

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (DB) No.990 of 2013**

Arising Out of PS.Case No. -132 Year- 2008 Thana -KRITYANAND  
NAGAR District- PURNIA

=====

Md. Mazed @ Majid S/O Late Mannan Resident of Village- Devinagar Bichala  
Tola, P.S.- Shrinagar, District- Purnea

..... Appellant

Versus

The State Of Bihar

..... Respondent

with

=====

**Criminal Appeal (DB) No. 915 of 2013**

Arising Out of PS.Case No. -132 Year- 2008 Thana -KRITYANAND  
NAGAR District- PURNIA

=====

Md. Nasim, son of Md. Mansoor Ali, Residents of village- Devi Nagar (Bichla  
Tola), Police Station- K. Nagar, District – Purnea.

..... Appellant

Versus

The State of Bihar

..... Respondent

with

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**Criminal Appeal (DB) No. 945 of 2013**

Arising Out of PS.Case No. -132 Year- 2008 Thana -KRITYANAND  
NAGAR District- PURNIA

=====

Md. Hasim @ Md. Hasib Son Of Md. Abdul Rasid Resident Of Village - Devi  
Nagar (Bichla Tola) Police Station - K. Nagar, District - Purnea

..... Appellant

Versus

The State Of Bihar

..... Respondent

with

=====

**Criminal Appeal (DB) No. 932 of 2013**

Arising Out of PS.Case No. -132 Year- 2008 Thana -KRITYANAND  
NAGAR District- PURNIA



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Md. Mofizul S/O Md. Malik Village- Devi Nagar Bichla Tola, P.S- K. Nagar,  
District- Purnea.

..... Appellant

Versus

The State Of Bihar

..... Respondent

with

=====

**Criminal Appeal (DB) No. 976 of 2013**

Arising Out of PS.Case No. -132 Year- 2008 Thana -KRITYANAND  
NAGAR District- PURNIA

=====

Md. Sabed @ Md. Sawed S/O Late Abdul Mannan Resident of Village Devi Nagar  
(Bichla Tola), Police Station K. Nagar, District Purnea.

..... Appellant

Versus

The State Of Bihar

..... Respondent

with

=====

**Criminal Appeal (DB) No. 1035 of 2013**

Arising Out of PS.Case No. -132 Year- 2008 Thana -KRITYANAND  
NAGAR District- PURNIA

=====

Md. Nausad @ Md. Naushad son of late Abdul Mannan, resident of Village- Devi  
Nagar (Bichla Tola) Police Station- K. Nagar, District- Purnea

..... Appellant

Versus

The State Of Bihar

..... Respondent

with

=====

**Criminal Appeal (DB) No. 1029 of 2013**

Arising Out of PS.Case No. -132 Year- 2008 Thana -KRITYANAND  
NAGAR District- PURNIA

=====

Md. Kasim @ Md. Quasim Son of late Abdul Mannan Resident of Village - Devi  
Nagar ( Bichla Tola ) Police Station - K. Nagar, District - Purnea



.... .... Appellant

Versus

The State Of Bihar

.... .... Respondent

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**Appearance :**

(In CR. APP (DB) No.990 of 2013)

For the Appellant : Mr. Vikram Deo Singh

For the Respondent : Mr. Abhimanyu Sharma, APP

(In CR. APP (DB) No.932 of 2013)

For the Appellant : Mr. Suraj Narain Sinha, Sr. Adv.  
Mr. Mukul Prasad

For the Respondent : Mr. Satya Narayan Pd., A.P.P.

(In CR. APP (DB) No.1035 of 2013)

For the Appellant : Mr. Suraj Narain Sinha, Sr. Adv.  
Mr. Mukul Prasad

For the Respondent : Mr. Ajay Mishra, APP

(In CR. APP (DB) No.976 of 2013)

For the Appellant : Mr. S.N.P. Sinha, Sr. Adv  
Mr. Mukul Prasad

For the Respondent : Mr. S.N.Pd., A.P.P.  
Ms. Rashmi Bharti

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**CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL**  
**and**

