

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.207 of 1995

Vijay Singh, son of Sri Baleshwar Singh, resident of village-Mainpura, P.S.
Patliputra, District-Patna.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
CRIMINAL APPEAL (SJ) No. 73 of 1995

1. Baleshwar Singh, son of Sri Mathura Singh
2. Ajay Singh @ Ajay Kumar Singh, son of Baleshwar Singh
3. Gorakh Singh, son of late Ragho Singh

All residents of village-Mainpura, P.S. Patliputra, District Patna.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 207 of 1995)

For the Appellant : Miss Surya Nilambari, Amicus Curiae

For the State : Mr. Shiwesh Chandra Mishra, A.P.P.

(In CRIMINAL APPEAL (SJ) No. 73 of 1995)

For the Appellant : Miss Surya Nilambari, Amicus Curiae

For the State : Mr. Dilip Kumar Sinha, A.P.P.

**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA**

and

**HONOURABLE MR. JUSTICE RAJENDRA KUMAR
MISHRA**

ORAL JUDGMENT

**(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA)**

Date : 07-03-2019

1. Both the above stated criminal appeals have arisen
out of common judgment of conviction and sentence order dated



27.05.1995 passed by learned 2nd Additional Sessions Judge, Patna in Sessions Trial No. 583 of 1991 by which and whereunder the learned 2nd Additional Sessions Judge convicted the sole appellant in Criminal Appeal (D.B.) No. 207 of 1995, namely, Vijay Singh for the offence punishable under Section 302 of the I.P.C. and 27 of the Arms Act and sentenced him to undergo rigorous imprisonment for life for the offence punishable under Section 302 of the I.P.C. and to undergo rigorous imprisonment for two years for the offence punishable under Section 27 of the Arms Act. The learned trial court also convicted the appellants in Criminal Appeal (S.J.) No. 73 of 1995, namely, Baleshwar Singh, Ajay Singh and Gorakh Singh for the offence punishable under Section 325/34 of the I.P.C. and sentenced them to undergo rigorous imprisonment for three years for the offence punishable under Section 325/34 of the I.P.C. The appellant no. 1 in Criminal Appeal (S.J.) No. 73 of 1995, namely, Baleshwar Singh was also convicted for the offence punishable under Section 325/109 of the I.P.C. and was sentenced to undergo rigorous imprisonment for three years for the offence punishable under Section 325/109 of the I.P.C. However, all the sentences were ordered to run concurrently. Since both the above stated appeals have arisen out of common judgment of conviction



and sentence order, both the above stated appeals are being disposed of by this common judgment.

2. Briefly stated the prosecution case is that PW-4 Ramlakhan Singh gave his ferdbeyan to PW-5 Vinod Kumar Shrivastava, the then Inspector of Police of Patliputra police station, on 17.06.1990 at 11:15 P.M. at his house to this effect that one month prior to the alleged occurrence, white washing of his house was going on and in that course, some drop of lime water fell on the Antenna of his neighbour Baleshwar Singh upon which Baleshwar Singh abused him. PW-4, further, claimed that on 17.06.1990 at about 10:00 to 10:30 P.M. he returned to his home after attending Barat of Mukhiya and was at his house whereas appellants Baleshwar Singh, Vijay Singh, Ajay Singh and Gorakh Singh were on the roof of their house. He, further, claimed that Baleshwar Singh ordered to shoot him and thereafter, Vijay Singh opened fire from the roof of his house which hit to his grand-daughter and having sustained firearm injury on her neck, his grand-daughter fell down there. He as well as others went running there and his grandson Upendra Singh with the help of Surendra Singh took his grand daughter to P.M.C.H. on scooter for treatment but later on, Upendra Singh came back and informed that his grand daughter died.



3. On the basis of ferdbeyan of PW-4, Patliputra P.S. Case No. 102 of 1990 for the offence punishable under Section 302/34 of the I.P.C. was registered and on 18.06.1990 at 1:30 A.M. formal FIR was drawn up against the appellants for the offence punishable under Section 302/34 of the I.P.C. The first information report and ferdbeyan were put up before the learned Chief Judicial Magistrate on 18.06.1990.

