IN THE HIGH COURT OF JHARKHAND AT RANCHI

(Criminal Appellate Jurisdiction)

Criminal Appeal (DB) No. 330 of 2013

[Against the judgement of conviction dated 21.03.2013 and the order of sentence dated 23.03.2013 passed by the learned Additional Sessions Judge-IV, Dhanbad in Sessions Trial Case No. 436 of 2011]

Kanhaiya Nishad, son of Ram Charitra Nishad, resident of Kalali Road, Tetulmari, P.O.-Sijua, P.S.- Katras (Tetulmari), District-Dhanbad

..... Appellant

Versus

The State of Jharkhand ..... Respondent

(Heard through V.C. on 23.09.2020)

PRESENT
HON'BLE MR. JUSTICE SHREE CHANDRASHEKHAR
HON'BLE MR. JUSTICE RATNAKER BHENGRA

For the Appellant : Mr. Arwind Kumar, Advocate
For the State : Mrs. Nehala Sharmin, APP
For the Informant : Mr. Ranjan Kumar Singh, Advocate

J U D G E M E N T

CAV on : 23rd September,2020 *Pronounced on: 1st October,2020*

Per, Shree Chandrashekhar, J.

In S.T. Case No. 436 of 2011, the appellant has been convicted and sentenced to RI for life and a fine of Rs. 10,000/- under section 302 IPC and RI for three years and a fine of Rs. 3000/- under section 27 of the Arms Act. There is a default stipulation to undergo further imprisonment for RI for one year on each count.

2. On the basis of the fardbeyan of Manoj Kumar Rawani which was recorded at PST ground around 20:45 hours on 15.04.2011 by R.K. Verma, officer-in-charge of Tetulmari Police Station, Katras (Tetulmari) PS Case No. 87 of 2011 was lodged under section 307/34 IPC and section 27 of the Arms Act against Kanhaiya Nishad and two unknown persons. After the investigation a charge-sheet was submitted against Kanhaiya Nishad, the appellant, and he has faced the trial on the charge of committing murder of Binod Rawani by firearm. During the trial the prosecution has examined 13 witnesses out of whom PW-5, PW-6 and PW-7 are family members of Binod

Rawani and PW-1, PW-2 and PW-3 are his friends.

3. PW-1 and PW-2 are friends of the appellant as well as the deceased. The prosecution has projected them as eye-witnesses. PW-1 has deposed in the Court that he has given Rs. 93, 600/- to Binod Rawani for his admission in Mining Course and Binod Rawani in turn gave money to Kanhaiya Nishad for managing his admission but it could not be arranged. He therefore asked Binod Rawani for money however when Binod Rawani asked the appellant he did not return money as promised. Finally, he agreed to return money on 15.04.2011 and on that day he called Binod Rawani and asked him to come at PST ground, Tetulmari. At the PST ground he has seen Kanhaiya Nishad talking to someone on phone. At that time two unknown persons were also standing near him. They talked something among themselves and then the appellant came near Binod Rawani. The appellant said about his inability to arrange money and while Binod Rawani was expressing his displeasure in the mean-time the appellant whipped out a pistol and shot at Binod Rawani. He ran away raising hulla, several persons rushed there and the appellant fled away. Thereafter PW-1 had gone to the house of Binod Rawani and informed his parents about the occurrence. He has stated in his cross-examination that police arrived at the place of occurrence after about half an hour of the occurrence and the brother of Binod Rawani has taken him to hospital after the police came there and made enquiries. He further says that Binod Rawani was taken to hospital on a bike by his brother and a friend of his brother. He admits that Tetulmari Police Station is near the place of occurrence but can not say who first gave information in the police station. He admits that money was due from Binod Rawani and he was under stress because even after one year he did not return his money. He has further admitted that the brother of Binod Rawani and the appellant had fought election for Mukhiya but he does not know whether the appellant had won the election. PW-2 has also narrated almost a similar story about the incident. He has deposed in the Court that the appellant had called Binod Rawani at PST ground to return money which was given to him by Binod Rawani for arranging admission of PW-1 in a Mining College. He says that at about 20:30 PM he had gone to PST ground, Tetulmari and seen the appellant there talking to someone on phone with two unknown persons standing near him. He has stated that Binod Rawani became annoyed when

