness to the occurrence or other two witnesses i.e. P.W.-1 and 2 had not at all whispered as to whether in the occurrence, any hard and blunt substance was used or not, so *anti-mortem* injuries found on the person of the deceased also does not consistently corroborate the prosecution story.

19. In the present case, five persons were put on trial, however; the learned Trial Judge had acquitted three accused persons. Surprisingly, though in the present case, right from the very beginning, it was consistent case of the prosecution that in the occurrence, there were three persons, but the investigating officer without any rhyme and reason had also forwarded other three accused persons to face trial, whereas, the investigating officer in his cross-examination had accepted that even after arrest of these accused persons though their statement was recorded they had not stated anything indicating their involvement in the case, but to the best of the knowledge of the investigating officer, those persons were also forwarded and chargesheeted as accused and



they had faced trial and finally, out of five, three were acquitted by the trial court.

20. In the present case, the evidence of investigating officer i.e. P.W.-5 Ram Prasad Paswan is very vital, since at the time of argument, it was submitted by learned counsel for the appellants that none had seen the occurrence and subsequently, story was made out as if the occurrence was seen by P.W.-3 and in the occurrence, both the appellants were involved. The investigating officer in his examination in chief has proved firstly his endorsement on *fardbeyan*, which was marked as **Ext. '4'**, formal F.I.R. - **Ext. '5'**, seizure list of so called खोखा **Ext. '6'**, inquest report (paragraph – 22 of the case diary containing extract of so called inquest report) – **Ext. '7'**, one report regarding खोखा **Ext. '8'** and he has produced खोखा (used cartridge), which was marked as **Material Ext. I**. In his evidence, he stated that on 28-09-2008, he was posted as Sub-Inspector of Police in Ram Krishna Nagar Police Station and on the same date at about 19.00 hrs. (7:00 PM), the officer incharge of the police station namely Sona Prasad Singh had received information that near the Grain market of *Changar* mohalla, occurrence of firing and bomb lobbing had taken place. On this information, a sanaha entry no. 704 dated 28-09-2008 was recorded at 7:00 PM and he alongwith



his officer incharge reached to the place of occurrence, where officer incharge recorded *fardbeyan* of Ashok Prasad (informant, P.W.-3) and he also proved endorsement on the *fardbeyan*, which was marked as **Ext. '4'**. On the basis of said *fardbeyan*, a formal F.I.R. was lodged and same was got exhibited as **Ext. '5'**. In paragraph – 2, he has stated that he recorded re-statement of Ashok Prasad and thereafter, he recorded statement of Manohar Prasad (P.W.-1), Pradeep Kumar (P.W.-2) and Satya Narayan Prasad (not examined) brother of the informant. In paragraph – 3, he has stated that from the place of occurrence, he seized one खोखा of .315 Bore (used cartridge) and prepared a seizure list, which was signed by Devendra Prasad (D.W.-2) and Raghunath Prasad (D.W.-1) and he proved the said seizure list, which was marked as **Ext. '6'**. He further stated that on 29-09-2008 at 6:00 in the morning, he prepared inquest report in respect of recovery of dead body of Govind. At this juncture, it is necessary to indicate that the P.W.-3 in his evidence has made categorical statement that on the same date i.e. on 28-09-2008 at about 9:00-10:00 in the night, the police carried the dead body to the police station and dead body was lying in the police station and the witness had left the dead body in the police station and returned back. Again in the morning at 5:00-6:00 AM on 29-09-2008 he reached police station



