

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.123 of 2016

Arising Out of PS. Case No.-74 Year-1994 Thana- VIJAYEPUR District- Gopalganj

Vijay Singh @ Vijay Kumar Singh, son of Late Jag Bahadur Singh, Resident
of village- Sarupai Tola, Khahey, P.S.- Vijayee pur, District- Gopalganj.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant	:	Mr. Surendra Kumar Singh, Sr. Advocate Mr. Ravindra Kumar, Advocate
For the Respondent	:	Mr. Dilip Kumar Sinha, APP
For the Informant	:	Mr. Ajay Kumar, Advocate

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH
and
HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
C.A.V. JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 06-07-2022

The sole appellant in this case is seeking setting aside of the judgment of conviction dated 19.12.2015 and the order of sentence dated 02.01.2016 passed by learned Additional Sessions Judge – I, Gopalganj in Sessions Trial No. 192/2007/Registration No. 1586/2013 arising out of Vijaipur P.S. Case No. 74 of 1994 dated 21.09.1994 registered for the offence under Sections 302/34, 201 and 379/34 of the I.P.C. read with Section 27 of the Arms Act.

2. By the impugned judgment and order the appellant has been convicted for the charges under Section 302/34 of the Indian Penal Code and Section 27 of the Arms Act and has



been ordered to undergo life imprisonment and to pay a sum of Rs. 10,000/- as fine. On failure to deposit the fine the appellant shall be liable to undergo an additional period of six months. For the offence under Section 27 of the Arms Act he has been sentenced to undergo three years of imprisonment and a sum of Rs. 5,000/- as fine, in case of failure to deposit the fine he would be required to undergo imprisonment for an additional period of three months. Both the sentences are to run concurrently.

3. The First Information Report (Exhibit-4) has been lodged on 21.09.1994 at 1:30 P.M. by one Chandrashekhar Gupta, son of Faujdar Gupta resident of the village- Rasulpur, P.S.- Vijaipur, District – Gopalganj. The Sub-Inspector cum Officer-in-Charge (P.W.6) has recorded fardbeyan at 1:30 P.M. on the alleged place of occurrence (P.O.) which is said to be '*Rasulpur Sareh Jogibaba Asthan*'. In his fardbeyan the informant alleged that at about 8:30 A.M. on the same day he along with his brother Subhash Chandra Gupta (deceased) and nephew Bhola Gupta left for his native village Rasulpur as they heard that flood water had entered into their house. His brother Subhash Chandra Gupta was carrying his licensee rifle whereas the informant was himself carrying a single bore licensee gun.



At about 9:00 A.M. when they reached near ‘Rasulpur Sareh Jogibaba Asthan’, his brother Subhash Chandra Gupta stopped there watching the fishermen who were indulged in fishing. At this stage, it is alleged that in the meantime (1) Vijay Singh, son of Jangbahadur Singh lashed with rifle (2) Vishwanath Singh son of Jangbahadur Singh with rifle (3) Sanjay Singh, son of late Shivrath Singh with rifle (4) Rajesh Singh, son of Vishwanath Singh carrying a single bore gun, all resident of village Saroopai Tola Khape, P.S. – Vijaipur (5) Bharat Shahi, son of not known with rifle (6) Dharmendra Shahi, son of Bharat Shahi having one single bore gun, resident of village – Saraura P.S. Kotwali Dewariya, District – Dewariya, Uttar Pradesh (7) Ramakant Shah, son of Radha Shah carrying single bore gun (8) Yogendra Shah, son of Radha Shah lashed with a *lathi*, both residents of village – Marar (9) Majid Miyan lashed with *lathi* (10) Gorakh Ram, son of not known, village – *Babhnauli* having *lathi* in his hand along with 2-3 unknown persons came there. It is alleged that Vijay Singh said “*yahi sala Subhash hai bhun dalo*” and he fired from his rifle which hit his brother Subhash Chandra Gupta on his back side. Sanjay Singh fired from his rifle which hit on the eyes of Subhash and in the meantime Vishwanath Singh, Rajesh Singh,



Bharath Shahi, Dharmendra Shahi, Ramakant Shah started firing from their gun and rifle as a result whereof the body of the brother of the informant was riddled. One Raghubansh Singh who was an employee of Nalkoop Department was going on that way to Nalkoop, his body was also riddled and both the persons died on the spot itself.

It is then alleged that when Subhash fell down after receiving the shot one person of Vijay Singh (the appellant) went there to snatch the rifle from Subhash but he also suffered the firing which hit him and the said person died on the spot. The informant (P.W.3) claims that Sanjay Singh (co-accused) picked up the rifle of the deceased brother of the informant. The informant alleges that because of the firings there was a terror in the Sareh. The informant and others were shouting and started fleeing away towards their village. He further claims that the dead body of his brother was pulled away in the water by co-accused Ramakant Shah, Yogendra Shah, Majid Miyan and Gorakh Ram with an intention to conceal the same. The cause of the occurrence is said to be a land dispute with the family of Vishwanath Singh which



was going on for the last ten years and that in Vijaipur market the accused Vijay Singh, Sanjay Singh and Vishwanath Singh were demanding randari tax which was being opposed by the deceased brother of the informant.

4. After investigation police submitted a charge-sheet bearing no. 35 of 1998 dated 12.09.1998 against Vijay Singh (absconder) (appellant) and Sanjay Singh. Earlier a charge-sheet bearing No. 71/1994 dated 28.09.1994 was filed against co-accused (1) Majid Miyan (ii) Gorakh Ram and (iii) Ramakant Shah for the offence under Section 302/201/379/34 of the I.P.C. and Section 27 of the Arms Act. The investigation was kept pending against the co-accused (i) Yogendra Shah (ii) Vishwanath Singh (iii) Rajesh Singh (iv) Bharat Shahi and (v) Dharmendra Shahi. Later on a supplementary charge-sheet was filed bearing no. 95/1998 in which the police submitted a final form against the aforementioned five co-accused. Since no sufficient material could be found against them, they were not sent up for trial.

5. Cognizance was taken and upon finding sufficient material to proceed against the charge-sheeted accused the records were committed to the court of sessions, where charges



were framed against the appellant on 20.12.2011 for the offence under Sections 302/34, 201, 379/34 of the I.P.C. and Section 27 of the Arms Act. The appellant denied the charges and claimed to be tried.

6. On behalf of the prosecution altogether seven witnesses were examined. P.W.1 is Ram Nath Yadav who is a seizure list witness but denied his signature in the seizure list. He has been declared hostile by the prosecution. P.W.2 is Bhola Gupta who is son of the deceased Subhash Chandra Gupta, he admits his age as 12 years at the time of occurrence and claims to be an eye witness. P.W.3 is Chandra Shekhar Gupta who is the informant of the case and an eye witness. P.W.4 is Dr. Janak Lal Sharma who was deputed in Sadar Hospital, Gopalganj and had proved the post-mortem report of Raghubansh Singh as Exhibit-5 and the post-mortem report of the unknown dead body as Exhibit 5/1 respectively. P.W.5 is Dr. Tirtha Nand Singh who had conducted the post-mortem on the dead body of Subhash Chandra Gupta on 22.09.1994 at 2:00 P.M. He has proved the post-mortem report of Subhash Chandra Gupta as Exhibit 5/2. P.W.6 is Ram Pavitra Singh who was posted as Officer-in-Charge of Vijaipur police station on 21.09.1994 and had recorded the fardbeyan of P.W.3. He has



proved the fardbeyan (Exhibit 1), the formal F.I.R. (Exhibit-2), the seizure list (Exhibit – 2/1), the inquest report of Raghubansh Singh (Exhibit -3/1), the inquest report of the unknown dead body (Exhibit – 3/2) and the inquest report of Subhash Chandra Gupta (Exhibit 3). P.W.7 is one Sachintan Yadav who was not investigated by police but has been brought on behalf of the prosecution claiming that he is an eye witness.

7. On behalf of the defence Rajendra Singh (D.W.1), Laljee Mallah (D.W.2), Chandrika Mallah (D.W.3) and Brahmdeo Yadav (D.W.4) have deposed.

8. The statement under Section 313 Cr.P.C. was recorded. The appellant explained that Subhash Chandra Gupta was a person of criminal character and he had a tussle of supremacy with Chhannu Tiwary and in the said fight of supremacy both of them killed each other and Raghubansh was also killed. The case has been lodged by showing wrong place of occurrence and wrong time by taking into connivance the Investigating Officer (P.W.6). He has further alleged in his statement that the I.O. and Chandra Shekhar Gupta gave false statement and fabricated the case against the appellant. The I.O. Ram Pavitra Singh seized the gun of Rajendra Singh (D.W.1), brought the same to the police station and at the



instance of Chandra Shekhar Gupta (P.W.3) he tried to impose another serial number on the gun. The appellant claimed that he had been falsely implicated in this case as he was not present on the spot.

