

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1181 of 2016**

Arising Out of PS. Case No.-40 Year-2014 Thana- PIRO District- Bhojpur

Gauri Shankar Choudhary son of Late Teju Chaudhary, resident of Village-
Mothiwali, P.S.- Piro, District- Ara Bihar.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 1190 of 2016

Arising Out of PS. Case No.-40 Year-2014 Thana- PIRO District- Bhojpur

1. Hari Chaudhary son of Late Ram Sakal Chaudhary
2. Manoj Chaudhary, son of Hari Chaudhary Both resident of Village-
Mothibal, P.S.- Piro, District- Bhojpur,

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 1181 of 2016)

For the Appellant/s	:	Mr. Surendra Kumar Singh, Advocate
		Mr. Sanjeev Kumar Mishra, Advocate
For the Respondent/s	:	Ms. Shashi Bala Verma, APP
		Mr. Krishna Prasad Singh, Sr. Advocate

(In CRIMINAL APPEAL (DB) No. 1190 of 2016)

For the Appellant/s	:	Mr. Surendra Kumar Singh, Advocate
		Mr. Sanjeev Kumar Mishra, Advocate
For the Respondent/s	:	Ms. Shashi Bala Verma, Spl. P.P.

CORAM: HONOURABLE MR. JUSTICE CHAKRADHARI SHARAN SINGH

and

HONOURABLE MR. JUSTICE RAJIV ROY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE JUSTICE RAJIV ROY)

Date : 26-04-2023

The appellants are aggrieved by the order and
judgment dated 24.09.2016 and the sentence dated 27.09.2016



passed by the learned IVth Additional Sessions Judge, Bhojpur Arrah in Sessions Trial No. 280 of 2014 (in connection with Piro P.S. Case No. 40 of 2014) by which the appellants Gauri Shankar Choudhary (Cr. Appeal No. 1181 of 2016) Hari Choudhary and Manoj Choudhary (Cr. Appeal No. 1190 of 2016) have been held guilty under sections 302/34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life and fine of Rs. ten thousand and further Gauri Shankar Choudhary has been held guilty under section 27 of the Arms Act and sentenced to undergo Rigorous Imprisonment for two years and fine of Rs. 2,000/- and in default imprisonment of six months has been ordered. All the sentences have been directed to run concurrently.

2. The prosecution story as it unfolds in the FIR is/are as follows:

(i) Chano Devi @ Chano Kunwar, wife of the deceased Ram Chandra Singh alleged that in the night of 12.02.2014, she was sleeping in the '*Dalan*' while her husband was sleeping in the '*Verandah*'. On the barking of the dog, the couple woke up and saw that appellant Gauri Shankar Choudhary alongwith Lal Babu Choudhary, Dev Murat Choudhary are climbing roof



with the help of bamboo while appellants Hari Choudhary and Manoj Choudhary as also Lallan Choudhary, Brahmdeo Choudhary are standing in front of the house. Further, on the enquiry made by her husband, Hari Choudhary exhorted to kill him as they have been identified. On this, Gauri Shankar Choudhary opened fire by country made pistol, hitting the left side of husband's stomach;

(ii) due to sound of firing, as villagers rushed, the accuseds retreated. The accuseds were also identified by her son, Sunil Kumar as also some other villagers. Her husband, Ram Chandra Singh was rushed to Primary Health Centre, Piro and thereafter to Sadar Hospital, Arrah where he succumbed to his injuries. The reason was old dispute and the accuseds had threatened to settle the same or to face dire consequences;

(iii) this statement made by the Informant, Chano Kunwar (P.W. 7) at Sadar Hospital, Arrah led to the registration of Piro Case No. 40 of 2014 on 13.02.2014 at 12:30 P.M. (the fardbeyan having been recorded at 8:15 A.M. on 13.02.2014).



3. The police investigated the matter and having found the case true against the accused persons submitted charge sheet on 11.07.2014 under sections 302/34 of the Indian Penal Code and section 27 of the Arms Act vide charge sheet no. 156 of 2014. Thereafter cognizance was taken in the matter and the charges framed against Gauri Shankar Choudhary, Hari Choudhary, Manoj Choudhary, Lallan Choudhary, Lal Babu Choudhary, Dev Murat Choudhary and Nanhu Choudhary on 20.01.2015.

4. The accused persons were examined on 12.08.2016 under section 313 of the Cr.P.C. in which they claimed their innocence necessitating the Trial.

5. The prosecution put forward the following witnesses:

P.W. 1- Sunil Kumar , son of the deceased

P.W. 2- Dr. Jitendra Nath Mishra

P.W. 3- Satya Narayan Singh

P.W. 4- Rajesh Ranjan @ Raju Singh

P.W. 5- Chandrama Singh

P.W. 6- Pappu Kumar

P.W. 7- Chano Devi @ Chano Kunwar
(Informant and wife of the deceased)



P.W. 8- Sidhnath Sharma

6. The following documents were exhibited:

Ext. 1- Signature of Sunil Kumar on seizure list.

