

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.325 of 2012

Arising Out of PS. Case No.-2 Year-1999 Thana- C.B.I CASE District- Patna

DHRUV KUMAR JAISWAL @ DHRUV PRASAD @ DHRUV SAO @
DHRUV SAH S/O Late Jagdish Prasad, Jaiswal Resident Of Village- Surwal,
P.S.- Ziradei, District- Siwan

... .. Appellant

Versus

The State of Bihar through C.B.I

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 437 of 2012

Arising Out of PS. Case No.-2 Year-1999 Thana- C.B.I CASE District- Patna

SHEIKH MUNNA @ MUNNA KHAN @ MUNNA S/O Sheikh Nathuni
Resident Of Village- Mahmoodpur, P.S.- Jiradei, District- Siwan

... .. Appellant

Versus

The Union of India through C.B.I

... .. Respondent

with
CRIMINAL APPEAL (DB) No. 435 of 2012

Arising Out of PS. Case No.-2 Year-1999 Thana- C.B.I CASE District- Patna

ILLIYAS WARIS @ MANTU KHAN @ MINTU S/O Late Tauheed Hussain
Resident Of Village- Chandpali, P.S.- Jiradei, District- Siwan

... .. Appellant

Versus

The Union of India through C.B.I

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 325 of 2012)

For the Appellant/s : Mr. Surendra Singh, Sr. Adv
Mr.Jitendra Narain Sinha, Adv.

For the Respondent/s : Mr.Bipin Kumar Sinha SC- CBI

(In CRIMINAL APPEAL (DB) No. 437 of 2012)

For the Appellant/s : Mr. Surendra Singh, Sr. Adv.
Mr.Ramadhar Shekhar, Adv.

For the Respondent/s : Mr.Bipin Kumar Sinha SC-CBI

(In CRIMINAL APPEAL (DB) No. 435 of 2012)

For the Appellant/s : Mr. Ajay Kumar Thakur, Adv.
Mr.Ramadhar Shekhar, Adv.

For the Respondent/s : Mr.Bipin Kumar Sinha SC- CBI



CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI

and

HONOURABLE MR. JUSTICE VINOD KUMAR SINHA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA)

Date : 10- 05-2019

1. As all the above appeals arise out of same judgment of conviction and order of sentence, they are clubbed together and are being disposed of by this consolidated judgment for the sake of convenience
2. The appellants of all the above appeals stood convicted under Sections 302/149, 307/149, 120B and 34 of the Indian Penal Code as well as Section 27 of the Arms Act and were sentenced to undergo R.I. for life and a fine of Rs. 25,000/- under Section 302/149, R.I. for ten years and a fine of Rs. 10,000/- under Section 307/149 and R.I. for seven years under Section 120B of the Indian Penal code as well as R.I. for five years with a fine of Rs. 5,000 under Section 27 of the Arms Act vide judgment of conviction dated 20.03.2012 and order of sentence dated 23.03.2012 passed by Shri Dhirendra Kumar Pandey, the then Additional District & Sessions Judge -XIV, Patna – cum- Special Judge, C.B.I. -I, Patna in Sessions Trial No. 213/2001. All the above sentences were directed to run concurrently and in default of payment of fine, the convicts were directed to suffer additional R.I. for one year.



3. Prosecution case giving rise to Sessions Trial No. 213 of 2001, is based on the fardbeyan of Ramesh Singh Kushwaha (PW8) recorded on 31.03.1997 at 17.00 hours, stating therein, interalia that on 31.03.1997 at 3 P.M., Shyam Narayan Yadav (deceased) and District Committee Member of CPI (ML), Chandrashekhar Prasad (deceased), Former President Jawahar Lal Nehru University, Bhrigurashan Patel, a Member of CPI (ML) of Barhtharia Prakhand Committee (PW 10) and Ramdeo Ram, a District Committee Member, proceeded by a Tempo on a campaign for success of All Bihar Bandha and reached J.P. Chowk as soon as the tempo stopped, accused appellant Dhruw Sah armed with service revolver, accused – appellant Munna Khan armed with service revolver, Reyazuddin Khan armed with service revolver and Mantu Khan armed with sten gun rushed towards the said tempo and started indiscriminate firing and in the said firing, Chandrashekhar Prasad died on the spot and Shyam Narayan Yadav received severe injury, Bhrigurashan Patel (PW10) also received fire arm injury and Ram Deo Ram (PW 13) fell from the tempo and managed to save himself and in the said firing, the passers by have also received fire arm injury. Further case of prosecution is that deceased Chandrashekhar Prasad and injured Shyam Narayan Yadav were taken to sadar hospital by same Tempo, where,



Shyam Narayan Yadav was under treatment, and Shyam Narayan Yadav disclosed the names of accused-appellants in presence of Satyadeo Ram(PW11). Bhigurashan Patel (PW10) after bringing the injured to hospital went to the party office to inform the incident. He has also alleged that the occurrence took place under the conspiracy of local M.P. Syed Sahabuddin.

4. On the basis of the aforesaid fardbeyan, Nagar Police Station Case No. 54/1997 was registered under Sections 302, 307, 120B and 34 of the Indian Penal Code against the appellants of all the above appeals and against Rustam Mian and Riazuddin. Later on Shyam Narayan Yadav also succumbed to his injuries.

5. Later on vide notification dated 28.07.1997 of the State Government (Ext. 9) and also by notification dated 31.07.1997 (Ext. 9/1) C.B.I. was entrusted with the investigation of the case. Accordingly, RC.2(S)/97-SCB-II/DLI (Ext. 8) was registered against the appellants and other accused persons.

6. Post investigation, chargesheet was submitted by C.B.I. on 30.05.1998 against the accused persons including appellants showing accused Rustam Ali and Md. Reyazuddin absconding. Cognizance of the offence was taken and the case was committed to the court of Sessions.

7. Charges were framed against all the appellants under



Sections 302/149, 307, /149, 120-B and 34 of the Indian Penal Code and Section 27 of the Arms Act.

8. It appears that co-accused Rustam Khan was absconding, who was later on arrested and with respect to him another Sessions Trial i.e. 948/2001 was opened and one Md. Reyazuddin died, as such, the proceeding was dropped against him.

9. During Trial altogether twenty witnesses were examined on behalf of prosecution. They are:

PW1 – Rafeek Ahmad Khan, Sub-Inspector of Town Police Station, who recorded fardbeyan.

PW2 - Dr. Lakshman Prasad, is the doctor, who conducted postmortem examination on the dead body of deceased Chandrashekhar Prasad, Shyam Narayan Yadav and also treated the injured Md. Alam (PW5) and Chandraketu Singh (PW4).

PW3 – Dr. Bimal Kumar, is the doctor, who examined the injured Bhrigurashan Patel (PW 10).

PW4 – Chandraketu Singh is one of the injured and from his evidence, it appears that he was the passer by and he received gun shot injury, while he was coming from the Court.

PW5 – Md. Alam Khan, who has also received injuries in



the shoot out and was treated by PW2.

PW6 – Rajbanshi Baitha, A.S.I., who claimed that he reached the place of occurrence and saw the accused persons fleeing away on that he fired and one of the accused had also received injury.

PW7 - Indra Kumar is the driver of Tempo No. B.R. -04-A0087 carrying the deceased and others.

PW8 - Ramesh Singh Kushwaha is the informant in this case, although he had identified his signature on the fardbeyan Ext. 1, however, he turned hostile.

PW9- Md. Samsuddin has also been declared hostile by the prosecution and according to the F.I.R, PW8 and PW9 had brought the deceased and injured to the hospital.