9. The learned trial court having examined the materials on the record came to a conclusion that the real place of occurrence is Mauza '*Rasulpur Sareh near Jogibaba Asthan*' where all the three persons were murdered and from here the dead body of Subhash Chandra Gupta was pulled away with an intention to conceal the same or to make them disappear and the dead body was taken to second place from where the dead body of Subhash Chandra Gupta was recovered. The learned trial court disbelieved the evidence of the I.O. in paragraph '11' of his deposition that the place from where the dead body of Subhash Chandra Gupta was recovered is the second place of occurrence. The learned trial court also came to a conclusion in paragraph '28' of it's judgment that from perusal of the evidence it has come to light that in respect of the occurrence the oral statements made by the informant and Bhola Gupta (P.W.2) or any other villager to the police at the place of occurrence was not recorded by police on any paper. The learned trial court held that there were doubts over



the existence of the licensee rifle of Subhash Chandra Gupta because the license was neither produced in course of investigation nor in course of trial, the charge under Section 379/34 and Section 201 I.P.C. were not proved, hence the appellant was acquitted from those charges. The learned trial court, however, rejected all other contentions of the defence and took a view that the evidences adduced in course of trial are cohesive and consistent, thus, convicted and sentenced the appellant for the offences as have been mentioned at the top of this judgment.

Submission on behalf of the appellant

10. Mr. Surendra Prasad Singh, learned senior counsel assisted by Mr. Ravindra Kumar, learned Advocate has led the argument on behalf of the appellant. Learned senior counsel submits that the learned trial court has completely erred in appreciating the evidences available on the record. It is submitted that perusal of the evidence of the two eye witnesses namely, P.W.2 & P.W.3 would show that they are inconsistent and their statements are at variance to such an extent that it may be safely concluded that neither P.W. 2 nor P.W. 3 is an eye witness to the alleged occurrence. It is pointed out that in March, 2012 when P.W. 2 deposed in course of trial he is said



to be 29 years old, the occurrence is of 21.09.1994 meaning thereby at the time of the alleged occurrence P.W. 2 was hardly about 11 years of age. As regards this, the evidence of P.W.2 admits his age as 12 years only at the time of the alleged occurrence. It is submitted that in his evidence P.W. 2 has stated about the direction of road and the precise location at which the deceased was standing and how he was killed, which is nothing but a tutored statement. He could not have knowledge of the direction such as north, south, east and west at that age and cannot remember the same for about 17-18 years after the date of alleged occurrence.

11. It is submitted that as per the prosecution story, the deceased along with his brother (P.W.3) and his son (P.W.2) had started for his native village after hearing that flood water had entered into their house. It is submitted that in such circumstance it is difficult to believe that the deceased would take his 11-12 years old son to move on foot in the flood conditions that too when he having apprehension of his own life threat was going with rifle.

12. Learned senior counsel submits that according to P.W. 2 the alleged occurrence took place at 9:00 A.M. The deceased was carrying his licensee rifle and P.W. 3 was



carrying his licensee gun. He claims that the accused persons first of all snatched the gun of his uncle (P.W.3). It is submitted that in order to prove this part of snatching of gun from P.W.3, the I.O. seized the gun of one Rajendra Singh (D.W.1). D.W.1 was holding a license of DBBL gun and in course of examination of the serial number of the gun by the forensic science laboratory, the gun number was found to be the same as that of D.W.1. In his deposition, D.W.1 has stated that when Chandra Shekhar Gupta (P.W.3) filed an application for release of the said gun in the court of learned C.J.M., he could not produce the license of the gun, therefore, the gun was not released in his name. The gun number was that of D.W.1, hence it was released in favour of D.W.1. D.W.1 was though cross-examined by the prosecution but no contradictions could be taken from D.W.1 on this point.

13. Learned senior counsel further submits that according to P.W.2 Vijay Singh fired from his rifle on Subhash which hit on his back-side and as he turned around, Sanjay Singh (co-accused) fired from his rifle on eyes of Subhash Chandra Gupta whereafter he fell down and thereafter all the accused persons started making indiscriminate firing from their rifle and gun which riddled the body of Subhash Chandra



Gupta and he died. The road where Subhash was standing was made of brick soling and there was flood water of about 2-3 feet.

14. Learned senior counsel submits that the post-mortem report (Exhibit 5/2) of Subhash Chandra Gupta shows only three injuries which falsifies the claim that all the accused persons were making indiscriminate firing and the body was riddled. It is further submitted that the post-mortem report of Raghubansh who also died in course of firing (Exhibit 5) would show that he had suffered two injuries out of which injury no. 1 was one big zig-zag lacerated wound with sacrifices of whole skull, nasal bone, orbit of eyes (eyes were intact), survival vertebrae mandible, Trachea, Larynx were lacerated and this injury no. 1 is said to have been caused by explosive whereas injury no. 2 has been caused by fire-arm.

15. Learned senior counsel submits that the post-mortem report of the unknown dead body (Exhibit 5/1) also shows one big zig-zag lacerated wound of size 6" x 4" into cavity deep spreaded from left side of skull, left mandible, teeth, upper palate, nasal bone, left eye orbit, parietal bone of skull with brain matter lacerated. The two abrasions were found on the body of the unknown person.



16. Learned senior counsel submits that the kind of injuries suffered by Raghubansh would show that there were use of explosive substance at the place of occurrence, therefore, the post-mortem report is completely ruling out the manner of occurrence as alleged by P.W.2. In this connection, it is pointed out from deposition of the doctor (P.W.4) that he had not mentioned in his report as to whether there was any mark of blackening tattooing on injury no. (II) of Raghubansh, it means the shot was fired from long range. Regarding injury no. (I) of deceased Raghubansh Singh and injury no. (I) of the unknown deceased P.W. 4 has stated that they were most similar in nature and it was possible that injury no. (I) of the unknown deceased may be caused by explosive substance. Regarding injury no. (II) and (III) of the unknown deceased, P.W.4 opined that he had not mentioned the nature of injury in the post-mortem report but these injuries may be possible by fall on hard substance. Learned senior counsel, therefore submits that Raghubansh and unknown person both had suffered injury no. (I) due to use of explosive substance. The post-mortem report therefore completely rules out the ocular evidence of P.W.2.

17. Learned senior counsel relies upon the judgment



of the Hon'ble Supreme Court in the case of **Baliraj Singh V. State of Madhya Pradesh** reported in **AIR 2017 SC 2114** to submit that in criminal jurisprudence it is well settled that the value of medical evidence is only corroborative and the defence may use the medical evidence to prove that the injuries could not possibly have been caused in the manner alleged and thereby discredit the eye witnesses.

18. Further learned senior counsel submits that from the inquest report (Exhibit -3, 3/1 and 3/2), it would appear that in front of column no. 6 which requires an answer to the manner in which and the weapon by which injuries appear to have been inflicted, the I.O. has recorded “ *rifle yevam banduk ki goli ka fire hone se jakham hona prateet hota hai*”. It is his submission that the apparent injuries suffered by Raghubansh and the unknown person were caused by explosive substance, hence it could not be said to be a gun shot injury particularly when there was no entry wound and no exit wound. The inquest report does not show that P.W. 3 had disclosed himself as an eye-witness of the occurrence. The words ‘*prateet hota hai*’ is only a guess work.

19. Learned senior counsel submits that P.W.2 has taken an attempt to falsely implicate several persons. As per



allegations, all six accused were firing on Subhash Chandra Gupta but that is not corroborated. It is also difficult to understand as to how Raghubansh can sustain injury when as per this witness all the accused were firing on Subhash. At this stage, the third person could not have dared to go to Subhash Chandra Gupta to take his rifle, therefore the manner of occurrence causing death of the unknown person who was later on identified as Dhannu Tiwary is also fabricated story.

20. It is his submission that in fact there was no indiscriminate firing so question of third person sustaining injuries does not arise. Further it is submitted that as per P.W.2 Sanjay Singh picked up the rifle of Subhash but Sanjay Singh has already been acquitted from the charge under Section 379 I.P.C. The trial court has held that there is a doubt over the existence of the rifle itself and the prosecution had failed to produce any evidence to show that at the time of alleged occurrence Subhash Chandra Gupta was possessing any licensee rifle.