the appellant told him that he could not arrange money. When the appellant fired from a pistol at Binod Rawani he ran away and called the elder brother of Binod Rawani. In his cross-examination PW-2 has stated that the distance between Tetulmari Police Station and PST ground is about 100-150 meters and within 20-25 minutes of the occurrence the police came there. He did not go to the police station and says that after the police arrived at the place of occurrence Binod Rawani was taken away somewhere by his brother on a motor-bike. To a suggestion by the defence, he has denied knowledge that Manoj Kumar Rawani, brother of the deceased, had fought election of Mukhiya.

4. PW-3 and PW-4 have deposed in the Court that they have paid money to the appellant however he could not manage their admission in Mining Course and when they asked for money he was making excuses. PW- 3 has stated that he is a student in Katras college; he has never appeared in the entrance test for admission in the Engineering Course and that; for admission in a Mining College advertisement is published, applications are invited and admission is offered to the successful candidates. About payment of Rs. 59,000/- to the appellant he admits that he has not lodged any complaint with the police. PW-4 is a student of History (Hons.) and he also admits that admission in a Mining College is given to a candidate who clears the entrance test. He came to know about murder of Binod Rawani through Newspaper and he has not lodged a complaint against the appellant regarding payment of Rs. 60,000/- to him.

5. PW-5 is father of the deceased. In the evening he was at home with his wife. He has deposed in the Court that his son informed him that the appellant has called him to return money which was given to him by PW-1, Megh Lal, for his admission. He has said that PW-1 came running and told him that the appellant has shot his son at PST ground. He then ran to PST ground with his wife where he has found his son drenched in blood. He was writhing in pain and told him that the appellant has shot at him. In the meantime a crowd gathered there and the police also arrived there. In his cross-examination PW-5 has stated that the place of occurrence is just behind Tetulmari police station and the police has taken his son to hospital, but he cannot say whether the police has recorded statement of Binod Rawani and he has also shown ignorance how his son was taken to hospital by the police.

Strangely enough, he has simply said that he came to know that his son has died. PW-6 is mother of the deceased. She has stated that at about 8:00 PM she was at home. Binod Rawani , her son, got a phone call from the appellant and left home saying that the appellant has called him to give money and after sometime PW-1 came there and said that the appellant has fired at Binod Rawani. She has gone to PST ground and found her son injured. Her son has told her that the appellant has fired at him. She has further stated that PW-1 has given money to her son and her son had handed over money to the appellant for admission of PW-1 in Mining Course. She has said that people had taken her son hospital and in the night she received information that her son has died. In her cross-examination she has stated that by the time she reached at PST ground the police had already arrived there. She has also stated that the police did not record statement of her son nor has the police made seizure of any article at PST ground. PW-7 is elder brother of the deceased. He was somewhere around his house and at around 8:30 PM he received a phone call from Murari Singh that the appellant has shot Binod Rawani at PST ground. He has seen his brother in injured condition. He has stated in the Court that PW-2 told him that the appellant had called his brother several times for returning Rs. 93,600/- which PW-1 had given to his brother for admission in Mining College and that the appellant called Binod Rawani at PST ground for returning money. When Binod Rawani asked for money a verbal exchange ensued between them and the appellant fired a pistol shot at Binod Rawani. PW-7 has stated that the police arrived there after sometime and made inquiries from them. He has read his statement recorded by the police and affirmed that his fardbeyan was recorded at PST ground. He brought his brother at Chowk on a motorcycle and thereafter arranged a vehicle and took him to PMCH, Dhanbad, however, the doctor declared him brought dead. Next morning a panchnama was prepared and his dead body was sent for postmortem examination. He has stated that police seized blood-soaked soil in his presence and a seizure memo was prepared on which Ganga Dhar Mahto has put his signature. In his cross-examination PW-7 has admitted that he has fought last election for the post of Mukhiya against the appellant which the appellant had won. He has also admitted that no paper was prepared about his brother tendering money to the appellant. He has further admitted that his brother was a student of Mining College and not

the appellant. PW-9 is a resident of the locality. PW-7 has informed him over telephone about firing at his brother. He claims that he has gone to PST ground where he found Binod Rawani in injured condition. PW-7 later on told him that the appellant has shot his brother dead. He says that police has collected blood-soaked soil in his presence, however, in his cross-examination he says that the seized article was not sealed. The Investigating Officer has collected blood-stained soil from the place where Binod Rawani was found in injured condition. He has further stated that a bullet was recovered from the dead body during postmortem which was sent to the police station in the sealed condition. In his cross-examination the Investigating Officer has stated that in course of investigation he did not find any paper on money transaction. He has said that it was dark at the place of occurrence, however, there were lights around the place of occurrence.