PW10 – Bhrigurashan Patel is also named in the F.I.R and he claimed to be eye witness of occurrence and also received injury. He is also witness of the inquest report of deceased Chandrashekhar Prasad (Ext. 20) prepared by the police at 17.30 hours on 31.03.1997.

PW 11- Satyadeo Ram, the then M.L.A. Mairwa CPI (ML) Party, and as per his evidence, on information, he reached and deceased Shyam Narayan Yadav disclosed the names of assailants including the appellants to him in presence of others.



PW12 - Kaushalya Devi, mother of deceased Chandrashekhar Prasad as per her evidence, she reached at the hospital on information.

PW13 -Ramdeo Ram, who was also accompanying the deceased at the time of occurrence, although he turned hostile but he had supported the factum of occurrence.

PW14 – S.B. Sinha, is the Deputy S.P. of C.B.I. and he identified and reproduced that RC.2(S)/97-SCB-II/DLI was registered in his office on 07.08.1997 and he has further stated that the above F.I.R has been drawn on the basis of Siwan Town P.S. Case No. 54/1997 and the F.I.R of C.B.I. was marked as Ext. 8 and the notification issued by the Bihar Government and Central Government were marked as Ext. 9 and 9/1.

PW 15 – Ram Sagar Rai, is the then S.I. of Mairwa Police Station and he s the first I.O. when investigation was conducted by the Bihar Police.

P.W. 16: Rajdeep Singh Rawat, was the inspector C.B.I., and he has started the investigation and noticed PW8 Ramesh Singh Kushwaha and PW15 Ram Sagar Rai and identified the notice as Ext. 10 and site plan as Ext. 11.

PW17: Nag Narayan Singh was the Deputy S.P. Special Crime Branch, who took over the investigation of Siwan



Town P.S. Case No. 54/1997 on 11.08.1997.

PW18: Rashid Ahmad Khan, the District Magistrate, Siwan, who had approved the sanction letter as Ext. 13.

PW19: K. Nandkumar Nayar was a Government employee of C.P.W.D. and in his presence, disclosure of appellant Dhruw Sah has been recorded and the same was marked as Ext. 14.

PW20: Y. Hari Kumar was the C.B.I. Officer, who was the Investigating Officer of the case.

10. On behalf of the defence also, altogether fourteen witnesses have been examined and the evidence of DW1 Subhash Prasad and DW 14 Suman Prasad is on the point of alibi of accused Sheikh Munna, evidence of DW2 Rajeshwar Mishra and DW3 Bajrangi Mishra is on the point of alibi of accused Mantu Khan @ Mintu. Evidence of DW4 Bajrangi Mishra, DW7 Ashok Kumar Das and DW 13 Md. Noor is also on the point of alibi of accused Mantu Khan. DW11 Vishwanath Sing and DW12 is on the point of alibi of appellant Dhruv Sao. Evidence of DW5 Satyapal Srivastav @ Dhiran, DW6 Sanjay Srivastav@ Chhotan, DW8 Amit Kumar, DW9 Subhash Prasad Gupta and DW10 Dharm Jain disclosed that the occurrence is of 31.03.1997 but according to their evidence, Nepali Bhutias had fired on the date of occurrence.



11. The learned trial court on conclusion of trial has come to the conclusion that the deceased were killed in a criminal conspiracy hatched up by the appellants and accused Rustam Khan and Md. Reyazuddin by firing and the accused appellants also attempted to murder Chandrashekhar Prasad and others, on which, Bhrigurashan Patel, Chandraketu Singh and Md. Alam Khan received injuries and after considering the same, convicted the appellants of all the above appeals under Sections 302/149, 307/149, 120B and 34 of the Indian Penal Code and Section 27 of the Arms Act and sentenced them in the manner aforesaid.

12. Being aggrieved by the same, present appeals have been preferred separately by the appellants.

13. While, assailing the impugned judgment of learned Trial Court, the main thrust of argument of learned senior counsel Surendra Singh, appearing on behalf of the appellants in Criminal Appeal (DB) No. 325/12 and Criminal Appeal (DB) No. 437/12, which has also been adopted by Mr. Ajay Kumar Thakur, learned counsel appearing on behalf of appellants in Criminal Appeal (DB) No. 435/12 is that in this case informant Ramesh Singh Kushwaha (PW8) and Md. Samsuddin (PW9), who brought the deceased to Sadar hospital with informant have been declared hostile and PW4 (Chandraketu Singh), PW5 (Md.



Alam Khan), PW6 (Rajbanshi Baitha), PW7 (Indra Kumar) and PW13 (Ramdeo Ram) have not named the appellants or any accused persons and further PW11 (Satyadeo Ram) and PW12 (Kaushalya Devi) are not the eye witnesses of the occurrence. As such, the whole case rests on the evidence of PW10 (Bhrigurashan Patel) and so called oral dying declaration of deceased Shyam Narayan Yadav but so far presence of PW10 (Bhrigurashan Patel) is concerned, as per injury report of PW10 (Bhrigurashan Patel) (Ext 6/1) his presence at the place of occurrence or at Sadar hospital, is doubtful. Drawing the attention of this court towards the evidence of PW10 (Bhrigurashan Patel), it has been argued that his evidence is self contradictory as he has stated in his evidence in chief that he received injury in his back but in his cross-examination, this witness has stated that the bullet crossed touching his body. Further submission is that PW10 (Bhrigurashan Patel) is highly interested witness, as he was a party worker of CPI (ML), as such, conviction of the appellants on the solitary evidence of PW10 (Bhrigurashan Patel), whose evidence suffers from discrepancies and appears to be an interested witness, cannot be based unless it is corroborated by other evidence. In support of his contention, learned counsels for the appellants relied upon a decision of Hon'ble Apex Court in the case of **Shivaji**



Sahebrao Bobade & Anr. v. The State of Maharashtra reported in [1973 AIR 2622] as well as on the decision in the case of **Anil Phukan v. State of Assam** reported in [AIR 1993 SC 1462]. Further, in spite of occurrence being taken place in a crowded place in broad daylight, there is no independent witness of the occurrence.

14. Contention of learned counsels for the appellants so far oral dying declaration of deceased Shyam Narayan Yadav before the PW11 (Satyadeo Ram) is concerned is that the same also does not appear to be reliable and trustworthy in the background of evidence of PW11 (Satyadeo Ram) that the oral dying declaration was made in presence of daroga and evidence of PW10 (Bhrigurashan Patel) that Officer In-charge of Town Police Station was recording the oral dying declaration of Shyam Narayan Yadav but neither the Officer In-charge (PW1), author of fardbeyan nor any other police witnesses have stated so. On the other hand, evidence of PW5 (Md. Alam Khan) in his cross-examination disclosed that he saw Shyam Narayan Yadav in unconscious condition in hospital. Advancing their arguments, learned counsels for the appellants have also submitted that as per evidence of PW3, who conducted postmortem examination of deceased Shyam Narayan Yadav that he was not in a fit state of mind to speak as such, the story



of oral dying declaration by the deceased Shyam Narayan Yadav is also under cloud and no reliance can be placed on such a manufactured claim of oral dying declaration. Reliance has been placed on a decision of Hon'ble Supreme Court in the case of **Umakant and Anr. v State of Chhatisgarh** reported in [AIR 2014 SC 2943] wherein, Hon'ble Supreme Court has laid down certain principles about admissibility of oral dying declaration. Further contention is that there is no certification by the doctor as to whether Shyam Narayan Yadav was in a fit state of mind.

