

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.293 of 2019

Arising Out of PS. Case No.-14 Year-2016 Thana- BITHAN District- Samastipur

KUNDAN SINGH @ KUNDAN KUMAR SINGH Son of Late Sadanand Singh, Resident of village-Hasanpur, P.S-Hasanpur, District-Samastipur.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 262 of 2019

Arising Out of PS. Case No.-14 Year-2016 Thana- BITHAN District- Samastipur

KRISHNA KUMAR YADAV @ BARKU YADAV Son of Ram Swarath Yadav Resident of Parkaulia Larjha Ward No. 8, P.S.- Bithan, Samastipur, Bihar - 848207

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 354 of 2019

Arising Out of PS. Case No.-14 Year-2016 Thana- BITHAN District- Samastipur

LAXMI YADAV @ BHOTIAL S/o Ramji Yadav R/o village- Checheni, P.S.- Bithan, District- Samastipur

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 293 of 2019)

For the Appellant/s : Mr. Ramakant Sharma, Sr. Advocate
Mr. Sanjay Singh, Sr. Advocate
Mr. Nagendra Kumar Singh, Advocate
Mr. Bijay Kumar Patha, Advocate
Mr. Rahul Kumar, Advocate

For the State : Mr. Abhimanyu Sharma, APP

For the Informant : Mr. Ashish Giri, Advocate

(In CRIMINAL APPEAL (DB) No. 262 of 2019)

For the Appellant/s : Mr. Nagendra Kumar Singh, Advocate
Mr. Bijay Kumar Patha, Advocate
Mr. Rahul Kumar, Advocate

For the State : Mr. Abhimanyu Sharma, APP

For the Informant : Mr. Ashish Giri, Advocate

(In CRIMINAL APPEAL (DB) No. 354 of 2019)

For the Appellant/s : Mr. Abhay Shankar Singh, Advocate



Mr. Amit Kumar Mishra, Advocate
Ms. Rushali, Advocate
For the State : Mr. Abhimanyu Sharma, APP
For the Informant : Mr. Ashish Giri, Advocate

CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI
and
HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)

Date : 28-08-2024

All the present appeals have been filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Code') challenging the judgment of conviction dated 04.01.2019 and order of sentence dated 08.01.2019 passed by learned Additional Sessions Judge-1st Rosera, Samastipur in Sessions Trial No. 295 of 2017, arising out of Bithan P.S. Case No. 14 of 2016, whereby the concerned Trial Court has convicted the present appellants for the offences punishable under Sections 302, 120(B) of I.P.C. and Section 27 of the Arms Act and they have been sentenced to undergo imprisonment for life for offence committed under Sections 302/34 of I.P.C. and rigorous imprisonment of seven years for offences committed under Section 27(2) of Arms Act and to pay fine of Rs. 20,000/- and Rs. 10,000/- respectively for offence committed under Section 302/34 of I.P.C. and Section 27(2) of the Arms Act and in case of default of payment of fine, appellant will have to undergo rigorous imprisonment of 3 months for each offence. All the sentences were ordered to be run concurrently.



FACTUAL MATRIX:-

2. The *fardbeyan* of Lalit Yadav was recorded by S.I. Ranjeet Kumar, S.H.O., Bithan at Sirsiya Village that, on 16.02.2016, at about 07:00 a.m., the informant was going to Bithan on two motorcycles. His cousin Birendra Yadav was riding on the Glamour motorcycle in the front. Behind him, Rajesh Yadav was riding the motorcycle. When they reached at Sirsiya crossroad, two motorcycles were already standing there and some people were standing there with arms and weapons including Kundan Singh, Barku Yadav, Pappu Yadav, Sushil Yadav, Laxmi Yadav, Mangal Yadav. All are residents of Chhachhni Police Station, District-Samastipur. Other 3-4 unknown persons were there who can be recognized by looking at them. Kundan Singh, Barku Yadav, Pappu Yadav, Sushil Yadav, Mangal Yadav and others were equipped with weapons. On reaching Sirsiya Chowk, they surrounded the motorcycles and Kundan Singh abused him stating that they lodged case against him and that they will eliminate him. After uttering these, Kundan Singh fired bullet from the pistol held in his hand which hit the temple of Birendra Yadav. Birendra Yadav was shot by Kundan Yadav along with the other persons who had come with him. Birendra Yadav and Birju Yadav fell there by getting injured in the firing. After getting down from the motorcycle, Kundan Singh



shook Birendra Yadav and tried to know about his status and abusively uttered that he is dead. He told everyone that he is going towards Sonbarsha and that they should leave Bithan. After that, all the criminals ran towards the west Hasanpur with Kundan Singh and other three persons ran towards the west on their feet. Because of fear, the informant hid himself behind that place. After the criminals went away, he and Rajesh came out of their hiding place and reached Birendra Yadav and Birju Yadav. Both of them were dead by then.

2.1. After registration of the F.I.R., the Investigating Officer started the investigation and during the course of the investigation, he had recorded the statement of the witnesses and thereafter filed the charge-sheet against the appellant/accused before the concerned Magistrate Court. As the case was exclusively triable by the Court of Sessions, the learned Magistrate committed the same to the Sessions Court where the same was registered as Sessions Trial No. 295 of 2017.

3. In Criminal Appeal (DB) No. 293/2019, we have heard Mr. Ramakant Sharma and Mr. Sanjay Singh, learned senior counsels assisted by Mr. Nagendra Kr. Singh, Mr. Bijay Kumar Pathak and Mr. Rahul Kumar for the appellant, Mr. Abhimanyu



Sharma, learned A.P.P. for the Respondent State and Mr. Ashish Giri for the Informant.

3.1. In Criminal Appeal (DB) No. 262/2019, we have heard learned counsel Mr. Nagendra Kumar Singh assisted by Mr. Bijay Kumar Pathak and Mr. Rahul Kumar for the appellant, Mr. Abhimanyu Sharma, learned A.P.P. for the Respondent State and Mr. Ashish Giri for the Informant.

3.2. In Criminal Appeal (DB) No. 354/2019, we have heard learned counsel Mr. Abhay Shankar Singh assisted by Mr. Amit Kumar Mishra and Ms. Rushali for the appellant, Mr. Abhimanyu Sharma, learned A.P.P. for the Respondent State and Mr. Ashish Giri for the Informant.

SUBMISSIONS ON BEHALF OF THE APPELLANTS:-

4. Learned senior counsels Mr. Sanjay Singh and Mr. Ramakant Sharma, appearing in Criminal Appeal (DB) No. 293 of 2019, mainly submitted that the prosecution has projected PW-1 to PW-4 as eye-witnesses. However, from the evidence led by the prosecution, it can be said that they are not the eye-witnesses to the occurrence in question. In fact, PW-1 to PW-4 are interested witnesses and no independent witnesses have been examined by the prosecution. PW-2 has specifically admitted that both the deceased i.e. Birendra Yadav and Birju Yadav are his cousin brothers. PW-1



has also categorically admitted that besides being co-villagers they are related. It is also contended that PW-3 and PW-4 are chance witnesses. Learned counsels referred the deposition given by PW-3 and submitted that the said witness, in Paragraph-1, has stated that, at 07:00 a.m., on the date of incident, he was going to Bithan to buy vegetables. PW-4 has similarly stated, in Paragraph-1, of his deposition that he was coming from Bithan Bazar towards Sirsiya village while herding his buffalo. In fact, the said witness is also an interested witness and the said witness, in Paragraph-20, had admitted that the deceased Birendra Yadav and Birju Yadav were known to him. Sister-in-law of Birendra Yadav was earlier *pramukh* of the village. The said witness further deposed that his son-in-law Rakesh Kumar is posted in Chechani school as a Block Teacher by the concerned committee headed by *pramukh* and *mukhiya*. Thus, the son-in-law of the said witness has been given a job by the family of the deceased Birendra Yadav. At this stage, it is also pointed out, from the deposition of PW-8 i.e. the Investigating Officer, that occurrence had taken place in front of house of Ramnandan Rai. However, Ramnandan Rai, nor any other witness has been examined who were in the vicinity of the place of occurrence or such persons who have gathered at the place of occurrence after the incident took place.