Ext. 2- Post-mortem Report

Ext. 3- Signature of Rajesh Ranjan on the 'fardbeyan'.

Ext. 3/1- Inquest Report

Ext. 4- the Inquest Report having signatures of Rajesh Singh and Chandrama Singh

Ext. 5- the Inquest Report

Ext. 6- the signature of the S.P. Officer-in-Charge, Tarun Kumar on the 'fardbeyan'.

Ext.6/1- the signature of Constable Santosh Kumar on the F.I.R.

Ext.7- Sidhnath Sharma, Chandrama Singh and Sunik Kumar Singh's signature on the seizure list.

Ext. 8- Signature of Sidhnath Sharma on charge sheet.



Ext. 9- FSL Report no. 1697/2014 dated
26.11.2015.

7. P.W. 1, Sunil Kumar is son of the deceased. He deposed that on the fateful day, he was sleeping with P.W. 6, Pappu Kumar (his nephew) inside the house while mother, Chano Kunwar (P.W. 7) was sleeping in the '*Dalan*' and his father (deceased) in the verandah. On barking of the dog, he woke up and in the solar light, saw Gauri Shankar Choudhary, Hari Choudhary and Manoj Choudhary armed with pistols while Lalan Choudhary, Lal Babu Choudhary, Dev Murat Choudhary and Nanhu Choudhary were armed with '*lathi*'. Upon query by his father, Hari Choudhary stated that they have been identified and as such to kill him. Thereafter, Gauri Shankar Choudhary opened fire hitting the abdomen of his father. As villagers assembled, the accuseds left the place.

8. This prosecution witness further deposed that his father's sweater, vest, '*lungi*' as also mosquito net were seized by the Police and there was hole in the sweater as also the inner wear (vest). He further deposed that the solar light was shown to the police.

9. P.W. 2 is Dr. Jitendra Nath Mishra, the Doctor who conducted post-mortem of the deceased, Ram Chandra Singh



and found injury in the abdominal cavity with blackening darkening having no exit wound. The bullet was found in the right iliac crest. It is apt to incorporate the Post Mortem Report:

*“PM examination of Ram Chandra Singh
S/O Late Deep Narayan Singh.*

*Age: 65 years App of village- Mothiwal,
Thana-Piro, District- Bhojpur at 11:20 AM on
13.02.2014 and found following findings:-*

External:-

(1) R.M.- Present

*(2) Entry wound:- (a) above and left to
umbilicus in mid clavicular line*

*(b) elliptical shaped, 1 1/2” x 1” x
Abdominal Cavity deep, margin inverted blackening
& tattooing*

*3. No other external injuries seen on
wholebody*

4. No exit wound seen

Internal

*(1) No explanation of entry wound -
small intestine and large intestine was found badly
lacerated on several sites.*

*(2) Abd. Cavity is full of blood and blood
clots mixed with semisolid digested food material.*

*(3) Bullet is present at Rt margin iliac
crest (diagnosed by x-rays Abd.) ... of small bone
chips/parts, size 2” x 1/2” which is handed and
plastic ... to Mr. Surendra (D.S. Office).*

(4) Stomach and few partially digested



found particle seen

(5) Liver - Pale

(6) Glen – Pale

(7) Heart – Chamber empty & lung pale

Time since death - 6-36 hours

*Cause of death - Injuries to Intestine &
blood vessel – Hemorrhages & shock death”.*

10. P.W. 3, Satya Narayan Singh is the nephew of the deceased. He claims to have come out of his house with torch on hearing gunshots and reached the place of occurrence. In the said torch light, he saw the accused persons. He further deposed in cross examination that his aunty (P.W. 7) informed him that on the order of Hari Choudhary, Gauri Shankar Choudhary opened fire on his uncle (the deceased).

11. P.W. 4, Rajesh Ranjan is son of the deceased and claimed he was in Patna at the time of alleged occurrence.

12. P.W. 5, Chandrama Singh is a next-door neighbour of the deceased. According to him, on hearing gunshots, he alongwith his son reached the place of occurrence and claimed that he had seen pistols in the hands of Gauri Shankar Choudhary, Hari Choudhary and Manoj Choudhary and ‘lathis’ in the hands of other named accuseds person.

13. P.W. 6, Pappu Kumar deposed that he is grandson of the deceased and was sleeping with his uncle, Sunil Kumar



(P.W. 1) and on hearing the dog barking, came out and saw the entire occurrence. He fully supported the prosecution story and further deposed that accuseds, Gauri Shankar Choudhary, Hari Choudhary and Manoj Choudhary were armed with pistols while other accuseds were armed with 'lathi'. He further deposed that the injured was taken to Piro Hospital, then to Piro Police Station which was locked and then to Ara Hospital where his grandfather was declared dead.

14. He further deposed that in the solar light as also full moon light, the accuseds were identified. Further while his grandmother (P.W. 7) was sleeping inside the grill, the grandfather (deceased) was sleeping outside it.