15. Countering the submission, Mr. Bipin Kumar Sinha, learned standing counsel appearing on behalf of C.B.I. has defended the impugned judgment and submitted that PW10 (Bhrigurashan Patel) is an injured witness and his presence at the place of occurrence as well as at the Sadar hospital cannot be doubted merely on the ground that he is an interested witness and his evidence suffers from some discrepancies. Relying on decisions of Hon'ble Supreme Court in the case of **Pirara Singh and Others v. State of Punjab** reported in [AIR 1977 SC 2274] as well as in the case of **Seemon alias Veeranam v. State through Inspector of Police** reported in [2005 CrLJ 2618 (SC)] his contention is that the evidence of PW10 (Bhrigurashan Patel) supports the prosecution case so far



manner as well as identification of accused person and others are concerned and the same found corroboration from the fardbeyan (Ext.1) recorded immediately after the occurrence, which shows the presence of PW10 at Sadar Hospital. Furthermore, evidence of PW4 and PW5, who are independent witnesses and though PW8 and PW13 have been declared hostile but their evidence supports the factum of occurrence relying on the settled law that merely because witnesses turned hostile, their evidence cannot be discarded in toto and cited a decision of Hon'ble Supreme Court in the case of **Khuji alias Surendra Tiwari vs. State of Madhya Pradesh** reported in **[1991 Cr.Law Journal 2653 (SC)]** as well as on the decision in the case of **Arjun and Anr. v. State of Chattisgarh** reported in **AIR (2017) 3 SCC 247**. Further submission of learned counsel appearing on behalf of C.B.I. is that even the defence witnesses have supported the factum of occurrence though they have developed a story that firing was made by Nepali Bhutias.

16. It has also been contended by learned counsel appearing on behalf of C.B.I. is that so far oral dying declaration of deceased Shyam Narayan Yadav is concerned, the evidence of PW 11 (Satyadeo Ram) shows that deceased Shyam Narayan Yadav disclosed him the names of appellants and other accused persons as assailants and evidence of PW10(Bhurigurashan



Patel) corroborates the same. Doctor Laxman Prasad (PW2), who conducted postmortem examination of the deceased Shyam Narayan Yadav nor police witnesses have been cross-examined on the point of oral dying declaration of Shyam Narayan Yadav given to PW11 (Satyadeo Ram) nor any suggestion was given to doctors either PW3 or PW2 that the deceased Shyam Narayan Yadav was not in a fit state of mind, as such, defence is precluded from taking benefit of the same relying upon a decision of Hon'ble Apex Court in the case of **Gian Chand & Others v. State of Haryana** reported in [2013 (4) PLJR SC 7]. Contention is also that the evidence of PW11 (Satyadeo Ram) is also admissible under Section 6 of Indian Evidence Act and thus the prosecution case of oral dying declaration of deceased Shyam Narayan Yadav appears to be genuine and trustworthy.

17. In the background of the arguments of the rival parties and on close scrutiny of materials available on record, it appears that fardbeyan (Ext. 1) was recorded by PW1 on the statement of PW8 Ramesh Singh Kushwaha at 17.00 hours on 31.03.1997 and that disclosed that deceased along with Bhrigurashan Patel (PW10) and Ramdeo Ram (PW13) were on campaign for Bihar Bandh on the tempo and reached near the J.P. Chowk at 4.00 P.M. as soon as they reached, appellants and other accused Rustam Mian and Reyazuddin started indiscriminate firing due



to which, Chandrashekhar Prasad died on spot and Shyam Narayan Yadav received injuries and Bhrigurashan Patel has also received injuries and in the occurrence, passers by also received injuries and Shyam Narayan Yadav disclosed the names of appellants and other accused persons before Ramesh Singh Kushwaha (PW8) and also before Satyadeo Ram (PW11) and Bhrigurashan Patel (PW10) after reaching the hospital, left for party office for giving information of the occurrence.

18. PW8 Ramesh Singh Kushwaha is the informant in this case and his evidence disclosed that the occurrence is of 31st March 1997, he was waiting for vehicle and there was a hulla that MALE leaders were killed at J.P. Chowk, he came to the place of occurrence but none was there, thereafter, he went to the Sadar hospital and saw Chandrashekhar dead and Shyam Narayan Yadav in injured condition later on he also died. He identified his signature as on fardbeyan (Ext. 1). This witness has been declared hostile and his attention has been drawn towards the statement made before the C.B.I. and also about the fardbeyan but he denied the same.

19. PW1 Rafik Ahmad Khan, is the then Officer In-charge of Town Police Station, Siwan and according to him, he has recorded the statement of Ramesh Singh Kushwaha (PW8) and he had categorically stated that occurrence is of 31.03.1997 and



at 17.00 hours, he recorded the statement of Ramesh Singh Kushwaha (PW8) and handed over the same at the police station. On his statement fardbeyan was proved as Ext. 1 and he has also identified signature of A.S.I. K.L. Das on the endorsement as Ext. 2. Evidence of this witness in cross-examination disclosed that informant has got his statement recorded in presence of doctors but he has not asked the doctors to come, while recording the statement. Suggestion has also been given to him that occurrence did not take place on 31.03.1997 but on 01.04.1997 but he denied the same. Evidence of this witness, on recall, further disclosed that he prepared three inquest reports one of Chandrashekhar Prasad, second of Bhutali Mian and third of Shyam Narayan yadav, which have been marked as Ext. 20 to Ext. 20/2 and his cross-examination disclosed that those inquest reports were prepared at 17.39 hours, 18.25 hours and 18.45 hours respectively. From perusal of Ext. 20 to 20/2, it appears that all the inquest reports were prepared on 31.03.1997.

20. Evidence of PW4 Chandraketu Singh disclosed that on 31.03.1997 at 4.00 P.M., he received fire arm injury on his right leg, while he was coming from the court and his evidence further disclosed that crowd was coming and he heard the sound of firing and after receiving the injury, he was taken to Sadar



hospital for medical check ups. Evidence of this witness in cross-examination disclosed that in the hospital, he came to know that two CPI (ML) leaders Chandrashekhar Prasad and Shyam Narayan Yadav were killed.

21. Evidence of PW5 Md. Alam Khan disclosed that at 4.00 P.M., he received gun shot injury in his hand and after ten minutes, police arrived and taken him to hospital. His cross-examination also disclosed that one of the injured died and another was in unconscious condition.

22. Evidence of PW6 Rajbanshi Baitha, who was A.S.I. of police disclosed that on 31.03.1997, he had gone to the court and while he was coming from the court on motorcycle, he saw the crowd at the J.P. Chowk and came to know that there was firing and the miscreants have fled towards the Registry Office, then, he chased them for about 500 yards and fired on them.

23. PW 7 Indra Kumar was the driver of the tempo and his evidence also disclosed that he was coming along with Chandrashekhar Prasad and Shyam Narayan Yadav along with two more persons and when they reached near the J.P. Chowk, firing started and he fled away. His evidence also disclosed that Chandrashekhar Prasad and Shyam Narayan Yadav received injuries and he had taken them to hospital. This witness has been cross-examined and even his cross -examination disclosed



that there was indiscriminate firing.