6. The presence of PW-1 and PW-2 at the place of occurrence and at the time of occurrence has been seriously challenged by the defence. The defence has also suggested that Binod Rawani was shot by PW-1 and PW-2 or some unknown assailant and at the instance of PW-7, elder brother of Binod Rawani, they have falsely implicated the appellant in this case. The defence has tried to show that the prosecution story that the appellant has killed Binod Rawani is based on incoherent and insufficient material and conduct of PW-1 and PW-2 as well as parents of the deceased was unnatural.

7. The conduct of a witness is examined in the context of facts and circumstances of the case. The human mind is most unpredictable and so may be the conduct of a man who has just seen murder of a friend or a family member. This is almost impossible and even unrealistic to predict behavioral pattern of a witness. In *"Rana Pratap v. State of Haryana"* reported in *(1983) 3 SCC 327*, the Hon'ble Supreme Court has observed that there is no set rule of natural reaction and therefore to discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way. In *"State of Maharashtra v. Manglya Dhavu Kongil"* reported in *(1972) 3 SCC" 46*, the Hon'ble Supreme Court has observed that the Courts have to be careful not to substitute their own norms of behavior in a given situation for the norms of behavior of that witness. In *"Lahu Kamlakar Patil v. State of Maharashtra"* reported in *(2013) 6 SCC 417*, the Hon'ble Supreme Court has

elucidated the subject in the following words:

> "26. *.....,it is vivid that witnesses to certain crimes may run away from the scene and may also leave the place due to fear and if there is any delay in their examination, the testimony should not be discarded. That apart, a court has to keep in mind that different witnesses react differently under different situations. Some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene and yet some who have the courage and conviction come forward either to lodge an FIR or get themselves examined immediately. Thus, it differs from individuals to individuals. There cannot be uniformity in human reaction. While the said principle has to be kept in mind, it is also to be borne in mind that if the conduct of the witness is so unnatural and is not in accord with acceptable human behaviour allowing of variations, then his testimony becomes questionable and is likely to be discarded*".

8. The case projected by the prosecution is that PW-1 and PW-2 were present with Binod Rawani at PST ground when the incident has happened. The place of occurrence is just behind the police station and it is the evidence of prosecution that police has arrived at the place of occurrence within about half an hour of the occurrence. PW-1 has stated in the cross-examination that the police station is near the place of occurrence and PW-2 has stated that distance between the place of occurrence and the police station was about 100-150 meters. The parents of Binod Rawani have been informed immediately— they live nearby because they have also reached PST ground running, but none of these persons has informed anyone not even the police. PW-1 and PW-2 have stated that when the appellant shot at Binod Rawani they ran away from PST ground. PW-2 has called PW-7 but he has not gone to the police station or sent telephonic message to the police, and after the police arrived at the place of occurrence they had gone home. They were friends of Binod Rawani but they have not accompanied him to hospital. They have quietly gone home and do not even say that they made enquiries about Binod Rawani. As observed in *Lahu Kamlakar Patil case*, some witnesses get a shock, some become perplexed, some start wailing and some run away from the scene, but then, a witness must disclose a reason for his unusual conduct. He must say something about his conduct which in the normal circumstances appeared abnormal and his explanation given the special facts and circumstances of the case should make one believe that what he is saying is possible. PW-1 and PW-2 do not say a word why they