15. P.W. 7 is the informant and wife of the deceased who has seen the entire occurrence. The lady reiterated that while she was sleeping inside the channel, her husband was sleeping in the '*dalan*'. She further claimed to have seen all the accused persons and deposed that on dog bark, the couple woke up while her son Sunil Kumar (P.W. 1) and grandson (P.W. 6) also reached there. She saw Gauri Shankar Choudhary, Hari Choudhary and Manoj Choudhary were carrying pistols and upon enquiry by the deceased, Hari Choudhary exhorted to kill him as they have been identified. On this, Gauri Shankar



Choudhary opened fire. She raised alarm, on which neighbours also came there. The injured husband was taken to Piro Hospital, then they went to the Piro Police Station which was locked and later to Ara Hospital where her husband succumbed to the injuries. She thereafter gave her '*fardbeyan*' to the Piro Police who in the meanwhile had reached Ara Hospital. She claimed to have identified the accused persons in the solar light as also in full moon lit sky. She further stated to have shown the solar light to the Police.

16. P.W. 8 is the Investigating Officer, Sidhnath Sharma. He recorded the statement of the informant, Chano Kunwar and prepared the Inquest Report of the deceased (Ext. 3/1), visited the place of occurrence and prepared the seizure list.

17. P.W. 8 deposed that the FSL team visited the place of occurrence and seized the blood mixed soil and sent it for chemical examination. Further, he received the bullet recovered from the body on 09.07.2014. He further deposed that the deceased was not an accused in any case although P.W. 1, Sunil Kumar and P.W. 3, Satya Narayan Singh were accuseds in Piro P.S. Case No. 120 of 2013 and further on the statement of Sunil Kumar, another case vide Piro P.S. Case No. 119 of 2013 was



registered. He however denied that solar light was shown to him.

18. The case of Defence was of complete denial. The submission put forward by the Defence Counsel before the Trial Court was/were that:

(i) the accuseds were falsely implicated in this case due to enmity;

(ii) the source of identification i.e. solar light/torch light are doubtful;

(iii) earlier, the order giver role was attributed to only Hari Choudhary but later Manoj Choudhary was also included;

(iv) as such there is inconsistency in the statement/deposition of P.W. 7 (Informant).

19. The Trial Court having gone through the entire records, the deposition as also the submissions put forward by the learned Defence Counsel held that:

(i) the prosecution witnesses were consistent in their depositions that Gauri Shankar Choudhary opened fire from close range which hit the abdomen of the deceased which



proved fatal;

(ii) so far as Hari Choudhary is concerned, it has again been consistent stand of the every eye witness that he exhorted Gauri Shankar Choudhary to kill as the deceased has identified them;

(iii) further, in case of Manoj Choudhary also, allegation that he too exhorted has come;

(iv) so far as other accused persons namely, Lallan Choudhary, Dev Murat Choudhary, Lal Babu Choudhary and Nanhu Choudhary are concerned, as per the prosecution story, neither they entered the informant's house nor any role have been attributed to them.

(v) regarding the source of identification, the Trial Court held that there is consistency in the deposition of the P.Ws that the accused persons



were identified in the solar light, torch light as also due to full moon lit sky;

(vi) further, the non production of prescription of Piro Hospital cannot vitiate the trial as the police too has stated that they first went to Piro Hospital and were informed that the injured has been taken to Ara Hospital.

20. The Trial Court accordingly held that the prosecution has been able to prove the complicity of accuseds Gauri Shankar Choudhary, Hari Choudhary and Manoj Choudhary. Regarding accuseds Lal Babu Choudhary, Dev Murat Choudhary, Lallan Choudhary and Nanhu Choudhary, they were given the benefit of doubt.

21. Thus, all the three accuseds were held guilty of charges under sections 302/34 of the Indian Penal Code and Gauri Shankar Choudhary was further held guilty of the charges under section 27 of the Arms Act on 24.09.2016.

22. Accordingly, on 27.09.2016, the accuseds/appellants Gauri Shankar Choudhary, Hari Choudhary and Manoj Choudhary were sentenced to undergo Rigorous Imprisonment for life and fine of Rs. 10-10 thousands under sections 302/34 of the Indian Penal Code and further Gauri



Shankar Choudhary was sentenced to undergo Rigorous Imprisonment for two years and fine of Rs. 2 thousand. In default of payment of fines, further imprisonment of 6-6 months were ordered. Further, all the sentences were to run concurrently.

23. Feeling dissatisfied and aggrieved by the said order dated 24.09.2016/27.09.2016, the appellant Gauri Shankar Choudhary preferred Cr. App (DB) No. 1181 of 2016, while the other two appellants namely, Hari Choudhary and Manoj Choudhary preferred Cr. App. (DB) No. 1190 of 2016.

24. Heard Mr. Surendra Kumar Singh, learned Counsel appearing in both the criminal appeals as also Ms. Shashi Bala Verma, learned APP.