**HONOURABLE MR. JUSTICE VINOD KUMAR SINHA**  
CAV JUDGMENT

**(Per: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA)**

**Date: 07 -12-2017**

All the seven appeals arises out of K.Nagar P.S.Case No.132 of 2008. Three Sessions Trials emerged out of the above case being Sessions Trial No.228 of 2010 in which Md. Mazed @ Majid (A/1)) of Cr. Appeal (DB) No.990 of 2013, Md. Mofizul (A/2) of Cr. Appeal No.932 of 2013 were convicted. In second trial being S.T.No.1440 of 2010, Md. Nasim (A/3) of Cr. Appeal No.915 of 2013, Md. Hasim @ Md. Hasib (A/4) of Cr. Appeal (DB) No.945 of 2013 and Md. Nausad @ Md. Naushad (A/5) in Cr. Appeal (D.B.)



no.1035 of 2013 were convicted. Third Sessions Trial No.220 of 2009 resulted in conviction of Md. Sabed @ Md. Sawed (A/6) of Cr. Appeal (DB) No.976 of 2013 and Md. Kasim @ Md. Hasim (A/7) of Cr. Appeal (DB) No.1029 of 2017.

2. The judgment of conviction was rendered separately on 18.09.2013 by the learned Adhoc Additional Sessions Judge-III, Purnea.

3. A/1 was held guilty under Section 302 of the Indian Penal Code and Section 27 of the Arms Act whereas A/2 to A/7 were held guilty under Sections 302/120(B) of the Indian Penal Code. They were sentenced to suffer RI for life under Section 302 of the Indian Penal Code or under Section 302/120 of the Indian Penal Code. Separate sentence under Section 27 of the Arms Act was imposed upon A/1. He was directed to suffer R.I. for five years with fine, having default clause. The sentences were directed to run concurrently. These appeals assail those judgments of conviction and sentence.

4. It may be noted at the outset that the counsel for the appellants of these appeals have made submissions from the records of Cr. Appeal (D.B.) No.990 of 2013 and Cr. Appeal (D.B.) No.932 of 2013 (arising out of S.T.No.228 of 2010). It is stated that the witnesses in other trials being S.T. Nos.1440 of 2010 and 220 of 2009



made similar/identical statements. It shall not be necessary, therefore, to refer to the evidence adduced by the prosecution in S.T. Nos.1440 of 2010 and 220 of 2009 except the relevant part wherever it is necessary.

5. Rahila Khatoon (P.W.6) in Criminal Appeal (DB) No.990 of 2013, wife of the deceased lodged the fardbeyan (Ext.2) on 3.6.2008 at the place of occurrence recorded by Mehendra Prasad Singh (P.W.13) alleging that on 03.06.2008 at 09:50 hours in the morning, her husband left home on bicycle to go to the field to oversee the harvesting of the paddy. The informant after some time followed him. As soon as her husband reached near the house of Md. Rashid, she heard sound of gun firing and rushed to the place of occurrence to find that A/1 fired at the deceased, whereafter he fell down, A/7 sat on the chest of the deceased. In the meantime, other appellants also arrived there. She further alleged that while her husband was on the cycle, he was fired at. Her husband made attempt to save his life.

6. However, the other accused persons (appellants) also fired at him and thereafter escaped. Motive for the occurrence was alleged as prior enmity between A/7 and the deceased. She cited in detail the reasons for commission of the offence.



7. A formal FIR (Ext.3) was drawn. Death inquest proceeding was carried out at the site of the occurrence on 3.6.2008 at 08:40 hours, which was witnessed by P.W.2 and P.W.7. The dead body was sent for postmortem examination. P.W.8, while posted at Sadar Hospital, Purnea conducted the autopsy on 03.06.2008 at 01.15 P.M. and submitted the postmortem report (Ext.1). On conclusion of investigation and finding the accusations true against the appellants, the charge sheet was laid in stages, which ultimately gave rise to the three trials and on the file of the learned Trial Judge, where the charges were framed and read over/explained to the appellants to which they pleaded not guilty and claimed to be tried.

5. In order to bring home the charges, the prosecution examined 13 prosecution witnesses in Sessions Trial No.228 of 2010. The court summoned two more witnesses and they were examined as C.W.1 and C.W.2. The C.W.1 is Sri Manoj Kumar Roy, Judicial Magistrate, who recorded the statements of P.Ws.1, 2 and P.W.5 under Section 164 Cr.P.C., whereas C.W.2 is Subodh Kumar the third Investigating Officer, who had submitted the charge-sheet(s). A brief resume of the witnesses produced by the prosecution are as follows :