5. At this stage, learned senior counsels appearing for the appellants submitted that the medical evidence does not support version given by the so-called eye-witnesses. Learned counsels referred the deposition of Doctor (PW-7), who had conducted the *post mortem* examination of the dead body of both the deceased. It is contended that PW-7 specifically stated that the deceased Birendra Yadav sustained one lacerated injury over left side of skull. The said witness further explained that Injury No. 1 on the temple of the deceased Birendra Yadav could have been caused by hard and blunt weapon. It is also submitted that PW-7 (Doctor) has also specifically admitted that he did not find any charring, tattooing and blackening at the wound of entry. He further deposed that, in the present case, the shots had been fired from a distance of more than 7 feet. Learned senior counsels, therefore, urged that the medical evidence completely rules out the version given by the so-called eye-witnesses.

6. At this stage, learned counsels also contended that PW-7 (Doctor), who had conducted the *post mortem* examination, has specifically opined that since death was within 36 hours since *rigor mortis* was present. It is submitted that even if the time of *post mortem* examination was considered at 03:00 p.m. and the time of occurrence, as stated by the informant, is to be 07:00 a.m., the death



would be much prior to 07:00 a.m. It is further submitted that PW-8 (Investigating Officer) has also stated that he had started the investigation at 07:30 a.m. and in the Station Diary entry, on the same date, he had recorded that it was between 06:00-06:20 a.m. that he had received the information about occurrence. Further, the Investigating Officer had also admitted that he had received the information from an unknown person which he had mentioned in the Station Diary. The Investigating Officer has also deposed that he received the information about the occurrence from the Superintendent of Police. Learned counsels, therefore, contended that this clearly suggests that the occurrence had taken place much prior to 07:00 a.m. and PW-1 and PW-2 have deliberately stated that they had left their house from village Chechhani at 06:00 a.m. and had reached Sirsiya *Chowraha* at about 07:00 a.m. Thus, PW-1 and PW-2 are, in fact, not the eye-witnesses and they have manipulated the time of occurrence to explain the time taken to travel from their village Chechhani to Sirsiya since they have to cross a river by boat. Learned counsels, therefore, urged that when the aforesaid witnesses are relatives of the deceased and interested witnesses and when their deposition is not trustworthy, this Court may set aside the impugned judgment and order passed by the Trial Court.



7. Learned senior counsels would further submit that, as per the deposition of the Investigating Officer, the accused Laxmi Yadav was arrested from his house from village Chechhani. The arresting team comprised of the Investigating Officer himself and S.I. Badelal, who is said to have drawn up the arrest memo. Thereafter, Badelal along with the Investigating Officer had proceeded to village Ladma, Sonbarsha in Saharsa. The Investigating Officer went by private vehicle and S.I. Badelal went in Police vehicle. PW-8 (Investigating Officer) had deposed that when he reached Sonbarsha, he came to know that Kundan Singh was at the house of his relative and the house was full of guests and, on inquiry, he came to know that the nephew of Kundan Singh was getting married. It is also submitted that the prosecution nowhere explained the C.D.R. of the mobile of Kundan Singh which shows the location at Saharsa, nor does it explain footage of the vehicles crossing the toll plaza on 15.06.2016.

8. It is also contended that because of the political rivalry between the parties, the appellant has been falsely implicated though he was not present at the place of occurrence and he was at a distance of more than 200 kilometers from the place of incident, attending the marriage ceremony of his nephew. It is submitted that, by leading evidence by examining defence witnesses and by



producing necessary documents, the appellant was able to prove the *alibi*, despite which the Trial Court has discarded the same. Learned senior counsels also submitted that there are major contradictions, inconsistencies and indiscrepancies in the deposition of the prosecution witnesses and the prosecution has failed to prove the case against the accused beyond reasonable doubt, despite which the Trial Court has passed the impugned judgment and order and, therefore, the same be quashed and set aside.

9. Learned senior counsel Mr. Abhay Shankar Singh appearing in Criminal Appeal (DB) No. 354 of 2019 for the appellant Laxmi Yadav has also adopted the submission canvassed by the learned senior counsels appearing for the appellant Kundan Singh. However, it has been further contended that the prosecution has failed to prove the time of occurrence, manner of occurrence and even the place of occurrence beyond reasonable doubt. It is submitted that the deceased persons were having criminal history and having many cases of heinous nature pending against them and, therefore, there was all possibility of their killing in gang war by some other person in some other manner and at different time and place and the same cannot be ruled out. It is submitted that there is every reason for the false implication of the appellant by the informant by naming him as one among 6 named and 3-4 unknown



persons because the appellant had purchased a land from one Mahendra Yadav (uncle of informant) and one Ashok Yadav, who is the cousin of informant, for which the previous land dispute was going on. In fact, informant and his cousins were pressing hard to return the land in favour of Ashok Yadav, who is mastermind behind the false implication of the appellant and other accused person.

10. It is further contended that, even as per the deposition given by the Investigating Officer, appellant Laxmi Yadav was arrested from his house situated in the same village immediately after the occurrence took place which is not a normal conduct in as much as the normal conduct would be to escape or run away if one had participated in such an incident.

11. Learned counsel Mr. Nagendra Kumar Singh appearing in Criminal Appeal (DB) No. 262 of 2019 has also adopted the submission canvassed by the learned counsels appearing in two other criminal appeals. However, learned counsel further submits that, in the F.I.R., specific allegation against the appellant is that he along with five other named accused and 3-4 unknown persons indiscriminately fired upon the deceased Birendra Yadav who was driving motorcycle and Birju Yadav who was a pillion rider. Thus, general and omnibus allegation has been levelled against the appellant Krishna Kumar Yadav @ Barku Yadav. It is further



submitted that, as per PW-1, one Barku Yadav and Pappu Yadav fired shot over Birju Yadav. The appellant fired shot over Birju Yadav below eye and near the nose. The said witness had seen the incident from the distance of one *lagga* and stated that firing was done from close range. However, PW-7 (Doctor), who had performed the *post mortem* examination of the dead body of Birju Yadav has opined that there is one wound of exit below the eye which demolishes the entire prosecution case. It is also contended that the medical evidence does not support the version of the so-called eye-witnesses. It is also contended by the learned counsel that the prosecution has neither exhibited the blood-stained clothes of the deceased nor the blood-stained soil collected from the place of occurrence. At this stage, it is also pointed out, from the deposition of PW-7 (Doctor), that all the entry wounds were caused from behind the deceased which indicates that the deceased persons were killed at other place and not at the alleged place of occurrence.

12. Learned counsel for the appellant, therefore, urged that the prosecution has miserably failed to prove the case against the accused beyond reasonable doubt despite which the impugned judgment and order has been passed and, therefore, the same be quashed and set aside.



SUBMISSIONS ON BEHALF OF THE INFORMANT &

STATE:-

13. On the other hand, learned counsel appearing on behalf of the informant has vehemently opposed the present appeals. Learned counsel would mainly submit that there are four eye-witnesses to the occurrence in question and the presence of the said witnesses at the place was quite natural. It is also submitted that all the aforesaid witnesses have been cross-examined at length. However, the defence has not been able to point out any material contradiction so as to completely rule out the veracity of the deposition of the four eye-witnesses. Thus, the prosecution has proved the place and time of occurrence, the manner of occurrence and the presence of the accused persons at the place of occurrence. Learned counsel has referred the deposition of the aforesaid four eye-witnesses in support of the aforesaid contention. It is also submitted that even the presence of PW-3 and PW-4, who are resident of near vicinity, cannot be doubted and the said witnesses cannot be termed as a chance witnesses. In support of the said contention, learned counsel has referred Paragraphs- 1, 3, 5, 6, 8, 29, 39 and 59 of the deposition of PW-4.

