

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.826 of 2016

Arising Out of PS. Case No.-7 Year-2005 Thana- DANAPUR District- Patna

Raghu Nandan Mahto Son of Late Nathuni Mahto Resident of Village-
Lakhni Bigha, P.S. Danapur, Distt Patna.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 690 of 2016

Arising Out of PS. Case No.-7 Year-2005 Thana- DANAPUR District- Patna

Dev Nandan Mahto Son of Nathuni Mahto R/o village - Lakhni Bigha, P.S.
Danapur, District - Patna

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 709 of 2016

Arising Out of PS. Case No.-7 Year-2005 Thana- DANAPUR District- Patna

1. Shiv Mahto son of Kripal Mahto
2. Sujit Mahto son of Shiv Mahto
All r/o village- Lakhni Bigha, P.S.-Danapur, District- Patna

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :
(In CRIMINAL APPEAL (DB) No. 826 of 2016)
For the Appellant/s : Mr. Saket Anand
For the Respondent/s : Mr. Shivesh Chandra Mishra
(In CRIMINAL APPEAL (DB) No. 690 of 2016)
For the Appellant/s : Mr. Manoj Kumar Jha
For the Respondent/s : Mr. Mayanand Jha
(In CRIMINAL APPEAL (DB) No. 709 of 2016)
For the Appellant/s : Mr. Shiv Ganga Kumar Gupta, Adv
For the Respondent/s : Mr. Dilip Kumar Sinha



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**CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA
and
HONOURABLE MR. JUSTICE RAJENDRA KUMAR
MISHRA**

C.A.V. JUDGMENT
**(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR
SRIVASTAVA)**

Date : 05-04-2019

All the above stated criminal appeals have arisen out of Judgment of conviction and sentence Order dated 26.5.2016 and 31.5.2016 respectively passed by learned Additional Sessions Judge 1st, Danapur, in Sessions Trial No. 1231 of 2006/ Trial No. 251 of 2015, arising out of Danapur P.S. Case No. 07 of 05 and, accordingly, the above stated criminal appeals were heard in block and are being disposed of by this common judgment.

2. All the appellants have been convicted for the offence punishable under Sections 302/34 of the Indian Penal Code and sentenced to undergo life imprisonment and have also been fined of Rs. 5000/- each and in default of payment of fine they have been ordered to undergo further imprisonment for five months. Furthermore, appellant Raghu Nandan Mahto has, separately, been convicted for the offence punishable under Section 27 of the Arms Act and has been sentenced to undergo 3 years rigorous imprisonment with fine of Rs. 3000/- and in



default of payment of fine he has to go three months further imprisoned. However, the sentence of appellant Raghu Nandan Mahto was ordered to run concurrently.

3. Briefly stated the prosecution case is that P.W. 9 Sunil Paswan gave his *fard-e-beyan* to P.W. 10 Mahesh Prasad Rai, the then Officer-in-Charge of Danapur Police Station, on 2.1.2005 at 3.00 P.M. at village Adampur, to this effect, that on the same day at about 2.00 P.M. he along with his brother Ajit Kumar was returning to their home from Kailash Field after playing football and while they were on their way and reached near *Sharab Bhathi* situated at village Adampur, all of a sudden, appellants Dev Nandan Mahto, Raghu Nandan Mahto, Sujit Mahto, Shiv Mahto and Ajai Mahto as well as Sadhu Mahto encircled his brother Ajit Kumar. All the aforesaid persons were armed with country-made pistol except appellant Sujit Kumar, who was carrying big country-made gun. P.W. 9 Sunil Paswan further stated that appellant Dev Nandan Mahto ordered to shoot Ajit Kumar and after that appellant Raghu Nandan Mahto shot fire of his country-made pistol putting the same on the temple of Ajit Kumar, as a result whereof, Ajit Kumar, having sustained firearm injury, fell down there. P.W. 9 further claimed that he started crying, which attracted his



mother Ramdei Devi (P.W. 8), Akhilesh Paswan (P.W. 3), Vijay Kumar Sao (P.W. 5), Gajendra Paswan (P.W. 4) and several other persons. The aforesaid persons threatened to shoot the witnesses if they dared to come to save the deceased but, in the meantime, having heard the sound of firing several villagers assembled there and seeing the villagers the aforesaid persons went on the roof of their house and started making firing from their roof. He further claimed that the aforesaid persons, subsequently, started fleeing towards the west side sensing the arrival of police. The aforesaid persons were chased by the police and having chased them the police caught appellants Dev Nandan Mahto, Raghu Nandan Mahto and one Sadhu Mahto with their firearms.