P.W.1 Shan Muhammad is the *Mama* of the deceased. He has projected himself as the eye witness of the occurrence. P.W.2 Hzarat S/O Late Tahimuddin has also claimed in examination-in-chef



as eye witness to the occurrence. P.W.3 Abdul Quaiyum is another eye witness being the son of the deceased. He was also cited in the FIR as the witness. P.W.4 Hazarat son of Late Abdul Rahman claims himself as eye witness. However the prosecution did not rely on him and was later declared hostile. P.W.5 Md. Sumed is another eye witness of the incident. P.W.6, as noted above, is the informant of the case being wife of the deceased. P.W.7 Md. Sultan is witness to the inquest. He was declared hostile. P.W.8 is Dr. Satendra Kumar Singh, the autopsy surgeon who had conducted the postmortem and proved the postmortem report (Ext.1). P.W.9 Abdul Jabbar, P.W.10, Md. Nurul Haque and P.W.11 Mansoor Ali were declared hostile by the prosecution. P.W.12 Shomya Pridarshani is the second Investigating Officer, who took over investigation from P.W.13 Mahendra Pd. Singh, who had recorded fardbeyan initially and made investigation of the case. As noted above, C.W.1 Manoj Kr. Rai is the Judicial Magistrate, who had recorded statements of P.Ws. 1, 2 and 5 under Section 164 Cr.P.C. Those statements are on record as Ext.5, 5/1 and 5/2 respectively. From the trend of the cross-examination, it further appears that the appellants took the defence that the deceased was having criminal antecedents and was killed in a different manner and at a difference place.

9. In appreciation of the evidence on record, the learned



trial court held that the charges levelled against the appellants were provided beyond pale of doubts and held them guilty and punished in the manner noted above.

10. Heard Mr. Vikram Deo Singh in Cr. Appeal (D.B.) No.990 of 2013, Mr. Suraj Narain Prasad Sinha, Sr. Advocate in rest of the appeals and Mr. Satya Narayan Prasad, learned counsel for the State.

11. Counsel(s) for the defence have submitted that none of the eye witness presented by the prosecution had actually witnessed the occurrence. There are sharp contradictions in their evidence on material particulars. Almost all the eye witnesses have stated specifically about several gun-shot injuries sustained by the deceased at the hands of the appellants whereas the Doctor (P.W.8) found a solitary gun short injury on the person of the deceased, which resulted into his death. It is submitted that the evidence of the Doctor and his findings in the postmortem report completely discredits their evidence made in the court. Such contradictions is so fundamental that goes to the root of the prosecution case. It is also submitted that first version of the prosecution case has not been produced by the prosecution. The informant P.W.6 in her deposition has stated that the police reached the place of occurrence immediately, where her statement was recorded whereon she put her signature/LTI, whereas



P.W.1 has stated that when the witnesses went to the police station, the I.O. asked them to call the informant for becoming the informant of the present case, whereafter she was taken to the police station. Even P.W.6 has herself stated that she reached at the police station in the afternoon where her statement was recorded, on which she put her thumb impression. It has next been submitted that the place of occurrence has not been firmly established in the case. According to the evidence of the eye witnesses, it is a *kachcha* road in front of the house of Md. Rashid whereas I.O., in his deposition, has stated that the dead body was found 25 yards away from the house of Md. Rashid. In order to further discredit evidence of the eye the witnesses, the defence also drawn attention of the Court to the evidence of the I.O. to submit that many witnesses had not claimed as eye witness in their C.D. statements under Section 161 of Cr.P.C. before the I.O.

12. Counsel for the State has, however, supported the findings of the guilt recorded by the learned trial court. He has submitted that the prosecution case is fully proved by the evidence of the P.Ws. 1, 2, 3, 4 and 6. Out of whom, P.W.1 and P.W. 3 were cited in the FIR as witness to the incident. FIR was recorded without loss of time at 09:15 hours on 3.6.2008 whereas the time of occurrence is around 06.30 P.M. in the morning on the same day. He further submits the prosecution evidence is consistent on the manner of



occurrence as well as the genesis of the occurrence.

13. In different sessions trials witnesses had been examined by different numbers, however, learned counsel(s) for appellants have referred them by the P.W. numbers appearing in S.T.No.228 of 2010. Both the appellants and the state agreed that though, they were examined by different numbers but their evidences are almost identical.