have acted like this. They have not said about any threat to them by the appellant at the time of occurrence rather, from their evidence it is apparent that one of them has stayed near the place of occurrence. PW-1 was not even sure about condition of Binod Rawani as in paragraph no. 2 of his examination-in-chief he has said that at the time when Binod Rawani was taken for treatment whether he was alive or not he cannot say and next he says that Binod Rawani has passed away. In "*Maruti Rama Naik v. State of Maharashtra"* reported in *(2003) 10 SCC 670*, a witness who was employed under Krishna Mahada Naik, the victim, after seeing him lying injured in a critical condition did not inform the police, went to the factory, worked there for a while and gone home. The Hon'ble Supreme Court has observed that the Court would be hesitant to place any reliance on his evidence. In *"State of Punjab v. Sucha Singh"* reported in *(2003) 3 SCC 153*, the Hon'ble Supreme Court has observed that it is humanely improbable that the father of the deceased would be a mere spectator without trying to rescue him or intervene when his son has sustained several injuries, and about the chance witness who had claimed that at the time of the occurrence he was present at a nearby field the Hon'ble Supreme Court has observed that his presence at the place of occurrence was doubtful also because he did not accompany the injured to the hospital and there was no explanation by the prosecution as to his conduct.

9. Nothing much would have been made out of the conduct of PW-1 and PW-2 in not going to the police station but their conduct as a whole is definitely suspicious because neither they have informed the police, nor gone to the hospital with their injured friend, nor raised hulla after the occurrence to call the neighbors and, above all, they have just gone home and not even cared to make enquiry about Binod Rawani.

10. There is something more in the prosecution evidence which would make presence of PW-1 and PW-2 at the time of occurrence doubtful. PW-5 and PW-6, parents of Bijay Rawani, have stated that their son received a call from the appellant at about 20:00 PM - 20:30 PM in the evening and he left home telling them that the appellant has called him to give money. At that time PW-1 and PW-2 were not present at the house of Binod Rawani. PW-1 and PW-2 do not say that Binod Rawani had called them to accompany him to PST ground nor have they stated in the Court that Binod Rawani first came

to their house and then they all had gone to PST ground. The prosecution evidence is completely silent how PW-1 and PW-2 are found at PST ground and that too at the time when the appellant had called Binod Rawani there for returning money. The evidence of PW-1 and PW-2 does not suggest that there was a fight between the appellant and the deceased where after the appellant has fired at Binod Rawani. PW-1 and PW-2 both have stated that when the appellant expressed his inability to arrange money Binod Rawani expressed his displeasure saying that he has made promises several times in the past. In their evidence, there is no indication of any hot exchange between the appellant and Binod Rawani which could have enraged him to shot at Binod Rawani. At the time of the occurrence if PW-1 and PW-2 were present there it is highly unlikely that in the presence of known persons the appellant would have shot at Binod Rawani. From the evidence of PW-1 and PW-2 we gather that after the occurrence they have not cared to take Binod Rawani to hospital and they do not even know where he was taken from PST ground. The prosecution has not offered any answers to the aforesaid circumstances which create a doubt on presence of PW-1 and PW-2 at the time of occurrence.

11. Another significant aspect of this case is that the evidence of the parents of Binod Rawani does not inspire confidence. PW-5 has deposed in the Court that when he reached PST ground he found his son injured, drenched in blood and writhing in pain. He has further stated that his son told him that the appellant has fired at him. PW-5 and PW-6 were present at home when Binod Rawani left home saying that the appellant has called him at PST ground for payment of money which was given to him for arranging admission of PW-1 in Mining College. PW-6 has also stated that her son told her that the appellant has fired at him. But what makes their claim doubtful has come in their statements during cross-examination. PW-5 has stated that the police has seized blood-stained soil and PW-6 says that the police has not seized anything from PST ground. From the evidence of PW-5 it would appear that the police has arrived at the place of occurrence after he reached there, but PW-6 says that when she reached at PST ground by that time the police had already arrived there. PW-5 and PW-6 have stated that there was light (*Roshni Thee*) at the place of occurrence but the Investigating Officer has said that the place of occurrence was dark. PW-5 has stated that police