4. On the basis of aforesaid *fard-e-beyan* of P.W. 9 Sunil Paswan, Danapur P.S. Case No. 7 of 05 for the offences punishable under Sections 302/34 of the Indian Penal Code and 27 of Arms Act was registered on 2.1.2005 and on the same day formal first information report was drawn up against the appellants and others for the above stated offences.

5. P.W. 10, Mahesh Prasad Rai, took the charge of investigation. He inspected the place of occurrence, seized one live cartridge of .315 bore and three empty



cartridges as well as blood stained earth from the place of occurrence, recorded the statement of witnesses, prepared inquest report, recorded the statement of accused persons and after completion of investigation, he submitted charge-sheet against appellants Raghu Nandan Mahto, Dev Nandan Mahto, Sujit Mahto, Shiv Mahto and one accused Jitendra Kumar @ Sadhu for the offence punishable under Sections 302/34 of the Indian Penal Code and 27 of the Arms Act, whereas kept the investigation pending against FIR named accused Ajai Mahto.

6. The cognizance of the offence was taken in usual way and the case was committed to the court of sessions.

7. All the above stated appellants along with chargesheeted accused Jitendra Kumar @ Sadhu Chaudhary were put on trial and, accordingly, they stood charged for the offences punishable under Sections 302/34 of the Indian Penal Code and 27 of the Arms Act and, furthermore, the appellant Raghu Nandan Mahto @ Raghu stood charged, separately, for the offence punishable under Sections 302 of the Indian Penal Code. The appellants as well as chargesheeted accused Jitendra Kumar @ Sadhu denied the charges and claimed to be tried.

8. In course of trial, prosecution examined altogether 11 witnesses and also got exhibited inquest report



and postmortem report. The statements of all the appellants were recorded under Section 313 of the Cr.P.C., in which they reiterated their innocence. It is pertinent to note here that before pronouncement of the judgment, the trial of accused Jitendra Kumar @ Sadhu Chaudhary was separated by the trial court *vide* order dated 20.3.2015 as he was absconding after framing of the charge.

9. Learned trial court having heard the submissions of the parties and having evaluating the evidences available on the record convicted and sentenced the appellants, in the manner, as stated above.

10. Learned counsel appearing for the appellants assailed the impugned Judgment of conviction and sentence Order arguing that the learned trial court committed error in appreciating the prosecution evidence as the prosecution witnesses made contrary statements on vital points but even then the learned trial court placed reliance upon the testimonies of prosecution witnesses. He further submitted that the prosecution failed to prove the manner of occurrence as well as the place of occurrence. Continuing his submission, learned counsel of the appellants submits that in the *fard-e-beyan*, P.W. 9 claimed that out of fear he left the place of occurrence but



before court he claimed that he got himself hidden behind a sheesham tree. He, further, submitted that, moreover, P.W. 10 did not find any sheesham tree near the place of occurrence. He submitted that P.W. 9 claimed in his *fard-e-beyan* that having seen the occurrence, he raised alarm but in court he stated that he did not raise alarm. He further submitted that P.W. 9 claimed in his *fard-e-beyan* that the appellants and other FIR named accused made indiscriminate firing from the roof of their house and after that three persons were caught with their respective weapons but no weapon was seized nor produced in the court.

11. He, next, submitted that, as a matter of fact, none of the prosecution witnesses had seen the actual killing of the deceased and that was the reason there was inconsistency in their depositions. Continuing his submission, he submitted that P.W. 9 claimed that he as well as deceased were returning after playing football but P.W. 2 Ranjeet Paswan, admitted, in his cross-examination that nobody was playing football. He further submitted that the prosecution witnesses made contrary statements on the point of manner of occurrence as some witnesses claimed that Dev Nandan Mahto caught the deceased, whereas some witnesses stated that Dev Nandan Mahto had only given order to shoot the deceased. He further submitted



that postmortem report of the deceased goes to show that firearm injury was found on the temple of the deceased but some witnesses claimed that the firing was made from front side of the deceased. Similarly, some witnesses claimed that before making firing on the deceased a scuffled took place between deceased and the appellants and others, whereas some witnesses claimed that appellant Raghu Nandan Mahto all of a sudden opened fire on the deceased.