24. Evidence of PW10 Bhrigurashan Patel disclosed that they were campaigning for the success of Bihar Bandh and conducted several meeting between 10.00 A.M. to 2.00 P.M. His evidence further disclosed that when they proceeded towards the J.P. Chowk and as soon as they got down from the Tempo and the meeting was about to start, five persons, namely, Mantu Khan, Munna Khan, Rustam Khan, Reyazuddin and Dhruv Sao came and started indiscriminate firing, in which, he also received gun shot injury on his back and Shyam Narayan Yadav and Chandrashekhar Prasad got badly injured and there was stampede. He identified the accused – appellants in the dock. His evidence further disclosed that Ramesh Singh Kushwaha (PW8) and Samsuddin (PW9) brought them to the hospital, where, they were treated. PW8 has got the F.I.R registered. His evidence also disclosed that Daroga of Town Police Station was recording the statement of Shyam Narayan Yadav and Satyadeo Ram, M.L.A. (PW 11), Ramesh Singh Kushwaha (PW8) and Samsuddin (PW9) were present there. According to him, the occurrence took place between 4.00 to 4.30 P.M. This witness has been cross-examined at length and even in his cross-examination, in para -2 his evidence disclosed that he had not handed over the Mic to police, as he was himself injured and



was brought to the Sadar hospital and within 10 minutes, police arrived. His evidence in para -3 of cross examination, also disclosed that the bullet crossed touching his body and there was mark on the Kurta and Ganji and there was bleeding also but the police has not seized the Kurta and Ganji and the firing hit his rib area. This witness has been cross examined at length, however, there is nothing to doubt his presence at the place of occurrence or at the Sadar hospital. His attention was drawn towards the statement made before the police to show some omission and contradiction but those omission and contradiction appears to be minor. On recall, evidence of this witness also disclosed that all the appellants are the men of Syed Sahabuddin and on his direction, they have committed the occurrence and all the appellants and accused persons were meeting Sahabudin in jail and Sahabuddin got the occurrence committed as his party was gaining popularity.

25. PW11 Satyadeo Ram is the then, M.L.A. Mairwa C.P.I. (ML) and his evidence also disclosed that on 31.03.1997, he received information at 4.30 P.M. that C.P.I (ML) leaders were shot at J.P. Chowk and on that information, he reached J.P. Chowk, where, he was informed that Ramesh Singh Kushwaha (PW8), Samsuddin (PW9) and Ramdeo Ram (PW13) have taken them to hospital. Thereafter, he reached the hospital and



saw the dead body of Chandrashekhar Prasad and Shyam Narayan Yadav in injured condition and seeing him, Shyam Narayan Yadav uttered something. By that time, Daroga Ji also reached there and Shyam Narayan Yadav disclosed that Dhruv Sao, Munna Khan, Reyazuddin, Rustam and Mantu Khan had fired. Evidence of PW11 also disclosed that Ramesh Singh Kushwaha (PW8) was giving statement before the police, which was read over and explained to him. Thereafter, he put his signature. This witness had identified Dhruv Sao, Mantu Khan and claimed to have identified other accused persons. His evidence also disclosed that one Bhutali Mian also died. This witness has also been cross-examined at length but the cross-examination was directed only to show that he was party worker of C.P.I. (ML) and an interested witness. However, no suggestion was given that Shyam Narayan Yadav was not in a fit state of mind and has not disclosed anything.

26. PW12 Kaushalya Devi was the mother of Chandrashekhar Prasad and her evidence disclosed that Sahabuddin has threatened her son twice to leave his way and two to three days prior, his men has also threatened her. Her evidence also disclosed the presence of Ramesh Singh Kushwaha (PW8).

27. PW13 Ramdeo Ram is also a party worker of C.P.I. (ML)



and his evidence disclosed that campaigning was going on for Bihar Bandh on 02.04.1997 and on 31.03.1997, he had gone for campaigning along with Shyam Narayan Yadav and Chandrashekhar Prasad and Bhrigurashan Patel also met him and, thereafter, they had taken lunch at 2.30 P.M. and proceeded for campaigning and Bhrigurashan Patel was also there and Chandrashekhar Prasad and Shyam Narayan Yadav were killed, however, he claims that he was not present at the place of occurrence. His evidence also disclosed that he had given blood to Shyam Narayan Yadav at 5.30 P.M. on 31.03.1997 and Shyam Narayan Yadav died after 2 to 3 minutes. This witness has not supported the prosecution case further and had been declared hostile.

28. PW2 Dr. Lakshman Prasad is the doctor, who has conducted the postmortem examination on the dead body of deceased Chandrashekhar Prasad on 31.03.1997 at 5.50 P.M. disclosed that he had found gun shot injury on the person of the deceased and he further stated that the cause of death is due to hemorrhage and shock due to the injury caused by fire arm. He proved the postmortem report of deceased Chandrashekhar Prasad as Ext. 3. His evidence further disclosed that on same day at 7.20 P.M., he conducted postmortem examination on the dead body of Shyam Narayan Yadav and found the injuries on



the person of the deceased Shyam Narayan Yadav. According to him, the cause of death was hemorrhage and shock due to above injury caused by fire arm. This witness has proved the postmortem report of deceased Shyam Narayan Yadav as Ext. 3/1 and he has examined Md. Alam PW5 on the same day at 5.15 P.M. and found one injury of fire arm and his injury report was proved by him as Ext. 4. Similarly, he also examined PW4 Chandraketu Singh on the same day at 5.20 P.M. and found one fire arm injury and he proved his injury report as Ext. 4/1. This witness has been cross-examined and his evidence in cross-examination disclosed that deceased Chandrashekhar Prasad had only one gun shot injury, whereas, deceased Shyam Narayan Yadav had received three gun shot injuries and if there will be shock, there will be immediate hemorrhage, wounds of laceration of lungs will be immediately fatal from profuse bleeding. Cross examination of PW2 also disclosed that on 31.03.1997, Surgeon on duty was doctor Bimal Kumar, who is at present posted in the district of Gopalganj and S.O.D. is made first entry but in this intimation report, there is nothing written by the doctor Bimal Kumar.

29. PW3 is the Doctor Bimal Kumar and as per his evidence, he informed about the death of Shyam Narayan Yadav to the Officer In-charge and he proved the letter in his writing and



signature as Ext. 6. His evidence disclosed that he examined Bhigurashan Patel (PW10) on 31.03.1997 and he again appeared on 01.04.1997 at 10.30 A.M. and on examination he found, circular wound 1 C.M. diameter with black margin on the left lateral chest of the level of 6th inner muscular space. X-ray was advised but the report of X-ray was not submitted. This witness has been cross-examined and he had stated that whoever gets admitted in the hospital, bed head ticket is prepared.

30. PW16 Rajdeep Singh Rawat was one of the Investigating Officers in this case and as per his evidence, he had issued notice to PW8 (Ramesh Singh Kushwaha) as per direction of the Superintendent of Police and on notice PW8 (Ramesh Singh Kushwaha) appeared before him. This witness has proved the notice as Ext. 10. Evidence of this witness also disclosed that PW8 (Ramesh Singh Kushwaha) had admitted that he got the fardbeyan recorded (though with objection) and he has not stated before him that his signature was obtained on a plain paper. Thereafter, he along with PW8 (Ramesh Singh Kushwaha) came to J.P. Chowk and prepared draft plan i.e. site plan (Ext. 11). His evidence further disclosed that he recorded the statement of PW8 (Ramesh Singh Kushwaha) and as per him, he has supported the occurrence and PW13 (Ramdeo Ram) has also supported the occurrence before him. His evidence



disclosed that witness Samsuddin Ansari (PW9) had also supported the manner and factum of occurrence before him.

