

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (SJ) No.380 of 2002

Arising Out of PS.Case No. -null Year- null Thana -null District- KHAGARIA

- =====
1. Sunil Mahton son of Bhupi Mahton (abated vide order dt. 21.11.2017)
 2. Natho Mahton Son of Bhupi Mahton
 3. Badal Mahton Son of late Ganesh Mahton
 4. Jitendra Mahton Son of late Ganesh Mahton
 5. Bhupi Mahton son of Late Bishwanath Mahton (abated vide order dt. 21.11.2017)
 6. Sadanand Mahton Son of Sri Gulab Mahton
 7. Maneshwar Mahton son of late Indradan Mahton (abated vide order dt. 21.11.2017)
 8. Dhiran Mahton son of late Ganesh Mahton (abated vide order dt. 21.11.2017)
- All resident of Village and P.O. Raghunathpur, P.S. Sahebpur Kamal,
District- Begusarai.

.... Appellants

Versus

1. The State of Bihar.

.... Respondent

with

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Criminal Appeal (SJ) No. 392 of 2002

Arising Out of PS.Case No. -null Year- null Thana -null District- KHAGARIA

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Binay Mahton son of late Gangadhar Prasad, resident of Village Raghunathpur, P.S. Sahebpur Kamal, District Begusarai.

.... Appellant

Versus

State of Bihar

.... Respondent

with

=====

Criminal Revision No. 1058 of 2002

Arising Out of PS.Case No. -null Year- null Thana -null District- KHAGARIA

=====

Ram Swarup Rai son of late Hirdaya Rai, resident of village Raghunathpur, P.S. Shabebpur Kamal, District- Begusarai.

.... Petitioner/s

Versus

1. State of Bihar
2. Binay Mahto @ Binay Yadav son of Ganga Ram Yadav.
3. Sunil Mahto @ Sunil Yadav son of Bhupi Yadav
4. Nathu Mahto @ Nathu Yadav son of Bhupi Yadav
5. Badan Mahto @ Badal Yadav son of Ganesh Yadav



6. Jitendra Mahto @ Jitendra Yadav son of Ganesh Yadav
7. Bhupi Mahto @ Bhupi Yadav, son of Bishwanath Yadav
8. Sadanand Mahto @ Sadanand Yadav, son of Gulo Mahto
9. Dhiren Mahto @ Dhiren Yadav son of Ganesh Yadav
10. Muneshwar Mahto son of Inerdan Yadav

All resident of village Raghunathpur, P.S. Shahebpur Kamal, District Begusari
.... Respondents

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Appearance :

(In CR. APP (SJ) No.380 of 2002)

For the Appellant/s : Mr. Aaruni Singh, Adv

For the Respondent/s : Mr. Bipin Bihari Singh, APP

(In CR. APP (SJ) No.392 of 2002)

For the Appellant/s : Mr. Aaruni Singh, Adv.

For the Respondent/s : Mr. Bipin Kumar, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
ORAL JUDGMENT
Date: 03-01-2018

Both the Appeals bearing Cr. Appeal (SJ) No.380 of 2002 & Cr. Appeal (SJ) No.392 of 2002 and the Criminal Revision No.1058 of 2002 are directed against the judgment dated 12/16.7.2002 passed by Sri Govind Chandrayan, Additional Sessions Judge, Additional Court II, Khagaria-cum-Fast Track Court No.II, Khagaria in Sessions Case No.197 of 1983; by which the appellants of Criminal Appeal No.380 of 2002 and Criminal Appeal No.392 of 2002 stand convicted in Sessions Case No.197 of 1983 [arising out of Chautham (Mansi P.S.Case No.148 of 1982)] and appellant Binay Mahton has been convicted under Section 304 (Part II), 148 of the Indian Penal Code and under Section 27 of the Arms Act, other appellants have been convicted under Section 304/149 and 148 of the Indian Penal Code and Section 27 of the Arms Act except



Maneshwar Mahton and Bhupi Mahton.