12. He, next, submitted that the postmortem report of deceased also negates the claim of prosecution witnesses because some witnesses claimed that the firing was made from the distance of 4-5 yards, whereas some witnesses claimed that the appellant Raghu Nandan Mahto shot fire putting firearm on the temple of deceased and, moreover, blackening was found on the wound of the deceased and, therefore, the aforesaid circumstance also negates the claim of the prosecution witnesses. He, next, submitted that the conduct of family members of deceased was also suspicious as all the family members of deceased admitted that they had not gone to hospital along with deceased and the aforesaid circumstance reflects that the family members of deceased, who have been examined in present case as prosecution witnesses, were not



present on the place of occurrence when the occurrence took place and they came on the place of occurrence after taking away the deceased to the hospital and the aforesaid circumstance clearly indicates that the prosecution witnesses, who claimed themselves to be eye witnesses, actually had not seen the actual occurrence.

13. He, next, submitted that the clothes of deceased were neither seized nor produced before the court and, moreover, so-called eye witnesses made contrary statements in respect of clothes of the deceased. He further submitted that two bullet fragments were found at the time of postmortem examination of the deceased but no bullet was seized nor produced before the court. He also submitted that, it is the matter of common sense that if a fire is made from the close range, fragmentation of cell is not possible.

14. He, next, submitted that the inquest report of the deceased also appears to be doubtful as a wrong police case number has been mentioned and after taking all the above stated circumstances into consideration, it is obvious that prosecution could not succeed to prove its case beyond all shadow of reasonable doubts.

15. On the other hand, learned Additional Public



Prosecutor appearing for the State refuted the above stated submissions advanced on behalf of the appellants arguing that the learned trial court has rightly convicted and sentenced the appellants after evaluating the prosecution evidence. He submitted that all the eye witnesses, specifically, stated that it were appellants and others FIR named accused, who participated in the alleged crime having shared common intention and, therefore, it cannot be said that learned trial court failed to appreciate the evidence in its right perspective. He further submitted that, no doubt, some minor contradictions have occurred in the deposition of prosecution witnesses but only on the ground of above stated minor contradictions, the entire prosecution case cannot be discarded.

16. Having heard the above stated contentions of both the parties, I went through the records along with the lower court records. The only question arises for determination as to whether the prosecution has adduced sufficient evidence to prove the guilt of appellants or not and impugned judgment of conviction and sentence order are liable to be sustained or not.

17. As, I have already stated that prosecution examined, altogether, 11 prosecution witnesses out of them P.W. 1, P.W. 2, P.W. 3, P.W. 4, P.W. 5, P.W. 6, P.W. 7, P.W. 8 and P.W.



9 claimed themselves to be eye witnesses of the alleged occurrence, whereas P.W. 10 is the Investigating Officer and P.W. 11 is the doctor, who held postmortem examination on the dead-body of deceased.

18. First of all, I would like to refer the deposition of P.W. 11 Dr. Narendra Kumar Singh. This witness states that on 3.1.2005 at 8.30 A.M., he held postmortem examination on the dead-body of deceased Ajit Paswan and found following external injuries on the dead-body:-

(I) Lacerated injury left side of temporal region of scalp 4" x 2 "

(II) In the middle of injury No. 1, there were two rounded opening in the skull measuring $\frac{1}{2}$ " x $\frac{1}{4}$ " diameter which is communicating in cranial cavity. There is blackening of skin scalp around the injury.

This witness further states that on opening of scalp two metal fragments appears to be remnant of bullet found in the cranial cavity, which was sealed and handed over to the constable, who had brought the dead-body of the deceased Ajit Paswan. This witness further states that time elapsed since death was 6 hours to 36 hours and cause of death was due to



haemorrhage and shock as a result of severe head injury caused by firearm. This witness proved the postmortem report as Ext. 4. This witness admits in his cross-examination that there may be difference in nature of injury in case of firing as made in short range and long range. This witness further admits that he mentioned Danapur P.S. Case No. 5/05 in postmortem report. The perusal of testimony of P.W. 11, it is obvious that deceased Ajit Paswan died of firearm injury, which was found on his temple. Moreover, the death of deceased is not in dispute.

19. Now, I would like to deal with deposition of P.W. 10, who was Investigating Officer of the case. This witness states that he recorded the statement of P.W. 9 on 2.1.2005 and P.W. 9 having found the contents of his *fard-e-beyan* true and correct, put his signature on the *fard-e-beyan* and the aforesaid *fard-e-beyan* was witnessed by one Sudhir Kumar. This witness proved *fard-e-beyan* of P.W. 9 as Ext. 2.. Furthermore, this witness states that on the basis of *fard-e-beyan* of P.W. 9, he prepared formal first information report, which was marked as Ext. 2/1 and took the charge of investigation. This witness further states that he recorded further statement of P.W. 9 and inspected place of occurrence. This witness states that the place of occurrence was of field of appellant Dev Nandan Mahto,



