

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.201 of 2012

=====

1. Om Prakash Dubey S/O Late Bhagwati Saran Dubey, Resident Of Village-
Gabhirar, Police Station- Raghunathpur, District- Siwan

.... Appellant/s

Versus

1. The State Of Bihar

.... Respondent/s

=====

Appearance :

For the Appellant/s : Mr. Srinandan Pd. Singh, Advocate

Mr. Ashok Kumar, Advocate

Mr. Surendra Pd. Singh, Advocate

For the Respondent/s : Mr. A. K. Sinha, APP

=====

**CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP
SINGH**

and

HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI)

Date: 06-03-2017

Sole appellant, Om Prakash Dubey has been held guilty for an offence punishable under Sections 302 IPC and 27 of the Arms Act vide judgment of conviction dated 25.01.2012 and sentenced to undergo imprisonment for life as well as fine of Rs. 25,000/- in default thereof, to undergo imprisonment of two years additionally under Section 302 IPC, imprisonment of five years as well as fine of Rs. 3000/- in default thereof, to undergo imprisonment of three months additionally under Section 27 of the Arms Act vide order of sentence dated 30.01.2012 with a further direction to run the sentences concurrently by the Additional Sessions Judge-FTC-IV, Siwan in Sessions Trial No. 512/2010.

2. Rashendra Dubey (PW 5) gave his Fard-e-beyan



on 03.05.2009 at about 10:45 am before the O/C Raghunathpur at the house of Nagendra Dubey (deceased) disclosing therein that as marriage of son of Nagendra Dubey has been fixed to be held on 20.05.2009, on account thereof, Nagendra Dubey was cleaning his Sahan, wherein his uncle was also assisting. At about 10:00 am, his neighbour, Om Prakash Dubey and Kamalakar Dubey came and forbade. Nagendra Dubey resisted on the ground that he was cleaning his own Sahan, on account of which both indulged in an altercation. He along with Nagendra Dubey resisted whereupon they both went over their roof. After their arrival on the roof, Kamalakar Dubey provoked to kill whereupon Om Prakash Dubey directed his wife to bring Double Barrel licensee Gun which was handed over by her. Om Prakash Dubey loaded the gun and fired two rounds upon Nagendra Dubey. Nagendra Dubey after sustaining injury fell down. Copious blood flown from his injuries. Before managing to shift Nagendra to hospital, he died. There was injury near right eye as well as over chest, shoulder and forehead. Police got information and arrived. The motive of the occurrence has been shown to be land dispute.

3. On the basis of the aforesaid Fard-e-beyan, Raghunathpur PS Case No. 49/2009 was registered whereupon investigation was taken and after completing the same, charge-sheet was submitted against Om Prakash Dubey, Kamalakar Dubey and



Meena Devi, whereupon trial commenced and concluded wherein Meena Devi and Kamlakar Dubey were acquitted while appellant, Om Prakash Dubey has been found guilty as indicated above and, accordingly, sentenced, the subject matter of the instant appeal.

4. The defence case, as is evident from the mode of cross-examination as well as statement recorded under 313 CrPC, is of complete denial and of false implication at the instance of enemies of the appellant who happens to be associate of informant, Rasendra Dubey whose activity was protested by the appellant being an anti-social element as well as being an accused in a rape case.

5. Neither any DW nor any kind of document has been adduced on behalf of appellant though during course of trial at the end of Kamlakar Dubey (since acquitted), three DWs were examined.

6. While assailing the judgment of conviction and sentence, it has been submitted on behalf of appellant that learned lower court had failed to appreciate the evidence in its right perspective on account thereof, the finding so recorded is found against the materials available on the record. To substantiate the same, it has been submitted that right from Fard-e-beyan, there happens to be specific disclosure that firing was made from roof while the deceased was at the ground on account of which the injuries whatever



found over the deceased would have been towards the downward direction which, PW-1, during course of cross-examination had admitted that whatever ante-mortem injuries were found, would have caused at the deceased as well as assailant were at the same level. Furthermore, it has also been submitted that the doctor had found charring wound around the injuries suggesting close proximity of 2 to 3 Ft between the barrel and the deceased which completely contradicts the eyewitnesses who stated that distance in between Sahan as well as house of the accused, happens to be 10 Ft. and in likewise manner, having fired from the roof would have covered much more distance than that and so, none of the injuries would have contained charring wound. In the aforesaid background, it has been submitted that none of the eyewitnesses in real sense satisfy their status to be an eyewitness and in likewise manner belie the manner of occurrence as sponsored by the prosecution.

7. The learned lower court, though, dealt with the aforesaid event under para-19 of the judgment but had failed to appreciate its repercussions over the prosecution case and in likewise manner status of the witnesses in the aforesaid eventuality. Furthermore, it has also been submitted that there happens to be consistent view that in case medical evidence rules out the manner of occurrence then in that event, status of eyewitnesses became irreconcilable whereupon



prosecution case must fail.

8. It has also been submitted that in the Fard-e-beyan, there happens to be no disclosure with regard to witnesses but, from perusal of the charge-sheet, it is evident that apart from sons and daughters of the deceased other independent witnesses have also been cited, out of whom, only Ram Babu Singh, a villager has come forward along with Kamla Devi, widow of the deceased, apart from informant PW 4. However, prosecution has not explained with regard to non examination of those witnesses. The family members, in the background of allegation of the prosecution that murder was committed in the Sahan, might have been natural witness and their non-examination without any explanation is indicative of the fact that they might have declined to become puppet in the hands of PW-4, informant. So, their non examination must be considered adverse to the veracity of the prosecution and on this score also, prosecution case is liable to be discredited.