2. Appellant Binay Mahton has been sentenced R.I. for seven years under Section 304 (II) of the IPC and R.I. for three years under Section 27 of the Arms Act as well as a fine of Rs.5,000/- and in default R.I. for two years, whereas the other appellants have been sentenced to undergo R.I. for five years under Section 304(II)/149 of the Indian Penal Code and R.I. for two years under Section 148 of the IPC and all the appellants have been sentenced except Maneshwar Mahton and Bhupi Mahton, R.I. for three years under Section 27 of the Arms Act.

3. A Criminal Revision bearing No.1058 of 2002 has also been filed on behalf of the informant Ramswarup Roy (informant) assailing the judgment of the learned trial court as they have been convicted under Section 304 (II) of the IPC as well as under Section 304(II)/149 of the IPC, though they have been charged under Section 302 and 302/149 of the Indian penal Code and prayed that their conviction be modified under Section 302 and 302/149 IPC respectively.

4. During the pendency of these appeals, it appears that the appellant nos. 1, 5, 7 and 8 of Criminal Appeal No.380 of 2002 died and after receiving a report from the S.P., Begusarai, the appeal against them stands abated, vide order dated 21.11.2017. Hence, now



the appeal stands only against appellant nos.2 Natho Mahton, 3. Badal Mahton, 4. Jitendra Mahto and 6. Sadanand Mahton of Criminal Appeal (SJ) No.380 of 2002 and appellant Binay Mahton of Criminal Appeal (SJ) No.392 of 2002.

5. The prosecution case in short is that while the informant (P.W.4.) along his brother Rambilas Roy, Ramkripal Roy and Umakant Roy was at *Basa* at about 5.30 in the morning, he saw two buffallows and calve grazing in the field and also saw Binay Mahton and Natho Mahton there, on which he raised *hulla* and caught hold those buffallows and calve. It is also prosecution case that Binay Mahton and Natho Mahton fled away from there and started raising *hulla*. Further prosecution story is that thereafter all the appellants except accused Maneshwar Mahton and another accused Bhupi Mahton appeared with double barrel gun and accused Maneshwar Mahton and Bhupi Mahton appeared with arrows and they started indiscriminately firing and throwing arrows. Further prosecution story is that Binay Mahton fired by his double barrel gun causing injury to Ram Kripal Roy and while Natho Mahton was trying to load his double barrel gun, Ramswarup Roy assaulted by *lathi* at his gun; due to which the gun fell on the ground and he again assaulted Natho Mahton.

6. Further prosecution case is that thereafter appellants



fled away raising *hulla* that a murder was committed, as Ramkripal Roy sustained bullet injuries. It is also the prosecution case that Ramkripal Roy was sent to the hospital for treatment and a double barrel gun of Natho Mahton and some cartridges were recovered by the informant, which were handed over to P.W.10 Sacchidanand Singh.

7. It appears that after investigation of the case, the charge sheet has been submitted and the cognizance was taken, the case was committed to the court of sessions except the case of Bhupi Mahton and Maneshwar Mahton.

8. Accused Bhupi Mahton and Maneshwar Mahton have also been summoned later on under Section 319 IPC to face trial, hence, the witnesses have again been cross-examined.

9. During the trial, altogether 10 witnesses have been examined. P.Ws.1 Dayanand Roy claims to be eye witness, P.W.2 Sanjay Roy claims to be eye witness, P.W. 3 Rajendra Roy claims to be eye witness, P.W.4 Ramswarup Roy (informant), P.W.5 Birendra Prasad, P.W.6, Umakant Roy brother of the informant and the deceased, P.W.7 Rambilas Roy brother of the informant and deceased, P.W.8 Ram Pavitra Singh, second I.O. of the case, P.W.9 Dr. Ramanand Kumar is the Doctor who has examined the injury of the deceased when he was sent to the hospital as well as he has examined



the injuries of Natho Mahton, P.W.10 is S.I. Sachidanand Singh, who has recorded FIR and taken over investigation of the case.