14. It further appears that the postmortem report has been marked as Ext.1 in all the sessions trial. Similarly, the FIR has been marked as Ext. 2 and the inquest report has been marked as Ext. 4 in all the sessions trials. It further appears that the statement recorded under Section 164 Cr.P.C. of Shan Muhammad has been marked as Ext.5 in Sessions Trial no.228 of 2010. However, in Sessions Trial No.1440 of 2010 and in Sessions Trial No.220 of 2009 it was marked as Ext.7 but statement of Md. Hazarat under Section 164 Cr.P.C. has been marked as Ext.7/1 in Sessions Trial No.1440 of 2010 and Sessions Trial no.220 of 2009. Similarly statement of Md. Sumed under Section 164 Cr.P.C. has been marked as Ext.7/2 in Sessions Trial no.1440 of 2010 and Sessions Trial no.220 of 2009.

15. In the background of the contention of the rival parties, this Court shall scrutinize the materials available on the



record. Evidence of P.W.6 (informant), an eye witness and the wife of the deceased, has disclosed that at 6.30 A.M., her husband went for harvesting and she further claims that A-1 (Majid) , A-7 (Kasim) and A-4 (Hasim) fired on her husband. They thrashed him on the ground, A-5 (Naushad) sat over his chest and fired into his mouth. Her evidence further discloses that she saw A-2 (Mofizul), A-3 (Nasim), A-6 (Sabad) and others.

16. P.W.3 Abdul Quaiyum is the son of the deceased and his evidence discloses that A-1 fired on his father whereafter his father fell down and A-3 fired on his leg, A-2 and A-6 were standing on his hand, A-3 (Nasim) was there with A-1 (Majid) and A-5 (Naushad) sitting over his chest, assaulted his father by '*Butt*' portion of the three-nut and thereafter fired on his mouth. Similarly, statement of P.W.1 also discloses that the deceased was fired by A-1 (Majid) on left scapular region and he fell down and A-7 (Kasim) fired another shot, the third shot was fired by A-4 (Hasim). Thereafter, another accused sat on his chest and fired by three-nut.

17. P.W.2 has also stated about firing by A-1 (Majid), A-7 (Kasim), A-5 (Naushad). P.W.5 also disclosed about firings by Majid, Kasim, Hasim, and Naushad and also stated about the presence of other accused person. P.W.7 has also stated about 3 to 4



firings by the appellants which struck him (the deceased).

18. P.W.4 has been declared hostile by the prosecution.

19. On close perusal of their evidence, it appears that they all claim themselves to be eye witnesses. If their evidence is believed, the deceased ought to have received at least 3-4 gun short injuries, besides other injuries caused by assault with *Butt* of the fire arm.

20. In this case, P.W.8 Satyendra Kumar Singh has conducted autopsy. He found the following ante mortem injuries : -

*“(i) On external examination Rigor mortis was present in all four limbs, (ii) ½” X ½” lacerated wound with inverted margin with charring at back of right side 2” below right scapula- wound of entry.*

*(B) On dissection-*

*(i) Head & neck- NAD (Nothing abnormal detected),*

*(ii) Chest- Heart – lacerated wound at apex of heart.*

*Lungs- laceration of lower right lung and lower left lung. Thoracic cavity was full of blood and blood clots. A Bullet was recovered from left chest cavity.*

*(iii) Abdomen/Liver- Upper dome lacerated diaphragm and laceration of right diaphragm.*

*Spleen/Kidney- pale small and large intestine found- Gas and faces.*

*(iv) Stomach- Semi digested food*

*(v) Urinary bladder- Empty.*

*2. Time elapsed since death within 24 hours.*

*Cause of death- In my opinion the cause of death was due to*



***hemorrhage and shock due to above mentioned injuries caused by fire arm.”***

21. The above objective findings of P.W.8 Doctor is contrary to the evidence of almost all P.Ws. so far manner of occurrence, as he has found only one injury on the person of deceased.

22. This Court is conscious of the position that when there is contradiction between the ocular evidence especially the eye witness accounts and the medical evidence, this Court has generally held that eye witness accounts more reliable and credible and also held that their evidence cannot be discarded on the basis of medical evidence.