9. It has further been submitted that when the trial court disbelieved evidence of all the witnesses relating to Kamalakar Dubey as well as Meena Devi, then it should have also disbelieved the same relating to appellant because of the fact that occurrence without others involvement would not have taken place as, it has been stated by the prosecution witnesses that on provocation given by Kamalakar, the



appellant directed his wife Meena Devi to bring the gun which was brought by her and handed over to the appellant who accordingly, fired costing life of deceased, Nagendra Dubey. When Meena Devi got acquitted then in that event, presence of gun at the disposal of appellant became doubtful. Moreover, there happens to be no evidence at the end of the prosecution that appellant on his own brought the gun and shot at deceased. Therefore, acquittal of, more particularly, Meena Devi did not justify the finding recorded by the learned trial court.

10. It has also been submitted that though in the Fard-e-beyan there happens to be disclosure with regard to land dispute persisting amongst parties which, during course of evidence is found gutted. That being so, there was no occasion for the appellant to carry motive for commission of murder of deceased, Nagendra Dubey. Contrary to it, the evidence happens to be that after picking brick particles, deceased was keeping it by the side of Palani which stood adjacent to the house of appellant supported by the objective finding of the Investigating Officer and on account thereof, it is evident that whatever misfortune surfaced, that was on account of spur of moment and for that finding of the learned lower court identifying the appellant for committing murder of deceased Nagendra Dubey is not at all justified contrary to it, it should be culpable homicide not



amounting to murder.

11. Now coming to the factual aspect, it has been submitted that manner whereunder appellant was arrested from his house just after occurrence also speaks a lot regarding his innocence. Had there been occurrence at his end, he might have slipped. Furthermore, the prosecution also suggests that the gun was also seized therefrom, but there happens to be no finding at the end of the Investigating Officer that smoke was present inside the barrel of the gun. Had there been firing on the alleged date and time of occurrence as alleged by the prosecution, apart from there being presence of smoke in the barrel, there should have been smell of gun powder which, PW 6 never reiterated. The evidence of PW 5, ballistic expert is not going to support the case of the prosecution in the background of the fact that he examined gun after so many days without disclosing that gun was fired in near past.

12. Now coming to the ocular evidence of PWs-2, 3 and 4, it is evident that they are inconsistent with regard to position of the deceased at the time when he sustained gun shot injury. Some had stated that while he was picking brick particles bending his body, he sustained fire-arm injury which would not be possible as firing was made from the roof as, all the wounds happen to be over upper part of body as well as from front side. In sum and substance, it has been



submitted that the deceased might have sustained fatal injuries in different manner which found, by PW 5, a golden opportunity to implicate appellant as appellant was very much adamant to raise voice against PW 4, informant being a rapist. Therefore, the learned counsel for the appellant has submitted that the finding having been recorded against the appellant would not sustain, consequent thereupon, is fit to be set aside.

13. Rebutting the submissions having been made on behalf of appellant, it has been submitted by the State that acquittal of co-accused is not going to affect the finding recorded by the learned trial court in the background of the fact that they were given benefit of doubt on the basis of their status. It has also been submitted that there happens to be consistency in the evidence of the PWs over appellant having been armed with gun which he fired simultaneously causing injury to deceased which proved fatal. The defence during course of cross-examination had not extracted from the mouth of the witnesses regarding improbability in the prosecution version over manner of assault, then in that event, coming at the corner of the roof and then aiming when the gap in between, happens to be of 10 Ft. and further deceased while was standing who might have been 5 1/2 Ft. in length (average) not only rules out the improbability as flashed on behalf of appellant over nature of injuries to be in downward position rather



also explains presence of charring wounds. It has also been submitted that producing more witnesses on point of firing is not at all necessary, more particularly, when other family members came forward and supported the prosecution case. On account thereof, non examination of other family members was not at all prejudicial to the interest of the prosecution. In likewise manner, non examination of other independent witnesses is not going to cast any sort of dent in the prosecution case as, PW 2 himself happens to be an independent witness who corroborated the prosecution case in its entirety without any deficiency. Furthermore, PWs 3 and 4, wife of deceased and informant also narrated the prosecution case without any development, embellishment and so, the evidence in its entirety supports the finding having arrived at by the learned trial court whereupon, the instant appeal be dismissed.

14. In order to substantiate its case, the prosecution had examined altogether 6 PWs out of whom PW-1 is Md. Khurshid Alam, PW-2 is Ram Babu Singh, PW-3 is Kamla Devi, PW-4 is Rashendra Dubey, PW-5 is Vijay Kumar and PW-6 is Ashok Kumar. The prosecution had also exhibited, Ext-1, PM report, Ext-2, Seizure list, Ext-3, Fard-e-beyan, Ext-4, Ballistic examination report, Ext-5, Fard-e-beyan, Ext-6, Inquest Report (carbon copy), Ext-7 series, Seizure list, Ext-8, Formal FIR , Ext-9, Judgment of Sessions Trial



No. 404/99, Material Ext-1, DBBL Gun, Material Ext-VIII-Cartridge.

15. As indicated above, defence relating to accused Kamlakar (Since acquitted) shows examination of three witnesses, Himanshu Kumar, Arjun Pandey and Vijay Shankar Pandey as well as exhibited all prescriptions under Ext-A series which now became redundant.

16. PW-1, Doctor Md. Khurshid Alam had conducted postmortem over dead body of Nagendra Dubey on 03.05.2009 at about 3:45 PM and found following ante-mortem injuries:-

1. External injury 1" circular lacerated wound with inverted and charred margin on the right side of the cheek just lateral to nasal bridge deep to cranial cavity with the fracture of right modilla and upper jaw bone.
2. Multiple pea size with charred margin deep to muscle on the face, neck and front of chest upper part.

On dissection blood and clots in cranial cavity with the fracture of the base of skull bones with the laceration of the brain matter.