10. Apart from the above oral evidence, following documents have been brought into the evidence: Ext.1 Fardbeyan, Ext.2 production-cum-seizure list, Ext. 3 Seizure List, Ext. 3/1 and 3/2 two carbon copies of seizure list, Ext. 4 formal FIR, Ext. 5 Jimanama, Ext.6 Station Diary Entry No.99 of Morkahi P.S. dated 8.11.1982, Ext. 7 Carbon copy of Injury Report on the body of Natho Mahton, Ext. 7/1 report of Ramkripal Roy, Ext.8 post mortem report, Ext.9 Attested copy of judgment passed in G.R.No.838 of 1982.

11. On behalf of the defence though no oral defence has been adduced, however, these documents have been brought on the record as Exhibits: Ext. 'A' carbon copy of the injury report without objection of Natho Mahton, Ext. 'B' FIR of Choutham P.S. Case No.149 of 1982, G.R.No.838 of 1982, Ext. 'C' Carbon copy of the charge sheet on G.R.No.838 of 1982, Ext. 'D' Jamabandi of Appeal No.15 of 1985-86 passed by the A.D.M. dated 23.9.2001.

12. The learned trial court after considering the entire materials available on the record and also finding the evidence of witnesses reliable and consistent and he has also found support of the medical evidence, convicted the appellants under Section 304 (Part II) of the IPC as well as under Section 27 of the Arms Act and Section



148 of the Indian Penal Code and other appellants were convicted under Section 304 (Part II)/149 of the Indian Penal Code on the ground that there is no repetition of the firing and all the accused persons were carrying common object with Binay Mahton the appellant to kill the deceased.

13. The learned counsel for the appellants has also assailed the aforesaid judgment on the ground that the F.I.R. and the evidence of P.W.7 Rambilas Roy, who is brother of the informant, clearly shows that only three persons were present there; apart from the deceased and they are Ramswarup Roy (informant), Rajniti Roy and Umakant Roy, out of which, Rajniti Roy and Umakant Roy have not been examined by the prosecution, Ramkripal Roy now died and Umakant Roy had been sent to the police station for lodging a case apprehending the situation, as such only P.Ws. 4 and 7 may at best be eye witness and though P.W. 1, 2 and 3 also claim themselves as eye witnesses but in the FIR their names have not been mentioned nor P.W.7 has taken their names. It has also been argued that P.Ws. 4 and 7 are related and inimical witnesses and their evidence does not rely credibility, in absence of corroboration of these evidences by any independent witness, moreover P.Ws. 1 to 3 are also family members.

14. Further submissions of the learned counsel for the appellants is that in this case, initial investigation has been done by



the Markahi Police Station though the occurrence is within the jurisdiction of Mansi Police Station hence, the initial investigation is bad in law and initiation of the present case is not free from reasonable doubt.

15. Further submission of the learned counsel for the appellant is that though prosecution story is that indiscriminate firing was made and the evidence of P.W.7 discloses that he and Ramswarup Rai was standing there but in spite of that no injury or damage was caused either to the person or property including the buffalows or calve kept at the *Basa*, that clearly improbablise the prosecution story of firing by all the accused persons; on the other hand the evidence of P.W.7 itself disclose that there was a free-fight between the parties in which the deceased along with the others have participated from the informant's side also and the above evidence and the injuries found on the person of the Natho Mahton, which are grievous in nature completely demolishes the manner of occurrence as claimed by the prosecution.

16. Learned counsel for the appellants has also contended that the injury report of Natho Mahton (Ext.A) and the evidence of the Doctor Ramanand Kumar in the cross examination discloses that there were six injuries over the person of Natho Mahton and out of which four were punctured injuries, out of which two were grievous



in nature, apart from two lacerated injuries, whereas the prosecution tried to explain the same that Natho Mahton has received *lathi* injury assaulted by P.W.4 Ramswarup Roy and that clearly shows that the prosecution is suppressing the material facts from this Court and has not come with clean hands.

17. Further contention of the learned counsel for the appellants is that as per the prosecution case, a gun and a bag containing cartridges were recovered from the possession of Natho Mahton and during search some bullets of rifle have also been recovered from his pocket and the seizure list was also prepared but the seizure list witnesses have not been brought on the record nor there is any evidence that the seized gun and the cartridges and bullets were sent for examination either by the Forensic Science Laboratory or by the Sergeant Major/Armour to show that the seized gun was in the working condition and the above facts became relevant, considering the circumstance that seizure of the articles whatever has been made is on the basis of the production of those articles by the informant including the used cartridges, moreover there is also nothing available on record to show that these articles were kept in sealed packet or from where the same has been produced in the court.