31. On close scrutiny of the evidence of witnesses as well as other materials as discussed above, it appears that the fardbeyan has been recorded at 5 P.M. immediately after the occurrence, in which, the names of all accused persons has been mentioned. It has also been mentioned that deceased Shyam Narayan Yadav made oral dying declaration about the accused persons and PW10 (Bhrigurashan Patel) was also present there and he had also received injuries. Fardbeyan has been brought on record as Ext.1, which was proved by its author (PW1). No doubt, PW8 (Ramesh Singh Kushwaha), who was the informant of the case, was declared hostile but he has proved his signature on the fardbeyan as Ext. 2/1 and his evidence disclosed that in the occurrence, two MALE leaders were killed at J.P. Chowk and they were taken to hospital and as such, the above evidence supports the factum of occurrence. PW8 has been declared hostile and he has not supported the prosecution case in toto but the fact remains that PW1 has stated that the same was recorded on statement of PW8 and the same was brought on record as Ext. 1. In the present case, as discussed above, fardbeyan (Ext.1) has been lodged immediately after the occurrence and filing of prompt F.I.R rules out the possibility of manipulation



and addition in F.I.R. Hon'ble Apex Court has also considered this aspect in a decision in the case of **Ravinder Kumar v. State of Punjab** reported in **AIR 2001 (SC) 3570** and observed that “ of course, a prompt and immediate lodging of F.I.R. is the ideal as that would give the prosecution a twin advantage first is that it affords commencing of the investigation without any time lapse. Second is that it expels the opportunity for any possible concoction of a false version”.

32. In this case PW8 and PW9, who are said to have brought the deceased and others to hospital had been declared hostile and attention of PW8 has been drawn towards the statement made before the C.B.I. in para -2 of his cross-examination and a suggestion has also been given to him and on the basis of statement in the hospital, F.I.R. was lodged and he put signature about he denied the same. Evidence of PW16 (Rajdeep Singh Rawat), who has also conducted investigation on behalf of C.B.I. disclosed that he issued notice to PW8 and on notice PW8 appeared and this witness recorded his statement and he had supported the prosecution case, which will appear from para -1 of his evidence. Similarly, evidence of PW16 also disclosed that he has recorded the statement of PW9 (Md. Samsuddin) and he had also supported the prosecution case and the evidence of PW16 also disclosed that PW13 (Ramdeo Ram) had supported



the case of prosecution. As such, it is evident that PW8, PW9 and PW13 had tried to conceal the material truth with the purpose of shielding and protecting the appellants, may be due to fear or they might have been gained over and for that the appellants will not be allowed to get any benefit. So far evidence of hostile witnesses are concerned, Hon'ble Apex Court in the case of **Khuji alias Surendra Tiwari** (supra) and **Arjun and Anr. vs. State of Chhatisgarh** (supra) has held that evidence of such witnesses cannot be treated as effaced or washed off the record altogether but the same can be accepted to the extent his version is found to be dependable on a careful scrutiny thereof. In the case of **Hemudan Nanbha Gandhi vs. State of Gujarat** reported in **2019 CRI L.J. 736 (Supreme Court)**, Hon'ble Apex Court considering the judgment of Hon'ble Apex Court in the case of **State vs. Sanjiv Nanda** reported in **2012 (8) SCC 450**, has observed that *"if a witness becomes hostile to subvert the judicial process, the court shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal justice system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation. Further, Section 193 [IPC](#) imposes punishment for giving false evidence but is seldom invoked"* and further held in para 9 and 10 of its judgment, which reads as



follows:-

“9. A criminal trial is but a quest for truth. The nature of inquiry and evidence required will depend on the facts of each case. The presumption of innocence will have to be balanced with the rights of the victim, and above all the societal interest for preservation of the rule of law. Neither the accused nor the victim can be permitted to subvert a criminal trial by stating falsehood and resort to contrivances, so as to make it the theatre of the absurd. Dispensation of justice in a criminal trial is a serious matter and cannot be allowed to become a mockery by simply allowing prime prosecution witnesses to turn hostile as a ground for acquittal, as observed in *Zahira Habibullah Sheikh vs. State of Gujarat*, (2006) 3 SCC 374 and *Mahila Vinod Kumari vs. State of Madhya Pradesh*, (2008) 8 SCC 34. If the medical evidence had not confirmed sexual assault on the prosecutrix, the T.I.P. and identification therein were doubtful, corroborative evidence was not available, entirely different considerations may have arisen.

10. It would indeed be a travesty of justice in the peculiar facts of the present case if the appellant were to be acquitted merely because the prosecutrix turned hostile and failed to identify the appellant in the dock, in view of the other overwhelming evidence available. In *Iqbal vs. State of U.P.*, 2015 (6) SCC 623, it was observed as follows:

“15. Evidence of identification of the miscreants in the test identification parade is not a substantive evidence. Conviction cannot be based solely on the identity of the dacoits by the witnesses in the test identification parade. The prosecution has to adduce substantive evidence by establishing incriminating evidence connecting the accused with the crime, like recovery of articles which are the subject matter



of dacoity and the alleged weapons used in the commission of the offence.”

33. From the discussions made above, it appears that PW10 was present at the place of occurrence and he is an injured witness. Appellants have doubted the presence of this witness at the place of occurrence mainly relying on the evidence of PW3 Dr. Bimal Kumar, however, evidence of PW3 disclosed that he examined PW10 on 31.03.1997 and also on 01.04.1997 at 10.30. A.M. and found *“circular wound 1 cm diameter with black margin on the left lateral chest of the level of 6th inner muscular space. X-ray was advised”* and this witness has not been cross-examined nor any suggestion was given that he had not examined PW10 (Bhrigurashan Patel) on 31.03.1997 and he has prepared false injury report. It has also been argued on behalf of the appellants that the evidence of PW10 (Bhrigurashan Patel) in his chief shows that he received injury on his back, whereas, in the cross-examination, he has stated otherwise and doctor found injury on chest but to my opinion, these are minor discrepancies, on the other hand, the doctor has found fire arm injury on his person, which supports the prosecution case. In the case of **Mukesh and Anr. v. State for NCT of Delhi** and Others reported in [2017 CRI L.J. 4365], Hon’ble Apex Court has considered the evidence of injured witness, considering several judgment of Hon’ble Apex Court



and observed that “*The evidence of an injured witness is entitled to a greater weight and the testimony of such a witness is considered to be beyond reproach and reliable. Firm, cogent and convincing ground is required to discard the evidence of an injured witness. It is to be kept in mind that the evidentiary value of an injured witness carries great weight.*”

34. Further Hon’ble Apex Court in the case of **State of Maharashtra vs. Tulshiram Bhanudas Kamble** reported in [AIR 2007 SC 3042] has observed that the evidence of an eye witness, who is also an injured witness, cannot be doubted merely on the ground that he is inimical to the respondents and held in paragraph 29 to 31, which read as follows:-

29. Each of the reasoning assigned by the High Court, in our opinion, is contrary to the well-settled legal principle. The witnesses examined on behalf of the prosecution, apart from being eye-witnesses, were injured witnesses. Their presence at the place of occurrence, therefore, cannot be doubted. Only because they were inimical to the respondents, the same by itself cannot be a ground to discard their evidences. Although in accepting the same, some amount of caution is required to be maintained.

35. So far submission of learned counsels for the appellants that there are some discrepancies in the evidence of PW10 is concerned, the same appears to be very trivial and that is bound



to occur in the evidence of a witness deposing much after the occurrence. Hon'ble Apex Court in the case of **Smt. Shamim v. State (GNCT of Delhi)** reported in **2019 CRI.L.J. 732 (Supreme Court)** has considered this aspect of the matter in para 12 of its judgment, which reads thus:

“12. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole inspires confidence. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error without going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Minor omissions in the police statements are never considered to be fatal”.