A plastic wad and eleven metallic pellets were recovered from the brain matter. Cause of death due to shock and haemorrhage on account of above mentioned ante-mortem injuries caused by fire arm. Time elapsed since death 6 to 24 hours.

Injuries found on the person of the deceased were sufficient to cause death.

17. During cross-examination, he had stated that such injuries were not possible by small arms, like pistol. He had further stated that such injuries are possible only when injured and assailant



are standing parallel. He had further stated that injury no.1 was possible on firing from close distance. He had also stated that the deceased might have sustained injuries in the wee hours. He had further stated that injury was caused from the front side of the deceased.

18. So from the evidence of PW 1 along with Exhibit-1, postmortem report, it is apparent that the deceased died on account of fire arm injury. The relevant part of his evidence as taken up by the defence as sheet anchor is on account of his opinion suggesting that injuries were possible only having deceased as well as assailant at the same and similar position.

19. PW-5 is Vijay Kumar Choudhary, Ballistic Expert. He had stated that on 04.05.2009, he was posted at Siwan as Sergeant Major on which date he had examined the material Ext. (DBBL Gun, Cartridges) of Raghunathpur PS Case No. 49/2009). He had further give length of barrel as 67 CM while full length of the gun 112 CM. Its firing PIN as well as hammer was effective one. During course of his inspection, he perceived gun powder smell whereupon he came to conclusion that firing was made from the said gun. He had also found cartridges to be effective one. In para-3, he had stated that smell of gun powder usually remains present up to 60 days from the date of firing. So, from the evidence of this PW, it is evident that just after a



day, he had examined the gun which was seized from the possession of the appellant on the date of occurrence itself and found presence of smell of gun powder and so, it was reported to be used. Though defence had tried to extract from him but could not succeed on the score whether smell was of recent one or not.

20. In the present context, evidence of Investigating Officer, PW-6, became relevant to be discussed. PW-6 had stated that on 03.05.2009 while he was O/C of Raghunathpur PS, he received telephonic information at about 10:15 AM with regard to causing of murder of Nagendra Dubey by Om Prakash Dubey by fire arm on account of land dispute. He entered the same in station diary no. 46 and proceeded towards the place of occurrence where he reached at 10:45 AM. He took Fard-e-beyan of Rashendra Dubey (Exhibited). He took up investigation himself, recorded further statement of informant, prepared inquest report in carbon process (Exhibited), sent the dead body for postmortem after preparing dead body challan (Exhibited), found copious blood at the place of occurrence which he seized in presence of witnesses (Exhibited). He seized DBBL Gun and cartridges for which seizure list was prepared (Exhibited) and also exhibited material exhibits (gun as well as cartridges). He further identified the place of occurrence which happens to be the land of deceased (Sahan) where a thatched hut of deceased was present. The



aforesaid spot happens to be at 20 yards from the house of the deceased as well as 8 yards from his Baithka. In the northern boundary of the place of occurrence thatched hut of deceased was found where brick particles were kept and then thereafter house of Om Prakash Dubey lies. Sahan lies in front of house towards eastern side. In south, Sahan of deceased lies and then house and Baithka of deceased situated. House of Lalan Dubey lies on the eastern side of the place of occurrence. House of Om Prakash Dubey lies west to the Place of occurrence. He found brick particles scattered west to Palani. Dead body of the deceased was found west to thatched house near brick particles. His head was towards southern side while leg was northern side. He found injury below right eye as well as over other parts of body. He had found copious blood on the earth. He took statement of the witnesses. He raided house of the accused wherefrom accused was apprehended along with gun and cartridges. He was arrested on the same day. Meena Devi was found absconding. Kamlakar Dubey was also arrested. He returned back to the Police Station and registered the case, then thereafter (Exhibited), and seized fire arm as well as cartridges which were sent for ballistic examination. After completing the investigation, charge-sheet was submitted. Defence cross-examined this witness in two parts. First of all, he was cross-examined by accused Kamlakar Dubey (since



acquitted) in para-15, he had stated that he received information through mobile phone. Then he stated that Kamlakar Dubey was arrested from his house. He arrested the accused persons after inspection of the place of occurrence. Place of occurrence was shown by the informant. During cross-examination at the end of the appellant as well as his wife in para-23, he had stated that Om Prakash Dubey is a retired government servant. In para-26, he had stated that he had not mentioned in the case diary, details of the house belonging to the appellant, however, he had shown the building to be RCC having staircase. In para-29, he had stated that he had not seized the apparels worn by the deceased. He had not found pellets. He had not found sign of firing over house as well as Baithka of deceased. He had not prepared sketch map of the place of occurrence. In para-32, he has mentioned that he had not got blood stained earth examined by the FSL. In para-35, he had denied the suggestion that he sent the gun after firing at the instance of prosecution. So from the evidence of this PW, it is evident that Place of occurrence has not been challenged and in likewise manner, the position of the house of the accused lying adjacent to the place of occurrence. Though, height of the building has not been incorporated and in likewise manner height of the deceased which, defence could have had at the end of the PW 6, the Investigating Officer as well as PW-1, the Doctor in order to



substantiate the plea that injury on account of having been fired from the roof would have certainly shown impact of downward direction. Furthermore, it is also evident from the evidence of this PW that no development, contraction have been perceived in the evidence of PWs-2, 3 and 4. Remarkable fact which is apparent from the cross-examination of this PW is that though suggested but there happens to be admission by way of suggestion that firing was there since before ballistic examination. The occurrence is of dated 03.05.2009, as per evidence of PW 5, the gun as well as cartridges were examined on 04.05.2009 after its seizure on 03.05.2009 and so firing having been done by the seized gun on 03.05.2009 is out of controversy.