25. Learned counsel for the appellants submit that there is delay in the lodging of the FIR inasmuch as while the alleged occurrence took place at 11:00 in the night of 12.02.2014, the '*fardbeyan*' was recorded the next day (13.02.2014) at 8:15 AM at Ara Hospital and thus this delay gave the informant an opportunity to frame all the family members of the appellants.

26. Learned counsel further contended that the statement of the informant that from Piro Hospital, they visited



the Piro Police Station and as the gate was locked, were forced to rush to Sadar Hospital, Ara is fit to be rejected as the Police Station can never remain locked.

27. The further submission is that although the informant claimed that the deceased was firstly taken to the Piro Hospital, no such document/medical prescription of the Piro Hospital was ever presented before the Trial Court.

28. Learned Counsel submitted that biggest question is the source of identification. He submits that while the prosecution witnesses claimed to have identified the accused persons in the solar light, P.W. 8, the Investigation Officer deposed that he was not shown any solar light and as such, the entire prosecution story has to be rejected.

29. The further submission is that there is inconsistencies in the statement made in the '*fardbeyan*' vis-a-vis deposition of the informant P.W. 7 inasmuch as while in the FIR, it was alleged that Hari Choudhary exhorted whereafter Gauri Shankar Choudhary opened fire killing her husband, before the Trial Court, she attributed the role of order giver to both Hari Choudhary as well as Manoj Choudhary.

30. In support of his case, the learned counsel for the appellants has cited the Hon'ble Apex Court decision in the



case of **Kapildeo Mandal & Ors. Vs The State Of Bihar** reported in **AIR 2008 SC 533**; the Patna High Court order is **Barkat Mian Vs. The State of Bihar** reported in **2017 (4) PLJR 701**; **Shivji Sah Vs. The State of Bihar** reported in **2015(2) PLJR 714** as also the Patna High Court (Ranchi Bench) order in **Mashi Das Minz & Ors. Vs. The State of Bihar** reported in **2000(1) PLJR 517**.

31. Ms. Shashi Bala Verma, learned APP on the other hand, submitted that there is no inconsistency in the depositions of the P.W.s. She submits that on the exhortion of Hari Choudhary, Gauri Shankar Choudhary opened fire causing death of Ram Chandra Singh at Sadar Hospital, Ara.

32. She further submitted that even on the point of identification, the P.Ws have consistently deposed that in the solar light and full moon lit sky, the accuseds were identified. Further, the other P.Ws who rushed on hearing the gunshots, came with torch and in that torch light claimed to have identified the accuseds.

33. So far as the delay in recording the '*fardbeyan*' is concerned, it is her submission that the circumstances have been fully explained in the FIR that they firstly went to Piro Hospital, then to Piro Police Station and finally to Sadar



Hospital, Ara where the injured was declared dead.

34. She as such, submits that there is no error in the order of the Trial Court and both the appeals are fit to be dismissed.

35. We have heard the learned Counsels for the appellants as also the State at length and also has gone through the records of the case.

36. The first point put forward by the learned Counsel for the appellants was that there has been delay in lodging of the F.I.R inasmuch as while the alleged occurrence took place at 11 P.M. on 12.02.2014, the '*fardbeyan*' of the informant was recorded at 8:15 a.m. on 13.02.2014 and the same has not been properly explained.

37. In the considered opinion of this Court, the prime importance of the informant and her family members was/were to save Ram Chandra Singh. As per the prosecution story, immediately after the occurrence, the family members as also some villagers rushed with the injured to the Piro Hospital where the Doctor advised them to take him to the Sadar Hospital, Ara. Once they left Piro Hospital, it is the prosecution case that they firstly went to the Piro Police Station where the gate was locked and despite effort, as no one came out, found



with the said situation, when an injured needed immediate medical attention, they had no option but to rush to the Sadar Hospital, Ara where the Doctor unfortunately declared him dead.

38. Further, it is also the statement of the Police that upon knowledge, the Police official including the Officer in charge, Piro Police Station alongwith the local '*chowkidar*' went to the Piro Hospital where the authorities informed them of the injured having moved to the Sadar Hospital, Ara. Accordingly, they went to Ara Hospital where they found that the injured was dead. Thereafter the '*fardbeyan*' of the informant was recorded. Thus, when the delay has been properly explained by the prosecution, the submission put forward is fit to be rejected.

39. The second submission of the learned Counsel for the appellants is/was about source of identification. Learned counsel for the appellants harped on the deposition of P.W. 8, the Police official to submit that no solar light was shown by the prosecution witnesses and thus they could not have identified the accuseds. He further submitted that the torch light under which some of the witnesses claimed to have identified the accuseds was never produced before the Trial Court and



thus the identification of the accused was doubtful.