14. Learned counsel for the informant has placed reliance upon the following decisions:-



(i) **Gulab Vs. State of Uttar Pradesh**, reported in (2022) 12 SCC 677.

(ii) **Rajesh Yadav & Anr. Vs. State of Uttar Pradesh**, reported in (2022) 12 SCC 200.

(iii) **Vijendra Singh Vs. State of Uttar Pradesh**, reported in (2017) 11 SCC 129.

15. Thereafter, learned counsel for the informant has referred the deposition given by PW-7 (Doctor), who had conducted the *post mortem* examination of two deceased. It is contended that the bullet injury has been cause of death of the deceased Birju Yadav whereas four bullet injuries having been found by the said witness in the body of the deceased Birendra Yadav. The Doctor has specifically opined that the cause of death is firearm injuries. Thus, merely because there was some discrepancy with regard to the Injury No. 1 of Birendra Yadav and there was only one bullet injury sustained by Birju Yadav, the entire evidence of the prosecution cannot be discarded on the aforesaid ground. The said discrepancy is not fatal. It is also submitted that the Court can give precedence to ocular evidence. In support of the said contention, learned counsel has placed reliance upon the following two decisions:-

(i) **Rameshji Amarsing Takor Vs. State of Gujarat**, reported in (2023) SCC OnLine SC 1321.



(ii) **Darbara Singh Vs. State of Punjab**, reported in **(2012) 10 SCC 476**.

16. Learned counsel further submits that even if a single injury is said to have been proved and other injuries are not proved, yet the same is sufficient to bring home the conviction of all the accused as they have been charged for offences under Section 302 read with Section 34 of I.P.C. Thus, the Trial Court has rightly convicted all the accused persons for commission of the aforesaid offences. Learned counsel has placed reliance upon the following decisions:-

(i) **Ram Naresh Vs. State of Uttar Pradesh**, reported in **(2024) 1 SCC 443**.

(ii) **Vijendra Singh Vs. State of Uttar Pradesh**, reported in **(2017) 11 SCC 129**.

17. Learned counsel for the informant would further submit that merely because there are minor discrepancies in the deposition given by PW-8 (Investigating Officer), it would not nullify the other evidence led by the prosecution. Learned counsel referred the deposition of Investigating Officer (PW-8) and thereafter contended that he supports the place of occurrence and time of occurrence. Further, the Investigating Officer proceeded from the place of occurrence to arrest Laxmi Yadav and thereafter to the



accused Kundan Singh for which the explanation has been given. It is contended that it is the duty of the Court to weed out the grains from the chaff and not to entirely reject the testimony of a partly reliable witness. Learned counsel has placed reliance upon the decisions rendered by the Hon'ble Supreme Court in the case of **Amrita @ Amritlal Vs. State of M.P.**, reported in **(2004) 12 SCC 224**.

18. Learned counsel further submits that merely because accused Kundan Kumar Singh has been arrested from Sonbarsha, where there were some family function happening, the same by itself does not rule out the possibility of the said accused not being able to be present at the place of occurrence in all probabilities. Hence, the plea of *alibi* would not come in the aid of the accused. In support of the said contention, learned counsel has placed reliance upon the following decisions:-

(i) **Kamal Prasad & Ors. Vs. State of Madhya Pradesh (now State of Chhattisgarh)**, reported in **(2023) 10 SCC 172**.

(ii) **Vijay Pal Vs. State (Government of NCT of Delhi)**, reported in **(2015) 4 SCC 749**.

19. Learned counsel, therefore, urged that the prosecution has proved the case against all the appellants/convicts beyond reasonable doubt and, therefore, the Trial Court has not committed



any error while passing the impugned judgment and order. Learned counsel, therefore, urged that all these appeals be dismissed.

20. Learned A.P.P. for the Respondent-State has also adopted the submissions canvassed by the learned counsel for the informant and urged that all these appeals be dismissed.

ANALYSIS OF ORAL EVIDENCE:-

21. We have considered the submissions canvassed by the learned counsels for the parties. We have also perused the evidence of prosecution witnesses and also perused the documentary evidence exhibited.

22. At this stage, we would like to appreciate the relevant extract of entire evidence led by the prosecution before the Trial Court.

23. Before the Trial Court, prosecution examined 8 witnesses.

24. PW-1 Rajesh Kumar Yadav has stated, in his examination-in-chief, that the incident took place on 16th February, 2016 at about 07:00 a.m. On that day, at 06:00 a.m., he reached the crossroad of Sirsiya village. Six people were standing with weapons in their hands. Kundan Singh, Barku Yadav, Laxmi Yadav @ Bhatiyal Yadav, Pappu Yadav, Mangal Yadav, Sushil Yadav all were holding weapons in their hands which looked like pistol. Birendra



Yadav and Birju Yadav were ahead of them on a motorcycle and on the other motorcycle he was with Lalit Yadav. Birendra Yadav's motorcycle was at a distance of one and a half *lagga*. Birendra Yadav was riding on the motorcycle and Birju Yadav was pillion rider. Kundan Singh stopped Birendra Yadav and told him that they lodged a case against him, he would kill him right now. Kundan Singh shot Birendra Yadav on his right temple and all the other miscreants also kept firing on Birendra Yadav and Birju Yadav. After killing Birendra Yadav, Kundan Singh turned him upside down to make sure whether he had died or not. He shot him once again in his back and told all the accused persons to flee. Further, he said that he was going to Sonbarsha *kachhari*. Ten minutes after the incident, the SHO came there where Lalit Yadav gave the statement before the Police and also signed the *fardbeyan* as a witness. He identifies it and it is marked as Exhibit-1. His statement was also recorded before the Magistrate. He gave the same statement before the Magistrate. He identifies his signature on the statement which is marked as Exhibit-2.

24.1. In his cross-examination, he has stated that his statement was recorded before the Police on 16th February, 2016 at the place of occurrence. After giving the statement before the S.I., he gave his statement before the Magistrate. He reached at the place of



occurrence at 07:00 a.m. He reached Sirsiya village crossroad from his home at Chhachhni and saw that six people were standing there with weapons in their hands. Birendra Yadav and Birju Yadav were on a motorcycle. Birendra Yadav was driving the motorcycle and Birju Yadav was sitting behind him. Kundan Singh stopped Birendra Yadav and told him that since he had filed a case against him, he would kill him right then. Kundan Singh shot Birendra Yadav on his temple and the rest of the miscreants kept firing Birendra Yadav and Birju Yadav. Kundan Singh then turned Birendra Yadav upside down to make sure whether he had died or not. Thereafter, Kundan Singh fired a shot in his back too and told other persons to flee away. He told them that he was going to Sonbarsha *kachhari*. He has further stated that Birendra Yadav and Birju were relatives and were on the same motorcycle. There were ten people at the crossroad of Sirsiya village. There is a river one kilometer away from the place of occurrence, after crossing that he reached there. At the time of firing, he had counted the bullets. Birendra Yadav had received five bullets. Kundan Singh, Barku Yadav, Laxmi Yadav, Pappu Yadav, Mangal Yadav and Sushil Yadav had shot him. All six people had shot him at once. Barku Yadav and Pappu Yadav shot at Birju Yadav. Barku Yadav shot Birju Yadav below his eyes near his nose. He saw the incident at a distance of one *lagga*. The bullet was shot from a point