21. In the aforesaid background, now ocular evidences have to be adjudged.

22. PW-2 who is a co-villager had stated that on the alleged date and time of occurrence, while he was going towards eastern direction from his house passing through the house of Nagendra Dubey, saw Nagendra picking brick particles and during course thereof, was also engaged in duel altercation with Om Prakash. Seeing this, he stood there. When altercation came to its peak, Om Prakash and Kamlakar went to the roof of their house and therefrom also indulged in similar fashion. During course thereof, Kamlakar Dubey began to provoke Om Prakash to kill, whereupon Om Prakash got his



licensee gun through his wife and then, after loading the same, fired repeatedly upon Nagendra Dubey on account of which he sustained injury and died. After seeing the dead body, he found the one firing was made by the bullet and other by pellet. The gun and the cartridges were seized by the police in his presence and the seizure list was prepared (Exhibited). Blood stained earth was also seized by the police in his presence and for that seizure list was prepared (exhibited). He identified the accused. During cross-examination, at para-14, he had given vivid picturisation of the place of occurrence, as Sahan and Baithka lies in front of his house. Baithka lies adjacent north to house. Naad-Khuta is also there. Sahan is in front of his house where one hut is standing at its northern side. From the aforesaid hut at a distance of 10 Ft, house of Om Prakash lies having north front. It happens to be single storey building having Sahan in front of his house. It lies adjacent north to the Baithka of Nagendra Dubey. He is unable to say the exact measurement relating to the house of Om Prakash as well as his roof. In para-16, he had stated that for the first time when he had seen Om Prakash, he was on the ground and the altercation was going on in between Om Prakash and Nagendra at that very time Munni Singh, Shambhu Yadav, Lallan Dubey and others had come. They had disclosed the names of persons having house near about, as Mantri Dubey, Kamlakar Dubey,



Bachchan Dubey at eastern side. Munni Singh, he himself at western side. Om Prakash as well as some Muslims at northern side and Awadhesh Dube, Shivji Dubey as well as persons belonging to fisherman community at the southern side. In para-18, he had stated that they have not intervened into the matter. He had further stated in Para-22 that Nagendra Dubey was picking brick particles having scattered in his Sahan. At that very time, other family members were standing at Darwaza.

23. In para-21 had had stated that house of Om Prakash was at the distance of five steps from the place where Nagendra was picking the brick particles. He had further stated that road lies north to Sahan of Nagendra and then thereafter house of Om Prakash lies. In para-23, he had stated that villagers had seen Om Prakash coming over roof. He came towards southern side which happens to be a single storey building having 13-14 Ft. height. After hearing sound of firing, villagers did not scatter. He also remained there. Thereafter, all of them rushed but before their arrival, the inmates of the house of Nagendra had already taken care of.

24. In para-24, he had stated that when he had seen Nagendra, he was lying. He is not remembering as to whether mouth was opened or not. His head was at the eastern side direction while legs were north-western direction. Blood having fallen over ground,



had dried. He remained there for about four hours. During midst thereof, police came and apprehended the accused from their house. Only two persons were apprehended. He had denied the suggestions. In para-31, he had reiterated that Om Prakash stood over roof having southern-front. Kamlakar Dubey as well as his wife were also standing there. In para-33, he had stated that Om Prakash forbade Nagendra from the roof also. Nagendra was picking the brick particles in bending condition having northern western position. Brick particles were being kept near hut at western side. Then had given boundary of the hut; north, Om Prakash, south, Nagendra Dubey, east-Lallan Dubey, West-Om Prakash Dubey. His further cross-examination did not reveal any substantial gain saying. The evidence of this PW fairly tells the manner of occurrence having deposed at his end remained unshaken because of the fact that no cross-examination at the end of the appellant has been made nor with regard to position of the assailant as well as the victim during course of firing and the distance in between. More particularly, the defence could not pinpoint whether the firing was made during course of standing posture or in sitting position, which was relevant in the background of the fact that appellant being a retired military personnel was expected to be versatile with the nature of the weapon as well as manner of firing.

25. PW-3 is the wife of deceased. She had stated that on



the alleged date and time of occurrence, she was at her Darwaza. One thatched Palani stands near her Sahan in front of her Darwaza where her husband was picking brick particles. Rashendra Dubey was also assisting. Om Prakash Dubey came and forbade. He also indulged in an altercation. Then thereafter, Kamlakar and Om Prakash had gone to their roof on provocation having at the end of Kamlakar, Om Prakash got his DBBL Gun through his wife and then shot at her husband repeatedly who after sustaining injuries, succumbed. She identified the accused in dock. During cross-examination, in paras 13, 14, 15, 16 and 17, she had given topography of her house. In para-18, she had stated that no road lies north to Palani (thatched hut) but only a small lane passes through it. She is unable to disclose the width of that lane. In para-19, 20 and 21, she had disclosed location of house of Om Prakash. In para-24, 25, she had stated that first of all, the altercation was in normal tone but subsequently, in loud voice over which villagers assembled there. In para-27, she had stated that she was standing south to her husband. Om Prakash Dubey had gone to his roof after the altercation. In para-26, she had further stated that at that very time, along with her husband, were standing west to Palani in her Sahan. Villagers were standing at some distance. There was no talk in between her husband and the villagers. There was no grappling in between her husband and Om Prakash Dubey. Villagers had not tried