23. Hon’ble Apex Court in a case of *State of Haryana Vrs. Bhagirath reported in 1999 (5) SCC 96 in para 15* and it was held as follows :

***“The opinion given by a medical witness need not be the last word on the subject. Such 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. After all opinion is what is formed in the mind of a person regarding a fact situation. If one doctor forms one opinion and another doctor forms a different opinion on the same facts it is open to the Judge to adopt the view which is more objective or probable. Similarly if the opinion given by one doctor is not consistent with probability the court has no liability to go by that opinion merely because it is said by the doctor. Of course,***



***due weight must be given to opinions given by persons who are experts in the particular subject.”***

24. Hon’ble Apex court has also had similar view in the case of *State of U.P.- Vrs.- Hari Chand reported in 2009 (13) SCC 542 at para 13, as follows : -*

***“There was no reason for the High Court to discard the credible, cogent and trustworthy evidence of the eye witnesses. This was certainly not a case where medical evidence was at a variance with the ocular evidence. The evidence of the eye witnesses regarding injuries caused by the firearms is amply corroborated by the evidence of the doctor who found four firearms’ wounds. In any event unless the oral evidence is totally irreconcilable with the medical evidence it has primacy.”***

25. However, there are also discussion of Hon’ble Apex Court that when eye witness accounts of the evidence so far manner of occurrence is completely contradictory to the medical evidence and discarded their presence at the place of occurrence and claim of their being eye witnesses does not appear to be credible and trustworthy. Then the ocular evidence may be disbelieved.

26. In the present case, we find that the eye witnesses account of the witness, who claims to be eye witness, is completely different from the post mortem report and the medical evidence. They completely contradict to each other and discredit their



presence and the claim of the eye witness does not appear to be creditable and trustworthy. Hon'ble Supreme Court in a case of *Ram Narayan Singh Vrs. State of Punjab reported in 1975 (4) SCC 497* at *Para 14* has held as follows :

*“Where the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case. In Mohinder Singh v. The State AIR 1953 this Court observed in similar circumstances as follows:*

*In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle.*

*It is obvious that where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. While appreciating the evidence of the witnesses, the High Court does not appear to have*



*considered this important aspect, but readily accepted the prosecution case without noticing that the evidence of the eye witnesses in the Court was a belated attempt to improve their testimony and bring the same in line with the Doctor's evidence with a view to support an incorrect case."*

27. Similarly, the Hon'ble Supreme Court in a case of *State of U.P. Vrs. Dinesh Singh reported in 2009 (11) SCC 566 at para 14* has held that :

*"Apart from that medical evidence clearly rules out the manner of infliction of injuries as deposed. Though ocular testimony of the witnesses has greater evidentiary value vis-à-vis medical evidence, but when medical evidence totally improbabilises the ocular testimony, that becomes a relevant factor in the process of evaluation of evidence. In the instant case the medical evidence totally improbabilises the version regarding the manner of assault by both the accused persons as noted above.*

29. Similar view was also taken by the Hon'ble Apex Court in a case of *Mahavir Vrs. State of reported in 2016 (10) SCC 220 in which para 22* says as follows:

*"The position of law in case where there is a contradiction between medical evidence and ocular evidence can be crystallized to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true,*



***the ocular evidence may be disbelieved.”***

30. Similar view was also taken by the Hon’ble Apex Court in a case of ***Khambam Raja Reddy- Vrs. Public Prosecutor, High Court of A.P. reported in 2006 (11) SCC 239 at Para 21***, as follows :

***“Apart from the above, the High Court has also gone wrong in observing that there is no positive evidence on record to show that Accused 1 is crippled. The High Court has proceeded on the supposition that since a polio attack is always to the legs and not to the hands, a person who had suffered from a polio attack, was capable of lifting a stone weighing about 25 to 30 Kgs. with his hands. The learned Sessions Judge has, in fact, referred to a certificate issued by Dr. M. Venkatadri, Civil Assistant Surgeon, Gandhi Hospital, Secunderabad, dated 5-1-1994, to the effect that right leg of the Appellant 1 had been affected with polio and he was unable to travel without the assistance of an escort. Negatives in respect of the disability of Appellant 1 showing him to have been attacked by polio had also been filed. For Appellant 1 to have lifted a stone weighing 25 to 30 kgs. in his physical condition was highly improbable.”***

31. On perusal of above decision, as discussed above, when eye witness account clearly makes out a different type of manner of occurrence, which is completely different to the medical evidence and thus improbablise the presence of the witnesses at the place of



occurrence. The above contradictions completely improbablise the presence of the witnesses at the place of occurrence.