and subsequently, at about 7:00 in the morning on 29-09-2008, he alongwith his two brothers followed the dead body to the hospital. The evidence of P.W.-3 creates serious doubt regarding the date and time of preparation of the inquest report. Either the eye-witnesses are speaking lie or investigating officer is saying incorrect statement regarding the date and time of the preparation of the inquest report and this witness has produced paragraph – 22 of the case diary containing fact of inquest report, which was marked as **Ext.'7'**, however; to the reasons best known to the prosecution, neither original nor carbon copy of the inquest report was produced during the trial. The investigating officer has also inspected two places of occurrence in the present case, first; near Sri Hans Jewellery Shop of deceased and second, the *kharanja* road where dead body of the deceased was found. Thereafter, he disclosed that he arrested Dina Nath Kumar on 11-10-2008, on 12-10-2008 arrested Raju Kumar, then on 17-10-2008 he arrested Dinesh Kumar Sahani and one Fakir Chand Sao. On 17-10-2008, Sanoj Kumar @ Teni (appellant in Cr. Appeal DB No. 941/12) was arrested. It appears from the record that though chargesheet was submitted against six accused persons including Fakir Chand Sao, however; since during the trial, he remained absent, his case was separated and only five accused persons were tried together



including both the appellants. This witness has produced a communication made to the learned C.J.M. from the office of Sr. Superintendent of Police whereby a parcel of recovered used cartridge was submitted. This forwarding letter was got exhibited and marked as **Ext. '8'** and he produced the said cartridge (खोखा), which was marked **Material Ext. 'I'**. The investigating officer P.W.-5 in paragraph - 12 has stated that after obtaining permission from the superior authority, he submitted chargesheet against (1) Sanoj Kumar @ Teni (appellant in Cr.Appeal DB No. 941/12), (2) Rakesh Kumar (appellant in Cr. Appeal DB no. 1007/12), (3) Fakir Chand Sao, (4) Raju Kumar, (5) Dinesh Kumar Sahani and (6) Dina Nath Kumar and investigation in respect of other two was kept pending. In paragraph – 13 of his cross-examination, the investigating officer (P.W.-5) has stated that on 28-09-2008 officer incharge of the police station had received information regarding the fact that firing was going on at the place of occurrence. He further stated that at that very time, heavy rain was continuing and it was dark night and this was the reason regarding non-inspection of the place of occurrence. At this juncture, it is necessary to notice that only so called eye-witness i.e. P.W.-3 (Informant) in his evidence had stated that near the place of occurrence, there was vapour light and in the said light, he had seen the occurrence. This



witness has further stated that due to heavy rain and dark night, neither he could inspect the place of occurrence nor at that time, he could prepare inquest report, however, paragraph – 22 of the case diary incorporating the contents of the inquest report suggests that the inquest report was prepared on 28-09-2008 at 20 hours (8:00 PM) near about 60 yards away of Purbi Ram Krishna Nagar Chauraha. This fact has been stated in column no. 3 of the so called inquest report incorporated in paragraph – 22 of the case diary, whereas, in the same report, in column no. 1, which refers about the case number and date and time of preparation of inquest report ‘case number was shown blank i.e./08’ and date has been mentioned as 29-09-2008 at 6.00 in the morning and the investigating officer, who is P.W.-5, himself has signed and below his signature, he has mentioned the date as 29-09-2008. This shows regarding the conduct of the investigating officer. In cross-examination, he is saying that in the night, due to darkness and heavy rain, he did not inspect the place of occurrence nor he prepared inquest report, but in **Ext. ‘7’**, time and date of finding of the dead body at the place of occurrence has been mentioned as 28-09-2008 at 20.00 hrs. i.e. 8:00 PM. He could also not give reply to the question in the same paragraph i.e. paragraph – 3 as to whether he had asked the officer incharge as to how, since there



was heavy rain and dark night, he could record *fardbeyan* of the informant at the place of occurrence. It is made clear that during evidence, the officer i.e. Sona Prasad Singh, the officer incharge, who had recorded *fardbeyan*, was not produced to be examined as prosecution witness and as such, the defence were deprived to ask such relevant question from the officer, who had said to have recorded *fardbeyan* at the place of occurrence in the night during heavy rain without any light. He has further accepted that in the case diary, he has not mentioned as to whether the seized material exhibit i.e. fired cartridge (खोखा) was kept in “मालखाना” or not. This witness in paragraph 16 of his cross-examination has admitted that on 29-09-2008, after seeing the dead body, he had prepared inquest report, but to the reasons best known to him in the so called inquest report i.e. **Ext.‘7’** in column no. 3, he has mentioned the date of preparation of inquest report of the dead body as 28-09-2008. He further accepted that he visited the place of occurrence on second occasion at 11:30 AM on 29-09-2008, whereas, the informant in his cross-examination has stated that after recording *fardbeyan* at the place of occurrence, at the same place after 2 and 2 ½ hours, his re-statement was recorded by the police. Those statement i.e. statement of informant and this investigating officer is itself contradictory with each other. This is