to intervene. She also could not remove her husband. Accused persons had gone over roof soon after the altercation. In para 29, she stated that she was standing having northern front. Her husband was picking brick particles in bending position. In para-30, she had stated that she was simply standing. She was not assisting her husband. In para 31, she stated that after sustaining injuries, her husband cried, fell down and died. At the time of firing, her husband was not in bending position. In para 33, she had stated that she had not lifted her husband rather she began to weep grabbing her husband. The injury was over his face. As she was weeping, she is unable to disclose as to how many persons and who arrived there. Police had come but seeing my position, police had not interrogated me. She regained sense after ten days. In para 46, she had stated that there was no dispute in between Om Prakash Dubey and her husband relating to land. In para 50, she had stated that she is not aware with regard to any kind of land dispute with Om Prakash. In para 51, she had further stated that Om Prakash had not objected at any earlier occasion over picking of brick particles. In para 52, she had stated that place where she was standing near her husband is 10 steps away from the house of Om Prakash. In para 54, she had stated that she had seen Om Prakash aiming at her husband. As there was no time, so she could not push her husband aside. Similar situation was also before others, who were present



there. In para-56, she had further stated that soon after loading, Om Prakash fired. In para 59, she had stated that at the time of occurrence Rashendra Dubey was there. Her son was inside the house who came after hearing the firing sound. She had further stated that none other had sustaining pellet injury. In para 66, 67, she had stated that as her husband died soon after sustaining injury on account thereof, body was not smeared with dust. Copious blood oozed out from the injury. She denied in para 70 that her father-in-law had instituted Title Suit against the father of Om Prakash.

26. So from the evidence of this PW, it is crystal clear that again defence had not cared to test the veracity of this PW over manner of occurrence. These things have got relevance in the background of the fact that during course of argument, the learned counsel for the appellant emphatically argued that the firing was made from the roof, on account thereof, the location of the injury would have been downward and for that, the evidence of PW-1, Doctor had also been referred. Apart from this, from her cross-examination, it is evident that she stood firm to suggest that she was one of the eyewitnesses of the occurrence.

27. PW-4 is the informant, Rashendra Dubey. He had stated that on the alleged date and time of occurrence, he along with his uncle Nagendra Dubey were picking brick particles in order to



clean the Sahan as marriage of son of his uncle, namely, Rakesh Dubey was going to be solemnized. At that very time, his neighbour, Om Prakash and Kamlakar came and forbade as well as also indulged in altercation with his uncle. When they resisted, both of them had gone over their roof and at the instigation of Kamlakar, Om Prakash directed his wife to bring gun and cartridge which were handed over and then after loading the gun, fired repeatedly causing injury to his uncle Nagendra who died instantaneously. There was hole beneath right eye as well as pellet injury over shoulder, chest and forehead. Police came at Darwaja where Fard-e-beyan was recorded (Exhibited). Police also seized blood stained earth for which seizure list was prepared (Exhibited). Police took further statement. Identified the accused. During cross-examination at para 21, he had admitted his custody for 15-16 months. In para 26, he had further admitted that his house as well as the house of Om Prakash is intervened by a lane. In para 27, he had disclosed that house of Om Prakash had east front. In para 43, he had further stated that there is no dispute with Om Prakash relating to land. In para 44, he had stated that the accused persons had come bare-footed near his uncle. At that very time, he was along with his uncle. His aunt was at Darwaza. Son of his uncle was at bungalow. In Para 45, he had stated that his aunt was at the distance of 15-20 steps. At that very time, Om Prakash was 3-4 steps away from his



uncle and began to abuse. In para 46, he had stated that even at their protest, they continued with picking brick particles. Altercation continued up to 1-1.30 minutes. They had not tried to catch hold. In para-47, he had stated that then, the accused persons had gone over their roof. They have not chased. At that very time, none of the persons of their surroundings came. In para 48, he had stated that the distance of roof over which accused were standing happens to be 20 yards from the place where they were standing. In para-51, he had stated that they continued with picking brick particles even after departure of accused persons. In para-53, he had stated that soon after having gone, Om Prakash fired. In para 54, he had stated that at that very time, he was five steps away from his uncle. Both were having northern face at the time of firing. He had not sustained fire-arm injuries. After hearing sound of firing, villagers had come. Family members had also come. His uncle soon after receiving gun shot fell down and died. Accused persons had not tried to kill him. In para-58, he had stated that he lifted his uncle and on account thereof, blood had fallen down over his hand. In para-59, he had stated that Saari of his aunt was drenched with blood. In para-60, he had stated that police came after half an hour and then he had lifted his uncle. In para-66, he had stated that he is not knowing who had informed the police. In para-69, 70, he had stated that he is not remembering whether any



case was instituted against father of Om Prakash and in likewise manner denied presence of Title Suit No. 91/99. In para 71, he had admitted that he happens to be an accused in a gang rape case. In para 85, he had stated that Om Prakash was standing over his roof at southern side. In para-86, he had stated that he had seen the gun having been given by the wife of Om Prakash to Om Prakash. In para 87, he had stated that he had seen Om Prakash loading the gun but he had not tried to flee. Furthermore, he had stated that firing was made repeatedly.

28. So, from the evidence of this PW, again it is evident that posture of the deceased as well as accused at the time of firing has not been put under challenge. After going through the evidence of all the three PWs as discussed herein before it is apparent that they are consistent over manner of occurrence whereunder appellant, Om Prakash Dubey had fired over the deceased, Nagendra Dubey from his roof by a licensee gun. As stated hereinabove, the said gun was seized on the same day during course of apprehension of appellant from his house and further, as per evidence of PW-5, the ballistic expert, the gun was found having been used. Apart from this, as is evident from the evidence of PW-6, the Investigating Officer, a suggestion has been given that after seizure of gun, he fired from the gun in collusion with the prosecution party in order to create evidence and on account



thereof, the genuineness of the ballistic expert examination is not the controversy.

29. Whenever there happens to be controversy with regard to inconsistency amongst ocular evidence as well as medical evidence, it is settled principle of law that ocular evidence will prevail upon the medical evidence unless and until the medical evidence completely rules out the worthiness as well as credibility of the ocular evidence.