36. Further Hon'ble Apex Court in the case of **Sohrab and Anr. vs. State of M.P.** reported in **AIR 1992 (SC) 220**, Hon'ble Apex Court has also considered the evidence of injured witnesses and held that merely because there have been discrepancies and contradictions in the evidence of some or all the witnesses, the same does not mean that entire evidence of



prosecution has to be discarded. It is only after exercising caution and care shifting the evidence to separate the truth from untruth, exaggeration, embellishment and improvement, the Court had come to the conclusion that what could be accepted implicated the appellants and convicted them as the Court has held that falsus in uno falsus in omnibus'. is not a sound rule for the reason that hardly any one comes across witness whose evidence does not contain a grain of untruth or at any era some exaggeration or embellishment.

37. Hon'ble Apex Court in the case of **Ramesh and others v. State of Haryana** reported in **2017 CRI L.J. 352 (Supreme Court)** has also observed this fact in para 35 and 36 of the judgment, which reads as follows:-

“35. We find that it is becoming a common phenomenon, almost a regular feature, that in criminal cases witnesses turn hostile. There could be various reasons for this behaviour or attitude of the witnesses. It is possible that when the statements of such witnesses were recorded under Section 161 of the Code of Criminal Procedure, 1973 by the police during investigation, the Investigating Officer forced them to make such statements and, therefore, they resiled therefrom while deposing in the Court and justifiably so. However, this is no longer the reason in most of the cases. This trend of witnesses turning hostile is due to various other factors. It may be fear of deposing against the accused/delinquent or political pressure or pressure of other family members or other such sociological factors. It is also possible that witnesses are corrupted with monetary



considerations.

36. In some of the judgments in past few years, this Court has commented upon such peculiar behaviour of witnesses turning hostile and we would like to quote from few such judgments. [In Krishna Mochi v. State of Bihar](#), this Court observed as under:

“31. It is matter of common experience that in recent times there has been sharp decline of ethical values in public life even in developed countries much less developing one, like ours, where the ratio of decline is higher. Even in ordinary cases, witnesses are not inclined to depose or their evidence is not found to be credible by courts for manifold reasons. One of the reasons may be that they do not have courage to depose against an accused because of threats to their life, more so when the offenders are habitual criminals or high-ups in the Government or close to powers, which may be political, economic or other powers including muscle power.

38. Considering the above settled principle, on close scrutiny of evidence, it appears that PW10 has supported the prosecution case so far factum of occurrence is concerned and also identified the accused persons as the assailants and as discussed above, there is nothing to doubt his credibility or his presence at the place of occurrence. Even in fardbeyan (Ext. 1), his presence has been mentioned and further he had also received injuries and the same is corroborated by the evidence of PW3 and, hence, he appears to be wholly reliable witness. Apart from that



PW4 and PW5 as well as PW7 have supported the factum of occurrence and date of occurrence. No doubt, PW8 and PW13 have turned hostile but on scrutiny of evidence of PW8 and PW13, we find that they have supported the factum of occurrence and date and time of occurrence. Evidence available on record disclosed that due to popularity of deceased Chandrashekhar Prasad, he had been threatened earlier by local M.P. and, thereafter, while, he was campaigning for Bihar Band, in broad daylight in a crowded chauraha, accused persons including appellants made indiscriminate firing killing him and other and also causing injuries to several others and the said act of the accused persons, may put anyone in fear and in such a situation, if PW8, PW9 and PW13 turned hostile, this can well be presumed that out of fear, they turned hostile. As we have discussed above, it appears that they have suppressed the material facts in order to shield or protect the accused persons.

39. Another argument of learned counsels appearing on behalf of the appellants is that PW10 (Bhrigurashan Patel) is the solitary eye witness of the occurrence and his evidence suffers from discrepancies, as such, no conviction can be based on his solitary evidence in absence of corroboration. In the case of **Shivaji Sahebrao Bobade** (supra) it has been observed by Hon'ble Apex Court that "*even if the case against the accused*



hangs on the evidence of a single eye-witness it may be enough to sustain the, conviction given sterling testimony of a competent, honest man, although as a rule of prudence courts call for corroboration. It is a platitude to say that witnesses have to be weighed and not counted since quality matters more than quantity in human affairs". Further, in the case of **Anil Phukan** (supra), it has been held by Hon'ble Apex Court that *"Conviction can be based on the testimony of a single eye-witness and there is no rule of law or evidence which says to the contrary provided the sole eye witness passes the test of reliability. So long as the single eye-witness is a wholly reliable witness the courts have no difficulty in basing conviction on his testimony alone. However, where the single eye- witness is not found to be a wholly reliable witness, in the sense that there are some circumstances which may show that he could have an interest in the prosecution, then the courts generally insist upon some independent corroboration of his testimony, In material particulars, before recording conviction. It is only when the courts find that the single eye-witness is a wholly unreliable witness that his testimony is discarded in toto and no amount of corroboration can cure that defect".* In the case of **Pirara Singh** (supra), the Hon'ble Apex Court has observed that



“evidence of interested or inimical witnesses is to be scrutinised with care but cannot be rejected merely on the ground of being a partisan evidence. If on a perusal of the evidence the Court is satisfied that the evidence is creditworthy there is no bar in the Court relying on the said evidence”.

Similar view has also been taken by the Hon’ble Apex Court in the case of *Seemon alias Veeranam (supra)*.

40. So far number of witnesses to be examined in the Trial, **Section 134 of Indian Evidence Act, provides that; no particular number of witnesses shall in any case be required for the proof of any fact.** Hon’ble Apex Court in the case of **Vadivelu Thevar vs The State Of Madras** reported in **[1957 AIR 614 (SC)]** has also considered the same and held in para 14 and 15, which read as follows:-

14. In view of these considerations, we have no hesitation in holding that the contention that in a murder case, the court should insist upon plurality of witnesses, is much too broadly stated. Section 134 of the Indian Evidence Act has categorically laid it down that "no particular number of witnesses shall in any case be required for the proof of any fact." The legislature determined, as long ago as 1872, presumably after due consideration of the pros and cons, that it shall not be necessary for proof or disproof of a fact, to call any particular number of witnesses. In England, both before and after the passing of the Indian Evidence Act, 1872, there have been a



number of statutes as set out in Sarkar's 'Law of Evidence' - 9th Edition, at pp. 1100 and 1101, forbidding convictions on the testimony of a single witness. The Indian Legislature has not insisted on laying down any such exceptions to the general rule recognized in s. 134 quoted above. The section enshrines the well recognized maxim that "Evidence has to be weighed and not counted". Our Legislature has given statutory recognition to the fact that administration of justice may be hampered if a particular number of witnesses were to be insisted upon. It is not seldom that a crime had been committed in the presence of only one witness, leaving aside those cases which are not of uncommon occurrence, where determination of guilt depends entirely on circumstantial evidence. If the Legislature were to insist upon plurality of witnesses, cases where the testimony of a single witness only could be available in proof of the crime, would go unpunished. It is here that the discretion of the presiding judge comes into play. The matter thus must depend upon the circumstances of each case and the quality of the evidence of the single witness whose testimony has to be either accepted or rejected. If such a testimony is found by the court to be entirely reliable, there is no legal impediment to the conviction of the accused person on such proof. Even as the guilt of an accused person may be proved by the testimony of a single witness, the innocence of an accused person may be established on the testimony of a single witness, even though a considerable number of witnesses may be forthcoming to testify to the truth



of the case for the prosecution. Hence, in our opinion, it is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Generally speaking, oral testimony in this context may be classified into three categories, namely :

(1) Wholly reliable.