18. It has also been argued that there is prosecution case



about indiscriminate firing, in such a situation, the I.O. ought to have inspected the place of occurrence that is *Basa*, to find out the mark of pellet and also to find out the pellet at the place of occurrence rather the conduct of I.O. (P.W.10) clearly shows that he was interested party and even though the place of occurrence was not under the control of his area, in spite of that he visited the place of occurrence and almost completed investigation. Contention of appellants is also that this fact is important in view of the fact that P.W.10 is a police personnel and a suggestion has been given to P.W.10 that in collusion with Rambilas Roy (P.W.7), who is also a police personnel, he has deposed falsely in this case.

19. Learned counsel for the appellants pointing out the above inconsistencies and discrepancies had contended that the learned trial court has failed to consider all the aforesaid inconsistencies and infirmities in prosecution evidence and also failed to consider that there is land dispute between the parties from before and convicted the appellants, hence the impugned judgment is not sustainable in the eye of law.

20. On the other hand, the learned Counsel for the State has contended that there is consistent evidence available on record to show that the appellants formed unlawful assembly, came variously armed and fired indiscriminately and Binay Mahto fired hitting



Ramkripal Yadav who died and other appellants also assaulted. Learned counsel for the informant has further contended that the materials available on the record shows that the case under Section 302 and 302/149 also made against the appellants and as such he has preferred Revision against the impugned judgment.

21. In this case a Cr. Revision No.1058 of 2002 has been preferred by the informants, assailing the judgment on the ground that on the basis of the evidence available on the record discloses that the appellants forming unlawful assembly, came and made indiscriminate firing, causing injuries to Ramkripal Roy, who later on succumbed to injuries, hence, the learned trial court ought to have convicted the appellant under Section 302 of IPC and other appellants under Sections 302/149 of the IPC and conviction under Section 304 (Part II) and 304 (Part II)/149 of the IPC is erroneous and perverse, as such conviction of the appellants be modified under Section 302 and 302/149 of the IPC.

22. On examination of evidence available on record, it manifests an indiscriminate firing and throwing of arrows by the appellants resulting into death of Ramkripal Roy. The Doctor who has conducted postmortem examination has not been examined in this case and there is also nothing available on the record to show as to whether he is dead or alive but the evidence of P.W.9 Dr. Ramanand



Kumar Civil Assistant Surgeon of Khagaria discloses that he has examined Ramkripal Roy (deceased) at first, prior to his death and found following injuries :

- i. *Lacerated wound size 2 cm X 1 cm. Margin of the wound was inverted. On the right side of abdomen that wound was wound of entrance.*
- ii. *Lacerated wound 4 cm X 3 cm in the left side of abdomen. Margin irregular inverted. That was wound of exit. As one injury was caused by fire arm and grievous in nature. The injuries are possible by Gun Fire Arm.*
- iii. *Age- Within six hours from time of examination.*
- iv. *Old star mark in the left index finger.*

23. This witness in his cross examination has stated that on 8.11.1982 he has examined Natho Mahto (appellant) and has found following injuries :

- i. *Punctured wound size 4 cm X 2 cm X 3 cm in the skull.*
- ii. *Punctured wound size 2 cm X 1 cm X 1 cm. Just above the right eye brow.*
- iii. *Punctured wound size 2 cm X 1 cm X 2 cm in the left hand near elbow.*
- iv. *Bruise with fracture of Tibea and fasula in the leg below knee size 10" X 6".*
- v. *Bruise 5 cm X 3 cm in the left thigh.*
- vi. *Bruise 6 cm X 2 cm with right hand.*
- vii. *Injuries I, II, III were caused by sharp cutting weapon and are possible by bhala.*
Injury no.I grievous and other are simple in nature.
Injuries IV,V and VI were caused by hard and blunt substance.
Injury no.IV was grievous and V and VI were simple in nature.