21. As regards the place of occurrence, learned senior counsel submits that the prosecution has failed to establish the place of occurrence in this case. The dead bodies had come by floating in water to the 'Sareh' from where they were



recovered. It is pointed out that in paragraph '19' of his deposition, P.W.2 says that the fishermen were in between his father and Raghubansh Singh. The assailant of his father had fired from 10-12 ft. distance and his father had suffered three injuries, he saw the injury on his hand in the evening when the dead body was brought to the police station. Learned senior counsel submits that the inquest report of Subhash was prepared on 21.09.1994 at 17.45 P.M. and P.W.3 is one of the witnesses on the inquest report of Subhash. The dead body of Subhash was recovered at a distance of about 200 yards east-south corner of '*charakhiya math*' and it was lying inside 5 ft. water and the right hand was tied by a red colour *langot* with the *moonch*. P.W.6 has stated in paragraph '11' of his deposition that this is the second place of occurrence which is at a distance of one kilometer north from *Rasulpur Jogibaba Asthan*. It is submitted that if Subhash Chandra Gupta was killed at the first place of occurrence where the water was hardly three feet on road, on falling down after sustaining the fire-arm injury on the right side Subhash must have suffered some kind of injury on his body due to fall on bricks which are hard substance and further if the dead body was dragged to more than one kilometer the dead body must have shown



injuries due to fall, dragging or drowning, as it has also come in evidence that paddy crops were there in the agricultural field which were flooded. P.W.5 who has proved the post-mortem report of Subhash has not found any abrasion or sign of drowning. In paragraph 7 & 8 of his deposition P.W. 5 has stated that when a person is dragged on road, abrasion may be caused. Further he has stated that if the firing is made at a distance of six feet or less than six feet blackening will appear. He has further stated that he did not find any sign of drowning. It is submitted that if the assailant of Subhash was standing at a distance of 12-15 ft. and in between Subhash and Raghubansh fishermen were also there then the fishermen must have suffered an injury. It is further submitted that P.W. 2 and P.W.3 both claimed that they were standing at the same position at the place of occurrence where indiscriminate firing was taking place but surprisingly neither P.W. 2 nor P.W.3 suffered any injury. The deceased Subhash, P.W. 2 & P.W. 3 all were standing towards the northern side from the tree at a distance of 12-14 ft. P.W 3 was standing at a distance of 20-25 ft. and Raghubansh was also standing at the same distance in northern side. It is submitted that the evidence of P.W. 2 on this point is not reliable for two reasons, firstly, that had the firing



been taken place from a distance of 10-12 ft. Subhash would not have suffered inverted blackened margin of wound. P.W. 5 has clearly suggested that if firing is made from a distance of six feet or less than six feet blackening will appear. Secondly, if the firing had taken place from a distance of 10-12 ft. and P.W. 2 & P.W. 3 were also standing there, they would have definitely suffered some injuries particularly when indiscriminate firings were taking place. According to P.W. 2 firing was taking place for 2 - 2½ minutes and during this period he was standing at the place of occurrence.

22. P.W. 3 has also stated that he was standing at a distance of 14-15 ft. from Subhash in the same direction and he is nephew (P.W.2) was standing at a distance of 10-12 ft. towards southern side. The statement of P.W. 3 saying that P.W. 2 was standing towards southern side is not corroborating the statement of P.W. 2 in paragraph '16' where he says that he was standing at a distance of 10-12 ft. towards northern side. In paragraph 13, P.W. 3 has stated that he could not flee away and remained standing at his place at the time of firing whereas P.W. 2 could not flee away due to water and he remained standing at some distance. P.W. 3 has stated that where Raghubansh fell down there was about one and half to two



feet water only, learned senior counsel submits that the fact that Raghubansh did not suffered any abrasion or injury due to fall on hard substance further shows that P.W. 3 is only doing a guess work with regard to existence of water.

23. It is further submitted that according to P.W. 3 after two minutes of firing the assailant asked P.W. 3 to run away whereafter he along with his nephew (P.W.2) fled towards Rasulpur Village but they did not reach the village, they had run for about 250 yards but stopped before 150 yards from village. P.W. 3 further says that villagers came to the place of occurrence. It is submitted that both P.W. 2 and P.W. 3 have stated that how police reached at the place of occurrence. P.W. 6 who is I.O. says that he had heard rumour about the killing of Subhash by the appellant and had recorded a Sanha Entry in the police station but said Sanha Entry was not proved in course of evidence. P.W. 6 could not say as to who informed him about the alleged occurrence. P.W. 3 has categorically stated in paragraph '20' that police reached at the place of occurrence within one hour. P.W. 2 says that when police reached at the place of occurrence police did not record the oral statement of his uncle (P.W.3), thereafter police went in search of the dead body and started chasing the accused persons. P.W.



2 says that neither he nor his uncle had given any written statement to police. P.W. 3 says that when police reached at the place of occurrence neither he nor his nephew or any other villagers gave any statement in writing and further police had not recorded any statement of them on any paper.

24. Learned senior counsel submits that the fact that police reached at the place of occurrence within one hour still no fardbeyan of the informant or any other person was recorded would create a grave doubt on the prosecution story. Further the fact that sanha entry was not proved by I.O. would result in drawing an adverse inference. It is submitted that the delay in lodging of F.I.R. in the present case is such that it would take away the veracity of the prosecution story.

25. Learned senior counsel relies upon the judgment of the Hon'ble Supreme Court in the case of **Awadhesh and another v. State of M.P.** reported in **AIR 1988 SC 1158** and **Bachhu Narain Singh v. Naresh Yadav and others** reported in **AIR 2004 SC 3055** to submit that in this case since no plausible explanation has come as to why the fardbeyan was recorded at 1:30 P.M. and the inquest report was not prepared immediately when P.W. 6 had already reached at the spot within one hour of the alleged occurrence, it would throw a



grave doubt on the prosecution story.

26. Learned senior counsel submits that in the inquest report of Subhash the time of inspection of body has been shown as 21.09.1994 at 17.45 P.M. at a distance of 200 yards east - south corner from '*Charakhiya Math*' which is situated at a distance of more than one kilometer from the place of occurrence, but as regards this recovery, P.W. 6 has stated in paragraph '37' of his deposition that he has not recorded in the case diary as to the places where he had gone to conduct raid in search of the accused prior to 1:30 P.M. P.W. 6 says that he reached the place of occurrence at 1:30 P.M. He says that he reached the place of occurrence after tracing out the dead body of Subhash and chasing the accused persons where he seized two dead bodies which were tied with four bricks. He seized all the four bricks.

27. Learned senior counsel submits that if the I.O. had already come to know that Vijay Singh group has murdered Subhash Chandra Gupta and others and after receiving such information he had gone to trace the dead body of Subhash and chased the accused persons. In his deposition, he says that after tracing the dead body and chasing the accused he reached at the place of occurrence, in that case why



did not he made the inquest report of Subhash first at the place where the dead body of Subhash was lying and why the inquest report of Subhash has been prepared at 17.45 P.M. P.W. 6 has admitted in his deposition that he had not entered in the case diary that there was any hole on the cloths of the dead body, he had not mentioned that the dead body had swollen and the fact that he has himself stated in paragraph 33 that he had not gone to the place of occurrence before 1:30 P.M. is in complete conflict with the statement of P.W. 2 & P.W.3 who claimed that the police had reached at the place of occurrence within one hour of the occurrence. This gains importance because P.W. 6 has stated that he had not entered in the case diary about the time of inspection of the place of occurrence. His attention was drawn towards paragraph 7 of the case diary in which he has not mentioned the time as to when he had reached the P.O. He had not prepared the *Nazri Naxa* of the spot and had not recorded that he found that the dead body of unknown person and the dead body of Raghubansh were tied with bricks. P.W.6 admits that the doctor has described one of the injuries on the dead body of Raghubansh as caused by explosive substance. In paragraph 34 of the deposition P.W. 6 states that when he left for chasing the accused persons and to trace out the dead body



of Subhash Chandra Gupta he did not instruct any police officer to reach at the place of occurrence to know the status of the two dead bodies or to record the fardbeyan of the witness or to collect any other evidence present there. P.W. 6 says that because water was flowing at the place of occurrence he had not found any live cartridge or empty cartridge, therefore he had not written anything about it in the case diary. He had not entered as to whether there was any entry about gun and rifle licences of Chandra Shekhar Gupta and Subhash Chandra Gupta in the register of the police station.

28. Learned senior counsel points out that P.W.6 tried to fabricate the case against the appellant would be evident from his deposition. In paragraph 45 he says that Chandra Shekhar Gupta or Subhash Chandra Gupta had shown their fire-arm licenses to him and in this regard he had made entry in paragraph 133 in the case diary. The defence threw a suggestion to him that the entry made in paragraph 133 of the case diary is false because he had not enclosed copy of license with the charge-sheet. P.W. 6 simply denied this suggestion of the defence. In paragraph 47 he has stated that in paragraph 104 of the case diary he had made an entry that in course of patrolling on 29.09.1994 he had seized one single bore gun



with two LG 12 bore and four one number *Chharra* from the house of Rajendra Singh (D.W.1) which was the looted gun number 2938 and there was an interpolation by cutting the number 3 after 29 and making that 7 and after number 8 one new number had been inscribed. He has lodged the case against Rajendra Singh. He denied any information of the fact that the said gun was released by the then Chief Judicial Magistrate in favour of Rajendra Singh (D.W.1). The defence threw a suggestion that the prosecution story is ante-time and ante-dated which this witness denied.