has taken his son to hospital, but his wife has said that people (Log) had taken her son to the hospital – which would have a reference about the persons who had arrived there. However, the prosecution case is that their elder son had taken Binod Rawani to hospital. The most surprising evidence is that in her cross-examination PW-6 says that she cannot say how her son was taken to the hospital. PW-5 and PW-6 have not accompanied their son to hospital and there may be a good reason for that as Binod Rawani was taken by PW-7 to a Chowk on a motorcycle and from this evidence it can be inferred that no vehicle was available there, but what makes conduct of PW-5 and PW-6 suspicious is that they have quietly gone home and there is nothing on record to show that they did exhibit any anxiety about their son. In their evidence they have simply said that they came to know that Binod Rawani has died. From the evidence of PW-5 and PW-6 it is quite apparent that there is no consistency in their testimony, though both of them have claimed that they were at home when their son left home and when PW-1 came there and told them that the appellant has shot their son they have rushed to PST ground together. But if they have gone together they would observe things at PST ground in almost like manner, and not the way they have deposed in Court. There is so vast a difference in their evidence on all material points that they have rendered themselves untrustworthy.

12. The story of oral dying declaration by Binod Rawani to his parents is not believable.

13. In *"Jaswant Singh v. State Delhi (Admn)"* reported in *(1978) 4 SCC 85*, the Hon'ble Suprme Court has observed that even on the basis of uncorroborated dying declaration conviction of an accused can be maintained. It is quite a settled position in law that an accused can be convicted solely on the basis of a dying declaration and the only requirement in law is that the dying declaration should be free from embellishments and inspire confidence of the Court. In *"Kundula Bala Subrahmanyam and Anr v. State of Andhra Pradesh"* reported in *(1993) 2 SCC 684*, the Hon'ble Supreme Court has observed that a statement made by a person on the verge of his death must be accorded a special sanctity as at that solemn moment the person is most unlikely to make any untrue statement. There is no doubt that a dying declaration becomes a very important piece of evidence and it is a reliable evidence if the Court is satisfied that the dying declaration is true and

free from any embellishment, but before acting on a dying declaration this as a fact must be established that the deceased has made a statement before the prosecution witness and at that time he was alive and in a fit state of mind.

14. PW-6 has admitted in her cross-examination that her son Binod Rawani did not give his statement to the police. PW-1 and PW-2 who were with PW-5 and PW-6 at PST ground do not say that Binod Rawani has disclosed name of the assailant to his parents. PW-7, who has taken his brother to the hospital has also not made such a claim. It is the prosecution evidence that a large crowd had gathered at the place of occurrence, however, no one has said that Binod Rawani was conscious and speaking when he was taken to hospital. The aforesaid circumstances create a serious doubt on the story of dying declaration by Binod Rawani disclosing name of the appellant to his parents as the person who has fired at him. Binod Rawani had suffered a gun shot injury and his condition can be seen from the evidence of PW-7 who has said that by the time he reached hospital his brother had died. In *"Hari Singh and Another v. State of Madhya Pradesh"* reported in *(2019) 8 SCC 677*, the story of the victim who had suffered a knife injury making a dying declaration in view of the nature of injury suffered by him was found doubtful; evidence on record revealed that the victim was not in a position to speak. The circumstances in the present case do not lend assurance to the Court to believe that Binod Rawani has made a dying declaration before his parents – most likely he met with an instant death and that was the reason no one present at PST ground has shown any urgency to take him to hospital.

15. The complicity of the appellant in the occurrence is challenged also on the ground that the place of occurrence was a dark place and in normal circumstances it is not possible that the occurrence which has happened in the evening at a place surrounded by houses and roads connecting to Station and BCCL Colony is not seen by anyone.

16. The place of occurrence is a big field surrounded by few mud-houses. Around the ground there are barren fields and bushes and a road leads to Station and another to BCCL Colony. The description of the place of occurrence would suggest that it is not a well-lighted place and the Investigating Officer has also stated in his cross-examination that it was a dark place. PW-1 says that PST ground is an open ground and on the northern side there are houses. PW-2 has stated that there are two