which was situated in village Lakhni Bigha. This witness further states that on the north side of the aforesaid land, there was a hut in which the appellants runs illegal *Sharab Bhathi*. This witness further claims that at the distance of 10 feet towards south side from the aforesaid hut, he found copious of blood fallen on the land and towards North side of the place where blood had fallen, there was cemented *Nad*. This witness further claims that he found one live cartridge of .315 bore rifle and three empty cartridges lying near the aforesaid cemented *Nad*. This witness further states that the house of the deceased was towards west side at the distance of 150 yards, whereas the house of appellants was towards west-south side at the distance of 600 yards from the place of occurrence. This witness claims that he prepared seizure list of seized cartridges in presence of P.W. 1 and P.W. 2, who put their respective signatures on the seizure list. This witness proved the seizure list as Ext. 2/2. This witness further states that he recorded the statement of witnesses and prepared inquest report. This witness proves the inquest report as Ext 3. He also claims to have recorded statement of appellants and after that submitted charge-sheet against the appellants and accused Jitendra Kumar @ Sadhu Chaudhary. On being cross examined, this witness claims that there was *Sharab*



Bhathi on the place of occurrence but he could know about the *Sharab Bhati* when he reached on the place of occurrence and the aforesaid *Sharab Bhathi* belonged to appellant Dev Nandan Mahto. This witness admitted that P.W. 9 and one Soni Kumari claimed before him that Soni Kumari was teased on the alleged date of occurrence. This witness further admitted that he had not recorded the statements of co-villagers, who had their houses surrounding the place of occurrence. This witness further admitted that he had gone to the house of appellants and others but he did not find the appellants and others at their houses. This witness further admitted that there was no firing when he reached on the place of occurrence. This witness further admitted that the inquest report was not prepared in his presence rather the same was prepared at Hospital. The perusal of statement of this witness goes to show that the place of occurrence was near *Sharab Bhathi* of appellant Dev Nandan Mahto and, furthermore, the statement of this witness goes to show that P.W. 9 and one Soni Kumari had claimed before him that on the alleged date of occurrence, the said Soni Kumari was teased.

20. Now, I would like to see the statements of those prosecution witnesses, who claim themselves to be eye



witnesses of the alleged occurrence.

21. P.W. 1, Ragho Paswan, claims himself to be eye witness of the alleged occurrence and states that, at the time of alleged occurrence, he was at the roof of his house and heard noise. This witness claims that he saw towards *Daru Bhathi* from his roof and noticed that 4-5 persons had assembled there. This witness claims that he identified appellants Dev Nandan Mahto, Raghu Nandan Mahto, Sadhu Mahto, Ajai Mahto and deceased Ajit Kumar. This witness further claims that the appellants and others were scuffling with his nephew Ajit Kumar. He also noticed that appellant Dev Nandan Mahto caught his nephew Ajit Kumar and after that he heard sound of firing and Ajit Kumar fell down on the ground. He further claims that he got down from his roof and went running near the place of occurrence but all the above stated persons fled away towards west side making firing and giving threatening to him as well as others. This witness further claims that when the appellants and others left the place of occurrence, he went near Ajit Kumar and noticed firearm injury on the temple of Ajit Kumar and also noticed that one empty cartridge was lying on the ground. This witness further claims that he brought Ajit Kumar to his house and after that took him to Hospital, where



Ajit Kumar was declared brought dead. This witness further claims that police recovered empty cartridges. However, this witness states that seizure list was prepared by the police in his absence though he had signed the aforesaid seizure list, which has been marked as Ext 1. On being cross examined, this witness admits that there were several houses around the place of occurrence. This witness denied the suggestion of defence that he has deposed against the appellants due to previous enmity. It is obvious from deposition of this witness that defence failed to confront this witness on several material important points.

22. P.W. 2, Ranjeet Paswan, also claims himself to be eye witness of the alleged occurrence and states that at the time of alleged occurrence, he was at his house and having heard the noise, he came out the house and saw that appellants and others had encircled deceased Ajit Kumar and appellant Dev Nandan Mahto ordered to shoot Ajit Kumar and, thereafter, appellant Raghu Nandan Mahto shot fire from his pistol, which hit on the left temple of the deceased. This witness further claims that Sujit Mahto and others started making firing from their respective firearms and also threatened him and other persons. This witness further claims that he went near Ajit