29. Learned senior counsel submits that at a belated stage the prosecution introduced Sachintan Yadav (P.W.7). P.W.-7 was not a charge-sheet witness. He claims himself an eye witness. He has stated in examination in chief that accused persons were indiscriminately firing and in course of that firing one person came forward to take up the rifle of Subhash Chandra Gupta and suffered shot as a result of which he died. He claimed that accused Sanjay Singh picked up the rifle of Subhash Chandra Gupta. The defence argued before the learned trial court that Sachintan Yadav (P.W.7) has for the first time come forward to claim himself an eye witness after about 21 years of the alleged occurrence and he had not furnished



any plausible explanation as to why he is coming forward after such a long time, but the learned trial court has rejected the plea of the defence.

30. Learned senior counsel submits that the Hon'ble Supreme Court has considered this aspect in the case of **Ram Lakhan Singh and others v. The State of U.P.** reported in **AIR 1977 SC 1936**. In the said case the Hon'ble Supreme Court held that in a grave charge of this nature it will not be proper to place reliance of a witness who never figured during the investigation and was not named in the charge-sheet. The accused who are entitled to know his earlier version to the police are naturally deprived of an opportunity of effective cross examination and it will be difficult to give any credence to a statement which was given for the first time in court after about a year of the occurrence. In this case, P.W.7 had deposed after about 21 years.

31. Learned senior counsel submits that in this case the explanation of the appellant in his statement under Section 313 Cr.P.C. says that it is a case of false implication. This aspect of the matter is required to be examined keeping in view that in this case a large number of co-accused were not sent up for trial because in course of investigation police failed to find



sufficient materials to proceed against them. It is his submission that the prosecution case has a whole is inseparable. P.W. 2 & P.W.3 both claimed themselves to be an eye witness and according to them all the named accused persons were indiscriminately firing and in the said firing Raghubansh, unknown person who was later on identified as Dhannu Tiwary were killed along with Subhash Chandra Gupta. It is alleged that Dhannu Tiwary was killed when he tried to take away the rifle of Subhash in the midst of indiscriminate firing. The fact that neither the body of Raghubansh nor that of Subhash were found riddled as alleged and at least five accused were not sent up for trial would show that allegation of indiscriminate firing remained unsubstantiated in course of investigation. Further P.W. 2 & P.W. 3 both claimed that Subhash was having a rifle and Chandra Shekhar (P.W.3) was carrying a gun with cartridges. P.W. 3 has stated that he was having at least 33 cartridges under his belt but failed to state as to what happened to those 33 cartridges which remained with him. The learned trial court has doubted the very existence of the rifle in the hand of Subhash, has acquitted the appellant from the charge u/s 379/34 IPC. From the evidences it transpires that P.W. 6 tried to fabricate a



case on the point that the gun of Chandra Shekhar Gupta was snatched away in the said occurrence, he seized the gun of Rajendra Singh (D.W.1) in connection with this case but the said gun had been released in favour of Rajendra Singh. The learned trial court has further disbelieved P.W.6 that there is any second place of occurrence. It is submitted in such circumstance where the court attempts to separate the grain from the chaff, the truth from the falsehood, yet it could not be done and where the grain cannot be separated from the chaff because the grain and the chaff are so inextricably mixed up that in the process of separation the court would have to reconstruct an absolutely new case for the prosecution, then this principle will not apply.

32. It is submitted that in this case the prosecution has accepted the acquittal of the appellant under Section 379/34 and Section 201 I.P.C. In this connection, learned senior counsel relies upon the judgment of Hon'ble Supreme Court in the case of **Balaka Singh and others v. The State of Punjab** reported in **AIR 1975 SC 1962** to support his contentions.

33. In the background of the aforementioned submissions, learned senior counsel submits that in this case



the prosecution witnesses have in one voice falsely implicated the appellant, they have stated a completely different case. Eye witnesses are contradicted by medical evidence and the prosecution case is nothing but an absurd proposition. The incident seems to have taken place somewhere else and the bodies floated in the flood water. All the three bodies were secured at a distance of one kilometer from Rasulpur. It is submitted that the theory of indiscriminate firing at Subhash Gupta is palpably false and in these circumstances the trial court's judgement of conviction and order of sentence is liable to be set-aside and the appellant be acquitted from the charges.

Submission on behalf of the State

34. Mr. Dilip Kumar Sinha, learned Additional Public Prosecutor assisted by learned counsel for the informant has opposed the appeal and defended the judgement of the learned trial court. According to the prosecution, the I.O. (P.W.6) entered the information regarding the killing of Subhash Chandra Gupta and two others in the station diary being SDE No. 301 and proceeded for the place of occurrence in order to locate the dead body and to apprehend the accused persons. It is submitted that the delay has been well explained and would not be fatal for the prosecution as the F.I.R. was



duly transmitted to the learned court on the very next day without delay. Reliance in this regard has been placed on the judgment of Hon'ble Supreme Court in the case of **Bhajan Singh @ Harbhajan Singh & Ors. v. State of Haryana** reported in **AIR 2011 SC 2552**. The judgments cited on behalf of the appellant have been sought to be distinguished on the facts of those cases. It is submitted that in AIR 1981 SC 1230 the conduct of the SHO was highly doubtful as the sanha diary entry was not produced even after the order of the court. Regarding the judgments on the delay in lodging of the F.I.R. learned Addl. P.P. for the State has stated that in AIR 2004 SC 3055 the I.O. was present at the P.O. but none claimed himself as an eye witness, after 1:00 - 1:30 hours a person came and claimed as eye witness, during trial there were major contradictions so the court accepted the submissions of the defence on the point of delay in lodging of the F.I.R.

35. Learned Additional Public Prosecutor further submits that the exoneration of five accused persons cannot be a ground to discard the version of the eye witnesses. With reference to a judgment of the Hon'ble Supreme Court reported in **2022 Live Law (SC 137) Criminal Appeal No. 339-340 of 2014 (Rajesh Yadav and Another etc. v. State of U.P.)** it is



submitted that a final report is nothing but a piece of evidence. It forms a mere opinion of the investigating officer on the materials collected by him. It takes note of the offence and thereafter, conducts an investigation to identify the offender, the truth of which can only be decided by the court.

36. On the point of eye witness contradicted by the medical evidence, it is submitted that oral evidence has to be given primacy since medical evidence is only corroborative. It is submitted that the doctor has explained injury no. 1 of Raghubansh Singh caused by explosive and injury no. 1 of unknown deceased caused by fire-arm but during cross examination the doctor has opined that injury no.1 of Raghubansh Singh and injury no. 1 of unknown deceased are most similar in nature and, therefore, the inference could be drawn that the injury no. 1 of Raghubansh Singh may be caused by fire-arm as there is no other sign of explosive either on the body or through any other evidence which could suggest the use or presence of explosives in the area and the medical jurisprudence supports such injury by fire-arm.

37. The prosecution relies upon the judgment of the Hon'ble Supreme Court in **Bhajan Singh @ Harbhajan Singh & Ors. V. State of Haryana** reported in AIR 2011 SC



2552 (paragraph 23) to submit that ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. Regarding the fact that the arm was released in favour of Rajendra Singh, it is submitted that the prosecution had never claimed that the gun was seized at the place of occurrence, rather it was seized much after the occurrence for which Vijaipur P.S. Case No. 78 of 1994 dated 03.10.1994 under Section 414 I.P.C. And Section 25(1-b) of Arms Act was lodged. As number of gun was tampered, therefore, it was sent to F.S.L. Patna who vide it's report being F.S.L. No. 627/95 dated 01.11.1995 reported that tampering was done, thereafter the Officer-in-Charge of Vijaipur Police Station vide it's letter dated 28.11.1995 written a letter to learned Chief Judicial Magistrate, Gopalganj that the recovered gun is the same gun which was snatched in Vijaipur P.S. Case No. 74/94 and therefore, prayed for stay of the order of release dated 24.11.1995, however this fact was not brought during the trial. It is submitted that it was an omission on the part of the I.O. and the conducting counsel.

38. Regarding the evidence of Sachintan Yadav



(P.W.7), again it is submitted that his statement was recorded in supplementary case diary but it was not brought to the notice of the learned trial court due to omission on the part of the I.O. and the conducting counsel. In this regard, reliance placed by the defence on the judgment of the Hon'ble Supreme Court in the case reported in **AIR 2019 SC 3727** and **AIR 1975 SC 1962** is of no relevance.