24. On cross examination, this witness has stated that



he has not found any charring or blackening injury on Ramkripal Roy. Evidence of this witness further shows that he has examined both the deceased and the accused on the same day i.e. on 8.1.1982. The post mortem report has also been brought on record as Ext.8 under Section 294 Cr.P.C. and it appears from perusal of Ext.8 that (i) para median stitched wound 7" X ½" on the abdomen (2) two surgical rubber damage tubes were fitted on right side and one on left side and no opinion could be given regarding used weapon. Further the postmortem report shows cause of death was shock and hemorrhage. The post mortem report further shows that the time elapsed since the death more than 36 hours and the dead body was received on 9.11.1982.

25. P.W.4 is the informant in this case and the evidence disclose that two buffallows and calve were found in the field in the morning of 5.30 a.m. and Binay Mahton and Natho Mahton were also seen there thereafter those buffallows and calves were apprehended and brought to the *Basa* and appellant Binay Mahton and Natho Mahton fled away. His evidence further disclose that thereafter both the appellants Binay Mahton and Natho Mahton raised *hulla* thereafter the other appellants came there on the horses and except Maneshwar Mahton and Bhupi Mahton (died during the pendency of the trial) also appeared with arrows and all the other appellants were



armed with guns. His evidence also discloses that Binay Mahton fired, causing injury to Ramkripal Roy and while Natho Mahton was loading his gun he was assaulted on his hand by *lathi*, due to which his gun fell down and he was again assaulted and the gun fell down there. P.Ws. 1 and 2 have also supported the prosecution case so far genesis of the occurrence and the manner of occurrence is concerned. P.W. 5 has been tendered for cross examination and so far P.W.6 is concerned, he was sent to the police station with a written application given by P.W.7 Rambilas Roy, however, he has supported the prosecution case so far genesis of the occurrence is concerned.

26. P.W.7 has also supported the prosecution case so far genesis of the occurrence and manner of occurrence is concerned. No doubt there is intra contradiction between evidence of the witness from that of P.W.4, as his evidence discloses that when the firing was made he and Ramswarup Roy was standing there whereas Ramswarup Roy (P.W.4) has stated that on firing they hid themselves behind the paddy crops but it appears to be a minor one, which is bound to happen, as they were deposing after a long lapse of occurrence. Fardbeyan also discloses that at the time of occurrence P.W.4 along with Rambilas Roy (P.W.7), Ramkripal Roy (deceased) and Umakant Roy (P.W.6) were present at the *Basa*. Evidence of P.W.7 in para 16 to 18 disclosed that when Ramkripal Roy received



gun shot injury, the firing stopped and both parties came in front of each other and there was '*gutham-guthi*' (free fight) between parties and Ramswarup Roy assaulted Natho Mahton by *Lathi*, his evidence also discloses that his four brothers were in the free fight including Ramswarup Roy (P.W.4), Ramkripal (deceased) and Rajniti Roy (not examined). His evidence also discloses that he was armed with stick and other three brothers were armed with *lathi* and at that time, the accused persons were not firing and all his three brothers were assaulting by *lathi* causing injury to others and 2-5 accused persons might have received injuries.

27. If the evidence of P.W.4 and P.W.7 is believed that completely rules out the presence of other witnesses at the time of actual assault.

28. Evidence of P.W.7 also discloses in para 11 and 12 that the accused persons in collusion with the police has got proceeding initiated under Section 144 Cr.P.C. with respect to the land 10 to 15 days prior to the occurrence and his evidence in Para 10 also shows that there is land of the accused persons besides the place of occurrence and both the lands are joint land by ridge (*Aar*). The evidence of P.W.4 also shows that in the same *Bahiyar* the accused persons have also their land. His evidence in para 5 also disclose that with respect to the same land, uncle of accused Bhupi Mahton has



also lodged a case of loot against the father of Dhiren Mahton and Jitendra Mahton. His evidence in para 9 further shows that a counter case was also lodged against P.W.6, in which he is also an accused and he along with Ramswarup Roy were arrested in connection with that case and allegation against them is of assaulting Natho Mahton. The above evidence discloses enmity between the parties from before and the cases were going on among them and also a counter case of the present case also with respect to assault by Natho Mahton in which P.W.4 and P.W.7 were arrested. It also discloses that just 14-15 days prior, a proceeding under Section 144 Cr.P.C. was initiated between them with respect to land dispute.