4. PW-5 Vinod Kumar Shrivastava, the then Inspector of Police of Patliputra police station, took charge of investigation. He inspected the place of occurrence, recorded the statements of witnesses, seized bloodstained soil and particles of explosive substance, prepared seizure list but before completion of investigation, he handed over charge of investigation to other police official who, subsequently, having completed the investigation, submitted charge sheet for the offences punishable under Sections 302/34 of the I.P.C. and 27 of the Arms Act against the appellants. The cognizance of the offences was taken and the case was committed to the court of sessions, in usual way. The appellants stood trial and accordingly, appellant in Criminal Appeal (D.B.) No. 207 of 1995, namely, Vijay Singh stood, separately, charged for the offences punishable under Sections 302 of the I.P.C. and 27 of the Arms Act whereas appellants in



Criminal Appeal (S.J.) No. 73 of 1995, namely, Baleshwar Singh, Ajay Singh and Gorakh Singh stood charged for the offence punishable under Section 302/34 of the I.P.C. and furthermore, appellant no. 1 in Criminal Appeal (S.J.) No. 73 of 1995, namely, Baleshwar Singh stood, separately, charged for the offence punishable under Section 114 of the I.P.C. The appellants denied the charges and claimed to be tried.

5. In course of trial, prosecution examined, altogether, six prosecution witnesses and also got exhibited some documents to prove its case. The statements of appellants were recorded under Section 313 of the Cr.P.C. in which they reiterated their innocence and claimed their false implication. The appellants also got examined five defence witnesses and got exhibited some documents in support of their defence.

6. The learned trial court having relied upon the prosecution evidences convicted and sentenced the appellants in the manner as we have already stated.

7. Miss Surya Nilambari, learned Amicus Curiae appearing for the appellants assailed the impugned judgment of conviction and sentence order on several counts. She took us through the impugned judgment and tried to highlight the infirmities of the prosecution case. She argued that prosecution



could not succeed to prove the place of occurrence beyond all shadow of reasonable doubts because there is contradiction in the statements of prosecution witnesses in respect of place of occurrence. To buttress her submission, she invited our attention towards the testimonies of the prosecution witnesses.

8. Learned Amicus Curiae, next, submitted that PW-4, informant of the case, claimed, himself, to be eye witness of the alleged occurrence in his ferdbeyan as well as in his evidence recorded in course of trial but close scrutiny of evidence of PW-4 goes to show that he is not an eye witness of the alleged occurrence. To fortify her above stated contention, she argued that PW-4 has admitted in his ferdbeyan that at the time of alleged occurrence, he was at his house and the deceased was in the lane whereas the appellants were on the roof of their house and, therefore, it was not possible for PW-4 to see the appellants and, hence, the claim of PW-4 that it were appellants who shot fire on the deceased becomes doubtful.

9. Learned Amicus Curiae, next, submitted that according to ferdbeyan of PW-4, one month prior to the alleged occurrence, an altercation had taken place between PW-4 and appellants on account of some petty issues and the appellants committed the alleged crime on account of above stated reason but



according to ferdbeyan of PW-4, he was inside of his house and the deceased was in lane and the aforesaid fact goes to show that there was no occasion to appellants to make fire on the PW-4 as the PW-4 was not in the lane at the time of alleged occurrence and, therefore, the aforesaid circumstance also indicates this fact that deceased sustained firearm injury in other manner and not in the manner as claimed by PW-4.