40. This Court has taken note of the identification aspect. P.W. 7, the informant Chano Devi @ Chano Kunwar has specifically deposed that the face of the accuseds were not masked and she had identified them in the solar light and narrated the same before the police too. Her son, P.W. 1, Sunil Kumar another eye witness too claimed to have identified the accuseds in solar light. It was further deposed by the prosecution witnesses that the said solar light was shown to the police.

41. This Court has also taken note of the deposition of the prosecution witnesses that beside the solar light, 12.02.2014 was full moon lit night and as such the accuseds were easily identified. Thus, against the deposition of the I.O that the solar light was not shown, there are consistent statements of eye witnesses of not only having shown it to Police, the full moon lit night made the identification easy as the accuseds were not masked. Thus, the torch light was not the only piece of identification and its non-production does not make much difference to the case.

42. On the third submission put forward by the learned counsel for the appellants that earlier the order given role was



assigned to only Hari Choudhary, later during trial, it was deposed that Manoj Choudhary had also exhorted, in the considered view of this Court, there is force in the said contention. As per the original version, it was alleged that on having been exhorted by Hari Choudhary that they have been identified, Gauri Shankar Choudhary opened fire upon the husband of the informant which ultimately proved fatal. Further, no role was attributed to the appellant Manoj Choudhary save and except that he too was present alongwith Gauri Shankar Choudhary and Hari Choudhary.

43. Regarding inconsistency in the deposition of other prosecution witnesses vis-a-vis the P.W. 7, in the opinion of this Court there is no material inconsistency which can have any impact on the case. All the prosecution witnesses have consistently claimed that at the instance of Hari Choudhary, Gauri Shankar Choudhary opened fire which hit the abdomen of Ram Chandra Singh. He was rushed to Piro Hospital and then to Sadar Hospital, Ara where he died. The Postmortem Report fully supports the prosecution version. Thus the said submission too stands rejected.

44. So far as the cases cited by the appellants is/are concerned; in the case of **Kapildeo Mandal & Ors.** (supra) the



accuseds were identified in torch and lantern light which were not seized by the I.O. Further, there was no recovery of cartridges/pellets from the house. Lastly, the Doctor did not find any fire arm injury on the body of the deceased.

45. The Hon'ble Apex Court in that backdrop held in paragraphs 11 and 12 as follows:

“11. It is now well settled by series of decisions of this Court that while appreciating variance between medical evidence and ocular evidence, oral evidence of eye-witness has to get primacy as medical evidence is basically opinionative. [See Mange v. State of Haryana (1979) 4 SCC 349 (conviction based on sole testimony of eye-witness): State of U.P Vs. Krishna Gopal & Anr. (1988) 4 SCC 302 (in para 24)\; and Ramanand Yadav v. Prabhu Nath Jha & Ors. (2003) 12 SCC 606 (in para 17)]. But when the court finds inconsistency in the evidence given by the eye-witnesses which is totally inconsistent to that given by the medical experts, then evidence is appreciated in different perspective by the Courts. In Mohinder Singh v. The State, (1950) SCR 821 (at page 828), this Court said:-

“ ... In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be



the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case. In the present case, it is doubtful whether the injuries which are attributed to the appellant were caused by a gun or by a rifle. Indeed, it seems more likely that they were caused by a rifle than by a gun, and yet the case for the prosecution is that the appellant was armed with a gun and, in his examination, it was definitely put to him that he was armed with the gun P.16. It is only by the evidence of a duly qualified expert that it could have been ascertained whether the injuries attributed to the appellant were caused by a gun or by a rifle and such evidence alone could settle the controversy as to whether they could possibly have been caused by a firearm being used at such a close range as is suggested in the evidence....”

In Mani Ram and Ors. v. State of U.P., 1994 Supp (2) SCC 289 (in para 9), this Court held :

“...It is well settled by long series of decisions of this Court that where the



direct evidence is not supported by the expert evidence then the evidence is wanting in the most material part of the prosecution case and, therefore, it would be difficult to convict the accused on the basis of such evidence. If the evidence of the prosecution witnesses is totally inconsistent with the medical evidence this is a most fundamental defect in the prosecution case and unless this inconsistency is reasonably explained it is sufficient not only to discredit the evidence but the entire case....".

In another case of Thaman Kumar v. State of Union Territory of Chandigarh, AIR 2003 SC 3975 (in para 16), this Court held:

"The conflict between oral testimony and medical evidence can be of varied dimensions and shapes. There may be a case where there is total absence of injuries which are normally caused by a particular weapon. There is another category where though the injuries found on the victim are of the type which are possible by the weapon of assault, but the size and dimension of the injuries do not exactly tally with the size and dimension of the weapon. The third category can be where the injuries found on the victim are such which are normally caused by the weapon of assault



but they are not found on that portion of the body where they are deposed to have been caused by the eye- witnesses. The same kind of inference cannot be drawn in the three categories of apparent conflict in oral and medical evidence enumerated above. In the first category it may legitimately be inferred that the oral evidence regarding assault having been made from a particular weapon is not truthful. However, in the second and third category no such inference can straightway be drawn. The manner and method of assault, the position of the victim, the resistance offered by him, the opportunity available to the witnesses to see the occurrence like their distance, presence of light and many other similar factors will have to be taken into consideration in judging the reliability of ocular testimony.