blank range. The bullet shot by Barku Yadav remained stuck inside and blood came out. Two bullets were fired at Birju Yadav. One bullet was fired by Barku Yadav and the other bullet was shot by Pappu Yadav. Pappu Yadav also shot him at a point blank range. Further, he has stated that after the deceased was shot, he went closer and saw that there was a hole due to the bullet shot and saw blood oozing out. There was a black mark at the place where they had sustained the bullet injury. He has further stated that he got down the motorcycle and watched the said incident. He has further deposed that Birendra Yadav is from his village and is a relative of Birju Yadav. He stayed at the place of occurrence for half an hour. It takes an hour to reach the place of occurrence from his home. There was a case registered against him under the Arms Act in the year 2006 which was a false case. He has further stated that he saw the blood stains at the place of occurrence. Blood was spread at a distance of about 2 feet. The dead bodies were lying in the pool of blood. The distance between two deceased persons was only one foot and both of them were lying dead. On the day of incident, he crossed the *ghat* on boat. He has further stated that he started from his home at 06:00 a.m. and that he and Lalit were on the same motorcycle. He does not remember for how long he had stayed at the place of occurrence. The administration came at the place of occurrence ten minutes after



the incident. The people of his village got the petition written. He then signed it. The S.I. came at the place of occurrence and took away the dead body. He had gone to the Police Station with the dead body. He has further stated that Lalit Yadav is from his village but they are not related. Lalit Yadav is the cousin brother of the deceased Birendra Yadav.

25. PW-2 Lalit Yadav is the informant of the case. He has deposed, in his examination-in-chief, that the incident took place on 16.02.2016 at about 07:00 a.m. At that time, they were going from Chhachhni to Bithan on two motorcycles. Birendra Yadav and Birju Yadav were on the front motorcycle and he and Rajesh Yadav were in the rear motorcycle. When they reached Sirsiya crossroad, Birendra Yadav's motorcycle was at a distance of one and a half *lagga*. Six men were standing at Sirsiya crossroad with weapons in their hands. Kundan Singh stopped Birendra Yadav's vehicle and said in abusive language that since they filed a case against them, he will shoot him that day. Taking the weapon in his hand, Kundan Singh shot Birendra Yadav on the forehead and kept on firing him. Laxmi Yadav, Barku Yadav, Pappu Yadav, Sushil Yadav and Mangal Yadav all shot both Birendra and Birju on the back, forehead and arm. Both the men fell from the motorcycle. After falling, Kundan Singh tried to shake Birendra Yadav by kicking him and then he shot



a bullet in the back of Birendra Yadav. After they fled away, he saw that both men were dead. The head clerk of Bithan Police Station came there after 10-15 minutes and took his statement. His signature is on the *fardbeyan* which is marked as Exhibit-1/1. After that, the dead body was sent for *post mortem*. His statement was made in the Police and also in the Court before the Magistrate which he recognizes and is marked as Exhibit-2/1.

25.1. In his cross-examination, he has stated that he is the Deputy head of Narpa *Panchayat*. He recognizes Ashok Yadav. Ashok Yadav is his cousin brother. Police seized the Glamour vehicle which was driven by Birendra Yadav and Birju Yadav. It is stated that Birendra Yadav was his cousin and Birju was a relative. On the day of incident, he crossed Chhachhni Ghat which is on Kareh River. People cross it by boat. The vehicles are also loaded on the boat. In his statement, he had not talked about some persons standing with weapons, rather he had stated the names of all the six accused persons. In his statement before the Police, he had not alleged the accused Barku Yadav for committing any occurrence, rather he had stated the fact about the presence of Barku Yadav at that place only. He has further stated that he had known Kundan Singh for about three years. Later, he stated that when he looked at the deceased persons, people were at their doors. At the place of



occurrence, Birendra Yadav was wearing white coloured full pant, white and red coloured shoes and socks, white coloured vest and white coloured shirt and had a black belt around his waist. Birju Yadav was wearing white coloured full pant and white coloured shirt and cream coloured belt and had red and white coloured sandals on his feet. The heads of both the deceased persons were facing towards West from the road and their clothes were ensanguined in blood. After his statement, the S.I. took the dead bodies for *post mortem*. He did not went with the S.I., rather he started crying. The S.I. recorded his statement at Sirsiya crossroad. The distance of the Police Station from the place of occurrence was 1^{1/2}-2 kilometers. The S.I. reached at the place of occurrence at about 07:10 hours. It is stated that after being shot, Birendra and Birju fell from the vehicle. When they fell, the vehicle fell on the middle of the road. At the time when both the deceased fell from the motorcycle, there were six accused persons near them. Bullet was indiscriminately fired at a point blank distance. He can't tell how many bullets were fired. All the fired bullets hit the dead bodies of the deceased persons. He saw an empty cartridge at the place of occurrence which was recovered by the Head Clerk. 6-7 empty cartridges were recovered from the place of occurrence. In his *fardbeyan*, he had stated to S.I. that he was going to participate in the meeting of PACS. In his *fardbeyan*,



he had not said about Kundan Singh going to Hasanpur. He had told the S.I. that the accused persons escaped towards the west on two motorcycles and Kundan Singh escaped towards Sonbarsha. He had filed two cases against Laxmi Yadav for not irrigating the fields. One is this occurrence and another one is the occurrence of extortion.

26. PW-3 Binod Mukhiya had deposed that on the day of incident, when he reached at Sirsiya Chaumer, he saw that Kundan Singh, Pappu Yadav, Barku Yadav, Sushil Yadav, Bhatiyal Yadav and Mangal Yadav were standing with weapons in their hands. He stopped back out of fear. After some time, he saw that Birendra Yadav and Birju Yadav were coming on a motorcycle. At that time, Kundan Singh stopped him. Kundan Singh along with other people started firing indiscriminately. Because of the said firing, Birendra Yadav and Birju Yadav fell down. Hearing the uproar, Kundan Singh fled to the east and some people fled to the west. When Police came there, they recovered 7 bullet cartridges, blood soaked soil and a black coloured motorcycle. A seizure list was made, which he signed.

26.1. In his cross-examination, he has stated that he knows about the son of Laxmi Yadav who had fled from the village. It is stated that he had committed a murder, that is why he had fled. He is a witness in that case. He has testified in that case in the Court. He



has stated that he has the same case of incident. He had received a notice in the case but does not remember the case number. He went to Bithan *bazar* to purchase vegetables. He has further stated that it is not the case that Laxmi Yadav owns the land which he got registered in the name of Mahendra Yadav. Ashok Yadav and the informant in this case exerted pressure to return the land. When Laxmi Yadav refused to return the land, they hatched a conspiracy and implicated him in a false case. It is true that, he had said in his statement, that he reached Sirsiya *chowk* crossroad and when he saw the armed men, he hid himself. He saw the incident from a distance of 2 *lagga*. When he reached the spot of incident, he saw that four people had reached there before him. First Lalit Yadav reached there, then Rajesh Yadav and then he reached there. He could not tell the names of the number of people who came after him. It is stated that he hid behind a pile of dry cow dung but when he came out, the killers had run away. He has further stated that he left his village at quarter to six. His village is at a distance of one and a half kilometer from Sirsiya *chowraha*. He had stated that he has to cross the river at a distance of 300 feet to reach Sirsiya village. He crossed the river on boat. Since there was not sailor at that time, he rowed the boat himself. He cannot tell as to how much time it took to reach *chaumer* after crossing the river, as he did not have a watch. When



he reached *chaumer*, he did not ask anybody about the time but he guessed it was 07:00 hours. During his stay at *chaumer*, he saw only Lalit Yadav and Rajesh Yadav and no one else. It is stated that he does not do labour work and he had been the driver of Ashok Yadav's tractor and private vehicle for about 10 years.