39. Relying upon the judgment of the Hon'ble Supreme Court in the case of **Rajesh Yadav & Anr. Etc. v. State of U.P.** relying on **C. Muniappan v. State of Tamil Nadu reported in (2010) 9 SCC 567**; learned counsel submits that even if there are some omissions, contradictions and discrepancies, the entire evidence cannot be dis-regarded. Reliance has been placed on the judgment of the Hon'ble Supreme Court in the case of **State of Rajasthan v. Kishore** reported in **(1996) 8 SCC 217** and **Rajendra Prasad v. Narcotic Cell** reported in **(1999) 6 SCC 110**. It is submitted that every irregularities and illegalities in investigation will not thereby render prosecution case untrustworthy.

40. It is lastly submitted that the appellant is a criminal who on the basis of a forged anticipatory bail order said to be passed by Hon'ble Patna High Court executed the



bail bond on 20.10.1995. His bail bond was cancelled on 09.06.2002 due to its misuse. On 12.07.2005, he again surrendered after three years of bail cancellation and thereafter released on bail. This forged bail order was brought to the notice of Hon'ble Court and after inquiry, bail bond was cancelled on 19.05.2008 and the Hon'ble High Court directed him to surrender, which he had not honoured and on the next day killed the son of the deceased Subhash Chandra Gupta (pairvikar of the bail cancellation petition) for which Gorakhpur Sahpur P.S. Case No. 1293/2008 dated 20.05.2008 has been registered. Thereafter, Sanjay Singh was arrested in killing of son of the deceased Subhash Chandra Gupta in the State of U.P. and then remanded in this case whereas Vijay Singh (appellant) was arrested from Delhi and thereafter trial proceeded and concluded.

Consideration

41. Having heard learned senior counsel for the appellant, learned Additional Public Prosecutor for the State and learned counsel for the informant as also on perusal of the records, I find that in this case the place of occurrence is said to be the road made of bricks soling near '*Rasulpur Sareh Jogibaba Asthan*'. According to the prosecution witnesses



P.W.2 & P.W.3 who claimed themselves an eye witness to the occurrence Subhash Chandra Gupta (deceased) was standing having his face towards the western direction and it is stated that he was holding his rifle. P.W. 3 has stated that Subhash Chandra Gupta was also having some cartridges. P.W. 3 was standing at a distance of 14-15 ft. from Subhash in the same direction and his nephew was standing at a distance of 10-12 ft. towards southern side. P.W. 3 has stated that he had about 33 rounds of live cartridges under his belt. The appellant along with other accused are said to have arrived there armed with rifle, gun and other deadly weapons but neither the deceased Subhash Chandra Gupta nor P.W. 3 could see the appellant and others, even though it was morning hour at 9:00 A.M. and it is not the prosecution case that the appellant and others arrived on any closed vehicle or that they were not visible from some distance. The fact that neither the Subhash nor P.W. 3 who were armed with rifle and gun took note of the arrival of the appellant and other before they got close to 10-12 ft. distance is something which is to be scrutinized with much circumspection and care.

42. Further fact that despite being fully armed with rifle and gun neither Subhash nor P.W. 3 opened any fire upon



the appellant and others creates doubt on the conduct of the deceased and P.W. 3 because no person who apprehends an attack and for that reason he comes out of his house armed with fire-arms would remain silent even as his life is in danger and he is likely to be killed by his enemy. P.W. 2 and P.W.3 both have stated that first of all the four named accused, namely co-accused Vishwanath Singh and Rajesh Singh caught hold of P.W. 3 and Majid Miyan snatched the licensee gun of P.W. 3. Till this time Subhash (deceased) had not been overpowered or in any way injured by the appellant, still Subhash did not fire from his rifle. This is another reason to create a doubt in the prosecution version. It is not the prosecution case that the assailants had overpowered P.W. 2 or had threatened the Subhash to kill P.W. 2 if he resorts to any firing. The statement of P.W. 2 & P.W. 3 that this appellant identified Subhash and fired from his rifle which hit him on the back shows that when Vishwanath Singh and Rajesh Singh had caught hold of P.W. 3 and Majid Miyan had snatched the licensee gun of P.W. 3, still Subhash was standing with his face towards western direction and his back was towards the assailants, this story seems to be highly improbable that when the assailants had already arrived at a distance of 15 ft. and had



overpowered P.W. 3, still Subhash had not turned up to see his brother (P.W.3). It is stated that as soon as Subhash turned around after getting the fire-arm shot at his back, the co-accused Sanjay Singh fired from his rifle which hit at the eyes of Subhash as a result whereof he fell down and died. It has come in the evidence of P.W. 2 as well as P.W. 3 that the place where Subhash fell down is a road made of brick soling and there was about 2 ft. of water. Subhash fell down on the brick soling but did not suffer any injury which could have been caused as a result of fall on a hard substance. The prosecution witnesses have stated that in the field areas there were water around five feet and the agriculture fields were having paddy crops, under these circumstances, I fail to understand that no injury will be caused to a person who fell down instantaneously.

43. The prosecution witnesses have stated that all other accused indulged in indiscriminate firing upon Subhash Chandra Gupta and his body was riddled with bullets but in post-mortem report (Exhibit - 5/2) only three fire-arm injuries have been found on the body of Subhash Chandra Gupta. The Investigating Officer (P.W.6) did not find any empty cartridge at the spot and even though he has come out with an



explanation that there was flood water at the spot so the cartridges were not found there, the fact remains that he has nowhere mentioned in the case diary that any effort was made to find out the live or empty cartridges. The I.O. (P.W.6) has deposed in paragraph '6' of his deposition that after tracing out the dead body of Subhash Chandra Gupta and chasing the accused persons he reached at the place of occurrence where he recorded the fardbeyan of the informant and seized two dead bodies which were kept there tied with bricks and P.W.6 seized four bricks out of them. According to him, he reached at the place of occurrence at 1:30 p.m. then the question arises as to who had kept the two dead bodies there tied with bricks and why it was so done. P.W. 2 & P.W. 3 both have stated that police reached at the place of occurrence within one hour from the time of the alleged occurrence, therefore, according to them the I.O. (P.W.6) arrived at the place of occurrence at around 10:00 A.M. but then he left the said place without recording the fardbeyan of P.W. 2 or P.W.3 or any of the villagers who were already present at the spot. The conduct of P.W.6 in not recording the fardbeyan and preparing the inquest report of the dead bodies which were lying there at the spot remains unexplained.



44. P.W.2 and P.W.3 both have stated that the operator Raghubansh Singh suffered one shot and he fell down. In the meantime, it is said that one person who was among the accused persons came to take away the rifle of Subhash but he also fall pray to indiscriminate firings and died there. In paragraph 10 of his deposition P.W. 3 says that the deceased Raghubansh Singh was standing at a distance of 18-20 ft. from Subhash towards the north-east direction, P.W. 3 was also standing at a distance of 14-15 ft. from Subhash towards the north direction whereas his nephew (P.W.2) was standing at a distance of 10-12 ft. from Subhash towards the south direction. P.W. 3 has explained in paragraph '9' of his deposition that when his brother Subhash Gupta was shot at he was standing at the western corner of the road and road there has gone from north to south. He has further stated that from the place where Subhash was standing at a distance of about 5-7 ft. fishermen were engaged in fishing.

45. When I analyse the evidence of P.W. 2, it appears that in paragraph 18 of his deposition P.W. 2 says that the fishermen were fishing by throwing the net from the road towards the western side and this witness was standing towards the western side and his face was towards the west when he



was looking at the fishing. He has stated in paragraph 18 that in between three of them there was a fisherman and he did not remember who were the other persons. He has stated in paragraph 19 of his deposition that in between his father (deceased) and Raghubansh Singh (deceased) there were fishermen. In paragraph 15 P.W. 2 says that near Jogibaba Asthan there is a joint tree of Banyan and Peepal which is at south-west corner from where road is going toward south, west and north. So there is no road towards east. He has described this place as '*Trimohani*' and has further stated that the fishing was going on towards north side of the said tree. No fishing was being done towards the south or west direction from the said tree. He claims that he was standing at a distance of 10-12 ft. north from the said tree and Raghubansh was standing at about 25 ft. north. His father was standing at a distance of 12-14 ft. towards north and his uncle Chandrashekhar (P.W. 3) was standing at 20-25 ft. towards north from the said tree. If the description of the place of occurrence as disclosed by P.W. 2 and P.W.3 is concerned it may be easily found that on the road going from north to south if the deceased, P.W.2 and P.W.3 were standing having their faces towards western side then their back would be towards east. The accused may come at



'Trimohani' only from three sides i.e. west, south and north by road. The assailants would not take the risk to come through open fields in which paddy crops were there in the flood water. The firing of this appellant is said to have hit the back side of the father of P.W.2 which could not have been possible in case of firing from west-south or north side. The attention of P.W. 3 was drawn towards his statement made before police in course of investigation saying that the accused persons were firing indiscriminately in which his brother and Raghubansh Singh were riddled with bullets and this witness has stated that other persons who were firing were standing south to the first two persons who had fired. P.W. 3 says in paragraph 12 that the accused persons were firing from south - east corner of the place where the Bholu (P.W.2) was standing. The deposition of P.W. 2 and P.W. 3 as regards the place of occurrence is not only inconsistent but is contradictory as well.