further evident from paragraph – 19 of cross-examination of P.W.- 5, wherein he has stated that on 29-09-2008 at 6.00 in the morning after preparation of the inquest report at 7.00 AM with dead body challan he sent the dead body to Nalanda Medical College Hospital, Patna. In paragraph 20 of his cross-examination, he has stated that on the second place of occurrence (where dead body was found), he had not found remains of bomb, used cartridge (खोखा), however; to the reasons best known to the investigating officer, in earlier paragraph he has stated that he had found a used cartridge (खोखा) at the place of occurrence and he had also produced the said खोखा which was marked as **Material Ext. I**. It is also surprising that though, it was the case of the prosecution that besides giving number of shots, the accused persons had lobbed number of bombs, even then, no remains or sign of bomb was found at the place of occurrence. In paragraph 23, P.W.-5 the investigation officer has admitted that in seizure list, column no. 1, digit '29' was tampered and after tampering, it was mentioned as '28'. In the same column, he had accepted that the word “सुबह ” (morning) was deleted and the word ‘रात’ (night) was made. He accepted that on cuttings, there was no initial. He further accepted that on column no. 5 of the seizure list, below the signature of Raghunath Prasad (D.W.-1), date '29' was made as '28'. He



further accepted that in column no. 6, below his signature date '29/9/08' was pen down/deleted and it was made as '28/9/08'. This categorically suggests commission of criminal offence on the part of the investigating officer and in a court proceeding, he had brought on record document, which was forged, hence he deposed falsely. He accepted in paragraph – 28 that *fardbeyan* though was recorded by Sona Babu (officer incharge), neither his statement was recorded nor he was cited as witness in the chargesheet. The trial court had asked a question as to whether during investigation, in seizure list by way of tampering he had deleted the date 29-09-08 and substituted with 28-09-08, in answer, he accepted and stated that he himself had corrected the date from 29-09-08 to 28-09-08. On being asked by the court in paragraph – 31, as to why after making cutting/interpolation he had not put his signature, he did not give any reply. While giving reply to cross-examination made on behalf of the appellant Sanoj Kumar @ Teni in paragraph – 32, he stated that the informant in his re-statement in paragraph 5, Manohar Prasad (P.W.1) in paragraph – 6 and Pradeep Kumar (P.W.2) in paragraph – 7 had not stated the name of Teni. Neither he was identified nor T.I.Parade was ever held, even in jail. In paragraph – 34 of the cross-examination, by way of referring to certain paragraphs of the case diary, he has stated that



though he had recorded statement of other accused persons, but none had said regarding their involvement in the case. He has also stated that in the case diary, it was not mentioned as to from where Sanoj Kumar @ Teni was arrested. In paragraph – 36 of his cross-examination, this witness has accepted that though one fired cartridge (खोखा) was found at the place of occurrence, but it was not sealed. The investigating officer in his cross-examination has admitted that the so called seized fired cartridge (खोखा), which was found, was never sealed, but on perusal of **Ext. 8** i.e. forwarding letter to the C.J.M., it appears that it was sent in sealed cover. In **Ext. 8**, it was mentioned as if sealed cover containing fired cartridge was sent. This again creates serious doubt as to whether any fired cartridge was found at the place of occurrence or it was sealed or not. In paragraph 37, he has denied the suggestion that he himself had brought fired cartridge (खोखा) and shown its seizure by preparing seizure list.