10. Learned Amicus Curiae, next, submitted that there is contradiction in the ocular as well as medical evidence as the post mortem report as well as testimony of doctor, who did postmortem examination on the dead body of the deceased, go to show that track of bullet into the body of the deceased was upwards to backwards whereas claim of so-called eye witnesses is that the firing was made on the deceased from roof of the appellants and had the firing been made from the roof of the appellants, the track of projectile would have been downward and not upward. Continuing her submission, she submitted that no doubt, it is settled principle of law that ocular evidence shall prevail over the medical evidence, if the ocular evidence inspires confidence because the medical evidence is generally treated as opinion of Doctor but in the present case, the track of projectile found in the body of the deceased is not an opinion of the Doctor rather it is a



fact which was found by the doctor at the time of postmortem examination of the deceased and, therefore, it cannot be said that track of projectile found by the doctor in the body of the deceased is mere opinion of the doctor. She, further, submitted that moreover, the testimonies of prosecution witnesses do not inspire confidence as there are several infirmities, improvements and contradictions in the testimonies of prosecution witnesses and, therefore, in the present case, the medical evidence cannot be brushed aside on the principle that ocular evidence shall prevail over the medical evidence. In support of her contention, she cited decision of **Sanjay Khanderao Wadane vs. State of Maharashtra** reported in (2017) 11 SCC, 842 wherein at para 13 of the aforesaid decision the Hon'ble Apex Court has held as follows:-

13. A medical witness who performs a post-mortem examination is a witness of fact though he also gives an opinion on certain aspects of the case. The value of a medical witness is not merely a check upon the testimony of eyewitnesses; it is also independent testimony because it may establish certain facts quite apart from the other oral evidence. From the evidence on record, inferences are drawn as to the truth or otherwise of the prosecution case in criminal matters and truth or otherwise of a claim in civil matters. In this process, the medical evidence plays a very crucial role. If



there is inconsistency or discrepancy between the medical evidence and the direct evidence or between medical evidence of two doctors, one of whom examined the injured person and the other conducted post mortem on the injured person after his death or as to the injuries, then in criminal cases, the accused is given the benefit of doubt, and let off. Where the direct testimony is found untrustworthy, conviction on the basis of medical evidence supported by other circumstantial evidence can be done, if that is trustworthy.

11. Learned Amicus Curiae, next, submitted that defence got exhibited carbon copy of ferdbeyan of PW-1 recorded by the A.S.I., H.L. Ram on 18.06.1990 at 6:00 A.M. as Ext. D which was subsequently sent to Officer in charge of Patliputra police station on the same day and in the aforesaid ferdbeyan, though PW-1 stated that appellants shot fire on the deceased but he did not disclose the reason of occurrence nor made specific allegation of firing against the appellant Vijay Singh. She submitted that the prosecution did not bring the aforesaid Ext. D on record and as a matter of fact, the Ext. D was the first information in respect of the alleged occurrence but subsequently, the prosecution party in collusion with the local police got prepared ferdbeyan of PW-4 and claimed that ferdbeyan of PW-4 was recorded within one hour of the alleged occurrence. She submitted that it is admitted case in ferdbeyan of PW-4 that he came to know about the death of



deceased from Upendra Singh (PW-3) who took the deceased to P.M.C.H. and after returning from P.M.C.H., he gave information to PW-4 about the death of the deceased. She argued that it was not possible for PW-3 to cover the distance between Mainpura to P.M.C.H. twice within such a short span of time and, therefore, the aforesaid fact creates doubt about the timing of ferdbeyan of PW-4.

12. On the other hand, learned A.P.P. supported the impugned judgment of conviction and sentence order arguing that not only PW-4 but also the other prosecution witnesses very clearly stated that it was appellant Vijay Singh who shot fire on the deceased and at the time of firing, the remaining appellants were also present on the roof from where the firing was made. Learned A.P.P. further submitted that postmortem report of deceased supports the claim of eye witnesses and moreover, minor contradiction between ocular evidence and medical evidence shall not be fatal to the prosecution case and in that circumstance, the ocular evidence shall prevail over the medical evidence. He further submitted that prosecution has proved the place of occurrence, manner of occurrence as well as participation of the appellants in the alleged crime and, therefore, there is no ground before this



court to interfere into the impugned judgment of conviction and sentence order.