Kumar and while Ajit Kumar was being taken to hospital, he succumbed to his injury on his way. This witness also claims that three empty cartridges and one live cartridge as well as blood stained earth were seized by the police in his presence. This witness identified his signature on seizure list as Ext. 1/1. This witness further claims that he learnt that appellants Dev Nandan Mahto, Raghu Nandan Mahto and one Sadhu Mahto were caught with their respective weapons. On being cross examined by the defence, this witness admitted that his house was at the distance of two *Bans* from the place of occurrence. This witness further states that Ragho Paswan (P.W. 1), Akhilesh Paswan (P.W. 3), Gajendra Paswan (P.W. 4), Vijay Kumar Sao (P.W. 5), Babloo Kumar (P.W. 7), Ramdei Devi (P.W.8), Sunil Paswan (P.W. 9) and Soni Kumari had gone to the place of occurrence and except the aforesaid persons, there was no any other persons. However, again this witness claims that apart from his above stated family members, 100-250 villagers had also reached near the place of occurrence but he expressed his inability to disclose the names of those persons. This witness further admitted at paragraph 10 of his cross-examination that he as well as others reached over the place of occurrence after ten minutes of the alleged occurrence and, moreover, the



appellants and others (accused persons) had already fled away before arrival of this witnesses and others. This witness further admitted at paragraph 11 of his cross-examination that after 10 – 15 minutes of fleeing of appellants and others, the police reached there and when he reached near his brother deceased Ajit Kumar, the appellants and others had already left the place of occurrence. This witness further admitted in paragraph 12 of his cross-examination that there was no previous enmity between deceased and appellants and others. This witness admits that no accused was apprehended by the police in his presence. This witness further admitted that when the P.W. 10 seized the articles from the place of occurrence, he was not present there but when P.W. 11 prepared seizure list he was present there.

23. P.W. 3, Akhilesh Paswan also claims himself to be eye witness, and states that at the time of alleged occurrence, he was in his field and from there he noticed that a hot exchange of words was going on at *Bhathi* of appellant Dev Nandan Mahto. This witness claims that he went running there and saw that deceased Ajit Paswan and informant Sunil Paswan (P.W. 9) were encircled by the appellants and others and appellant Dev Nandan Mahto ordered to shoot deceased Ajit



Kumar and, thereafter, Raghu Nandan Mahto shot fire, which hit on the temple of deceased Ajit Kumar, as a result whereof, he fell down on the ground. This witness further claims that when villagers started assembling there, the appellants and others fled away towards their house making firing with an object to terrorise the villagers. This witness also claims that live and empty cartridges and blood stained earth were recovered from the place of occurrence. However, this witness for the first time discloses the cause of alleged occurrence stating that appellant Dev Nandan Mahto used to run illegal *Sharab Bhathi* and police had raided his *Sharab Bhathi* and appellant Dev Nandan Mahto suspected the hands of deceased Ajit Kumar behind the above stated raid of police. On being cross examined, this witness claims that his field was at the distance of 3 – 4 *Bans* from the place of occurrence. This witness further admitted that deceased Ajit Paswan was not playing football with him and at that time nobody was playing football in the field. This witness further states that distance between field of football as well as place of occurrence was about half mile. This witness further admits that when he reached on the place of occurrence having heard noise, he found the appellants and deceased as well as several villagers including P.W. 1, P.W. 9, P.W. 2, P.W.4, P.W. 5



and several others over the place of occurrence. This witness further states that, at the time of alleged occurrence, the firstly the hot exchange of words took place and after that firing was made when appellant Dev Nandan Mahto ordered to shoot the deceased uttering that the deceased had given information to police. This witness further states that all the appellants and other accused had opened fire. This witness also admitted that firing of Raghu Nandan Mahto hit deceased but the firing made by others did not hit to anybody. This witness further admitted that after the occurrence, Ajit was taken to hospital but he did not go to the hospital.

24. P.W. 4, Gajendra Paswan, is a chance witness. This witness claims that while he was returning from *Bazar*, he saw the occurrence. This witness also repeated almost the same story, which has been stated by P.W. 1, P.W. 2 and P.W. 3. However, this witness claims that he had witnessed the alleged occurrence from at the distance of 2 – 3 *Bans* . This witness admitted that prior to alleged occurrence, there was no dispute between appellants and deceased. This witness further admits that Ajit Paswan had sustained only one firearm injury and the occurrence was witnessed by P.W. 9, P.W. 1, P.W. 2, P.W. 5 and several others, who were standing at the distance of 2 *Bans* from



the place of occurrence when occurrence took place. This witness further states that when police came on the place of occurrence, P.W. 1, Ragho Paswan, and P.W. 2, Ranjeet Paswan, were present there and the dead-body had already been taken to hospital before arrival of the police. This witness further states that the deceased was taken to hospital on a motorcycle by Sudhir Paswan and Ragho Paswan (P.W. 1). This witness further admits that appellants Dev Nandan Mahto, Raghu Nandan Mahto and accused Sadhu Mahto were not caught by the police in his presence. This witness further states that at the time of alleged occurrence deceased had wore half pant and *Ganji*.