21. We have also perused the seizure list relating to seizure of so called .315 *Bore* fired cartridge (खोखा), which has been marked as **Ext. '6'**. In the seizure list, column no. 1 after date and time, there is cutting of the date and '28' has been corrected as '29' and similarly, the word 22 hours has been substituted. After deleting the word “सुबह ” (morning), it has been



changed as 'रात' (night). The said seizure list was witnessed by Devendra Prasad, who has been examined as D.W.-2 and Rathunath Prasad (D.W.-1). Below the signature of Rathunath Prasad the date 29-09-08 was corrected as 28-09-08 and the investigating officer has put his signature in column no. 6 of the seizure list and below his signature, again date has been interpolated and 29-09-08 has been corrected as 28-09-08. The Court is satisfied that the interpolation in the official record has been done and primarily the investigating officer during the trial has himself admitted that he has made such correction without any initial. Meaning thereby that the investigating officer has confessed his guilt regarding interpolation.

22. Though, in the case, it was alleged that occurrence had taken place at about 6.45 in the evening in the market area, to the reasons best known to the prosecution, the prosecution had not produced any independent witness nor even any shop-keeper of nearby or even egg seller, regarding which, the informant had stated that just before the occurrence, he was standing near the egg shop. Egg shop owner was also not examined. Not even a single independent witness has come forward to support as if he had heard the sound of either firing or exploding of bomb, whereas, it is case of the prosecution that in the occurrence,



number of shots were fired and besides firing, number of bombs were lobbed, which according to witnesses, also exploded.

23. The prosecution case also come into cloud, in view of the fact that two witnesses, who were shown to be witnesses of the seizure list in respect of .315 Bore fired cartridge purported to be seized at the place of occurrence, those witnesses were not produced from the prosecution side. However, after examination of the accused under Section 313 of the Cr.P.C., those two seizure witnesses had come to depose, as defence witness, and they have made categorical statement that on blank paper, their signature was obtained by the investigating officer. If this is the conduct of the investigating officer or its supervisory authority, then certainly besides passing order of acquittal, the court of law is also required to direct for conducting deep inquiry in respect of such officer. At the same time, the trial court, before whom false statement was made and during the trial forged document was brought on record, was also required to take appropriate action against such officer. The learned Trial Judge, it appears had not done its job in its right perspective and in perfunctory manner has passed the order of conviction and sentence. We are in agreement with the submission of Miss Divya Verma, learned *Amicus Curiae* that the Hon'ble Supreme Court in a case reported in **(2014) 5 Supreme Court**



Cases 108 (State of Gujarat vs. Kishanbhai and others) has directed the Home Department of the State Government to take appropriate action in case of such officer(s). She has placed reliance on paragraph – 23 of the judgment, which is required to be incorporated, is as follows:-

“23. On the culmination of a criminal case in acquittal, the investigating/prosecuting official(s) concerned responsible for such acquittal must necessarily be identified. A finding needs to be recorded in each case, whether the lapse was innocent or blameworthy. Each erring officer must suffer the consequences of his lapse, by appropriate departmental action, whenever called for. Taking into consideration the seriousness of the matter, the official concerned may be withdrawn from investigative responsibilities, permanently or temporarily, depending purely on his culpability. We also feel compelled to require the adoption of some indispensable measures, which may reduce the malady suffered by parties on both sides of criminal litigation. Accordingly, we direct the Home Department of every State Government to formulate a procedure for taking action against all erring investigating/prosecuting officials/officers. All such erring officials/officers identified, as responsible for failure of a prosecution case, on account of sheer negligence or because of culpable lapses, must suffer departmental action. The above mechanism formulated would infuse seriousness in the performance of investigating and prosecuting duties, and would ensure that investigation and prosecution are purposeful and decisive. The instant direction shall also be given effect to within 6 months.”