30. In *Darbara Singh v. State of Punjab* as reported in (2012) 10 SCC 476, it has been held:-

“10. So far as the question of inconsistency between medical evidence and ocular evidence is concerned, the law is well settled that, unless the oral evidence available is totally irreconcilable with the medical evidence, the oral evidence would have primacy. In the event of contradictions between medical and ocular evidence, the ocular testimony of a witness will have greater evidentiary value vis-à-vis medical evidence and when medical evidence makes the oral testimony improbable, the same becomes a relevant factor in the process of evaluation of such evidence. It is only when the contradiction between the two is so extreme that the medical evidence completely rules out all possibilities of the ocular evidence being true at all, that the ocular evidence is liable to be disbelieved. (Vide: State of U.P. v. Hari, (2009) 13 SCC 542; and Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana, (2011) 7 SCC 421).

31. In *Bastiram v. State of Rajasthan* as reported in (2014) 5 SCC 398, It has been held as follows:-

32. Finally, it was submitted that according to



the post mortem report and the evidence given by the doctor no firearm injury was found on the body of deceased Ram Narain. However, the ocular testimony is to the effect that deceased Ram Narain was shot at by appellant Mohan Lal injuring him and thereby causing his death. It was submitted that the Trial Judge and the High Court erroneously gave primacy to the ocular evidence disregarding the medical evidence.

33. The question before us, therefore, is whether the “medical evidence” should be believed or whether the testimony of the eye witnesses should be preferred. There is no doubt that ocular evidence should be accepted unless it is completely negated by the medical evidence.[(2010)10 SCC 259] This principle has more recently been accepted in *Gangabhavani v. Rajapati Venkat Reddy*.[(2013) 15 SCC 298]

34. The expression “medical evidence” compendiously refers to the facts stated by the doctor either in the injury report or in the post mortem report or during his oral testimony plus the opinion expressed by the doctor on the basis of the facts stated. For example, an injury on the skull or the leg is a fact recorded by the doctor. Whether the injury caused the death of the person is the opinion of the doctor. As noted in *State of Haryana v. Bhagirath*[(1999)5 SCC 96] on the same set of facts, two doctors may have a different opinion. Therefore, the opinion of a particular doctor is not final or sacrosanct.

35. What about the facts recorded by a doctor – are they sacrosanct? In *Kapildeo Mandal v. State of Bihar*[(2008)16 SCC 99] the facts found by the doctor were preferred over the eye witness testimony. The ocular evidence was to the effect that the deceased suffered firearm injuries. However, the doctor conducting the post mortem examination stated that he did not find any indication of any firearm injury on the person of the deceased. No pellets, bullets or any cartridge were found in any of the wounds. Accepting the “medical evidence” on facts, it was observed that,

“27.[T]he medical evidence is to the



effect that there were no firearm injuries on the body of the deceased, whereas the eyewitnesses' version is that the appellant-accused were carrying firearms and the injuries were caused by the firearms. In such a situation and circumstance, the medical evidence will assume importance while appreciating the evidence led by the prosecution by the court and will have priority over the ocular version and can be used to repel the testimony of the eyewitnesses as it goes to the root of the matter having an effect to repel conclusively the eyewitnesses' version to be true."

36. Similarly, a fact stated by a doctor in a post mortem report could be rejected by a Court relying on eye witness testimony, though this would be quite infrequent. In *Dayal Singh v. State of Uttaranchal*[(2012)8 SCC 263] the post mortem report and the oral testimony of the doctor who conducted that examination was that no internal or external injuries were found on the body of the deceased. This Court rejected the "medical evidence" and upheld the view of the Trial Court (and the High Court) that the testimony of the eye witnesses supported by other evidence would prevail over the post mortem report and testimony of the doctor. It was held:

"41. ...[T]he trial court has rightly ignored the deliberate lapses of the investigating officer as well as the post-mortem report prepared by Dr C.N. Tewari. The consistent statement of the eyewitnesses which were fully supported and corroborated by other witnesses, and the investigation of the crime, including recovery of lathis, inquest report, recovery of the pagri of one of the accused from the place of occurrence, immediate lodging of FIR and the deceased succumbing to his injuries within a very short time, establish the case of the prosecution beyond reasonable doubt. These lapses on the part of PW 3 [doctor] and PW 6 [investigating officer] are a deliberate attempt on their part to prepare reports and documents in a designedly defective manner which would have prejudiced the case of the



prosecution and resulted in the acquittal of the accused, but for the correct approach of the trial court to do justice and ensure that the guilty did not go scot-free. The evidence of the eyewitness which was reliable and worthy of credence has justifiably been relied upon by the court.”

37. An opinion given by a doctor, based on the facts recorded on an examination of a victim of a crime, could be rejected by relying on cogent and trustworthy eye witness testimony. In *Mange v. State of Haryana* [(1979) 4 SCC 349] an eye witness to a rape stated that the offence was committed on a particular day and at a particular time. However, the lady doctor who examined the victim was of the opinion that the offence was committed two days earlier. This Court did not accept the opinion and preferred to rely on the eye witness account holding, inter alia, that:

“2. ... It is difficult for any medical expert to give the exact duration of time when the rape was committed. More particularly when we have the evidence of PW 4 [eye witness] as to the time and date of the occurrence, the medical evidence can hardly be relied upon to falsify the evidence of the eyewitness because the medical evidence is guided by various factors based on guess and certain calculations.”