12. In the present case, the medical evidence is to the effect that there were no fire arm injuries on the body of the deceased, whereas the eye-witnesses' version is that the accused-appellants were carrying firearms and the injuries were caused by the firearms. In such a situation and circumstance, the medical evidence will assume importance while appreciating the evidence led by the prosecution, by the court and will have priority over the ocular



version and can be used to repel the testimony of the eye witnesses as it goes to the root of the matter having an effect to repel conclusively the eye witnesses version to be true. The medical evidence when specifically rules out the injury claimed to have been inflicted as per the eye-witnesses' version, then the court can draw adverse inference to the effect that prosecution version as being put forth State before the court, is not trustworthy. In the present case, the medical evidence completely rules out the prosecution version of the injuries being caused by firearms, coupled with the fact that no evidence has been produced by the prosecution of any pellet or bullet being recovered from the place of incident or from the body of the deceased in post-mortem. In the light of the of the fact that there was a previous enmity between the parties and the eye-witnesses examined are related to the deceased and are interested witnesses; and that in absence the lantern or the torch, in the light of which the incident was said to have been witnessed, the prosecution case as placed before the court is full of doubts, and as such he accused-appellants are entitled for benefit of doubt”.



46. In the present case, the informant as also her son have narrated/deposed that the accuseds were identified in the solar light as also it was full moon lit sky. It has further been deposed by them that they had shown the I.O. the solar light. Further, the Doctor in his deposition clearly held that fire arm injury was there in the abdomen and there was no exit wound.

47. Thus, so far as the **Kapildeo Mandal and Ors. (supra)** case is concerned, it does not come to the appellants' rescue.

48. Another case cited by the appellants Counsel is **Barkat Mian Vs State of Bihar (supra)**. In that case too, the accuseds were identified in the torch light/lantern but the same were not seized/produced. There was previous enmity and out of four FIR witnesses, only one was produced who turned hostile. There was no explanation given for delay in recording 'fardbeyan' and Doctor who conducted post mortem was not examined. The Patna High Court citing **Kapildeo Mandal & Ors. (supra)** held as follows in paragraphs 17 to 19:

17. We have examined the materials on record as well as perused the evidence led by the prosecution. It is apparent that there are four material witnesses i.e. P.W.2 Man Deo Mukhiya, P.W. 6-Dhruv Narayan Prasad, P.W. 7-Ram Deo Bin (informant) and P.W. 9-Radhe Krishna Prasad.



While P.W. 2, P.W. 6 and P.W. 9 have stated to have recognized the appellant while fleeing away in torchlight, the informant herein i.e. P.W. 7 has stated that he had recognized the appellant in the light of lantern. However, neither the torch nor the lantern have either been seized or produced as evidence in the present case. Hence, non-production of the source of identification of the accused persons creates a doubt on the case as put forth by the prosecution. It is also difficult to believe that the appellant was identified in the torch light and the lantern light on a dark night, in absence of either seizure or production of either of the said two source of light/identification. The judgment referred to above by the learned counsel for the appellant in the case of Kapil Deo Mandal & Others (supra) squarely covers the present case. It would ti be relevant to quote paragraphs-19 and 27 d of the said judgment hereinbelow:-

“19. In the present case, we find from the evidence of the witnesses examined by the prosecution as already noticed that the witnesses are related and their relations were strained with the appellants on account of the litigation. The incident happened at 11.00 O'clock in the night. The witnesses have stated that they have seen the incident and recognized the appellants either in the torchlight or in the lantern-light which was burning at their house. It has come in



evidence of the witnesses as well as the Investigating Officer that neither the torch or the lantern was seized by the I.O. during the course of investigation nor was it produced before the court. In the circumstances, it is difficult to believe that the appellants have been identified in the torchlight or in the lantern-light.

27. In the light of the fact that there was a previous enmity between the parties and the eye- witnesses examined are related to the deceased and are interested witnesses; and that in absence of the lantern or the torch, in the light of which the incident was said to have been witnessed, the prosecution case as placed before the court is full of doubts, and as such the accused-appellants are entitled for benefit of doubt."