27. PW-4 Gopal Yadav had deposed that at the time of incident, he was going towards Sirsiya village. When he reached at Sirsiya village *chaumer*, from a pole's distance he saw that six persons were standing there armed with weapons. Birendra Yadav and Birju Yadav were coming on a motorcycle from the side of Sirsiya Dam. When he arrived at *chaumer*, he found that some men had started firing. Kundan, Barku Yadav and Bhatial Yadav were there but he does not know the names of the remaining three. Birendra and Birju died because of bullet injuries. The accused persons fled from the spot after killing. After that, Police Station Incharge came there and prepared the *Panchnama* and he signed both the *Panchnama*. His statement was recorded before *Darogaji*. When he reached at the place of incident, he found that there was no one else there but the people were standing far. He had stated that he got home an hour later than he was supposed to. He knew Birendra Yadav and Birju Yadav. He is not a member of their group.



Birendra's sister-in-law was *pramukh*. He does not know that his brother's name was Ashok Yadav.

27.1. In his cross-examination, he has stated that he had three sons who does farming and live in the village and he had a daughter who is married to Rakesh Kumar Ravi. His son-in-law is a teacher posted at Chechhani school. It is stated that his first post was at Chechhani itself. He has further stated that the place of incident is at a distance of 3-4 kilometers from his house. On the day of incident, at about 07:00 a.m., he was going towards his house.

28. PW-5 Rajesh Kumar Singh is the A.S.I. He presented the material exhibit in sealed state in Bithan Case No. 14/2016 by orders from head clerk of Bithan Police Station.

29. PW-6 Mithilesh Kumar Singh was posted at the post of Sergeant Major at Police Line, Samastipur on 16.04.2016. On that day, as per orders of A.C.J.M., Rosera seized the material exhibited in Bithan P.S. Case No. 14/2016 which was presented before him for examination in sealed packet. On opening the said packet, he found seven 9mm bullet cartridges. After investigation, all the bullet cartridges were marked as A, A1 to A6. All the bullet cartridges are made by company and their bottom is OK and K.F. marked. All the bullet shells are of 9mm calibre. The investigation report is filled and



signed by him in printed form which he recognizes and it is marked as Exhibit-3.

30. PW-7 Birendra Prasad Rai was posted as Medical Officer in Sadar Hospital, Samastipur on 16.02.2016. On the same day, at 03:00 p.m., he performed the *post mortem* examination on the dead body of Birju Yadav in the presence of observer Dr. R.C.S. Verma of Sadar Hospital, Samastipur and found following *ante mortem* injuries:-

“External Injuries:

Wound of entry:- A round lacerated injury with inverted margin was found over back of skull in occipital area size 1 cm in diameter with fracture of occipital bone, cavity deep.

Wound of exit:- One lacerated injury found below Lt. Eye with everted margin size 1.25 cm in diameter approx.

On dissection: All viscera were pale.

Lacerated injuries was present in brain matter.

Skull cavity full of blood.

Time elapsed since death- within 36 hours. Because rigor mortis was present.

Cause of death was due to hemorrhage and shock, produced by above mentioned injury caused by fire arm.”

31. On the same day dead body of Birendra Yadav was brought and, at 02:35 p.m., the *post mortem* examination of his dead body was performed in the presence of observer Dr. R.C.S. Verma of Sadar Hospital, Samastipur and following *ante mortem* injuries were found:-

“External Injuries:



1. One lacerated injury was found over Lt. Side of skull in Ant. Part size 3"x1" X muscle deep.

2. Wound of entry:- A lacerated injury was found over back of Lt. Upper arm.

Shape- round size 1 cm diameter with inverted margin.

Wound of Exit: Lacerated injury over Lt. Side of Lt. Upper arm with everted margin, oval in shape 1.25 cm in diameter approx.

3. Wound of entry: A lacerated injury with inverted and irregular margin was present in back of skull in occipital area with inverted and irregular margin, shape round with fracture of occipital bone size 1 cm in diameter approx.

Wound of exit: A lacerated injury with everted margin was present over Lt. Side of skull in middle part.

Shape-oval, 1.25 cm in diameter approx.

4. Wound of entry: lacerated injury was present over Rt. Side of vertebrae in middle part over back of trunk with inverted and irregular margin shape round, size 1 cm in diameter approx. cavity deep.

A bullet was recovered beneath the skin over Rt. Side of abdomen.

5. Wound of entry: A lacerated injury with inverted margin was found over right side of vertebrae in upper part over back of trunk, cavity deep shape round, 1 cm in diameter approximately.

Exit: A lacerated injury present with everted margin over right side of chest size 1.25 cm in diameter, oval in shape.

On dissection: All viscera were pale.

Chest cavity and abdomen cavity full of blood.

Time elapsed since death- within 36 hours because rigor mortis was present.

Cause of death was due to hemorrhage and shock produced by above mentioned injuries caused by fire arm except Injury No. 1."



32. A bullet was recovered which was handed over to A.S.I., C.K. Singh of Bithan P.S. with sealed vial and duly sent by him. The *post mortem* report is in his pen and signature and also signed by observer Dr. R.C.S. Verma of Sadar Hospital which is exhibited as Ext. 4 and 4/1 on identification.

32.1. In his cross-examination, he has stated that the dissection is done in *post mortem*. Dissection was done on his instruction by his staff Smt. Manju Devi. He has further stated that the point where bullet inserts is called 'Entry' and the point where it exits is called 'Exit'. They estimate on the basis of margin of both the wounds. He had not found any blackening, tattooing and charring on the entry wound. He had further stated that, in the present case, bullet was fired from more than a distance of 7 feet. He can't tell from where the first injury incurred by the deceased Birendra Yadav. He had not stated in his *post mortem* report the margin irregular as disintegrated wound is decided on the basis of irregular margin. He has further admitted, in Para-46, of his cross-examination that Injury No. 1 would be possible by piece of rod and the same could be possible by hard and blunt weapon.

33. PW-8 Ranjit Kumar is the Investigating Officer of this case. He was posted as S.H.O., Bithan at the time of incident. The *fardbeyan* is in his writing and bears his signature which is marked



as Exhibit-1/2. The Seizure List was prepared by Bade Lal Prasad which is marked as Exhibit-5 and which bears the signature of Binod Mukhiya and Bablu Mukhiya. It is stated that, during raid, he went to Chhechhni village and arrested Laxmi Yadav @ Bhotiyal Yadav. After that, he came to know that the accused Kundan Singh was in Saharsa so along with the team, he reached Sonbarsha Police Station in Saharsa District and arrested Kundan Singh from his relative's house. Then the arrested accused was brought to Samastipur, where he was kept for questioning by senior officials. After that, he arrested Laxmi Yadav @ Bhotiyal and Kundan Kumar Singh, who were presented in the Court and were duly sent in judicial custody. After obtaining orders from the Court, the items seized from the spot were examined and the investigation report was obtained. The *post mortem* report of the deceased Birju Yadav and Birendra Yadav were obtained and it was mentioned in the diary. The criminal history of accused Kundan Kumar Singh was obtained and recorded in the case diary. Barku Yadav's criminal history was recorded in the case diary. Pappu Yadav's criminal history was recorded in the diary.