46. The I.O. (P.W.6) had described the place of occurrence in Paragraph 9 of his deposition. He has stated that the place of occurrence is the road near the Banyan and Peepal tree from where the dead body of the deceased Raghubansh Singh and the unknown person were recovered. He has stated that there was three feet flood water on the road and five feet



flood water around the road in vast area. The Jogibaba Asthan is situated at a distance of 10 yards south from the place of occurrence and there is a joint Banyan and Peepal tree there. P.W. 6 had described a second place of occurrence in paragraph 11 of his deposition. He says that this place is situated at a distance of one kilometer north from Jogibaba Asthan and further 200 yards towards eastern–southern direction from ‘*Charakhiya Math*’. This is the place where the dead body of Subhash Chandra Gupta was lying inside the water and the dead body was tied with the ‘*langota*’ with a ‘*moonch*’.

47. On analysis of the evidences of P.W. 2, P.W. 3 and P.W.6 as discussed hereinabove, I find that in case of an indiscriminate firing taking place from the southern side the fisherman who was said to be in between the deceased Raghubansh and the father of P.W.2 (paragraph 19 of the deposition of P.W. 2) must have suffered the firing. P.W. 2 has, though, stated he could not see as to who fired from which direction on Raghubansh Singh but P.W.3 has stated that in the indiscriminate firing operator Raghubansh Singh suffered the shot and died. The evidence of P.W. 2 and P.W. 3 are highly inconsistent and contradictory inasmuch as it is not possible to believe that Raghubansh Singh who was standing at a distance



of 18-20 ft. from Subhash towards north-east direction will suffer the fire-arm injury whereas P.W. 3 who was standing only at a distance of 14-15 ft. in the same north direction would not receive a single injury. P.W. 2 was standing at a distance of 10-12 ft. south from his father Subhash Chandra Gupta and according to P.W. 3 he was standing north from the said joint tree of Banyan and Peepal. If the evidence of P.W.2 is believed for a moment, the irresistible conclusion would be that in case of an indiscriminate firing by a large number of accused persons as has been claimed, P.W. 2 would have also received some fire-arm injuries. According to him (paragraph 16) Raghubansh and P.W.3 were standing at almost the same distance of about 25 ft. from the said tree, if it is so, then also in case of indiscriminate firing P.W. 2 and P.W. 3 both would have suffered the injuries. According to P.W. 2 (paragraph 16) he was standing at a distance of 10-12 ft. north to the said tree and his father Subhash Chandra Gupta (deceased) was standing at a distance of 12-14 ft. north to the said tree. If it is so, then the testimony of P.W. 2 (paragraph 19) that the person who had fired from a distance of 10-12 ft. and the person who had fired at the eyes of his father had fired from 8-10 ft. distance cannot be believed, because in that case there was no chance of P.W. 2



escaping the firing as he was standing at almost the same place where his father was standing.

48. P.W. 3 has stated in paragraph 12 of his deposition that the accused persons were firing from south-east corner of the place where Bhola (P.W.2) was standing and all the assailants were firing aiming Subhash Chandra Gupta. An analysis of this evidence of P.W. 3 suggests that on the road which goes from north to south from '*Trimohani*' where joint Banyan and Peepal tree is standing and P.W. 2 as well as Raghubansh and P.W. 3 were standing towards the north direction, the accused persons were firing from south to Bhola (P.W.2), in that case, it was Bhola (P.W.2) who would be in front of the assailants because P.W. 2 claims that he was standing at a distance of 10-12 ft. towards north of the said tree.

49. It is further evident that from this place of occurrence if the dead body of Subhash Chandra Gupta is dragged away to a distance of more than one kilometer, the said deceased must have got several injuries of bruises and abrasion on his body, because the road where the occurrence took place was hardly having sufficient water to facilitate easy flow of the dead body with the help of water.



50. It is also important to note that according to P.W. 2 and P.W. 3 the firing took place for about 2 – 2½ minutes whereafter they started fleeing away towards their village. P.W. 3 says that after two minutes of firing the assailants told him to run away whereafter he and his nephew (P.W.2) started fleeing away towards his village Rasulpur but they did not reach the village and stopped about 150 yards before the village. They had run to about 250 yards. This witness says that the villagers came and he also reached to the place of occurrence with the villagers. According to him, some of the assailants ran away towards western direction to *Sarpine Khapey Tola* and some of them went with the dead body towards north – western direction but P.W.3 and others could not chase the assailants because they were lashed with arms. At this stage, if the deposition of Sachintan Yadav (P.W.7) who has deposed for the first time in trial claiming himself an eye witness is looked into, it may be found that though he has tried to corroborate P.W. 2 and P.W. 3 as regards the place of occurrence and manner of occurrence, but his evidence is not trustworthy and it would not be safe to rely upon him because he did not come forward to make his statement in course of investigation. He had not disclosed that he was an eye witness. He has come to



support the prosecution case after about 21 years of the occurrence.

51. To me, thus, it appears that the prosecution is not able to establish the place of occurrence. As regards his claim of second place of occurrence the learned trial court has disbelieved him. The I.O. (P.W.6) has stated that in course of investigation he did not prepare the *Nazri Naxa* of the spot. He did not record that the dead body of Raghubansh Singh and the unknown person were tied with the bricks, though he had recorded it in some other paragraphs of the case diary. He had not recorded as to whether there were any blood-stained cloths on the two dead bodies which were found at the first place of occurrence. The I.O. has tried to explain that blood was coming out but were flowing with the water, therefore, there was no blood-stain on the cloth. He had also not recorded that the cloths of the deceased were wet and there was any hole of the fire-arm on the cloths. All these evidences on the record go a long way to show that there was no sign of the alleged occurrence having taken place at the Sareh near Jogibaba Asthan.

52. In course of evidence the prosecution witnesses have contradicted each other as regards the arrival of police at



the place of occurrence. P.W. 2 and P.W.3 say that police arrived at the place of occurrence at around 10:00 A.M. P.W.3 could not say as to how the police arrived there. In paragraph 25 of his deposition, P.W. 2 says that the police did not record oral statement of his uncle (P.W.3) and the police went in search of the dead body and to chase the accused persons. Neither P.W. 2 nor P.W. 3 had given any statement in writing to police. In paragraph 20 of his deposition, P.W. 3 says that when police arrived at the place of occurrence police did not record his statement on any paper and did not prepare the inquest of the two dead bodies which were lying at the place of occurrence. P.W. 3 further says that he cannot say whether he is a witness on the inquest report of the two dead bodies. He says that he could not identify 5 - 6 other police personnel and did not give attention to the fact that whether the chowkidar of Rasulpur village was there or not. He did not remember whether police had left any police personnel at the spot or whether all the police personnel had gone chasing the accused persons. P.W. 3 says that the police had gone in search of the criminals to *Sarpine Khapey Tola* and police did not record his fardbeyan even at *Sarpine Khapey Tola* village. P.W.3 says in paragraph 26 that he was with the police till 2:00 - 2:30 P.M.



whereafter he went to his Vijaipur house and again came back in search of dead body at 4:00 P.M. Police had called him to village *Mardar* as at that time police had received information that the dead body of a person was seen towards the south-east corner of *Charakhiya Janki Math* where flood water was of about 5 ft. which were flowing slowly. How police came to know about the dead body and who informed him about this are not known.

53. The defence threw a suggestion to this witness that his brother had a fight with the opponent Dhannu Tiwary to show his supremacy and in the night of 20th both sides had indulged in firing in which people from both sides were killed. P.W. 3 denied this suggestion. P.W. 2 & P.W.3 both were suggested by defence that no occurrence as alleged had taken place on 21.09.1994 and no such occurrence had taken place at the alleged place of occurrence and further neither he nor his nephew had seen the occurrence, these suggestions have been denied by P.W. 3.

