

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1121 of 2017**

Arising Out of PS. Case No.-207 Year-2011 Thana- ROSERA District- Samastipur

Shashi Mahto S/o Umesh Mahto, Resident of Village- Mahabir Ashthan,
Police Station- Rosera, District- Samastipur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Rajendra Narain, Sr. Advocate Mr. Jagdhar Prasad, Advocate
For the State	:	Mr. Sujit Kumar Singh, APP
For the Informant	:	Mrs. Nivedita Nirvikar, Sr. Advocate Mrs. Mira Kumari, Advocate Mrs. Shashi Priya, 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 : 26-06-2024

The present appeal has been filed under Section-374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred as 'Cr.P.C.') challenging the impugned judgment of conviction dated 12.07.2017 and order of sentence dated 18.07.2017, passed by the learned Additional Sessions Judge- Rosera, Samastipur, in connection with Sessions Trial No. 177 of 2013 (arising out of Rosera P.S. Case No. 207 of 2011 corresponding to G.R. No. 976 of 2011) by which the appellant/convict has been convicted for the offences under Section-302/34 of I.P.C. and 27(1) of the Arms Act and



sentenced to imprisonment for life and a fine of Rs.20000/- for the offence u/S-302 of the I.P.C. and, in default of payment of fine, he has been directed to undergo R.I. for 6 (six) months. He has further been sentenced to undergo R.I. for 3 (three) years and a fine of Rs. 10000/- for the offence u/S-27(1) of the Arms Act and, in default of payment of fine, to undergo further 3(three) months R.I. Both the sentences have been directed to run concurrently.

2. Heard Mr. Rajendra Narain, learned Sr. Advocate assisted by Mr. Jagdhar Prasad for the appellant, Mr. Sujit Kumar Singh, learned A.P.P. for the respondent-State and Mrs. Nivedita Nirvikar, learned Sr. Advocate assisted by Mrs. Mira Kumari, Ms. Shashi Priya, for the informant.

3. The brief facts leading to the filing of the present appeal are as under:

“On 01/12/2011 at around 8:00 pm, the informant’s son Chhotu Kumar, aged about 20 years, had gone to the market with her daughter Ritu Devi to buy medicines. At around 08.15 p.m., her daughter Ritu Devi came home crying and shouting that (1) Shashi Mahto, S/o- Umesh Mahto, R/o- Girls High School, Rosera and (2) Amarjeet Kumar Sah, S/o- Suresh Sah, R/o- Lakshmipur, both PS-Rosera, Distt.-



Samastipur, have shot bullets in the forehead with a pistol near Ramesh Mahto's wholesale shop (Gaddi) next to the old hospital under Ward No.14, due to which he got seriously injured. Both of them had pistols in their hands. At this, she came running along with other family members and saw her son Chhotu Kumar on the road near Ramesh Mahto's wholesale shop (Gaddi) with a wound on his head which was drenched with blood. When she asked her injured son, he said to her, "Mother, Shashi Mahto and Amarjeet Sah have fired at me." Then, with the help of other family members, she got her injured son admitted in the Sub- divisional Hospital for treatment. But the doctor immediately, assessing the condition to be critical, referred him to Sadar Hospital, Samastipur. They were taking Chhotu Kumar to Samastipur by ambulance, but her son Chhotu Kumar succumbed to the injuries near Sindhiya Ghat bridge. She again returned back in ambulance van to the sub-divisional hospital. Bhola Mahto, S/o-late Vindeshwar Mahto, R/o-Girls High School Rosera, PS-Rosera, Distt.-Samastipur has played the main role in the incident. The reason for the incident is the land dispute with Shashi Kumar Mahto and his family for many years. Last month too, Shashi Mahto had beaten her daughter and her, in connection with which a



case was filed.”

4. After filing of the F.I.R., the investigating agency carried out the investigation and, during the course of investigation, the Investigating Officer recorded the statement of the witnesses and collected the relevant documents and thereafter filed the charge-sheet against the accused. As the case was exclusively triable by the Court of Sessions, the case was committed to the Court of Sessions.