mud-houses on the western side of PST field; the road on the northern side goes to Station and on the southern side leads to BCCL project. PW-5 has stated that there is BCCL colony, a hospital, two schools, a Mine and newly constructed houses, around the place of occurrence. The Investigating Officer has inspected the place of occurrence and according to him there is a house of Yamuna Prasad, Holy Mother's Kids school, barren lands on the eastern and western side, a boundary on the northern side and house of Shivlal Das on the southern side – no one from the vicinity has been examined during the trial. Later, in his cross-examination the Investigating Officer has made an entirely opposite statement to what the other witnesses have earlier said in their evidence. He has stated that he did not find new houses, a Mine, schools, hospital, BCCL colony or Station Road near PST ground. From such evidence it is not possible to identify the place of occurrence. PW-1, PW-2, PW-5, PW-6 and PW-7 have suggested that there was light near the place of occurrence but the most important evidence which has come on record is statement of the Investigating Officer that after arranging proper lighting he has inspected the place of occurrence. The objective findings of the Investigating Officer about the place of occurrence and insufficient lights there cannot be brushed aside lightly.

17. The prosecution story is surrounded by several suspicious circumstances and the lapses during the investigation and lacunae in the prosecution case have hazed the story with cloud of doubts. It is definitely a suspicious circumstance that Binod Rawani was not taken to hospital by the police. The prosecution witnesses have stated that after the police arrived at the place of occurrence and made enquiries then Binod Rawani was taken to hospital. According to PW-7 he has taken his brother on a motorcycle to a Chowk, arranged a vehicle there and then took him to hospital. The prosecution has however failed to disclose the circumstances under which PW-7 was permitted to take his brother hospital on his own. It is also not understandable why Binod Rawani was not taken hospital immediately and why his brother and parents who came there shortly after the occurrence waited for about half an hour for the police to arrive and that too when they did not inform the police and it is not known who had called the police. The fardbeyan of PW-7 was recorded at 20:45 hrs. at PST ground, Tetulmari and a case was registered at 21:30 PM under section 307 IPC but strangely enough

the police has not taken any further step in the matter. PW-7 has stated that he does not know whether any entry about admission of his brother at PMCH was made or not. From hospital he came back home at about 01:45 AM - 02:00 AM and; he has gone to the hospital again at about 05:00 AM and stayed there for about 2-2 ½ hours. He came back home again at 07:00 AM - 07:30 AM and when the police called him had again gone to PST ground. He has not explained the reason for his frequent visits to hospital and what transpired at PST ground between him and the Investigating Officer. In this context this has to be kept in mind that PW-7 has stated that by the time he reached hospital his brother had died. PW-7 has stated that he cannot say whether police had recovered empty cartridge from the place of occurrence and he has admitted that in his statement before the police he has not stated that in his presence blood-soaked soil was collected by the police. The Investigating Officer has admitted that he could not arrest the other two accused and recover firearm from the appellant. He has stated that he has sealed the blood-stained soil, however, it was not sent for forensic examination. PW-13 has produced the blood-stained soil in the Court and he has admitted that description of the police station is not recorded on the sealed jar and there are several police stations within Dhanbad district. It is the prosecution evidence that a large crowd had gathered there and from evidence of PW-1 who has said that his statement was recorded by the police between 21:00 PM - 21:30 PM it is clear that the police has stayed at the place of occurrence for about half an hour, but statements of independent witnesses present there were not recorded by him. PW-11 is an inquest witness and PW-12 is the Magistrate who has recorded statement of PW-1 and PW-2 under section 164 CrPC. PW-12 has admitted in his cross-examination that in the statement of PW-1 and PW-2 it is not recorded that it was taken on oath and he has also admitted that he has not given any certificate as required under section 164 CrPC. It is fundamental in a criminal trial that the prosecution must lead sufficient evidence to establish involvement of an accused in the crime and mere ipse dixit of a so-called eye-witness whose presence at the time of occurrence is doubtful would not suffice. The materials collected during the investigation of this case are useless in large measures and vital evidences were left out.

18. Binod Rawani has suffered a homicidal death by firearm shot

has been established by the prosecution. PW-8, Dr. Shailendra Kumar who was posted as Associate Professor in the Department of FMT at PMCH, Dhanbad has conducted the postmortem examination on 16.04.2011 around 11:15 AM and found one entrance wound of firearm about half inch in diameter on the right flank of the chest of Binod Rawani. He has suffered the following injuries also:

Abrasions:

(a) 3/4" x 1/4" on the left chick,
(b) 1/2" x 1/2" on the left temple,
(c) 1" x ½" on left elbow,
(d) 1/2" x ½" on the right knee,
(e) 1/2" x 1/4" on the chin."