32. Learned counsel for the appellant has assailed the judgment on the ground that learned Trial Court failed to consider major contradiction between ocular and medical evidences and erred in finding P.Ws. 1, 2, 5, 6 & 7 as eye witnesses of occurrence and also contended that the fardbeyan of P.W.6 informant, purported to be recorded at the place of occurrence does not appear to be free from the doubt as P.W.1 has stated that he went to the police station and at the police station, the I.O. called the wife of the deceased to become informant, thereafter he came on tempo and he has taken wife of the deceased and statement was recorded whereas as per FIR and the evidence of the I.O. it appears that he has recorded fardbeyan at the village of the informant. Evidence of P.W.6 wife of the deceased in chief also shows that statement was recorded at village, however, her cross examination in para 23 discloses that the day on which the deceased died, she had gone to the police station and thereafter she had not gone to the police station. Considering the evidence discussed above, creates doubt about recording of the statement of the informant at the place of occurrence. If that be so then the prosecution can be blamed for suppressing the fresh version of the case.

33. Submission of the learned counsel for the appellant is



also that in this case, inquest report has been prepared, prior to lodging of the FIR, which will appear from perusal of the Ext.4 as at the time of preparation of the inquest report on 3.6.2008 at 8.40 A.M. and the inquest report discloses that it was prepared on the basis of the fardbeyan whereas fardbeyan Ext.2 discloses that it was recorded at 9.15 A.M. and that suggests that there is other statements prior to recording statement at 9.15 P.M. and the prosecution has failed to bring earliest version in this case and supported the same.

34. This Court really fail to understand as to why the I.O. was interested in recording the statement of the wife of the deceased as the informant though P.W.1 had gone to the police station for giving information. Obviously he would have given some information to the police and that earliest information has not been brought on record the inquest report also suggests of recording of statement earlier to that. No explanation has been offered by the prosecution on that. This aspect of the matter, certainly makes fardbeyan incredible and untrustworthy.

35. Learned Trial Court has accepted that P.Ws. 1, 2, 5, 6 and 7 are eye witnesses of the occurrence and on the basis of the same and the evidence of Doctor P.W.8 he has convicted the appellant A/1 under Section 302 of the Indian Penal Code and convicted all other appellants under Section 302/120B of the Indian Penal Code. The



learned trial court has also relied on the statement of the witnesses under Section 164 Cr.P.C.

36. Learned counsel for the appellant has also drawn attention of the Court towards the postmortem report and the medical evidence which shows that semi undigested food was found in the stomach though whereas occurrence took place at 6.30 A.M. and the evidence of P.W.6 wife of the deceased also shows that the deceased had not taken food in the morning. In such a situation presence of undigested food during the postmortem shows that occurrence took place not at 6.30 A.M. rather in the night. On perusal of the post mortem report, I find the contention of the appellants true as undigested food was found in the postmortem report and there is also evidence that he had not taken anything in the morning and that also improbablise timing of the occurrence as projected in the prosecution case.

37. As discussed above, there is vital contradictions between the ocular and medical evidence and contradictions is such so as to make the presence of prosecution witnesses improbable at the place of occurrence as they are narrating a completely different story. Evidence of I.O. also shows that the prosecution witnesses are not eye witness of the occurrence. Considering the infirmities and contradictions, it appears that none of the prosecution witnesses are



eye witness of the occurrence. It further appears from the close scrutiny of their evidence that the earliest version of the prosecution has not been brought on record.

38. The defence has also come with a case that the deceased had criminal antecedent and the same has been admitted by P.Ws. also and he was accused in several cases and was earlier in jail custody also and the defence has also given a suggestion that due to enmity he might have been killed in some other manner, no body had seen occurrence and they have been falsely implicated in this case as there was enmity between parties from before with respect to death of son of the deceased.

39. In the light of discussions made above, in the view of the court, the evidence suffers from severe infirmities and inconsistencies, which have not been considered by the learned trial court and convicted the appellants. There is absolutely no evidence to prove the conspiracy. No doubt conspiracy can be inferred from the proved circumstances. However, except that one co-accused Naushad wanted a share of Rs.25,000/- from the amount of Rs.1,25,000/- on which compromise was reached between the deceased and one Ansul, there is absolutely nothing on record to prove the conspiracy.

40. Considering the entire discussions made above,



prosecution has failed to prove its case against the appellants beyond all shade of doubt and hence they are entitled for benefit of doubt.

41. Accordingly, all the appeals are allowed, impugned judgments and sentence are set aside.

42. As the A-1 (Md. Mazed @ Majid) is in custody, he is directed to be released, if not required in any other case. All the other appellants are on bail, hence, they are discharged from the liabilities of their bail bond.

**(Vinod Kumar Sinha, J)**

K.K.Mandal, J. I agree.

**(Kishore Kumar Mandal, J)**

chn/-

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