5. Learned Senior Advocate for the appellant Mr. Rajendra Narain submits that the prosecution has examined only near relatives of the deceased who are interested witnesses. It is further submitted that P.W. 3 is not an eye-witnesses. However, she was projected as an eye-witness to the incident in question. He has also submitted that the so-called oral dying declaration made by the deceased before P.W. 1 and P.W. 2, who are parents of the deceased, is not required to be believed. It is thereafter contended that the investigating officer has specifically admitted that he had recorded statements of independent witnesses, however, said independent witnesses have not been examined and, therefore, adverse inference should be drawn. Learned Senior Advocate would further submit that the version given by P.W.3, so-called eye-witness,



is not supported by medical evidence. It is submitted that, as per the case of the prosecution, *post mortem* of the dead body of the deceased was conducted at 09:00 a.m. on 02.12.2011, i.e. within 12 hours of the occurrence. However, the Doctor has specifically admitted that the time since death is within 36 hours. It is submitted that the prosecution has not disputed the said finding or re-examined the said witness on that point. Learned senior advocate, therefore, submitted that the eye-witness may not be believed.

5.1. Learned senior advocate thereafter submitted that it is a specific case of the prosecution that the present appellant made firing from his pistol and one bullet hit the forehead of the deceased, whereas the other bullet hit near the left ear. Thus, as per the prosecution case, one firearm was used from which two bullets were fired. However, at this stage, learned senior counsel has referred the deposition given by P.W. 5, the investigating officer, in which he has stated that he had seized one live cartridge of pistol upon which K.F. 7.65 was engraved and one projectile (front portion) of 303 was also found from the place of occurrence. Learned senior counsel, therefore, urged that recovery of one projectile of 303 means another firearm was used by the assailants and it is not that the



bullet was fired from pistol only. At this stage, it is also contended that the Doctor who had conducted the *post mortem* has specifically deposed before the Court that two bullets were found from the dead body of the deceased and the same were handed over to the police personnel. However, the investigating agency has not sent the said bullets as well live cartridge which was found from the place of incident for necessary analysis to the F.S.L. It is, therefore, urged that recovery of one projectile of 303 from the place of occurrence, which can be said to be an independent evidence, the theory of the prosecution through P.W. 3, the eye-witness, that both the bullets were fired from the pistol by the appellant is not to be believed. Learned senior counsel, therefore, urged that the impugned judgment and order be quashed and set aside, the appeal be allowed and the appellant be acquitted.

6. On the other hand, learned Sr. Advocate Mrs. Nivedita Nirvikar, appearing for the informant, has vehemently opposed the present appeal. She would mainly submit that P.W. 3 is the eye-witness to the occurrence. She has specifically named the present appellant and detailed the role played by the appellant. It is further submitted that said version given by the eye-witness is supported by medical evidence as two bullets



were recovered from the dead body of the deceased at the time of conducting the *post mortem* of the dead body of the deceased. It is thereafter contended that, above all, the deceased has also given the oral dying declaration before his parents i.e. P.W. 1 and P.W. 2 in which also the deceased has specifically named the appellant and alleged that the appellant is the assailant who has opened fire. It is submitted that merely because there are minor discrepancies, contradictions and/or exaggeration in the version given by the prosecution-witnesses, whole case of the prosecution cannot be discarded. At this stage, it is contended that the other independent witnesses have not come before the Court because of the fear of the informant against whom there are criminal antecedents and, therefore, merely because the independent witnesses have not been examined by the prosecution, benefit of the same cannot be given to the appellant. Thereafter it is contended that conduct of the appellant is also required to be seen. The appellant has absconded from the custody and thereafter he has committed offences for which many F.I.Rs. have been filed against him. It is further submitted that in two cases he has been convicted also. Thus, on this ground also, the present appeal may not be entertained.



6.1. Learned senior counsel for the informant would further submit that if there is *lacuna* in the investigation carried out by the investigating officer, benefit of the said *lacuna*/lapses may not be given to the appellant accused.

6.2. Learned senior counsel has placed reliance upon the following decisions: **AIR 2003 SC 1164 (Amar Singh Vs. Balwinder Singh & Ors.)**, **AIR 2004 SC 1920 (Dhanaj Singh Alias Shera & Ors. Vs. State of Punjab)** and **(2023) 5 SCC 391 (Ravasaheb Alias Ravasahebgouda And Ors. Vs. State of Karnataka)**.

6.3. It is also contended that P.W. 4, the doctor, has specifically mentioned that *rigor mortis* was present. It is submitted that *rigor mortis* starts after two hours and ends after 36 hours and, therefore, when the doctor found *rigor mortis*, it cannot be said that death was caused prior to 36 hours.

7. Learned A.P.P. Mr. Sujit Kumar Singh has opposed the appeal and has adopted the submissions advanced by the learned senior counsel for the informant.