13. Now, the question arises for adjudication as to whether the impugned judgment of conviction and sentence order can be sustained or not. As we have already stated that in course of trial, prosecution examined, altogether, six witnesses to prove its case. Out of them, PW-1 Suresh Prasad Singh, PW-2 Seema Kumari, PW-3 Upendra Kumar Singh and PW-4 Ramlakhan Singh claimed themselves to be eye witness of the alleged occurrence whereas PW-5 Vinod Kumar Shrivastava is investigating officer and PW-6 is Dr. Shambhu Saran who did postmortem examination on the corpus of deceased. Let us examine the statements of PW-1, PW-2, PW-3 and PW-4.

14. PW-1 Suresh Prasad Singh is son of PW-4. This witness states that on 17.06.1990 at about 10:00 P.M. to 10:30 P.M. a Barat party had come and he along with his father (PW-4), mother, niece, namely, Pummy, maternal niece, namely, Seema (PW-2) had gone to see the above stated Barat and while they were returning after seeing the Barat and reached near the door of their house, all of a sudden appellant Baleshwar Singh uttered from his roof to kill PW-4 and after that this witness turned to his backside and saw that appellant Vijay Singh opened fire which hit his niece



Pummy. This witness, further, claims that appellants Baleshwar Singh, Gorakh Singh, Ajay Singh and Vijay Singh were on their roof at the time of alleged occurrence. This witness, further, states that his son, namely, Upendra (PW-3) took Pummy to P.M.C.H. on his scooter. This witness, further, states that Pummy had sustained firearm injury below her neck. He also states that after one hour of the alleged occurrence, Pummy died in the hospital. This witness also claims that he heard sound of explosion of bomb after taking away Pummy to the hospital. This witness states the reason of the alleged occurrence that one month prior to the alleged occurrence, white washing of his house was going on and some drop of lime water fell on Antenna of Baleshwar Singh as a result of which an altercation had taken place between Baleshwar Singh and his father (PW-4). This witness also states that his father agreed to compensate the damage which had been done to Antenna of Baleshwar Singh but could not compensate the damage as a result whereof the appellants committed the alleged occurrence. This witness further states that light were coming out from his house as well as from the house of appellants. Continuing his statement, this witness states that police reached on the place of occurrence at about 11:15 P.M. and recorded the statements of his father (PW-4) who signed his statement. On being cross-examined by the



defence, he denied this fact that police official of Pirbahore police station had taken his statement at P.M.C.H. However, this witness admits that the police official of Pirbahore police station had taken his signature on plain paper. This witness identified his signature which has been marked as Ext. A. This witness further denied that he had made statement before the police official of Pirbahore police station to this effect that he along with his father, mother, niece and maternal niece had gone to see the Barat which had come in his neighbour. This witness, further, denied that he had not made statement before the police official of Pirbahore police station to this effect that while having seen Barat he as well as other were returning and reached at their door, the appellant Baleshwar Singh uttered from his roof to kill the PW-4 and after that appellant Vijay Singh opened fire which hit to Pummy and at that time he saw that all the appellants were on the roof of their house. This witness also denied this fact that he had not made statement before the police official of Pirbahore police station that light was coming out from his house as well as from the house of appellants. This witness, further, denied that he had not made statement before the police official of Pirbahore police station that he was not aware about the cause of occurrence. This witness, further, admitted that he had not shown electric bulb to police but



he had made statement before the police official of Patliputra police station that light was coming out from both the houses. At para 8 of his cross examination, this witness admits that he had only put his signature before the police official of Pirbahore police station at 6:00 A.M. on 18.06.1990. This witness denied that his father made statement before the police of Patliputra police station after putting his signature on a petition before the Pirbahore police station. This witness also denied the suggestion of the defence that there was firing in the procession of Barat and in the aforesaid firing, deceased Pummy sustained firearm injury. This witness also denied this fact that ferdbeyan of PW-4 was recorded after 18.06.1990.