25. P.W. 5, Vijay Kumar Sao, also claims that, at the time of alleged occurrence, he was at his house and having heard the noise, he went near the *Bhathi* of appellant Dev Nandan Mahto and saw the alleged occurrence. This witness also states the manner of occurrence as stated by other witnesses. This witness also states that appellant Dev Nandan Mahto was illegally running *Sarab Bhathi* and had suspected that it was deceased, who had given information to police in respect of his *Sharab Bhathi*. This witness admits in his cross-examination that his house was at the distance of 10 *Bans* equivalent to 200 metres from the place of occurrence. This



witness further states that when he as well as others reached near the place of occurrence, the appellants and others had encircled the deceased Ajit Kumar. This witness further states that after alleged occurrence, deceased Ajit Kumar was taken to hospital by P.W. 1, Ragho Paswan and P.W. 3, Akhilesh Paswan. This witness further states that within half an hour of the alleged occurrence, police reached at the place of occurrence. This witness further states that Ajit was lying near the *Sharab Bhathi* of appellant Dev Nandan Mahto.

26. P.W. 6, Chandrika Paswan, is uncle of deceased. This witness states that having heard the noise, he as well as 40-42 other persons went running to the place of occurrence and witnessed the occurrence in which deceased Ajit was killed. This witness further states that when firing was made, he was at his field and having heard the sound of firing, he came at the place of occurrence. However, this witness claims that Ajit had not sustained firearm injury before his arrival at the place of occurrence. This witness further admits that P.W. 1 and others went running to the place of occurrence along with him. However, this witness at para 4 of his cross-examination admitted that when Ajit sustained firearm injury, he was alone and there was no other members of his family along



with him. This witness states that, at the time of occurrence, deceased Ajit had wore red colour shirt. However, again this witness at para 9 of his cross-examination admits that after half an hour of the noise, he came at the place of occurrence. This witness further states that between the aforesaid half an hour the firing was made.

27. P.W. 7, Babloo Kumar, also claims himself to be eye witness of the alleged occurrence and states that, at the time of alleged occurrence, he was at his house and having heard the noise, he came out from his house and saw the occurrence. This witness states in his cross-examination that his house was at the distance of 2 – 2 ½ *Bansh* from the place of occurrence. This witness further admits that Sunil Paswan (P.W. 9), Vinod Paswan, Lalit Sao, Akhilesh Paswan and others came at the place of occurrence having heard the noise. This witness further admits that except deceased Ajit none had sustained any injury. This witness further admits that there was no animosity between the appellants and deceased Ajit Kumar. This witness states that, at the time of alleged occurrence, deceased Ajit Kumar had wore shirt and half paint.

28. P.W. 8, Ramdei Devi, is the mother of deceased and she, too, claims that having heard the noise, she came out



from her house and saw the alleged occurrence. This witness states, in her cross-examination, that the place of occurrence was at the distance of 2 – 2 ½ *Bansh* from her house. She further states that there was *Sharab Bhathi* on the place of occurrence. This witness claims that Ajit sustained firearm injury in her presence and prior to making fire, there was no scuffle between deceased and his assailants. This witness further claims that at the time of alleged occurrence, P.W. 9 had got hide himself behind the sheesham tree. This witness further admits that Soni Kumari was her niece.

29. P.W. 9, Sunil Paswan, is the informant as well as elder brother of deceased and he, too, claims himself to be eye witness of the occurrence. This witness states that he as well as Ajit Kumar were returning after playing football and when they reached near *Sharab Bhathi* of appellant Dev Nandan Mahto, the appellant Dev Nandan Mahto, Sujit Mahto, Shiv Mahto, Ajay Mahto and one Sadhu Mahto having armed with pistols encircled his brother Ajit Kumar, whereas Raghu Nandan Mahto opened fire on Ajit Kumar, as a result of which, Ajit Kumar sustained firearm injury on his left temple. This witness further claims that being afraid of the aforesaid occurrence, he got himself hide behind sheesham tree and on the noise his