33.1. In his cross-examination, he has stated that he stayed at the spot of incident for about an hour. He recorded the *fardebayan*. He himself inspected the spot of incident. It is stated that the F.I.R. regarding the alleged incident was registered at 03:30 p.m. on the



same day of incident. He came to know about the incident on the day of incident. He arrested Kundan Kumar Singh and Bade Lal Singh from Saharsa. They were arrested under Sonbarsha Police Station in Saharsa. He started the investigation of the current case on 16.02.2016 at 07:30 a.m. The time of receiving the information is mentioned in the case diary which is about 06:00 a.m. or 06:20 a.m. When he reached at the place of incident, he found that a large crowd was already gathered there. He took the charge of the investigation on 16.02.2016 and after completing it on 02.07.2016, handed it over to A.S.I., Bithan for further investigation because he had been suspended. The then S.H.O. was Shekhar Babu. He had left from the spot to arrest Laxmi Yadav, which is mentioned in Paragraph-6 of the case diary, but the time is not mentioned. He had himself arrested Laxmi Yadav from his house. Laxmi Yadav did not try to flee away. He had taken the statement of Binod Mukhiya in this case, which is mentioned in Para-19 of the case diary. His statement was taken on 17.02.2016. The place where these details were taken, were not mentioned in the case diary. Binod Mukhiya did not mention about the witness in the Seizure List in his statement. During investigation, it came to light that the deceased Birendra Yadav and one other were killed in the fight for supremacy. It is stated that he knows Ashok Yadav. He knows him after the



incident because he had a criminal history which is registered in his Police Station. He had also stated that Birendra Yadav had a registered criminal history. The Seizure List of fired cartridges, blood-stained soil and motorcycle were made by Badelal Prasad and they left only after the Seizure List was made. The Seizure List was made after he reached the spot. He sent the seized items for investigation on 16.04.2016 itself. He did not confiscate the blood-stained soil. The blood-stained soil was not sent to any laboratory. His signature is not on the arrest list and arrest memo. There is no information about sending blood-stained soil to forensic science laboratory. After seeing the Malkhana register, the cartridges were sent to Sergeant Major for investigation. Date and time are mentioned in the columns of the Seizure List whereas there is no mention of place. He has also stated that he does not remember whether Ashok Yadav was also involved. Badelal Prasad arrested Kundan with the help of Deputy S.P. He was in the role of assistant that is why he did not arrest him. He took the statement of Arun Yadav who lived near the incident site. He has stated that, on his instruction, the Inquest Report was prepared by A.S.I. Chandraketu Singh on the date of incident at 08:30 hours. He has further stated that he had gone to arrest accused Laxmi Yadav @ Bhotiyal before registration of the F.I.R. Laxmi Yadav was arrested and sent to Town



Police Station. It is stated that recovery of 7 empty cartridges has been mentioned at Serial 5 at Page-5 of the Seizure List in Para-1 of the Case Diary. He has further stated that there is also mention of recovery of blood-stained soil in the Seizure List but he has no knowledge as to what happened to that soil as he gave charge of his investigation. He has also stated that CDR and CAF was preserved for examination but whether it's surveillance report was received or not is not known to him. He has denied the suggestion that he had intentionally, in collusion with the prosecution, had concealed that report. He has admitted that he had recorded the criminal antecedents based on the information and without verifying its veracity. He has admitted that pagination starting from 08924931 is not as per *seriatim* by the number 08924933 relating to registration of the F.I.R.1 tallies with the Seizure List date 16.02.2016. He has stated that he had recorded the statement of witness Manoj Kr. Singh in Para-20 of the Supplementary Case Diary and he had stated that Kundan Singh, resident of Samastipur, had come to attend the second marriage of Rituraj Singh, son of Rajkumar Singh (his brother-in-law), on 15.02.2016 at 09:00-10:00 hours in the night, who was arrested on 16.02.2016 with the help of Sonbarsa Police at 12:30 hours and taken to Samastipur. In Para-21, he had recorded the statement of Awadhesh Jha who corroborated the same. He also



recorded the statement of Sikandar Mahto who has also supported the above version. The said version has also been supported by others who had gathered at the time of recording their statements. He further stated that, in his statement, Lalit Yadav had stated to have proceeded from his house on 16.02.2016 at 07:00 a.m. whereas, in *fardbeyan*, he had stated to have proceeded to Bithan. It is further stated that witness Gopal Yadav had not stated that the S.H.O. had prepared *panchnama* of the dead bodies nor the death of Birendra Yadav and Birju Yadav in his presence. He had only stated to their falling on the ground. He has denied the suggestion that he had not brought all the evidences in favour of the accused Kundan Singh before the Court.

34. Defence has also examined 21 witnesses out of whom D.Ws. 1, 5 and 6 are witnesses to the registry of land in the name of Laxmi Yadav @ Bhotiyal. D.W's.2, 3, 4 and 7 have detailed the train journey undertaken by accused Krishna Kumar Yadav @ Barku Yadav. D.W's. 8 to 19 have described as to the time, place and manner of arrest of accused Kundan Singh by the police. D.W. 20 is the doctor who has certified the existing health condition of accused Kundan Singh and the symptoms of the disease he is suffering from. D.W. 21 is an advocate clerk who has attested certain document. However, thus the defence has examined the defence witnesses with



a view to prove the dispute between the concerned accused and the informant side as well as with a view to prove the *alibi* of Kundan Singh. As such, their deposition need not be gone into in detail.

DISCUSSIONS AND FINDINGS:-

35. We have considered the submissions canvassed by the learned counsels appearing for the parties. We have also re-appreciated the entire evidence led by the prosecution as well as the defence and the decision upon which reliance has been placed by the learned counsels appearing for the parties. It transpires from the record that *fardbeyan* of one Lalit Yadav (PW-2) came to be recorded by S.I. Ranjeet Kumar at village Sirsiya on 16.02.2016 at 07:30 hours. The said *fardbeyan* was recorded for the alleged incident which took place at 07:00 a.m. The informant (PW-2) named all the present appellants, in the *fardbeyan*, and alleged that all the named accused persons with 3-4 unknown persons came on the motorcycle. All were carrying the weapons and, at Sirsiya *Chowk*, they surrounded the motorcycles of Birendra Yadav and Birju Yadav. It is alleged that Kundan Singh fired bullet from his pistol which hit the temple of Birendra Yadav. All the accused fired bullet from the pistol which they were carrying and, in the said incident, Birendra Yadav and Birju Yadav sustained firearm injuries. It is relevant to note that the prosecution has projected PW-1 and



PW-2 as eye-witnesses. Similarly, PW-3 and PW-4 are also projected as eye-witnesses. It is contended by the learned counsels for the appellants that PW-1, PW-2, PW-3 & PW-4 are interested witnesses and the prosecution has failed to examine the independent witnesses including the witness Ramnandan Rai near whose house, the alleged incident took place. It is also contended by the learned counsels for the appellants that the other independent witnesses, who were in the vicinity of the place of occurrence, were also not examined. Thus, at this stage, we would like to observe from the deposition of PW-2 that both Birendra Yadav and Birju Yadav were his cousin brothers. Even, in the *fardbeyan*, PW-2 has stated that on one motorcycle his cousin brother Birendra Yadav and Birju Yadav were going ahead of him. Thus, it is revealed that PW-2 is related and interested witnesses. Further, PW-1, in Paragraph-18, has categorically stated that besides being co-villagers, he and the deceased are related. Further, PW-1 has also admitted that Lalit Yadav (PW-2) and Birendra Yadav are cousin brothers. Further, Ashok Yadav, who is the *mukhiya*, is also the cousin brother of Lalit Yadav (PW-2). Further, PW-4 has also admitted, in Para-20, that the deceased Birendra Yadav and Birju Yadav were known to him. Further, he had stated that the sister-in-law of Birendra Yadav was earlier *pramukh* of the village and, in Paragraph-34, the said witness has further



stated that his son-in-law Rakesh Kumar is posted in Chechhani school as a Block Teacher and was appointed by the concerned committee. Thus, it is a case of the defence that son-in-law of the said witness had been given a job by the family of the deceased Birendra Yadav. Further, PW-3 has also admitted, in Para-23, 24 & 25, that he has deposed against the son of Laxmi Yadav (accused) in a murder case. Thus, from the aforesaid evidence, it can be said that the aforesaid witnesses are interested/related witnesses. It is well settled that merely because a witness is a related or interested witness, his deposition cannot be discarded. However, deposition given by such witness is to be examined closely/carefully. Thus, now we would like to examine the relevant portion of deposition of PW-1 to PW-4.