38. This being the position, insofar as the injury to deceased Ram Narain is concerned, Dr. D.K. Purohit (PW-18) stated that he had conducted the post mortem examination on the dead body. He described the injuries on the body and in his cross-examination categorically stated as a matter of fact that “This is correct to suggest that there was no firearm injury on the body of Ram Narain”. In the face of this categorical factual assertion, and absent any cogent evidence to the contrary, we cannot accept the conclusion arrived at by the Trial Court and the High Court that deceased Ram Narain suffered a gunshot injury. The ocular evidence undoubtedly shows that deceased Ram Narain was fired at by appellant Mohan Lal, but in view of the unchallenged testimony of the doctor it is quite clear



that the gunshot did not hit deceased Ram Narain and the cause of his death was due to the cumulative effect of the various injuries suffered by him.

39. However, this has no impact on our final conclusion since we are in the agreement with the Trial Court and the High Court that the appellants had the common intention of causing the death of deceased Rameshwarlal, deceased Ram Narain, deceased Mohanlal and injured Rajaram. That Rajaram survived the injuries is fortuitous. We are also in agreement with both the Courts that the appellants were armed with pistols and that they had fired at their victims with the intention of killing them. We have not been shown anything that would suggest the contrary.

32. In *Mohammad. Mian v. State of U.P.* as reported in (2011) 2 SCC 721, it has been held as follows:-

11. The High Court then dealt with the medical evidence vis-a-vis the ocular evidence and observed that as per the prosecution story the fatal shots had been fired at the deceased by Ahmad Mian and Shamim Mian from the roof of the house which was about 10 feet in height. The Court observed that merely because the wounds of entry and exit were either parallel to each other or in one case the exit wound was slightly higher than the wound of entry would not detract from the other evidence as it could not be said with certainty as to the posture which the deceased and the assailants were applying when the shots had been fired.

23. The trial court had acquitted the accused of the charge of murder primarily on the ground that the medical evidence did not support the ocular version of the incident. To our mind, the reasons given by the trial court were not well considered. It has been observed by the Trial Court thus:

"Moreover, the medical evidence also does not fit in the prosecution story in this case even if it is presumed although reluctantly that



the fatal shots were fired from the roof top by the accused Ahmad Mian and Shamin Mian. According to Dr. K.S.Tiwari who conducted the post mortem examination of the dead body of Riasat Husain there were four gun shot wounds of entry on the back of chest of the deceased which are injuries no.1 to 4 in the post mortem examination report Ex. Ka-3. Their corresponding wounds of exit are injuries no.5,6,7 and 8 respectively. According to PW5 Dr. K.S. Tiwari the exit wounds of injury No.1 is slightly higher than the wound of entry. This particular injury cannot be caused from roof top. The witness PW.1 Sharafat Husain stated that the height of the roof from where the fatal shots were fired is about 10' and there is also a Mundair thereon about 1 = ' or 2' high. This witness also stated that the deceased Riasat Husain was at a distance of 6 or 7 stops from the door of the shop from the roof of which the accused Shamim Mian and Ahmad Mian fired the shots. This topography makes it certain that injury No.1 corresponding to its wound of exit injury no.5 cannot be caused from the roof top.

The witness PW5 Dr. K.S.Tiwari further stated that injury No.2 and injury No.4 have their exit wound at the same level. This witness further says that the exit wound of injury No.3 is slightly on a lower plan. Thus the position of the wounds of entry and exit is such that it is difficult to believe that the firing in which Riasat Husain (illegible) was caused from the roof top as alleged by the prosecution. It appears that the firing actually took place from the shop itself and the two accused Ahmad Mian and Shamim Mian were elevated to the roof top simply to be seen by the witnesses from point 'F' and in this process the prosecution evidence lost its credibility and led the court only to a confusion which was aggravated all the more by the contents of the FIR Ex.Ka-1. It became and doubtful under these circumstances to ascertain which of the two sets of accused fired the fatal shot. The court cannot presume that it were the accused Mohammad Mian and Zamir Mian standing at the shop fired the fatal shots because they are not stated by the witnesses to have fired any shot at Riasat Husain deceased. The



other set of the two accused Ahmad Mian and Shamim Mian are unautmously alleged to be at the roof top and first alleged to have fired at Riasat Husain at his chest and then at his back but by medical evidence it is not probable that the fatal shots were at all fired from the roof top."

25. This is what Dr. Modi has to say in Modi's Medical Jurisprudence and Toxicology, 23rd Edition at page 724-725:

"Direction from which the Weapon was fired.-- The question regarding the direction of fire, whether from right to left or from front to back is of medico-legal importance. To ascertain this, it is necessary to know the position of the victim at the time of the discharge of the bullet, when a straight line drawn between the entrance and exit wounds and prolonged in front generally indicates the line of direction. In some cases, it is difficult to determine the direction as the bullet is so often deflected by the tissues that its course is very irregular, also when the bullet wobbles."

33. In *Lallan Chaubey v. State of U.P.* as reported in *AIR 2011 SC 241*, it has been held as follows:-

"10. Mr. Anoop Kumar Srivastava, counsel for the appellant tried to contend that the view taken by the trial court was a reasonable and possible view and, therefore, the High Court was in error in interfering with the judgment of acquittal. Mr. K.T.S. Tulsi, senior counsel who came at the fag end of the hearing of the case confined his submissions to some self perceived inconsistency between the ocular evidence and the medical evidence. Mr. Tulsi laid great stress that according to the ocular testimony at the time of firing the shot, the appellant and Raj Kumari were not standing at the same level and from there he tried to build up an argument that the direction of the movement of the pellet inside the victim as found by the Doctor belied the prosecution case. In support of his submission he relied upon some decisions of this Court in which the presence of



the eye witnesses at the time of the occurrence was doubted and their testimony was not accepted in light of the medical evidence. In the facts of this case, we fail to see any inconsistency in the medical evidence and the ocular evidence and, therefore, the decisions relied upon by Mr. Tulsi have no application to this case. It is to be noted that in this case according to the medical evidence the shot had hit the head of the humerus that got punctured and the signs of the wound were medially towards inside and slightly towards below and it was from the right to left. Once the pellets hit a hard substance like the humerus bone, they can get deflected in any direction and on that basis it cannot be said that there is any inconsistency between the medical evidence and the ocular evidence. We are in agreement with the High Court that the ocular evidence in this case is highly consistent and leaves no room for any doubt about the commission of the offence by the appellant.”