54. In this context, when the evidence of PW 6 is gone into, it is noticed that PW 6 claims to have received information on 21.09.1994 at 09:30 A.M. that an occurrence has taken place near village Rasulpur Sarah, Jogibaba Asthan



where Subhash Chandra Gupta and two other persons have been killed by Vijay Singh (appellant) group and they are taking away the dead body of Subhash Chandra Gupta by dragging. The I.O. claims that he had recorded Sanha No. 301 dated 21.09.1994. He proved paragraph '3' of the case diary saying that he had recorded there that after tracing the dead body of Subhash Chandra Gupta and chasing the accused persons, he reached at the place of occurrence where he recorded the fardbeyan of the informant (PW 3) and recovered two dead bodies which were kept there tied with bricks and he seized 4 bricks out of them and prepared a seizure list. PW 6 has proved the fardbeyan (Exhibit 1), formal FIR (Exhibit 2) and the seizure list (Exhibit 2/1). He has further proved the inquest report of Ragubansh Singh and that of the unknown person as Exhibit 3/1 and 3/2 respectively. He has identified the signature of the inquest report witnesses namely, Phulan Prasad Shrivastava and Ramnath Yadav (both of them not deposed). P.W.6 has further proved the inquest report of Subhash Chandra Gupta as Exhibit 3. The Exhibit 3 has been witnessed by Chandra Shekhar Gupta (PW 3) and Radhakrishna Kharwar (not deposed).

55. The I.O. (PW 6) has not proved the sanha entry.



Though he has proved the inquest report but in none of the inquest report the witnesses therein have claimed that they are eye witnesses. In this connection, Exhibit 3/2 which bears the signature of PW 3 would show that regarding the cause of death the opinion of the witnesses was recorded as “*rifle avam bandook se fire ke jakhm hone se mrityu hona bataya jata hai*”. The column number 7 in the inquest report requires to state the circumstances, if any, which give rise to suspicion of foul play. In front of this column, nothing is stated which suggests that the inquest witnesses particularly P.W.3 who claims himself to be an eye witness was not aware of the circumstances under which Subhash Chandra Gupta had suffered the injuries on his body. The conduct of P.W.3 showing that he did not make a complaint in writing to police either at the place of occurrence or at *Sarpine Khapey Tola* village and the police did not record either his statement or the statement of his nephew and co-villager and further that PW 3 left for his Vijaypur house at 2-2:30 P.M. and only after information from police at 4 P.M., he went to the place near *Charakhiya Janki Math* from where the dead body of his brother was recovered is highly doubtful, his statements are totally inconsistent and contradictory to the statement of PW 6 who says that for the first time he reached at



the place of occurrence at 1:30 P.M. only and he had reached the place of occurrence after tracing the dead body of Subhash Chandra Gupta and chasing the accused persons (paragraph 34) of the deposition of P.W.6. P.W.6 has though stated that he had recorded a sanha entry but in course of his evidence, he failed to say that who had informed him about the alleged occurrence. The fact remains that the sanha entry was not proved in course of trial. The entire prosecution story as developed by P.W.2 and P.W.3 gets demolished from the evidence of P.W.6. P.W.6 has not recorded as to which place he had raided to recover the dead body or to catch hold of the accused persons and he failed to explain that prior to 1:30 P.M. he had gone to which place in search of the dead body.

56. From the materials on the record, it is evident that till first two dead bodies were recovered i.e. dead body of Raghubansh and unknown dead body, P.W.2 and P.W.3 had nothing to do. The fact that PW 3 had gone to his Vijaypur house at about 2:00 - 2:30 P.M. and the two inquest witnesses of the bodies of Raghubansh and the unknown who has later been identified as Dhannu Tiwary have not deposed in course of trial would give rise to a suspicion as to the manner of recovery of the two dead bodies from the place near Jogibaba



Asthan. P.W.3 says that he and his nephew had been told to run away towards the village but after about 250 yards distance, they stopped and came back to the place of occurrence with the villagers, during this short period who tied the dead bodies with the bricks remains a question as the I.O. (PW 6) has deposed that he found the two dead bodies tied with the bricks and had seized four bricks.

57. P.W.3 says that he received information from police at about 4 P.M. that police had information about a dead body near *Charakhiya Janki Math*, who gave this information to police is not known. PW 3 went on call from police and thereafter the dead body of Subhash Chandra Gupta was recovered. This story is also suspicious because if the police had got information that a dead body is lying there in water near *Charakhiya Janki Math* then why instead of going to the said place and recovering the dead body, the police would first give a call to P.W.3 to come and accompany them. How P.W.6 can think that the dead body would be that of Subhash the brother of P.W.3. According to P.W.2 and P.W.3, the criminals were dragging the dead body of Subhash but in the given condition of the road and the agriculture fields having paddy crops dragging of a dead body for more than one kilometer



would not only be very difficult but is likely to take a substantial period of time. In this case P.W.3 claims that he and his nephew returned to the place of occurrence with the villagers only after running to a distance of about 250 yards from the said place. This would hardly take 15-20 minutes and in such a short time, it would not have been possible for the criminals to drag away the dead body of Subhash to a distance of more than one kilometer that too when the dead body does not have mark of bruises or abrasion, it is not possible to believe the prosecution story that Subhash Chandra Gupta was killed at the place near Jogibaba Asthan and then he was dragged through water to more than one kilometer even though the villagers and the police arrived within one hour from the time of occurrence. The story of arrival of police within one hour as propounded by P.W.2 and P.W.3 has been contradicted by P.W.6. Thus, the entire manner of occurrence as claimed by the prosecution becomes highly doubtful. The statement of P.W. 2 and P.W.3 saying that the occurrence took place at about 9:00 A.M. and police came there within one hour and his oral statement was recorded by P.W.6 either at the place of occurrence during his first visit or during P.W.6 visit to village Sarpine not inspiring confidence, particularly when sanha entry



has also not been proved.

58. It is equally important to note that the story of indiscriminate firing by several accused persons have not been substantiated in course of investigation. Since the police did not find sufficient materials to proceed against the co-accused (I) Yogendra Shah (II) Bishwanath Singh (III) Rajesh Singh (IV) Bharat Shahi (V) Dharmendra Shahi, they were not chargesheeted and the police submitted a final form showing them not sent up for trial. This has never been challenged by the prosecution.

59. If the story of indiscriminate firing is discarded from the prosecution story, this Court would be willing to accept the submission of learned Senior Counsel for the appellant that in this case any attempt to separate the grain from the chaff and the truth from the falsehood would not be possible. The entire story is so interwoven and so inextricably mixed up that in the process of separation, I would have to reconstruct an absolutely new case for the prosecution. To make it more simple, I say that if the story of indiscriminate firing by the accused persons are left out then the prosecution story that all were indiscriminately firing upon the Subhash but in the said firing Raghubansh was also killed cannot be kept



alive. The learned trial court has disbelieved that Subhash was carrying a rifle, the said finding of the learned trial court is not under challenge. In fact, the very existence of the rifle in the hand of Subhash has been doubted by the learned trial court, if it is so, then, the prosecution story that when the unknown person from amongst the groups of the accused persons went to pick up the rifle of Subhash, he was killed in the indiscriminate firing gets completely demolished on both counts that neither there was rifle in the hand of Subhash nor there was any indiscriminate firing on him. The post-mortem report of the three deceased proved as Exhibit – 5/2, 5 and 5/1 are as under:

60. P.W.-6 is Dr.Tirthanand Singh who was posted as Orthopedic Surgeon at Sadar Hospital, Gopalganj and on 22.09.1994 at 2.00 pm he had conducted the postmortem examination on the dead body of Subhash Chandra Gupta. He has proved the postmortem report and he has found the following anti-mortem injuries on the person of the deceased:-

“(i)1/2” diameter oval aperture with inverted blackened margin of wound on the back of right lumber region into deep to abdominal cavity i.e wound of entrance .



1 1/2 diameter circular wound with everted margin of wound and protruding outside the omentum and loop of intestine on front of abdomen above umbilicus i.e. wound of exist.

(ii) 1/2" diameter oval aperture with inverted margin of wound on outer canthus of left eye i.e. wound of entrance and 1 1/4" oval aperture with everted margin of wound on back of right ear (the wound of exit). Orbital bone, frontal bone on left side and temporal and mastoid bone on right side were found fractured, left side of eye ball eviscerated.

(iii) Lacerated wound on front and back of left hand 2 1/2"x1"x deep to bone.

On P.M. Dissection- Abdominal cavity and pelvic floor was full of blood and blood clotts, small gut, large gut were found lacerated, Mesentric vessels were lacerated wound of exist and wound of entrance was in continuation. There were comminuted fracture of orbital fossa, vault of skull, frontal bone on left side and temporal bone with Mastoid process on Rt. Side. Brain tissue were lacerated and intermingled with blood and blood clotts. Wound of entrance and exist were in continuation.