36. The case of the prosecution rests on the deposition of the aforesaid four witnesses who are projected as eye-witnesses. PW-1 Rajesh Kumar Yadav, in his examination-in-chief, has stated that when he reached the crossroad of Sirsiya village, 6 people were standing with weapons in their hands. The said witness named the 6 accused and further deposed that all were holding weapons in their hands which looked like pistol. He further deposed that Birendra Yadav and Birju Yadav were ahead of them on a motorcycle and, on the other motorcyle, he was with Lalit Yadav (PW-2). It is a specific



case that Birendra Yadav was riding on the motorcycle and Birju Yadav was a pillion rider. It is a specific case of PW-1 that Kundan Singh shot Birendra Yadav on his right temple and all other miscreants kept firing Birendra Yadav and Birju Yadav. It is also stated that after killing Birendra Yadav, Kundan Singh turned him upside down to make sure whether he died or not. He shot him once again on his back.

36.1. Similarly, PW-2 Lalit Yadav (informant) has also narrated the similar story. PW-2 has also specifically deposed that Kundan Singh shot Birendra Yadav on the forehead and kept on firing whereas Laxmi Yadav, Barku Yadav, Pappu Yadav, Sushil Yadav and Mangal Yadav also shot both Birendra Yadav and Birju Yadav on the back, forehead and arm. After that, Kundan Singh tried to turn Birendra Yadav by kicking him and then he shot a bullet in the back of Birendra Yadav.

36.2. PW-3 Binod Mukhiya, who is a chance witness, has also specifically deposed that Kundan Singh along with other people started firing indiscriminately and because of the said firing, Birendra Yadav and Birju Yadav fell down. PW-4 Gopal Yadav is also a chance witness, who has deposed that when he arrived at crossroad of Sirsiya village, he found that 6 persons were standing armed with weapons and Birendra Yadav and Birju Yadav were



coming on a motorcycle from the other side. Thereafter, some person had started firing. He identified Kundan, Barku Yadav and Bhotiyal Yadav. He also stated that Birendra Yadav and Birju Yadav died because of bullet injuries.

37. Now, keeping in view the aforesaid version given by the so-called eye-witnesses, if the deposition given by PW-7 (Doctor), who had conducted the *post mortem* examination of the dead body of the deceased is carefully examined, it is revealed that the said Doctor has found only one wound of entry and one wound of exit. The wound of entry was found over the back of skull in occipital area and a wound of exit was found below the left eye.

37.1. Thus, from the aforesaid deposition of the Doctor, it can be said that only one injury was found on the dead body of the deceased. However, as per the version given by the so-called eye-witnesses, all the accused started indiscriminate firing in which the deceased sustained injuries and died. At this stage, it is required to be recalled that PW-1 has deposed, in Para-24 to 26 as well as in Para-28, about the manner of occurrence and, in Para-15, he has stated that Birju Yadav was shot by Barku Yadav and Pappu Yadav. It specifies that Barku Yadav shot Birju Yadav below the eye near the nose. The bullet had been shot from the close range and the bullet fired by Barku Yadav had remained in the body. The said



witness further stated that there was sign of blackening on both the deceased persons. Now, PW-7 (Doctor) found that the deceased Birju Yadav had sustained only one bullet injury i.e. the point of entry was the back of skull and the exit point was on the left eye near the nose.

38. Now, the deposition given by PW-7 (Doctor), who had also conducted the *post mortem* examination of the dead body of Birendra Yadav, is carefully examined, he found the first external injury as one lacerated injury over left side of skull in Ant. Part size 3" x 1" x muscle deep. The other injuries were firearm injuries. Now, so far as Injury No. 1 is concerned, PW-7, in Paragraph-43 to 46, has specifically deposed that Injury No.1 was found on the temple of the deceased Birendra Yadav and the said injury could have been caused by hard and blunt weapon. Further, PW-7 has admitted, in Paragraph-40, that he did not find any charring, tattooing or blackening at the wound of entry. The said witness further admitted, in Paragraph-42, that, in the present case, the shots had been fired from a distance of more than 7 feet. Further, in Paragraph-18, he says that all the entry wounds have been found on the back of the deceased person. At this stage, it is also relevant to note that, as per the case of so-called eye-witness, the incident took place at 07:00 a.m. However, if the deposition given by PW-7 is



carefully examined, it is revealed that the said witness commenced the *post mortem* examination at 03:00 p.m. and he has specifically opined that time lapsed since death is 36 hours because *rigor mortis* was present.

39. Thus, from the medical evidence given by the expert i.e. the Doctor, who had conducted the *post mortem* examination, completely rules out the version given by the so-called eye-witnesses that all the named accused and other 3-4 unknown accused made indiscriminate firing in which both the deceased sustained injuries. Further, the version of the so-called eye-witnesses is specific that the accused Kundan Singh fired a shot on the temple of the deceased Birendra Yadav. The said version is not corroborated by the medical evidence. Even the prosecution has failed to explain Injury No. 1 sustained by the deceased Birendra Yadav which was caused by hard and blunt substance. It is also surprising that, in the so-called indiscriminate firing made by the accused, the pillion rider sustained only one fire arm injury whereas the person who was driving the motorcycle i.e. Birendra Yadav sustained 5-6 injuries and, as per the medical evidence, all the injuries sustained by Birendra Yadav was from the back side.

40. At this stage, deposition given by PW-8 is also required to be scrutinized closely. It is pertinent to note that, during



cross-examination, the said witness i.e. the Investigating Officer (PW-8) has evaded a number of questions/suggestions put by the defence by giving answer that he does not know by saying that he has forgotten. PW-8 deposed that he received information about the occurrence and the information so received was entered in the Station Diary. However, he forgot to mention the *sanha* number in the Station Diary. The said witness has specifically admitted that he received information about the incident between 06:00-06:20 a.m. The said aspect has been stated in Station Diary. However, he had stated that he cannot say who had given the said information. PW-8 has further admitted that S.P. informed him that murder has taken place and, therefore, he informed S.P. that he got the same information from his staff. The said witness has further admitted that because of the investigation made by him, in the present case, he was suspended. The said witness has also admitted, in Para-169, that formal F.I.R. was registered at 15:30 hours on 16.12.2016 whereas the Seizure List was prepared at 07:40 a.m. In the Seizure List Exhibit-5, there is a reference of F.I.R. Number. He had further admitted that he did not collect the blood-stained soil nor he had sent the same to the F.S.L. He has also admitted that he had recorded the statement of Arun Yadav who was residing near the place of incident and there was a reference in Paragraph-10 of the Supplementary



Case Diary. Further, from the deposition of PW-8, it can be said that the so-called witnesses have stated about certain aspects for the first time before the Court and they did not state the same while giving the statement under Section 161 of the Code.

41. At this stage, we would like to examine the decisions upon which the reliance has been placed by the learned counsel for the informant. In the case of **Rajesh Yadav (supra)**, **Gulab (supra)** as well as **Vijendra Singh (supra)**, the Hon'ble Supreme Court has observed that mere fact that relatives of the deceased are the only witnesses is not sufficient to discredit their cogent testimonies. The Hon'ble Supreme Court has also held that merely because a witness happens to see an occurrence by chance, his testimony cannot be brushed aside though a little more scrutiny may be required at times.

41.1. We cannot dispute the proposition of law laid down by the Hon'ble Supreme Court in the aforesaid decisions. As discussed hereinabove, in the present case, PW-1 and PW-2 are relatives of the deceased and also interested witnesses. The said aspects has been discussed in detail. Further, PW-3 and PW-4 are chance witnesses. As discussed hereinabove, the deposition given by the related/interested witnesses are required to be scrutinized closely.