34. In *Sultan Singh v. State of Haryana* as reported in (2014) 14 SCC 664, it has been held as follows:-

“.....Similarly, contention that PW 3-Dr. Gajinder Yadav who conducted the post mortem made a statement in cross examination that there was more probability of death being caused by accidental fire as there was no smell of kerosene oil from the body of the deceased and that the fire had started from the lower parts of the body towards upper parts is equally without any merit. Such statement of an expert witness without being based on any specialized knowledge cannot be accepted.”

35. In *Vijay Pal v. State (Govt. of NCT of Delhi)* as reported in (2015)4 SCC 749, it has been held:-

“15. There is no dispute that the value of medical evidence is only corroborative. It proves that the injuries could have been caused in the manner as



alleged and nothing more. The use which the defence can make of the medical evidence is to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye-witnesses. Unless, however the medical evidence in its turn goes so far that it completely rules out all possibilities whatsoever of injuries taking place in the manner alleged by eyewitnesses, the testimony of the eye-witnesses cannot be thrown out on the ground of alleged inconsistency between it and the medical evidence. It is also true that the post-mortem report by itself is not a substantive piece of evidence, but the evidence of the doctor conducting the post-mortem can by no means be ascribed to be insignificant. The significance of the evidence of the doctor lies vis--vis the injuries appearing on the body of the deceased person and likely use of the weapon and it would then be the prosecutor's duty and obligation to have the corroborative evidence available on record from the other prosecution witnesses. It is also an accepted principle that sufficient weightage should be given to the evidence of the doctor who has conducted the post-mortem, as compared to the statements found in the textbooks, but giving weightage does not ipso facto mean that each and every statement made by a medical witness should be accepted on its face value even when it is self-contradictory. It is also a settled principle that the opinion given by a medical witness need not be the last word on the subject. Such an opinion shall be tested by the Court. If the opinion is bereft of logic or objectivity, the court is not obliged to go by that opinion. That apart, it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eyewitnesses' account which are to be tested independently and not treated as the 'variable' keeping the medical evidence as the 'constant'. Where the eyewitnesses' account is found credible and trustworthy, a medical opinion pointing to the alternative possibilities cannot be accepted as conclusive. [See: *Solanki Chimanbhai Ukabhai v. State of Gujrat*[(1983) 2 SCC 174], [State of Haryana v. Ram Singh](#)[(2002) 2 SCC 426], [Mohd. Zahid v. State of T.N.](#)[(1999)6 SCC 120], [State of Haryana v.](#)



[Bhagirath](#)[(1995) 5 SCC 96] and [Abdul Sayeed v. State of M.P.](#)[(2010) 10 SCC 259].

36. It has also been contended on account of acquittal of co-accused, the appellant should have also been acquitted.

37. In *Jagtar Singh v. State of Haryana* as reported in (2015) 7 SCC 675, it has been held as follows:-

21. We are not impressed by the submission of the learned counsel for the appellant when he urged that since the co-accused was acquitted of the charges, hence the benefit of the same be also extended to the appellant.

22. As held above, the evidence on record in no uncertain terms proves that it was the appellant who was the aggressor and hit the deceased. This evidence was rightly made basis by the two courts to hold the appellant guilty for committing the offence in question. When the evidence directly attributes the appellant for commission of the act then we fail to appreciate as to how and on what basis we can ignore this material evidence duly proved by the eyewitnesses. Such was not the case so far as co-accused is concerned. The prosecution witnesses too did not speak against the co-accused and hence he was given the benefit of doubt. It is pertinent to mention that the State did not file any appeal against his acquittal and hence that part of the order has attained finality.

38. After considering the evidence in its entirety, it is evident that no previous animosity was persisting in between the parties nor on the alleged date of occurrence, the accused persons have had made any sort of interference in the activity of the



prosecution party. From the evidence, it is also apparent that prosecution party were stocking the brick particles west to Palani which was adjacent to the house of the accused persons and the same has also been found by the Investigating Officer, PW-6. There is also consistent evidence of the prosecution that appellant along with Kamlakar Dubey came and forbade the deceased which was resisted and on account thereof, there was an altercation whereupon, after leaving the place they have gone to their roof and fired therefrom without any pre-meditation, could be a result of spur of the moment and on account thereof, the whole episode would fall within the exception-4 of Section 300 IPC thereby attracting modification from Section 302 IPC to Section 304 Part-II of the IPC, as held by the lower court.

39. Consequent thereupon, the finding of lower court is modified accordingly, identifying the appellant guilty for an offence punishable under Sections 304 Part-II and the sentence is modified directing the appellant to undergo RI for ten years as well as is also fined a sum of Rs. 5,000/- in default thereof, to undergo RI for three months additionally, retaining the conviction and sentence to the extent of Section 27 of the Arms Act with a further direction to run the sentences concurrently. Furthermore, it is directed that in case of payment of fine, the same should be given to the victim, PW-3, Most.



Kamla Devi on proper identification by the learned trial court in lieu of compensation.

40. With such modification, the instant appeal is dismissed.

(ADITYA KUMAR TRIVEDI, J)

I agree
(SAMARENDRA PRATAP SINGH, J)

Patna High Court
March 6th 2017
Perwez/AFR

(SAMARENDRA PRATAP SINGH, J)

U		T	
---	--	---	--