29. Moreover, Natho Mahton received injury in the occurrence, admitted by prosecution and the Doctor has examined on same day when Ram Kripal Yadav was examined, prosecution tried to explain the same that while he was loading gun he was assaulted by *lathi* by P.W.4 due to which his gun fell down and he was again assaulted causing injury to him, however, the injuries which were disclosed by P.W.9 (Doctor) and the injury report Ext.A shows that Natho Mahton carries four punctured injures caused by incised and penetrated weapon and two lacerated weapons caused by *lathi*, hence, the explanation given by the prosecution regarding punctured injuries found on the person of Natho Mahton, one of which was grievous is



far from satisfactory and suggests that the appellants are suppressing some material facts. It is settled law that in each and every cases, non-explanation of injury on the person of accused persons can not be held to be fatal, however, in the present case, the injuries are not superficial, rather the appellant Natho Mahton received punctured injuries caused by sharp and penetrating weapon including one grievous injury and two lacerated wounds caused by hard and blunt substance and one of them was also grievous injury. In such a situation, explanation of the prosecution certainly creates a grave doubt about manner of occurrence. The Hon'ble Apex Court in a case of *Dashrath Singh and State of U.P.* reported in (2004) 7 SCC 408 and has dealt with such situation and held in para 19 of judgment as follows : -

“.....Ultimately, the factum of non- explanation of injuries is one circumstance which has to be kept in view while appreciating the evidence of prosecution witnesses. In case the prosecution version is sought to be proved by partisan or interested witnesses, the non- explanation of serious injuries may prima facie make a dent on the credibility of their evidence. So also where the defence version accords with probabilities to such an extent that it is difficult to predicate which version is true, then, the factum of non- explanation of the injuries assumes greater importance. Much depends on the quality of the evidence adduced by the prosecution and it is from that angle, the weight to be attached to the aspect of non-explanation of the injuries should be considered. The decisions abovesited would make it clear that there cannot be a mechanical



or isolated approach in examining the question whether the prosecution case is vitiated by reason of non-explanation of injuries. In other words, the non-explanation of injuries of the accused is one of the factors that could be taken into account in evaluating the prosecution evidence and the intrinsic worth of the defence version.

30. Considering the evidence of prosecution witness in the background of pronouncement of Hon'ble Apex Court, it appears that the evidence of P.W.7 itself suggests that there was free fight between the parties in which prosecution side has also assaulted 2 to 5 appellants by *lathi*. The learned trial tried to explain the injuries found on the person of Natho Mahton stating that as the counter case filed by the appellant side resulted in acquittal, the prosecution case can not be disbelieved on the basis of the injuries found on the body of Natho Mahton and the learned trial court has also disbelieved Exts. A, B and 'C', which show that parties were at loggerhead from before. Learned Trial court failed to consider that Natho Mahton has not been examined in counter case in trial and some of the witnesses had also not turned up for cross examination. Moreover injuries are found on the person of Natho Mahton by the Doctor (P.W.9), who is a prosecution witness, which includes grievous injuries.

31. Apart from the above in this case there is absolutely no proper investigation to verify the allegation of indiscriminate firing by



the accused persons by the I.O. He has only recorded statement of the witnesses and makes out seizure list on the basis of production of the articles by Ramswarup Roy and has not tried to make his own investigation .