18. Another aspect of the matter is that the informant i.e. P.W. 7 who is the father of the deceased has admitted previous enmity with the accused persons, hence false implication of the accused persons can also not be ruled out. Moreover, there were four FIR witnesses out of which only one was produced by the prosecution but he turned hostile, however, the remaining three FIR witnesses were withheld by the prosecution which also creates doubt about the case put forth by the



prosecution. The incident is said to have taken place in the mid-night of the previous day of 16.3.1986 but the fardbeyan was recorded at 12:30 in the afternoon on 16.3.1986 but no explanation has been furnished for the delay in recording the fardbeyan, hence, the possibility of false implication cannot be ruled out. Another aspect of the matter is that although the Investigating Officer is said to have seized the blood but neither the same was exhibited nor the same was got examined by the Forensic Science Laboratory, thus prejudicing the defence. The inquest report was prepared at 11:30 A.M. on 16.3.1986 and only thereafter the fardbeyan is said to have been recorded on the same day i.e. at 12:30 in the afternoon which also creates doubt about the case of the prosecution. Furthermore, neither the inquest report has been exhibited nor the witnesses to the inquest report have been examined during the course of the trial. As far as the post mortem report is concerned, the same has been got proved by a Pharmacist. However, the doctor who has conducted the post mortem, has not been examined resulting in no opportunity being provided to the defence to cross-examine the doctor which have also seriously prejudiced the defence. It is a



matter of record that though the appellant and two other persons, namely, Bande Mian and Tabdin Mian were also holding the gun along with the appellant herein, the said two accused persons have been given a clean acquittal by the learned trial court and on the same set of evidence, the appellant herein has been convicted which further makes the case of the prosecution doubtful on account of the serious contradiction in the evidence of the prosecution witnesses.

19. Upon consideration of the entire evidence it is apparent that there was previous enmity between the informant and the accused persons, there is material contradiction in the evidence of the prosecution witnesses, neither the torch nor the lantern which were the only source of identification of the accused persons on a dark night were seized nor exhibited in the present case, the doctor who has conducted the post mortem report has not been examined, out of four FIR witnesses, only one was produced and examined but he turned hostile, there is no explanation for delay in recording the fardbeyan, the inquest report was prepared before the fardbeyan was recorded and the witnesses to the inquest were also not examined. Hence, the prosecution case as placed before the Court



is full of doubts and the prosecution has not been able to prove the case beyond all reasonable doubts. As such, the appellant herein deserves to be given the benefit of doubt.”

49. This Court can only observe that it has already explained in earlier paragraphs that the informant identified the accused in solar light as also that it was full moon lit sky. Further, unlike in **Barkat Mian case (supra)**, here all the FIR witnesses deposed and made statements in line with their earlier version. The lady in the FIR itself has stated that they rushed the injured to the Piro Hospital from where Doctor asked them to immediately move to Ara Hospital whereafter they went to Piro Police Station. As the gate of the Police Station was locked, they rushed to the Sadar Hospital, Ara where however the Doctor declared him dead. The ‘*fardbeyan*’ thereafter was recorded at Sadar Hospital itself where the Piro Police had arrived. Thus, the prime consideration at that time for the family members was/were to save the informant’s husband.

50. Further, the Police Officer/I.O. who deposed as P.W. 8 stated that he got information about the injury sustained by the informant’s husband as also that injured has been taken to the Piro Hospital. Thereafter he alongwith the Officer-in-charge of the Piro Police Station and ‘*chowkidar*’ reached Piro Hospital



where they were informed that the injured has been taken to Sadar Hospital, Ara. They thereafter moved to Ara Hospital where they came to know about the death of Ram Chandra Singh. There, he recorded the '*fardbeyan*' of the informant, Chano Devi @ Chano Kunwar.

51. Thus it is reiterated that the delay has been fully explained and there is consistency in the statement made by the informant vis-a-vis the deposition of the I.O.

52. Further, the Doctor, Dr. Jitendra Nath Singh deposed as P.W. 2 in the present case and supported the prosecution case/injury sustained by the deceased. Thus the case of **Barkat Mian** (supra) does not come to the aid of the appellant.

53. So far the next case cited by the learned Counsel for the appellants, **Shivji Sah** (supra) of Patna High Court is concerned, in the said case, the evidences of the eye witnesses were found contradictory to each other and the medical evidences also contradicted on the injury on the chest, it was held in paragraphs 45 to 47 as follows:

45. It is trite that the witnesses, ordinarily, fall into three distinct categories, namely, (i) wholly reliable, (ii) wholly unreliable and (iii) neither wholly



reliable nor wholly unreliable. If the witness is wholly reliable, his evidence can be implicitly relied upon and such a witness's testimony can be made basis for conviction of an accused. Similarly, when a witness is found to be wholly unreliable, no reliance can at all be placed on his evidence and his evidence has to be rejected outright. When, however, a witness is found to be neither wholly reliable, nor wholly unreliable, his evidence cannot be accepted as true unless his evidence is found to have been corroborated by some credible independent evidence, direct or circumstantial.

46. The evidence of the eye-witnesses, which the prosecutions has adduced in the present case, cannot be safely relied upon unless the same is found to have been/corroborated by some credible independent evidence, direct or circumstantial.