15. PW-2 Seema Kumari is maternal grand daughter of PW-4. She claims that on the alleged date of occurrence, she along with PW-1, deceased Pummy and PW-4 Ramlakhan Singh was returning to their house after seeing Barat of Mukhiyajee and as soon as they reached in lane, appellant Baleshwar uttered to kill PW-4 and thereafter, appellant Vijay Singh opened fire from country-made pistol which hit Pummy as a result whereof Pummy fell down in the lane. This witness, further, claims that appellant Vijay had shot fire from mundera of his roof and the remaining appellants were also present on the roof at the time of alleged



occurrence. This witness, further, claims that Surendra and Upendra (PW-3) took Pummy to hospital on scooter and after that she heard sound of explosion of bomb in the lane. She, further, claims that after half an hour of the alleged occurrence, Pummy died and information regarding her death was given by the PW-3 Upendra Kumar Singh. She, further, claims that at the time of alleged occurrence, an electric bulb was burning near the door of her house and in the light of electric bulb, she had identified the appellants. This witness, further, claims that her statement was recorded by the police in the night of alleged occurrence. On being cross examined by the defence, she stated that she had made statement before the police to this effect that at the time of alleged occurrence an electric bulb was burning and in the light of electric bulb she had identified the appellants but she admitted that she had not disclosed the place where the electric bulb was burning. She further admitted that on both sides of the road, there were houses and several persons had assembled on both sides of the road to see the Barat. She admitted that she as well as her other family members were standing on a Bandh at the time of seeing Barat party and the height of aforesaid Bandh was up to her chest from the road. She also admitted that her house was a double storied house and some persons of her family members were standing on



the roof of her house. This witness, further, admitted that main door of her house is towards north side and in south side of her house, there is verandah and at the time of occurrence several persons were sitting at her verandah but she could not disclose the name of those persons who were sitting at the verandah of her house. She, further, admitted in her cross examination that while she and others were returning to their house deceased Pummy was behind PW-1 and PW-4 was behind Pummy and she was behind PW-4 and her maternal grandmother was behind her and all the above stated persons were in a queue. She further states that as soon as she reached in the lane, the firing was made. She, further, admitted that just after the occurrence Pummy was taken to hospital. She denied this fact that just after the occurrence, PW-4 asked PW-1 to lodge complain against the appellants in Patliputra police station. This witness denied the suggestion of the defence that her family members planted the present case in the next morning for implicating the appellants.

16. PW-3 Upendra Kumar Singh also claims that on the alleged date of occurrence he was watching the Barat of Mukhiya from his house and when the Barat passed out and his family members were returning through the lane, all of a sudden he heard sound of firing and having heard the sound of firing, he came



running at verandah of his house and saw that his father and others had picked up Pummy who had sustained firearm injury below her neck and blood was oozing out from the injury. This witness, further, claimed that he learnt that Pummy had sustained firearm injury. This witness, further, claimed that his father disclosed that on the instigation of appellant Baleshwar Singh, appellant Vijay Singh had opened fire which hit to Pummy and at that time appellant Gorakh Singh and Ajay Singh were also standing there. This witness, further, claims that he as well as Surendra brought Pummy to hospital where she was declared brought dead. This witness, further, claims that he returned to his home and gave information to his family members about the death of Pummy. This witness, further, claims that within 10 to 15 minutes police reached there and at about 5:00 A.M. he along with his father Suresh Prasad Singh again went to hospital where A.S.I. of Pirbahore police station prepared inquest report on which he put his signature. This witness proved his signature on inquest report. This witness, further, claims that his father demanded the dead body of Pummy but A.S.I. of Pirbahore police station took the signature of his father on several plain papers and stated that the dead body will be handed over after postmortem examination. This witness also stated the reason of alleged occurrence as disclosed