mother and other witnesses came there but appellants and others left the place of occurrence and they went on the roof of their house and made indiscriminate firing. This witness further states that appellants suspected that police had raided their *Sharab Bhathi* on the basis of information of the deceased and that was the reason of alleged occurrence. On being cross examined, this witness states that the appellants had encircled only deceased Ajit Kumad and he got hide himself behind a sheesham tree, which was at the distance of one *Bansh* from the place where appellants and others had encircled the deceased Ajit Kumar. This witness further admits that out of fear, he could not raise alarm nor made any attempt to save his brother. This witness further admits at para 10 of his cross-examination that he could not hear as to whether any one had given the order to shoot the deceased or not but he could see that appellant Raghu Nandan Mahto had opened fire on the deceased. Again, at para 11 of his cross-examination, this witness states that something was uttered by appellant Dev Nandan Mahto and after that firing was made but what was uttered by Dev Nandan Mahto, he could not hear. This witness further admits that police raided the house of appellants and others but he did not accompany the police when police went to raid the house of



the appellants and others. This witness further states at paragraph 21 of his cross-examination that the above stated *Sharab Bhathi* was at the distance of 150 yards from his house.

30. On perusal of the above stated statements of prosecution witnesses, it is obvious that P.W. 1, P.W. 2, P.W. 3, P.W. 4, P.W. 5, P.W. 6, P.W. 7, P.W. 8 and P.W. 9 claimed themselves to be eye witnesses of the alleged occurrence but except P.W. 9, all the other remaining prosecution witnesses have admitted that they reached over the place of occurrence when they heard noise and sound of firing and only P.W. 9 claims that he was returning along with deceased when alleged occurrence took place and witnessed the alleged occurrence from behind the sheesham tree. No doubt, Investigating Officer (P.W. 10) did not mention about any sheesham tree while describing the place of occurrence at para 2 of his deposition but at para 3 of his examination-in-chief, P.W. 10 (Investigating Officer) has mentioned that in north side of place of occurrence, there was orchard of one Ram Awtar and, therefore, it cannot be said that there was no tree at all near the place of occurrence. P.W. 1, P.W. 2, P.W. 6, P.W. 8 and P.W. 9 are family members of deceased whereas P.W. 3, P.W. 4, P.W. 5 and P.W. 7 are stranger to the family of deceased but they are co-villagers



of the deceased. No doubt, some minor contradictions have occurred in depositions of above stated prosecution witnesses on the point of clothes of deceased as well as manner of occurrence but the aforesaid minor contradictions do not go to the root of the prosecution case and only on the basis of minor contradictions the testimonies of prosecution witnesses cannot be discarded. However, it has to be seen as to whether the above stated eye witnesses had actually seen the killing of the deceased or not.

31. P.W. 1 has claimed that appellants were scuffling with deceased Ajit Kumar and Dev Nandan Mahto caught the deceased Ajit Kumar and after that he heard sound of firing. P.W. 1 has not been confronted by the defence on the aforesaid point. However, except P.W. 1 not a single so-called eye witnesses claimed that appellant Dev Nandan Mahto caught the deceased and after that firing was made rather P.W. 2, P.W. 3, P.W. 4, P.W. 5, P.W. 6 and P.W. 8 claimed that appellant Dev Nandan Mahto had given order to shoot the deceased Ajit Kumar, whereas P.W. 7, Babloo Kumar and P.W. 9 informant Sunil Paswan have nowhere stated that appellant Dev Nandan Mahto gave order to shoot the deceased. According to the claim of P.W. 9, he was more nearer to the deceased and



appellants than the other prosecution witnesses when occurrence took place and P.W. 9 has, nowhere, stated that the appellant Dev Nandan Mahto had given order to shoot deceased. There is inconsistency in the depositions of the prosecution witnesses on the above stated point. Therefore, in my view, prosecution could not succeed to prove this fact beyond all shadow of reasonable doubt that appellant Dev Nandan Mahto had given order to shoot the deceased and on the instigation of appellant Dev Nandan Mahto, appellant Raghu Nandan Mahto had opened fire on the deceased. Furthermore, the eye witnesses claimed that all the appellants and other accused encircled the deceased when deceased reached near *Sharab Bhathi* of Dev Nandan Mahto. Therefore, it is admitted case of the prosecution that alleged occurrence took place near *Sharab Bhathi* of Dev Nandan Mahto. The appellants Raghu Nandan Mahto, Sujit Mahto and Shiv Mahto are family members of appellant Dev Nandan Mahto and, therefore, their presence near the *Sharab Bhathi*. is quite natural. Furthermore, I find that no specific overt-act has been attributed against appellant Sujit Mahto, Shiv Mahto and it is only stated that they along with others encircled the deceased but, according to the prosecution case itself, they did not touch even the body of deceased when the occurrence took place and,