47. It is also an undisputed proposition of law that one infirm witness cannot be treated to have corroborated the evidence of another infirm witness meaning thereby that witnesses of same brand cannot be taken to have corroborated each other. Thus, when a witness is neither wholly reliable nor wholly unreliable, his evidence cannot be taken to



have been corroborated by a witness of the same brand, namely, a witness, who is neither wholly reliable nor wholly unreliable, for, evidence is not to be counted, but weighed. It is not the number, of the witnesses, which determines the outcome of a trial; rather, it is the inherent falsity or truth of the evidence given by the witness, which decides the outcome of trial. If each one of a large number of witnesses is found to be wholly unreliable, their evidence cannot become acceptable as true merely because a large number of similar brand of witnesses has corroborated each other.”

54. This Court has already elaborated the deposition of the informant, the identification as also the depositions of the I.O. and the Doctor and would not like to make repetitions save and except observing that unfortunately this case too do not fit in the present case.

55. The other case cited is **Mashi Das Minz & Ors.** (supra) passed by Patna High Court (Ranchi Bench). In the said case, the I.O. and the Doctor were not examined, the ocular evidence was found shaky and the villagers did not support the prosecution story. Further, the torch, the source of identification was not produced. The Court accordingly held that charges were not proved beyond reasonable doubts and the appellants are



entitled for benefits of doubt and the relevant paragraphs are 15
& 16:

15. I have already discussed above that neither the Investigating Officer nor the doctor has been examined in the case and none of the villagers supported the prosecution case in any manner, except PWs 5 and 7 who claimed to have seen the occurrence at the first instance and again they returned back to the village and later on again they rushed to the spot, but in the second time they were not allowed to see the occurrence. Such story as propounded by both the witnesses does not appear to be probable and convincing in absence of any other Independent witness to support the said story. Examination of Investigating Officer, particularly, in a murder case becomes essential when there is contradiction in the deposition of eye witnesses who are also inimical terms from before. In the Instant case, the Investigating Officer has not been examined which also causes the appellants' case prejudiced. Apart from this, the Doctor has also not been examined due to which the medical evidence could not be tested in the court. The occurrence said to be taken place in the night and the torch by which the



witnesses claimed to have identified has not been produced nor brought on the record which makes the whole story of identification in the night doubtful as a result of which the appellants should have been given benefit of doubt. Thus, in my view, the learned court below committed error in convicting the appellants.

16. For the reasons stated above, coupled with the evidence on record, it is clear that the prosecution has utterly failed to establish the charges against all the appellants beyond all reasonable doubts. In the result, the judgment of conviction and sentence passed by the learned Sessions Judge is fit to be set aside. Hence, I find merit in the appeals and both appeals being Cr. Appeal No. 303 of 1989 (R) and 346/89 (R) are accordingly allowed. The judgment of conviction and sentence passed by the learned Sessions Judge is hereby set aside. The appellants, who are on bail, are discharged from the liability of the bail bonds”.

56. For the reasons recorded in earlier paragraphs, in the considered view of this Court, even the aforesaid case cited do not come to the appellants rescue and absolve them of the charges.



57. Under the aforesaid circumstances, the judgment and order of the Trial Court so far as the same relate to Gauri Shankar Choudhary and Hari Choudhary, they have rightly been convicted under sections 302/34 of the Indian Penal Code and further Gauri Shankar Choudhary has again rightly been convicted under section 27 of the Arms Act.

58. Thus Cr. Appeal (DB) No. 1181 of 2016 (**Gauri Shankar Choudhary vs. The State of Bihar**) and Cr. Appeal (DB) No. 1140 of 2016 (relating to appellant no. 1, **Hari Choudhary vs. The State of Bihar**) need no interference and are accordingly dismissed.

59. However, so far as the appellant no. 2, **Manoj Choudhary** in Cr. Appeal (DB) No. 1190 of 2016 is concerned, in the prosecution story, the main allegation was that appellant no. 1 Hari Choudhary exhorted, that they have been identified and upon such exhortation, appellant Gauri Shankar Choudhary opened fire while no role was assigned to appellant Manoj Choudhary but later during the trial, it was deposed that he too had exhorted.

60. In the aforesaid circumstances, in the considered view of this Court, a reasonable doubt is created on the complicity of appellant no. 2, Manoj Choudhary in the killing of



Ram Chandra Singh.

61. In the aforesaid facts and circumstances, the impugned judgment and order dated 24.09.2016 and 27.09.2016 passed by learned IVth Additional Sessions Judge, Bhojpur at Ara in Sessions Trial No. 280 of 2014 (in connection with Piro P.S. Case No. 40 of 2014) so far as the same relates to appellant no. 2, Manoj Choudhary [Cr. Appeal No. (DB) 1190 of 2016] is concerned, the same is set aside.

62. The appellant no. 2 Manoj Choudhary [Cr. Appeal No. (DB) 1190 of 2016] is acquitted of the charges under section 302/34 of the Indian Penal Code.

63. The appellant no. 2 Manoj Choudhary is in jail custody. He be released forthwith, if not wanted in any other case.

(Rajiv Roy, J)

(Chakradhari Sharan Singh, J)

(Chakradhari Sharan Singh, J)

Jagdish/-

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