by the PW-1. On being cross-examined, this witness admitted that no complain against the A.S.I. of Pirbahore police station was made either by him or by his other family members and for the first time, he disclosed the fact of taking signature of his father on plain paper by police of Pirbahore police station before the court. This witness also admitted that his statement was taken by D.S.P. on the alleged date of occurrence. This witness further admitted that prior to the alleged occurrence, an altercation had taken place between the parties but no information regarding the aforesaid altercation was given to police. This witness admitted that when the procession of Barat was passing out, he along with his mother, sister and others were on the roof of their house. This witness further stated that just after the alleged occurrence, his father asked to lodge case in Patliputra police station but his father did not himself go to the police station. Further this witness admitted that after death of Pummy, he returned to his house crossing Pirbahore police station but he did not give any information in respect of the alleged occurrence in Pirbahore police station. This witness admitted that he had not made statement before the police that Ramlakhan Singh (PW-4), Suresh Prasad (PW-1), Pummy (deceased), Seema Kumari (PW-3) and his grandmother had gone through lane rather he had made statement before the police that



his family members had gone through the lane. This witness admitted that one private counsel was engaged in the case but he as well as other family members never asked to his counsel to file petition against the document prepared by the police of Pirbahore police station.

17. PW-4 Ramlakhan Singh is the informant. This witness also states that while he was returning through lane to his house after seeing the Barat of Mukhiya, appellant Baleshwar Singh uttered to kill him and in the meantime, appellant Vijay Singh opened fire of his pistol which hit to his grand daughter Pummy Kumari who was ahead of this witness. He further claimed that all the remaining appellants were also present at the place from where the firing was made. This witness, further, claims that he raised alarm and after that Suresh Prasad (PW-1) brought the victim Pummy outside and asked his son Upendra and Surendra to take the victim to hospital and thereafter, Upendra and Surendra took the victim to hospital on scooter. This witness, further, claims that Upendra gave information about the death of Pummy and after that Inspector of Patliputra police station recorded his ferdbeyan on which he put his signature. He identified his signature. This witness, further, claims that one Vinod and Suresh (PW-1) witnessed the ferdbeyan. This witness, further, claims that on his



identification police inspected the place of occurrence. On being cross-examined by the defence, this witness denied this fact that his ferdbeyan was recorded by the police on 18.06.1990. This witness admitted that prior to the alleged occurrence, procession of Barat of Mukhiya was going and the aforesaid procession of Barat was passing out at the distance of 100 to 150 ft. towards south side from his house. This witness denied this fact that after seeing the Barat of Mukhiya, he came at his home and after that the alleged occurrence took place. This witness admitted that at the time of alleged occurrence, he was returning through the lane but he did not mention the aforesaid fact in his ferdbeyan. This witness also stated that he had made statement in his ferdbeyan that Vijay Singh shot fire of his pistol which hit his grand daughter Pummy who was ahead of him at the time of alleged occurrence. Furthermore, this witness admitted in his cross-examination that there was a Bandh towards south side of his house and adjacent south to the aforesaid Bandh, there was a road. This witness expressed his ignorance to disclose the height of aforesaid Bandh. This witness denied this fact that Pummy was on the aforesaid Bandh when the procession of Barat was going. This witness also denied the suggestion of the defence that Pummy sustained firearm injury on the Bandh. This witness also denied that in the procession of Barat



indiscriminate firing was going on and his grand daughter Pummy sustained firearm injury due to aforesaid indiscriminate firing.

18. On perusal of testimonies of aforesaid prosecution witnesses, it is emerged out that on the alleged date of occurrence at about 10 to 10:30 P.M. procession of Barat of one Mukhiya was going and several persons having stood on both sides of the road were watching the procession of Barat. Furthermore, PW-2 Seema Kumari has admitted that she as well as her other family members were standing on the Bandh when the procession of Barat was going. It has also emerged from the statements of witnesses that the aforesaid Bandh is adjacent to the road and the height of aforesaid Bandh was up to three to four feet from the road. Furthermore, it is also emerged out from the above discussed evidence that at the time of alleged occurrence, all the appellants were on the roof of their house and allegedly, firing was made from the roof of the appellants. The trends of cross-examination of prosecution witnesses go to show that the defence claims that deceased Pummy Kumari sustained firearm injury when indiscriminate firing was being made in procession of Barat and at that time she was standing on Bandh. The main controversy between the parties is as to how deceased Pummy sustained firearm injury because prosecution claims that deceased Pummy