32. Further the investigation has been done by A.S.I. of Markahi P.S. though the place of occurrence does not situate in his jurisdiction but the learned trial court considering provisions of Section 147 (Ka) of the Bihar Police Manual which provides that investigation can be conducted by the police officer within whose jurisdiction the P.O. does not fall, of a case, hence, whole investigation in this case can not be said to be improper. In this case there is production list cum seizure list of riffle cartridges and bullets which have been produced by the informant to the I.O. stating that the same have been recovered from him. Production cum seizure list was prepared and marked as Exhibit, however, absolutely nothing is on record to show as to whether they have been kept in sealed packet and as to where the same has been kept till production in the court, Hon'ble Apex Court has considered the aspect of the matter in large number of cases and one in the similar case *Sahib Singh Vrs. State of Punjab* reported in (1996) 11 SCC 685 has held as follows : -

“We next find from the record that the arms and ammunitions allegedly recovered from the appellant and seized were not packeted and sealed. In Amarjit Singh Vs. State of Punjab this Court has observed



that non-sealing of the revolver at the spot is a serious infirmity because the possibility of tampering with the weapon cannot be ruled out. From the record we further find that there is no evidence to indicate with whom the revolver was after its seizure by P.W.3 till it was sent to the Arms Expert for testing through Head Constable Baita Singh. This missing link also weakens the prosecution case. For all these infirmities we are of the view. that the appellant is entitled to the benefit of reasonable doubt.”

33. There is absolutely nothing on record to show that the seized rifle or cartridges were test fired as to find out they are in working condition and they are the cartridges used by the rifle/gun and used in the same occurrence. The above discrepancies certainly goes against the prosecution. Further though there is allegation of indiscriminate firing and also throwing of arrows but the I.Os. have not tried to seize the pellets of gun or arrows and the arch to verify the allegation.

34. It manifests from the entire discussions made above that the informant and others caught hold buffallows and she-calve of the appellant Natho Mahton and Binay Mahton, the prosecution parties claim that the appellants came variously armed and made indiscriminate firing as well as threw arrows, there is no evidence that any other except deceased Ramkripal Roy received injuries and no other damages caused to the person or property. P.W.7 himself has admitted that there was ‘gutham-guthi’ between the parties and Natho



Mahton and 2 to 4 other appellants also received *lathi* injuries. Explanation given by the prosecution on the injuries found on the person of Natho Mahton is far from satisfactory and it appears that prosecution is trying to suppress the actual manner of occurrence.

35. Just 14 to 15 days ago there was a proceeding under Section 144 of the Cr.P.C. and case and counter case between the parties and their land is situated adjacent to each other. Witnesses are related and inimical witness and no independent witness has been examined, no examination of the alleged production/seized gun and cartridges, even not sealed and packed.

36. Considering the entire facts, the prosecution story of manner of the occurrence is not free from reasonable doubt and further prosecution case is that appellants are aggressor, does not inspire confidence, especially when there was scuffle between the parties and both the parties have received injuries.

37. In a similar facts and circumstances, the Hon'ble Apex Court in the case of *Ishwar Singh -Vrs. -State of UP* reported in AIR 1976 SC 355 has held as follows : -

“.....If really the accused were not the aggressors, no case either under Section 147 or Section 148 of the Penal Code can be maintained against them, and then it is for the prosecution to prove the individual assaults of which there is no evidence. The conviction of appellants Ilam Singh, Harpal, Brahm Singh and Deep Chand under Section 326, Section 324 and Section 323 of the Penal



Code, founded against each of them on the basis of Section 149 of the Code is not therefore sustainable.

38. The word ‘**sudden fight**’ has been defined in the case of *Mariadasan and Ors. Vs. State of Tamil Nadu* reported in *AIR 1980 (SC) 573* in the following manner :-

“Sudden fight- When no party attacks the members of the opposite party at the commencement of the occurrence and there is no evidence regarding formation of unlawful assembly with a particular common object and the fight takes place as result of heated passion and without premeditation, it can be said to be a ‘sudden fight’. No unlawful assembly can be said to have been formed in such cases and the accused cannot be convicted under this Section. All the persons must be held responsible for their individual acts and not vicariously liable for acts of others.”

The Supreme Court in the case of Mariadasan (supra), further held that even in sudden fight which had taken place on spur of moment, the accused cannot be convicted under Section 147, 148 or Section 149 IPC.

39. Considering the above settled law, it appears that this is a case of free and sudden fight between the parties and in which it can not be said with certainty that who was aggressor, as such there would be no case of vicarious liability of all the appellants for death caused to Ramkripal Roy rather they appears to be individually liable for the act and further it is also not safe to convict the appellants in the facts and circumstance of the case under Section 147, 148 or 149 of



the IPC.