42. In the case of **Rameshji Amarsing Takor (supra)** as well as **Darbara Singh (supra)**, it has been observed by the Hon'ble



Supreme Court that the greater importance should be given to ocular evidence over opinion of the medical expert. Here again, we cannot dispute the proposition of law laid down by the Hon'ble Supreme Court. However, from the evidence led by the prosecution, if the presence of the so-called eye-witnesses at the place of occurrence raises doubt and the manner in which the incident took place, as per the version of the so-called eye-witnesses, is not supported by other evidence led by the prosecution including the medical evidence and deposition of Investigating Officer. The medical evidence assumes importance and, therefore, we are of the view that aforesaid decisions would not render any assistance to the informant in the facts of the present case.

43. In the case of **Ram Naresh (supra)** and **Vijendra Singh (supra)**, the Hon'ble Supreme Court has discussed provisions contained in Section 34 of the I.P.C. and held that, for applying Section 34 of I.P.C., there should be a common intention of all the accused persons which means community of purpose and common design. Common intention is a psychological fact and it can be formed a minute before the actual happening of the incidence or even during the occurrence of the incidence. Here also, we cannot dispute the proposition of law laid down by the Hon'ble Supreme Court in the aforesaid decisions. However, in view of the discussion



made hereinabove, when the deposition given by the so-called eye-witnesses is not trustworthy and when the prosecution has failed to prove the time of incident, manner of incidence and doubt is created with regard to the presence of the so-called eye-witnesses, the aforesaid decisions would not render any assistance to the informant.

44. In the case of **Kamal Prasad (supra)**, the Hon'ble Supreme Court has discussed the principles regarding the plea of *alibi*. The Hon'ble Supreme Court has observed in **Para-24 to Para-24.5** as under:-

“24. The principles regarding the plea of alibi, as can be appreciated from the various decisions of this Court, are:

24.1. It is not part of the General Exceptions under IPC and is instead a rule of evidence under Section 11 of the Evidence Act, 1872.

24.2. This plea being taken does not lessen the burden of the prosecution to prove that the accused was present at the scene of the crime and had participated therein.

24.3. Such plea is only to be considered subsequent to the prosecution having discharged, satisfactorily, its burden.

24.4. The burden to establish the plea is on the person taking such a plea. The same must be achieved by leading cogent and satisfactory evidence.

24.5. It is required to be proved with certainty so as to completely exclude the possibility of the presence of the accused at the spot of the crime. In other words, a standard of “strict scrutiny” is required when such a plea is taken.”

45. Keeping in view the aforesaid decisions, if the evidence and the facts of the present case, as discussed hereinabove,



are examined, we are of the view that following glaring aspects would emerge:-

(a) PW-8 (Investigating Officer) got information about the incident at about 06:00-06:20 a.m. on 16.02.2016. The said aspect he has stated in the Station Diary. However, the said Station Diary entry was not produced. He does not know as to who gave that information. Further, S.P. informed PW-8 that the incident of murder took place and, therefore, he informed to the S.P. that he had already got the said information.

(b) As per the version of so-called eye-witnesses i.e. PW-1 to PW-4, incident took place at 07:00 a.m. and the *fardbeyan* was recorded at 07:30 a.m.

(c) At 07:45 a.m., Seizure List was provided by PW-8. Surprisingly, the F.I.R. Number has been mentioned in the said Seizure List.

(d) In fact, formal F.I.R. came to be registered at 03:30 p.m. prior to which even the Inquest Report was prepared and the *post mortem* examination was conducted.

(e) PW-1 and PW-2 are interested/related witnesses. It is their specific case that Birendra Yadav was riding on the motorcycle and Birju Yadav was a pillion rider. Kundan Singh shot Birendra Yadav on his right temple and all the other miscreants also



kept firing on Birendra Yadav and Birju Yadav. After killing Birendra Yadav, Kundan Singh turned him upside down to make sure whether he died or not. He shot him once again on his back. Further, the bullet was shot from a point blank range and Barku Yadav and Pappu Yadav shot at Birju Yadav. Barku Yadav shot Birju Yadav below his eyes near his nose. Two bullets were fired at Birju Yadav.

(f) PW-3 and PW-4 are chance witnesses and it is their specific case that Kundan Singh along with other accused started firing indiscriminately. Because of the said firing, Birendra Yadav and Birju Yadav fell down.

(g) Thus, it is a specific case of the prosecution witnesses that indiscriminate firing was made. Further, Birju Yadav sustained two bullet injuries and one shot was fired by Barku Yadav and Pappu Yadav each. Further, Kundan Singh shot Birendra Yadav on his right temple and the firing was made from a point blank range.

However, from the medical evidence, it would reveal that PW-7 has specifically deposed that one lacerated injury was found over Lt. Side of skull in Ant. Part size 3"x1"x muscle deep on the dead body of Birendra Yadav.



(h) He has also admitted, during cross-examination, that Injury No. 1 could be possible by rod i.e. a hard and blunt weapon. He has further stated that, in the present case, bullet was fired from a distance of more than 7 feet. Further, PW-7 has specifically stated that time elapsed since death was within 36 hours because *rigor mortis* was present. Further, he had stated that only one injury was found on the dead body of Birju Yadav whereas, as per the eye-witnesses, two accused persons shot fire. It is further revealed that all entry wounds were on the back side. It is further surprising that in indiscriminate firing, one person sustained seven injuries whereas the pillion rider sustained only one bullet injury. Thus, medical evidence completely rules out the version of the so-called eye-witnesses.

(i) Kundan Singh has taken specific defence of *alibi* and examined defence witnesses by contending that, in fact, he was present at village Sonbarsha in the marriage ceremony of his nephew. In support of the said submission, C.D.R. and footage of the vehicles crossing the toll plaza etc. were produced. In fact, PW-8 (Investigating Officer) has also admitted that when he had gone to village Sonbarsha to arrest Kundan Singh, he was found at the place of his nephew while marriage ceremony was going on and a number of guests were present.



(j) PW-8 (Investigating Officer), before registration of the formal F.I.R., directly went from the place of incident to arrest Laxmi Yadav who was residing in the same village and, in fact, he was found in his house and he had not tried to flee away from the house. Thereafter, the Investigating Officer had gone in the private vehicle to arrest Kundan Singh who was in village Sonbarsha which is situated in another district and at a distance of more than 200 kilometers. Both these persons were arrested even before the registration of the formal F.I.R. Thus, the conduct of the Investigating Officer, in the present case, was not a normal conduct and, in fact, he has admitted that thereafter he was suspended.

46. Looking to the aforesaid discussion, we are of the view that the prosecution has failed to prove the case against the appellants/accused beyond reasonable doubt, despite which the Trial Court has recorded the order of conviction and, therefore, the impugned judgment and order deserves to be quashed and set aside.

CONCLUSION:-

47. Accordingly, the impugned judgment of conviction dated 04.01.2019 and order of sentence dated 08.01.2019 passed by learned Additional Sessions Judge-1st, Rosera, Samastipur in Sessions Trial No. 295 of 2017, arising out of Bithan P.S. Case No. 14 of 2016 are quashed and set aside.



48. All the appellants are acquitted of the charges levelled against them by the learned Trial Court.

49. Appellant Krishna Kumar Yadav @ Barku Yadav (in Criminal Appeal (DB) No. 262 of 2019) is on bail. He is discharged from the liabilities of his bail bonds.

50. Appellants namely Kundan Singh @ Kundan Kumar Singh (in Criminal Appeal (DB) No. 293 of 2019) and Laxmi Yadav @ Bhotial (in Criminal Appeal (DB) No. 354 of 2019), are in custody. They are directed to be released from jail custody forthwith, if their custody is not required in any other case.

51. Accordingly, all the appeals stand allowed.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

Sachin/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
Uploading Date	11.09.2024
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