sustained firearm injury due to firing made by the appellant Vijay Singh from his roof whereas the defence claims that deceased Pummy sustained firearm injury from the firing made by the Barat party but it is admitted position of the prosecution that at the time of alleged occurrence, all the appellants were on their roof and the deceased Pummy was in lane. Here, we would like to discuss the evidence of PW-6, Dr. Shambhu Saran who claimed that he did postmortem examination on the corpus of the deceased on 18.06.1990 at 11:30 A.M. in P.M.C.H., Patna and found penetrating wound of ½” diameter in 2nd intercostal space, 1” left from the midline. Between 2nd and 3rd costal cartilage perforated the lung directing upward and backward and a metallic object like bullet was lodged in subscapular muscle. Chest cavity was filled with blood and blood clot. The PW-6 opined that cause of death was gun shot injury. This witness proved postmortem report as Ext. 8. On being cross-examined by the defence, this witness admitted at para 3 of his cross examination that if the shooter is on the lower level and the victim is on higher level, then the injury will be directed straight-upward and backward inside the body. The testimony of this witness as well as postmortem report goes to show that track of bullet in the body of the deceased was found upward and backward. The track of bullet in the body of deceased



goes to show that at the time of receiving bullet injury, the deceased was on higher level whereas the shooter was on lower level. The aforesaid fact creates doubt about the claim of the prosecution witnesses that firing on the deceased was made from the roof of appellants and at the time of sustaining firearm injury, the deceased was in lane rather the aforesaid fact supports the defence case that at the time of firing deceased was standing on Bandh and procession of Barat was going on road adjacent to the aforesaid Bandh and firing was being made in the aforesaid procession of Barat. No doubt, it has been held in several decisions of the Hon'ble Apex Court as well as this court that ocular evidence shall prevail over the medical evidence, if the ocular evidence inspires confidence to the court but in the present case, the prosecution witnesses admitted that the deceased as well as others had gone to see the procession of Barat and furthermore, PW-2 has admitted that deceased as well as others were on a Bandh at the time of seeing the Barat. Therefore, in view of the aforesaid admission of the prosecution witnesses, it is difficult to accept the statement of prosecution witnesses as gospel truth and it is also difficult to rely upon the testimony of prosecution witnesses. Therefore, in our view, in the aforesaid circumstance, the medical evidence cannot be brushed aside. Moreover, it is not



opinion of PW-6 regarding track of projectile found in the body of the deceased rather he narrated the fact which was found by him in course of postmortem examination on the dead body of the deceased and, therefore, in that circumstance also, the testimony of PW-6 cannot be discarded.

19. PW-5 Vinod Kumar Shrivastava is investigating officer of this case. This witness states that on 17.06.1990 at about 11:00 P.M. he got telephonic information from one Hiralal that firing was made in Mainpura and having got the aforesaid information he entered Sanha no. 600 and proceeded to Mainpura where he recorded the ferdbeyan of PW-4 at 11:15 P.M. However, again this witness stated that ferdbeyan of PW-4 was recorded by A.S.I., S. Mishra in his presence and he put his signature on the aforesaid ferdbeyan. This witness further stated that he took the charge of investigation, recorded the further statement of PW-4 and inspected the place of occurrence. This witness stated that place of occurrence was a lane situated between house of PW-4 and appellant Gorakh Singh. The width of aforesaid lane was about 4 ft. and the aforesaid lane runs north to south. This witness also states that there was double storied house of PW-4 and the exit of aforesaid house was towards south side. However, there was another door in the house of PW-4 towards east side in front