40. Appellant Binay Mahton has been convicted under Section 304 (Part II) and appellants other than Binay Mahton had been convicted under Section 304 (part II) with the aid of Section 304 of the IPC to Section 149 and also under Section 148 of IPC and under Section 27 of the Arms Act.

41. Learned counsel for the informant has challenged the judgment and argued that conviction under Section 304 (II) be modified to the conviction under Section 302 of the IPC, however, on discussions made above, it appears to be a case of free and sudden fight as admitted by P.W.7, there is a case and counter case between the parties, as appellant Natho Mahton has received grievous injuries, no satisfactory explanation of the same has been given by the prosecution the evidence of P.W.7 also shows that the other accused persons have also received injuries. It further appears that it is not an intention of either appellants Binay Mahton and other appellants to kill any person, rather to overawe and use criminal force, in such a situation, learned trial court has rightly not convicted appellants under Section 302 or 302/149 of the IPC. Hence, the prayer of the informant in Cr. Revision No.1058 of 2002 to modify the sentence under Section 302 and 302/149 of the IPC appears to be devoid of merit.

42. Though the appellants other than Binay Mahton have



also been convicted under Section 304 (Part II) of the IPC with aid of Section 149 of the IPC as well as Section 148 of the IPC and also under Section 27 of the Arms Act but as discussed above in the facts and circumstances of the case, all the appellants are liable for their individual act and though the prosecution case is that all the appellants indiscriminately fired but nothing is available on the record to show that their firing hit anybody or caused any damage nor there is recovery of bullets/empty cartridges from his possession. Further there is absolutely nothing available on the record to show that the aforesaid gun and cartridges were sent for examination.

43. In such a situation, all the appellants except Binay Mahton deserve benefit of doubt as the prosecution has not been able to establish the case against them beyond all shadow of doubt.

44. So far appellant Binay Mahton is concerned, there is allegation against him that he fired causing injury to Ramkripal Roy. Evidence discloses that appellant Binay Mahton fired on the deceased killing him and P.W.9 who has treated the deceased Ram Kripal Roy has found gunshot injuries over his person, no doubt the Doctor who has conducted the post mortem has not been examined but the record shows that he died during the pendency of the trial. There is no suggestion or cross examination on the point that the deceased Ramkripal Ropy was not killed in the occurrence due to injuries



caused in the occurrence or he has received injuries in some other manner and some other place, hence so far conviction of the appellant Binay Mahton under Section 304 (II) and Section 27 of the Arms Act is concerned that appears to be free from infirmities and discrepancies. However, in view of the finding arrived as above, so far conviction under Section 148 of the IPC of the appellant Binay Mahton is concerned, it does not appear free from reasonable doubt.

45. It has also been submitted that the appellant Binay Mahton has remained in custody though sentences of R.I. for seven years under Section 304 (Part II) of the IPC and R.I. for three years under Section 27 of the Arms Act and he has remained in custody for 4 ½ months and the occurrence is of the year, 1982 i.e. 35 years, during which he suffers mental agony and ignominy, as such his sentence be reduced to the period already undergone.

46. I find merit in the submission of the learned counsel for the appellant, Binay Mahton hence so far conviction of the appellants under Section 304 (Part II) of the IPC and Section 27 of the Arms Act is concerned, they are affirmed, however, sentences under Section 304 (Part II) is reduced to the period already undergone, however, conviction and sentence of Binay Mahton under Section 148 of the IPC is set aside.

47. With the aforesaid modification in the conviction and



sentence, Cr. Appeal No.392 of 2002 is dismissed.

48. So far Cr. Appeal No.380 of 2002 pending against appellant nos. 2 Natho Mahton son of Bhupi Mahton, 3. Badal Mahton son of Late Ganesh Mahton, 4. Jitendra Mahton son of Late Ganesh Mahton & 6. Sadanand Mahton son of Sri Gulab Mahton in the facts and circumstances as discussed above is allowed. Their conviction and sentence under Section 304 (Pat II) as well as under Section 148 of the IPC and under Section 27 of the Arms Act are set aside.

(Vinod Kumar Sinha, J)

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