(2) Wholly unreliable.

(3) Neither wholly reliable nor wholly unreliable.

15. In the first category of proof, the court should have no difficulty in coming to its conclusion either way - it may convict or may acquit on the testimony of a single witness, if it is found to be above reproach or suspicion of interestedness, incompetence or subornation. In the second category, the court, equally has no difficulty in coming to its conclusion. It is in the third category of cases, that the court has to be circumspect and has to look for corroboration in material particulars by reliable testimony, direct or circumstantial. There is another danger in insisting on plurality of witnesses. Irrespective of the quality of the oral evidence of a single witness, if courts were to insist on plurality of witnesses in proof of any fact, they will be indirectly encouraging subornation of witnesses. Situations may arise and do arise where only a single person is available to give evidence in support of a disputed fact. The court naturally has to weigh carefully such a



testimony and if it is satisfied that the evidence is reliable and free from all taints which tend to render oral testimony open to suspicion, it becomes its duty to act upon such testimony. The law reports contain many precedents where the court had to depend and act upon the testimony of a single witness in support of the prosecution. There are exceptions to this rule, for example, in cases of sexual offences or of the testimony of an approver; both these are cases in which the oral testimony is, by its very nature, suspect, being that of a participator in crime. But, where there are no such exceptional reasons operating, it becomes the duty of the court to convict, if it is satisfied that the testimony of a single witness is entirely reliable. We have, therefore, no reasons to refuse to act upon the testimony of the first witness, which is the only reliable evidence in support of the prosecution.

41. So far another argument of learned counsels for the appellants that no independent witnesses have been examined in this case is concerned, it appears that PW4 and PW5 have been examined as independent witnesses and they have supported the factum of occurrence and date of occurrence but they have not named the appellants and other accused persons and not identified them. This court cannot shut its eyes to the situation prevailing in the society that in these days, no persons are willing to come forward as a witness and depose in the court in order to save themselves from harassment caused to them at



the police station and appearing before the Court days after days. Hon'ble Apex Court in the case of **Appabhai and another vs. State of Gujarat** repored in [AIR 1988 SC 696] has considered this aspect of the matter and has observed in para 36, which reads as follows:-

“ 36. It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused. The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The Court, therefore, cannot reject their evidence merely because they have behaved or reacted in an



unusual manner. In Rana Pratap v. State of Haryana 1988 (3) S.C.C. 327 O. Chinnappa Reddy J. speaking for this Court succinctly set out what might be the behaviour of different persons witnessing the same incident”.

42. In view of the above pronouncement, the evidence of PW10, who is an injured witness and his presence is also not doubted, appears to be reliable and trustworthy. As such, his evidence cannot be brushed aside due to non-examination of independent witnesses. Furthermore, PW4 and PW5 are independent and injured witnesses and they have also supported the factum of occurrence.

43. Evidence of PW11 (Satyadeo Ram) disclosed about the oral dying declaration of deceased Shyam Narayan Yadav and on close scrutiny of evidence of PW11, it appears that he reached at Sadar hospital immediately after the occurrence and Shyam Narayan Yadav disclosed him the names of accused persons including appellants, as such, the aforesaid statement on facts appears to be in relation to the facts in issue and part of the same transaction. Hence, that appears to be relevant under Section 6 of the Indian Evidence Act. The above evidence of PW11 was assailed by the appellants firstly on the ground that the evidence of doctors do not show that he was in a fit state of mind, secondly, there is no certification of the doctors about him



being in a first state of mind, thirdly, on the ground that evidence of PW10 and PW11 shows that the oral dying declaration has been made in presence of police official and evidence of PW11 further shows that same has been recorded by Officer In-charge of Town Police Station but there is no such evidence available on record and fourthly on the ground that evidence of PW4 and PW5 disclosed that Shyam Narayan Yadav was in unconscious condition.

44. On scrutiny of evidence of PW11, it appears that he has stated in his evidence as discussed above that when he reached the hospital Chandrashekhar Prasad had died and Shyam Narayan Yadav was in injured condition and he was uttering something and Officer In-charge of Town Police Station was also reached there and Shyam Narayan Yadav disclosed that appellants and other accused persons fired at them. This witness has been cross-examined and in his cross-examination, he has stated that whatever Shyam Narayan Yadav was telling, the same was listened by others also and after statement of Ramesh Singh Kushwaha, he became unconscious. PW10 has also stated in his evidence that the Officer In-Charge was taking the statement of Shyam Narayan Yadav and Satyadeo Ram (PW11), Ramesh Singh Kushwaha (PW8) and Samsuddin Mian (PW9) were present at that time.



45. Apart from above, fardbeyan (Ext. 1) also shows that Shyam Narayan Yadav disclosed the names of accused persons in presence of PW11 (Satyadeo Ram). Evidence of PW10 also disclosed the above facts though there is slight variation in the evidence of PW10 and PW11 but as discussed above, some discrepancies are bound to occur as the power of observation differs from person to person and what one may notice another may not and they can only be recalled the version and it is unrealistic to expect a witness to depose like a parrot. It further appears that there is no cross-examination to PW1, the Officer In-charge, who has recorded the statement of informant Ramesh Singh Kushwaha (PW8) or any other police officials about the disclosure made by the deceased Shyam Narayan Yadav. Prosecution has not even cross-examined PW2 Dr. Laxman Prasad on this point and according to the doctor (PW2), it was doctor (PW3), the surgeon on duty at the time of admission of deceased but even PW3 has not been cross-examined nor any suggestion has been given to him on this point.

46. It is well settled that the defence in order to extract advantage, has to cross examine the witnesses in respect of missing links, as such, no grievance can be raised at this juncture. Hon'ble Apex Court in the case of **Gian Chand and Others** (supra), as relied upon by learned counsel appearing on



behalf of C.B.I., the Hon'ble Apex Court in paragraph 11 and 12 has held as follows:-

11. The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in Laxmibai (Dead) Thr. [L.Rs. & Anr. v. Bhagwanthuva \(Dead\) Thr. L.Rs. & Ors.](#), AIR 2013 SC 1204 observing as under:

“31. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in [Section 138](#) of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by [Section 146](#) of the Evidence Act, which permits a witness to be questioned, inter-alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a



witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”

12. The defence did not put any question to the Investigating Officer in his cross-examination in respect of missing chits from the bags containing the case property/contraband articles. Thus, no grievance could be raised by the appellants in this regard.

47. So far argument that there is no certification by the doctors that the deceased Shyam Narayan Yadav was not in a fit state of mind to speak, when there are evidences of PW10 and PW11 that the deceased disclosed the names of appellants and other accused persons as the assailants and the same has also been mentioned in the fardbeyan (Ext.1), which was recorded immediately after the occurrence and the same cannot be thrown out merely on the ground that the same has not been certified by the doctors. Hon'ble Apex Court in the case of **State of Madhya Pradesh v. Dal Singh** reported in [**AIR 2013 Supreme Court 2059**] has considered this aspect and held in para 14, which reads as follows:-

14. The law on the issue can be summarised to the effect that law does not provide who can record a dying declaration, nor is there any prescribed form, format, or procedure for the same. The person who records a



dying declaration must be satisfied that the maker is in a fit state of mind and is capable of making such a statement. Moreover, the requirement of a certificate provided by a Doctor in respect of such state of the deceased, is not essential in every case.