24. It is also necessary to be noticed that the Apex Court in a case reported in **(2012) 8 S.C.C. 263 (Dayal Singh and others vs. State of Uttaranchal)** after noticing the apparent inaction on the part of the investigating officer had directed the D.G.P. to take appropriate action against such investigating officer. At this juncture, it would be appropriate to quote paragraph nos. 43 and 47.4 of the judgment, which are as follows:-

“43. Similarly, the Director General of Police U.P./Uttarakhand also be issued notice to take appropriate action in accordance with the service rules against PW6, SI Kartar Singh, irrespective of the fact whether he is in service or has since retired. If retired, then authorities should take action for withdrawal or partial deduction in the pension, and in accordance with law.

47.4. The Directors General of Police U.P./Uttarakhand are hereby directed to initiate, and expeditiously complete, disciplinary proceedings against PW6, SI Kartar Singh, whether he is in service or has since retired, for the acts of omission and commission, deliberate dereliction of duty in not mentioning reasons for non-disclosure of cause of death as explained by the doctor, not sending the viscera to the FSL and for conducting the investigation of this case in a most callous and irresponsible manner. The question of limitation, if any, under the Rules, would not apply as it is by the direction of the Court that such enquiry shall be conducted.”



25. After noticing such interpolation in the record, which were brought in a judicial proceeding by either of the official whether investigating officer or any supervisory authority, the High Court, being the appellate court, may not shut its eyes. In such circumstances, considering the observation of the Supreme Court, as quoted hereinabove, it is necessary to direct the Director General of Police, Govt. of Bihar to see that the concerned investigating officer/supervisory officer may be dealt with properly by way of initiating regular departmental proceeding.

26. After examining the aforesaid evidences, it is evident that the story developed by the informant itself is suspicious, whereas, in the evidence of P.W.-1 and P.W.-2, it has been established that they had not seen any occurrence, but whatever they had stated, they had stated as informed by the informant/P.W.-3. The evidence of P.W.-3 is itself suspicious, particularly in view of the fact that though in his evidence, he had claimed to identify accused persons in the vapour light, which was seen at the time of occurrence, the investigating officer in his deposition P.W.-5 has stated that due to heavy rain and darkness, he was not in a position to inspect the place of occurrence in the night of 28-09-08 nor he could prepared inquest report on the dead body. The evidence of P.W.-3 also makes it clear that inquest



report was not prepared at the place of occurrence, since he has deposed that dead body was removed from the place of occurrence on 28-09-08 in between 9 and 10 in the night itself, so the story of the investigating officer that inquest report was prepared at the place of occurrence is apparently incorrect. In the case, there is no independent witness to support as if any firing had taken place or any bomb was exploded at the time of occurrence, save and except three witnesses, who are none else but own brother of the deceased and as such, no reliance can be placed on such evidence.

27. Considering the evidence of three so called eye-witnesses, which has been demolished by the evidence of investigating officer/P.W.-5, the appellant of both the appeals deserve to be extended the benefit of clean acquittal.

28. Accordingly, the judgment of their conviction and sentence dated 23.07.2012 and 26.07.2012 respectively passed by Sri Om Prakash Sinha II, learned Additional Sessions Judge - XI, Patna in Sessions Trial No. 201 of 2009 (arising out of Ram Krishna Nagar P.S. Case No. 51 of 2008) is, hereby, set aside and both appeals are allowed.

29. Since both the appellants are in custody and judgment of their conviction and sentence has been set aside, they are directed to be released forthwith, if not wanted in any other



case.

30. The Director General of Police, Govt. of Bihar, in the light of the observation of the Supreme Court, as quoted hereinabove, is directed to take appropriate action against Investigating Officer/Supervisory Authority and submit its report regarding compliance of the order of this Court within a period of six months from the date of receipt/production of a copy of this order. The report is required to be addressed to the Registrar General of the Patna High Court.

31. Registry is directed to send a copy of this judgment to the Director General of Police, Govt. of Bihar forthwith.

(Rakesh Kumar, J.)

(Mohit Kumar Shah, J.)

Anay

AFR/NAFR	AFR
CAV DATE	N/A
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