19. PW-8 has found 9th rib of the right flank of the chest broken by bullet which entered in the chest cavity. The bullet perforated the lower portion of the right lung, right side of the diaphragm and pierced into the right lobe of liver and stuck there. A bullet of about 7 mm in diameter and 3 cm long was recovered, sealed and handed over to the constable. In the estimation of the doctor the time elapsed since death was 12 to 18 hours and he has rendered a definite opinion that the death was caused due to hemorrhage and shock on account of injuries caused to the internal organs of Binod Rawani. PW-8 has stated that Binod Rawani was shot at from a close range, within a distance of 6 inches and he has observed burning all around the wound.

20. Under section 45 of the Evidence Act which refers to opinion of the expert the doctor's evidence is only a relevant fact. In *"State of H.P. v. Jai Lal and Others"* reported in *(1999) 7 SCC 280*, the Hon'ble Supreme Court has held as under :

> "18. *An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions*."

21. The medical evidence in this case suggests that there was a

scuffle with the deceased and not that he was fired at suddenly as spoken by PW-1 and PW-2. The prosecution case is that two unknown persons were present with the appellant at the time of occurrence and the investigating officer has deposed in the Court that he could not arrest those two unknown persons. Generally, the medical evidence plays a secondary role in a criminal trial and it is used to corroborate and strengthen the prosecution case but in a case like the present one in which the prosecution case is on shaky grounds if medical evidence does not fully support the prosecution then there would be further doubts on veracity of the prosecution story.

22. From the aforesaid discussions, it is apparent that the manner of occurrence, time of occurrence and place of occurrence are all in serious controversy in this case and the prosecution has not been able to clear the suspicious circumstances surrounding its case.

23. Mrs. Nehala Sharmin, the learned APP has contended that the prosecution has brought cogent materials to prove motive for the crime, however, we find that the prosecution has failed to prove motive on the part of the appellant. The foundation of the prosecution case is that the appellant who had conned several persons did not want to return money for which Binod Rawani was pressing for last about one year and therefore he eliminated him, but what the prosecution witnesses have said in the Court would suggest that the money story is a concoction. PW-3 and PW-4 have been examined by the prosecution on the point to show that the appellant had taken money from others also for arranging admission in Mining Course. But during the cross-examination PW-3 has admitted that he was studying in Katras College and PW-4 was a student of History and they have admitted that admission in a Mining Course is offered through entrance test. The defence has elicited from the prosecution witnesses that PW-1 was demanding money from Binod Rawani for the last one year and that the appellant was not a student of Mining Course. The prosecution story that Binod Rawani asked the appellant for arranging admission in a Mining Course does not appear probable also for the reason that he himself was a student of Mining College and the investigating officer did not find any evidence of money transaction.

24. Finally, we would conclude that the prosecution has failed to prove the charge of murder against the appellant and his conviction in

Sessions Trial Case No. 436 of 2011 is not sustainable in law.

25. Accordingly, the judgement of conviction of the appellant under section 302 IPC and under section 27 of the Arms Act dated 21.03.2013 and the order of sentence to RI for life and a fine of Rs.10,000/- under section 302 IPC and RI for three years and a fine of Rs.3000/- under section 27 of the Arms Act dated 23.03.2013 passed by the learned Additional Sessions Judge-IV, Dhanbad in Sessions Trial Case No. 436 of 2011 are set-aside.

26. Mrs. Nehala Sharmin, the learned APP states that the appellant is in jail custody.

27. Accordingly, the appellant, namely, Kanhaiya Nishad shall be set free forthwith, if not wanted in connection to any other case.

28. In the result, Criminal Appeal (DB) No. 330 of 2013 is allowed.

29. Let lower Court records be transmitted to the Court concerned, forthwith.

30. Let a copy of the judgement be transmitted to the Court concerned through 'FAX'.

(Shree Chandrashekhar, J.)

(Ratnaker Bhengra, J.)

Jharkhand High Court, Ranchi
Dated- 1st October, 2020
Sharda/S.B.-AFR