therefore, only on the ground of their presence over the place of occurrence, it cannot be said that they had shared common intention along with appellant Raghu Nandan Mahto. The prosecution witnesses claimed that all the appellants were armed with firearms and the appellants were charged for the offence punishable under Section 27 of the Arms act but the learned trial court did not convict the appellants except appellant Raghu Nandan Mahto for the offence punishable under Section 27 of the Arms Act and, therefore, the learned trial court dis-believed the claim of the prosecution witnesses that, at the time of alleged occurrence, appellants, except appellant Raghu Nandan Mahto, were carrying firearm in their hands. Moreover, except vague claim of prosecution witnesses that all the appellants made indiscriminate firing, there is nothing in the evidence of prosecution witnesses that the appellants except appellant Raghu Nandan Mahto used their respective firearms for causing injury to deceased or any other person. Therefore, in the aforesaid circumstance, I am of the opinion that the prosecution failed to prove the charges framed against appellants, except appellant Raghu Nandan Mahto, beyond all shadow of reasonable doubts and the appellants, except Raghu Nandan Mahto, are entitled to get benefit of doubt.



32. So far appellant Raghu Nandan Mahto is concerned, almost all the eye witnesses claimed that it was the appellant Raghu Nandan Mahto, who shot fire on the deceased and, therefore, it is obvious that prosecution succeeded to prove charge under Sections 302 of the Indian Penal Code and 27 of the Arms Act against the appellant Raghu Nandan Mahto.

33. No doubt, blackening was found on the wound of deceased in course of postmortem examination and some witnesses claimed that firing was made from 4 – 5 yards, whereas some witnesses claimed that the firing was made from very close range but only on the basis of aforesaid contradictions, the entire testimonies of prosecution witnesses cannot be discarded. However, it is well settled principle of law that if there is contradictions between ocular evidence and medical evidence and the ocular evidence inspires confidence, the ocular evidence shall prevail over medical evidence because medical evidence is only mere an opinion. Therefore, in the aforesaid circumstance, even if there is some minor contradictions in the statements of prosecution witnesses as well as medical evidence, then also the testimonies of eye witnesses cannot be rejected.

34. It has come in the depositions of prosecution



witnesses that the house of deceased was at the distance of 150 yards from the place of occurrence and prosecution witnesses, who are family members of the deceased, except P.W. 9, admitted that, at the time of alleged occurrence, they were at their house and came out from the house having heard the noise and witnessed the occurrence. Admittedly, the house of deceased was in very close vicinity of the place of occurrence and, therefore, it cannot be said that the family members of deceased were not in a position to hear the noise and to reach at the place of occurrence within short span of time. Therefore, even if it assumed that above stated prosecution witnesses went to the place of occurrence when the scuffle was going on between the appellants and deceased, then also it cannot be said that they had not seen the alleged occurrence.

35. According to the prosecution case, the alleged occurrence took place at 2.00 P.M. and within half hour of the alleged occurrence, the police reached at the place of occurrence and the *fard-e-beyan* of P.W. 9 was recorded at 3.00 P.M., therefore, it is obvious that just after the alleged occurrence, the present case was lodged and the P.W. 9 disclosed that it was appellant Raghu Nandan Mahto, who shot fire on the deceased. In the aforesaid circumstance, I am of the



opinion that the learned trial court rightly convicted the appellant Raghu Nandan Mahto for the offences punishable under Section 302 of the Indian Penal Code and Section 27 of the Arms Act and there is no scope to interfere into the impugned judgment of conviction and sentence order, so far as it relates to appellant Raghu Nandan Mahto.

36. On the basis of aforesaid discussions, Cr. Appeal (DB) No. 690 of 2016 and Cr. Appeal (DB) No. 709 of 2019 are allowed and, accordingly, the impugned Judgment of conviction and sentence Order are, hereby, set aside so far as it relates to appellant Dev Nandan Mahto in Cr. Appeal (DB) No. 690 of 2016 and appellant Shiv Mahto and Sujit Mahto in Cr. Appeal (DB) No. 709 of 2016. The appellants Dev Nandan Mahto, Shiv Mahto and Sujit Mahto are acquitted of the charges framed against them. They are on bail and, therefore, they are discharged from the liabilities of their respective bail bonds.

37. So far as Cr. Appeal (DB) No. 826 of 2016 filed on behalf of the appellant Raghu Nandan Mahto is concerned, the same stands dismissed and the impugned Judgment of conviction and sentence order so far as it relates to appellant Raghu Nandan Mahto in Cr. Appeal (DB) No. 826 of 2016 is, concerned, the same is hereby, confirmed.



38. In the aforesaid manner, all the aforesaid
three appeals stands disposed of.

(Hemant Kumar Srivastava, J)

Rajendra Kumar Mishra, J: I agree

Spd/-

(Rajendra Kumar Mishra, J)

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