of house of the appellant Gorakh Singh. This witness also stated that there was one storied house of appellant Gorakh Singh towards east side of the aforesaid lane. This witness, further, claims that he found some blood at the distance of five *Gaj* from the door of PW-4 in the aforesaid lane and found some sutri and pieces of bangles from which smell of explosive was coming out. This witness seized the pieces of bangles and sutri. This witness also claims that he found one empty bottle of old rum from the roof of the appellants and seized bottle of aforesaid old rum. This witness further admits that on 18.06.1990 at about 7:30 A.M. he went to P.M.C.H. where he learnt that inquest report of the deceased had already been prepared by the police officials of Pirbahore police station. This witness stated that he obtained inquest report of deceased but before completion of investigation, he handed over charge to other police officials. This witness denied the suggestion of the defence that formal FIR and ferdbeyan of PW-4 were antedated. This witness admitted in his cross examination that though he found blood in the lane but he did not seize blood from the place of occurrence nor sent the seized sutri for chemical examination. This witness admitted at para 12 of his cross examination that PW-4 had not claimed before him that when deceased Pummy sustained firearm injury, she was



ahead of him. This witness also admitted that PW-4 had not made statement before him that in the evening of alleged occurrence, the appellants had given threatening of dire consequences to him. Similarly, at para 13 of his cross examination, this witness admitted that PW-3 had not made statement before him that his family members were returning through the lane nor had named those persons who were returning through lane. This witness also stated that PW-3 had not stated before him that having heard the sound of firing he came down from his roof and saw that Pummy had sustained firearm injury below her neck. This witness also admitted that PW-2 had not made statement before him that appellant Vijay Singh had opened fire from mundera of his roof nor had claimed the burning of electric bulb. Similarly, at para 15 of his cross examination, this witness admitted that PW-1 had not claimed before him that there was light of electric bulb which was coming out from the houses of the parties. However, this witness was recalled and again prosecution examined him and thereafter, this witness stated that he had inspected the place of occurrence in the light of electric bulb but on being cross examined by the defence, this witness admitted that he had not mentioned in the case diary that he had inspected the place of occurrence in the light of electric bulb.



20. DW-1 Md. Shoaib Khan placed dispatch register of Pirbahore police station on the direction of the court. DW-2 Harilal Ram stated that on 18.06.1990 he was posted as A.S.I. of Pirbahore police station and he claimed that entry no. 1134 of station diary of Pirbahore police station was made by him. Similarly, DW-3 Bhagwan Das Mahto is a formal witness who brought death register and DW-4 is also a formal witness who proved entries in the station diary of Patliputra police station.

21. DW-5 Pradeep Ram claimed that on 18.06.1990 he was posted at Pirbahore police station and on the same day, he sent the inquest report of deceased Pummy as well as ferdbeyan of Suresh to Patliputra police station through a constable.

22. On perusal of statements of aforesaid prosecution and defence witnesses, it is obvious that on 18.06.1990 the statement of Suresh Prasad Singh was taken by the A.S.I. of Pirbahore police station and the inquest report of dead body of the deceased was prepared by the police official of Pirbahore police station and subsequently, both the aforesaid documents were sent to Patliputra police station. PW-1 and PW-3 claimed before the court that police official of Pirbahore police station had taken signature of PW-1 on pretext of handing over the dead body of the deceased but they admitted that they had not made any complain



either before higher police official or before the court against the police official of Pirbahore police station, particularly, in the circumstance, when a private counsel was engaged by the informant before the trial court. Therefore, it is obvious that for the first time, PW-1 and PW-3 claimed before the trial court that police official of Pirbahore police station got prepared forged ferdbeyan of PW-1 and, in our view, only on the basis of denial of PW-1 and PW-3, it cannot be said that police official of Pirbahore police station had not recorded the ferdbeyan of PW-1 on 18.06.1990.

23. On the basis of aforesaid discussions, we find that there are several infirmities in the prosecution case and prosecution failed to prove its case beyond all shadow of reasonable doubts and in the aforesaid circumstance, the impugned judgment of conviction and sentence order cannot sustain in the eye of law.

24. Accordingly, both the above stated criminal appeals are allowed and the impugned judgment of conviction and sentence order are, hereby, set aside. The appellants are on bail. They are discharged from the liabilities of their bail bonds.

25. Let copy of first and last page of this judgment be handed over to learned Amicus Curiae Miss Surya Nilambari so



that she could claim for her remuneration before competent authority.

(Hemant Kumar Srivastava, J)

(Rajendra Kumar Mishra, J)

shahzad/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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