Undoubtedly, the subject of the evidentiary value and acceptability of a dying declaration, must be approached with caution for the reason that the maker of such a statement cannot be subjected to cross-examination. However, the court may not look for corroboration of a dying declaration, unless the declaration suffers from any infirmity.

So far as the question of thumb impression is concerned, the same depends upon facts, as regards whether the skin of the thumb that was placed upon the dying declaration was also burnt. Even in case of such burns in the body, the skin of a small part of the body, i.e. of the thumb, may remain intact. Therefore, it is a question of fact regarding whether the skin of the thumb had in fact been completely burnt, and if not, whether the ridges and curves had remained intact”.

48. The Hon’ble Apex Court in the case of **Pothakamuri Srinivasulu alias Mooga Subhaiah v. State of Andhra Pradesh** reported in [AIR 2002 SC 2780], while dealing with the similar facts observed in para -8 of its judgment, which reads as follows:-

“8 It was submitted by Ms. Nanita Sharma, the learned counsel for the appellant that for several reasons the dying declaration cannot be believed. She submitted that looking to the nature of the injuries suffered by the



deceased possibly she could not have spoken and must have become unconscious instantaneously. However, no such suggestion has been made to any of the witnesses including the two doctors who respectively conducted the medico-legal examination and post-mortem examination of the victim. On the contrary the three eye-witnesses have positively stated that the deceased was speaking when they had met her soon after the incident. The victim had died tow days after the incident. We cannot in the face of this positive evidence just assume that the injured must have become unconscious and speechless because of the injuries and discard on such assumption the dying declaration deposed to by independent witnesses corroborated by the promptly lodged FIR.

49. So far decision cited by learned counsels for the appellants in the case of **Umakant and Anr (supra)** with respect to dying declaration and in that case, Hon'ble Apex Court has laid down certain guidelines in para – 20 of the said judgment also disclosed that where the court is satisfied that the declaration is true and voluntary, it can base its conviction without further corroboration.

50. From the discussions made above, it appears that oral dying declaration of deceased Shyam Narayan Yadav does not suffer from any glitch rather the same appears to be reliable and credible. Now the question arises, as to whether, statement made by deceased Shyam Narayan Yadav before his death is relevant in determining the cause of death of deceased



Chandrashekhar Prasad or not. The said question was considered by the Hon'ble Apex Court in the case of **Tejram Patil v. State of Maharashtra** reported in **2015 CRI. L.J. 1829**, in which, the Hon'ble Apex Court after considering Section 32 and 6 of the Indian Evidence Act as well as several other pronouncements of Hon'ble Apex Court including the cases **Kashiram Tukaram Jadhav v. State of Maharashtra** reported in **1984 CRI. L.J. 1447 (Bom)**, **Ratan Gond v. State of Bihar** reported in **AIR 1959 SC 18**, **Sharad Birdhi Chand Sarda v. State of Maharashtra** reported in **(1984) 4 SCC 116** as well as the case **Pakala Narayan Swami v. Emperor** reported in **AIR 1939 PC 47** has held in para 25 of the judgment that *"It is thus clear that the DD is admissible not only in relation to the cause of death of the person making the statement and as to circumstances of the transaction which resulted in his death, if the circumstances of the said transaction relate to death of another person, the statement cannot be held to be inadmissible when circumstances of "his" death are integrally connected to the circumstances of death of such other person"*. In the present case, the statement made by the Shyam Narayan Yadav before his death is not only relates to circumstances of the present case resulting in his death but it also shows the transaction resulting in death of deceased



Chandrashekhar Prasad and as such, his evidence is admissible with regard to circumstances of transaction resulting in his death as well as the death of deceased Chandrashekhar Prasad.

51. Learned counsel for the appellants also emphasized the point that the F.I.R lodged by the C.B.I. is the second F.I.R., as one F.I.R. has also been lodged on the statement of PW8 Ramesh Singh Kushwaha by PW2 as such, it is hit under Section 162 Cr.P.C. However, on perusal of the record, it appears that F.I.R. lodged by the C.B.I. is nothing but interpretation of the statement made by PW8 Ramesh Singh Kushwaha as required under C.B.I. manual, and as per notification – Ext. 9 series, the investigation was entrusted to the C.B.I., which it did, and as such, it could not be said to be hit by Section 162 Cr.P.C.

52. Even the evidence of witnesses examined on behalf of defenced i.e. DW5, DW6, DW8, DW9 and DW10, disclosed that an occurrence of firing took place on the day and time of occurrence though they tried to show that Nepali Bhutias were responsible for the occurrence.

53. Defence has also come with alibi of all the appellants but the appellants in their statement recorded under Section 313 Cr.P.C. has not taken such a plea and as such, their plea of alibi does not stand.



54. Evidence further disclosed that motive behind the occurrence is that the local M.P. was not happy with the popularity of deceased Chandrashekhar Prasad and he had threatened Chandrashekhar Prasad earlier and the appellants are the men of local M.P. and it further appears that the deceased were campaigning for Bihar Bandh and addressed the series of meeting and, then, they were killed and above fact also found supports from the evidence of PW12 Kaushalya Devi and she also withstood the test of cross – examination and stated that her son was earlier threatened. Hence, there are sufficient, cogent and reliable evidences available on record with respect to the motive behind the occurrence.

55. It appears that appellants were convicted under Sections 302/149, 307/149 and 120B of the Indian Penal Code and under Section 27 of the Arms Act. Learned counsel for the appellants have assailed the conviction of appellants under Section 120B of the Indian Penal Code on the ground that there is no evidence available on record so as to show that the accused persons including appellants conspired with someone to kill the deceased and they have no motive to commit such an offence.

56. Hon'ble Supreme Court in the case of Yogesh @ Sachin Jagdish Joshi vs. State of Maharashtra reported in 2008 (C) CRI. L.J. 9872 has considered the said aspect of the matter and



it is manifest that meeting of mind of two or more persons for doing an illegal act by illegal means is sine qua non of the criminal conspiracy but it may not be possible to prove the agreement between them by direct proof. Nevertheless, existence of the conspiracy and its objective can be inferred from the surrounding circumstances must form a chain of events from which a conclusion about the guilt of the accused could be drawn. It is well settled that an offence of conspiracy is substantive offence and renders the mere agreement to commit an offence punishable even if an offence does not take place pursuant to the illegal agreement, as such, this court does not find force in the argument of learned counsels for the appellants that no case under Section 120B of the Indian Penal Code is made out against the appellants.

57. From the entire discussions made above, we find that PW10 is an injured and an eyewitness of the occurrence and he has supported the prosecution case and his evidence is corroborated by oral dying declaration of deceased Shyam Narayan Yadav and there are evidences of other witnesses available on record so far factum of occurrence is concerned. As such, there is sufficient evidence available on record against the appellants that they in conspiracy with others, killed deceased Chandrashekhar Prasad and Shyam Narayan Yadav



and also caused fire arm injuries to others and, hence, we are of the considered view that the prosecution has been able to prove its case beyond reasonable shade of doubt and the impugned judgment and order does not suffer from any infirmity.

58 Accordingly, conviction and sentence of the appellants in all the above three appeals under Section 302/149, 307/149, 120B of the Indian Penal Code as well as under Section 27 of the Arms Act is upheld.

59. Accordingly, all the above three appeals are dismissed.

(Vinod Kumar Sinha, J)

Aditya Kumar Trivedi, J._____.

(Aditya Kumar Trivedi, J)

sunilkumar/-

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