Hence the death was due to shock and haemorrhage arising out of above mentioned both injuries caused by firearm (rifle). ”

61. In his cross-examination this witness says that he cannot say as to which injury out of the three injuries was caused at first on the person of the deceased. Injury no.(i) and (ii) may be caused at different time and not at a time. If the injury no.1 is caused at first deceased will be fallen on earth. It is not necessary that deceased will fall on the ground facing front portion. P.W.-6 has further opined that blackening of skin around the wound margin may be possible when the body of deceased is at the distance of 6 ft. or less from exit point of firearm. He did not find any sign of drowning the body into water and the time elapsed since death is within 36 hours. Regarding the rigor mortis present on the person of the deceased it is stated that it may start from 2.00 am in the night of 20/21-9-94. The postmortem report of Subhash Chandra Gupta has been proved as Ext.-5/2. A perusal of the Ext.-5/2 shows that in column showing the place from where the dead body was brought it is written as “Samho Tola, Vijaipur, whereas the inquest report



contains name of a different place. This is one thing which again raises doubt as to the place from where the dead body was recovered.

62. P.W.-7 is Dr.Janak Lal Sharma. He had conducted the postmortem examination on the dead body of the deceased Raghubansh Singh and had found anti-mortem injuries on the body of the deceased as under:-

“(i) one big zig-zag lacerated wound with sacrifice of whole skull, Nasal bone, orbit of eye (Eyes were intact), cervical vertebrae Mandible, Trachea, Larynx were lacerated

(ii) one 1” oval lacerated wound on left iliac region of abdomen with profusion of large gut entry wound and abdominal tissue lacerated on Dissection wound of entry.)

(iii) One 1 1/2” oval lacerated wound on back just parallel to injury no.(ii) – wound of exit

63. In my opinion death was due to shock and haemorrhage caused by injury nos.(i) and (ii). Injury No.(i) caused by explosive and injury no.(ii) by firearm.”

64. About injury no.1 P.W.7 states in his opinion that injury no.(i) was caused by explosive and injury no.(ii) was caused by firearm. The postmortem report has been



marked as Ext.5. The time elapsed since death in this case has been recorded as within 24 hours. In his cross-examination, P.W.-7 says that injury nos.(ii) and (iii) of deceased Raghubansh Singh are the injuries caused by one shot. His injury nos.(i) and (ii) are very serious in nature. The doctor has opined that after sustaining either injury no.(i) or injury no.(ii) person will not remain stand on his leg rather he would be fallen down. The doctor had not recorded in his report as to whether there was any mark of blackening which was caused by firearm. It means shot was fired from long range. The doctor has stated that on the basis of police requisition he had mentioned in his report that dead body of deceased Raghubansh Singh was found near Nalkup at village Vijaipur. He had further deposed that injury no.(i) of deceased Raghubansh Singh and injury no.(i) of unknown deceased are most similar in nature. The injury of the unknown deceased has been found as under:-

“(i) one big zig-zag lacerated wound of size 6”x 4” cavity deep spreaded on lefft sub Mandibular region to lefft side of skull. Left Mandible, Teeth, upper palate, Nasal bone, left eye orbit, parietal bone of skull with brain matter



sacrificed

(ii) Small abrasion 3"x3" on front left side of chest

(iii) one abrasion 3"x3" on left hypo chondrium

65. In my opinion, death was due to shock and haemorrhage caused by injury no.(i) which was caused by firearm."

66. Again perusal of the postmortem report of Raghuvansh Singh shows that in column showing the place from where dead body was brought it is written as "Near Nalkup Vijaipur" but it has been cutdown/penneddown and above that it is written as "Yogibaba place, Vijaipur". It means when the requisition was sent to the Sadar Hospital with the dead body of Raghuvansh Singh the place of recovery was shown near Nalkup. This also creates doubt as to the actual place of occurrence.

67. The postmortem report of unknown body has been marked as Ext.5/1. In his cross-examination the doctor says that 'Zig-zag lacerated wounds were found over dead bodies of both the deceased but their size were different and no size possible by explosive substance. He has not mentioned the nature of injury no.(ii) and (iii) of unknown



deceased. These injuries may be possible by fallen hard substance.

68. At this stage, the submission of learned senior counsel for the appellant as regards the nature of injury found on the body of the deceased would be required to be considered. The deceased namely, Subhash has suffered three injuries. According to P.W. 2 & P.W.3, this appellant had caused the fire-arm injury on his back whereas co-accused Sanjay had caused the fire-arm on his eyes. P.W.3 could see the third injury on the hand of the deceased Subhash only at the police station. His statement is that all the accused were indiscriminately firing upon Subhash, if it is so, then, it is difficult to believe that on such huge firing Subhash will suffer only one fire-arm injury on his hand. P.W.2 & P.W.3 both say that they were standing when the firing was taking place and Raghubansh fell down after one of the shot hit him, but Raghubansh has suffered two injuries and from whose firing he suffered the injuries remain unanswered. Further injury no. 1 of Raghubansh and injury no. 1 of unknown dead body were in the nature of a big zig-zag lacerated wound with sacrifices of the whole skull, nasal bone, orbit of eyes, cervical vertebrae mandible were found. The doctor (P.W.4) has clearly opined



that injury no. 1 of Raghubansh has been caused by explosives whereas injury no. 2 has been caused by fire-arm. The injury no. 1 of the unknown dead body was similar to the injury no. 1 of Raghubansh and he had got two abrasions also on his body. P.W.4 has stated that the injury no. 1 of both the deceased were most similar in nature and it was possible that injury no.1 of the unknown deceased may be caused by explosive substance. The opinion of P.W.4 has been able to cast a grave doubt on the prosecution story which does not talk of use of explosives in the alleged occurrence.

69. In the above circumstances, I am of the considered opinion that the prosecution story in this case is so inextricably mixed up and interwoven that it is not possible to separate one part of the prosecution story from the another part. Any attempt to do so would require reconstruction of an absolutely new case for the prosecution.

70. I am, therefore, finding that the prosecution story as regards the place of occurrence and manner of occurrence is highly doubtful and it would not be safe to convict the appellant on the basis of the testimonies which are not trustworthy. I have recorded the submissions advanced on behalf of the prosecution, the prosecution has in its written



notes of submissions not at all controverted the submissions of learned Senior Counsel for the appellant as regards the place of occurrence and the manner of occurrence. Some submissions have been made as regards the evidence of Sachintan Yadav (PW 7) showing that his statement was recorded in supplementary case diary but at the same time, it is submitted by the prosecution that it was not brought to the notice of learned trial court. Perusal of the records show that in fact P.W.-7 was not a charge-sheet witness but the prosecution filed a petition in the trial court to allow him to depose as prosecution witness because his statement was recorded in the supplementary case diary and the prosecution witnesses have also said about him. The learned trial court allowed the request of the prosecution.

71. I have carefully perused the evidence of PW 7. P.W.7 has entered in this case as prosecution witness on 16th April, 2015 which is after about 21 years from the date of alleged occurrence. He has stated in paragraph '8' of his deposition that he had told to the son of the deceased that he had seen the occurrence. He says that police had not examined him in course of investigation. This witness has stated in his cross-examination (paragraph 25) that the operator was not at



the place of occurrence within 2-3 minutes he came there from Vijaipur and he was wearing full shirt and *lungi*. PW 7 has further stated that nobody from his village went to the place of occurrence. In paragraph 25, he says that when police reached at the place of occurrence police found the dead body of Raghubansh and one unknown person. Regarding the dead body of Subhash Gupta neither police asked him nor he told anything to police. In paragraph 26, he says that at about 6 P.M. he came to know that a dead body of Subhash Gupta is at particular place. This witness says that he had not seen the dead body of Subhash Chandra Gupta, his villagers told that police had brought the dead body of Subhash Chandra Gupta. From the deposition of this witness it is evident that he had not disclosed before police when police reached at the place of occurrence that he is an eye witness and he had seen the dead body of Subhash Gupta only after it was recovered and brought by police. The submission advanced on behalf of the prosecution giving much emphasis on the evidence of P.W.7 is noted only for the purpose of rejection.

72. Keeping in view the materials discussed hereinabove and the judgments on which reliance have been placed on behalf of the appellant and has been taken note of by



me in the earlier part of the judgment, I am of the considered opinion that the judgment of conviction of the learned trial court suffers from several infirmities, and, to me, it appears that the learned trial court has erred in appreciation of the materials available on the record, hence, the judgment under appeal is hereby set-aside.

73. The appeal is allowed.

74. The appellant stands acquitted and is directed to be set free if he is not wanted in any other case.

(Rajeev Ranjan Prasad, J.)

Ashwani Kumar Singh, J.: I agree.

(Ashwani Kumar Singh, J.)

Rajeev/-

AFR/NAFR	
CAV DATE	10.02.2022
Uploading Date	06.07.2022
Transmission Date	06.07.2022