8. 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.



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

10. Before the Trial Court, prosecution examined 5 witnesses.

11. P.W. 1 Bishnudeo Mahto is the father of the deceased. He has stated in his examination-in-chief that the incident took place about three years ago at 08:00 p.m. He was at his home. He heard a commotion from Ramesh Mahto's *Gaddi* (wholesale shop). His daughter came running and told his mother that Shashi Mahto has shot at her elder brother. He rushed to the front of the saloon and saw that his son Chhotu Mahto was lying on the ground drenched in blood. He told him that Shashi Mahto has shot at him. He also said that there were three other persons with Shashi Mahto. He also said that out of three he identified Amarjeet Sah and could not identify two others. Thereafter an administration vehicle came and took his son to Government Hospital, Rosera. The doctor, finding the condition to be critical, referred him to Samastipur, but his son breathed his last while on way to Samastipur near Sindhiya bridge. The vehicle returned to Rosera Hospital. He was also in the van. He has further stated that the police had recorded his



wife's statement at hospital and the same was read over to his wife in his presence upon which she put her thumb impression and he signed the same. He identifies the same (Ext-1). Police had prepared the *Panchnama* of the deceased at the hospital itself. He had put his signature on *Panchnama*. Police had recorded his statement also. He identifies accused Shashi Mahto present in Court and claims to identify other accused persons.

11.1. In his cross-examination, he has stated that the father of accused Shashi Mahto has built his house on his land and did not give him his share despite repeated requests. His share is about 2.5-3 katthas. He did not file any case for his share. The *Panchnama* paper is not in front of him at present. He does not remember whether the night of the occurrence was a moonlit night or a dark night. The salon (the incident site) is three-four *laggas* towards east of his house. There are houses of many people in between. There are houses of 17-18 people on both sides of the road. There is only one salon there. He does not know the name of the salon. He does not know the name of the Thakur (owner) of the salon. After his house, there are houses of Hansilal Sahni, Baso Sahni, Jagdish Sahni, Vidhyanand Sahni, Shyamsundar Lal and then school. None of



the above mentioned persons was present at the place of occurrence. His daughter Ritu Devi is 20-21 years old. His son (deceased) had left home for the market around eight o'clock. Daughter Ritu had also gone to the market to buy some articles at around 7:45 pm. His wife was unwell from two-three days for whom his daughter had gone to take the medicine. When he reached the place of occurrence, his son was lying east-west. His forehead was on the east side and his feet were on the west side. He was wearing terry-cotton pant and half shirt. The blood had spilled on the ground in a radius of one hand. The blood had spilled in the pot-hole also. There was a wound on his son's temple. He does not remember whether the wound was on the left or on the right temple. The wound was two fingers above the ear, from which blood was coming out. He did not touch the boy. He did not stop bleeding. No one else came there except him. His wife had informed the administration. He was at home when his wife went running to police station. He remained near his son. Thereafter he states that his wife reached to the son first. Then he arrived. Daroga Ji (SI) had come in his vehicle. Daroga Ji immediately picked up the boy and took him to the hospital. He has stated that the road near the place of occurrence is paved (*pucca*).



The salon was also locked. The adjacent shop had also got closed. As soon as the incident took place, all the shopkeepers closed their shops. His son was alive for an hour. His son had taken the names of Shashi Mahto and Amarjeet Sah and had said that he could not identify two others. While going from Rosera to Samastipur, there was a police man. The police had given a paper to his wife. He has denied the suggestion that the accused Shashi Mahto has been implicated due to land dispute and no such incident, as stated by him, had happened.

12. P.W. 2 Chandrakala Devi is the informant, mother of the deceased. She has stated in her examination-in-chief that the incident took place three years ago between 08:00 to 08:15 p.m. She was at home and had sent her son Chhotu Kumar to purchase medicine from the market. Her daughter Ritu Devi had also gone with him. Ritu Devi came near the house and shouted that Shashi Mahto had shot Chhotu. She went to the place of occurrence running which is the road in front of Ramesh Babu's wholesale shop (*Gaddi*). When she reached the place of occurrence, she saw that her son was lying on the ground and had received gun-shot. Chhotu was saying, "Shashiya(Shashi) has shot at me, now I shall not survive". There were two culprits at the place of occurrence. The bullet



was fired by Shashi Mahto. The second culprit was Amarjeet Sah. Shashi Mahto ran away after firing. She proceeded to the police station, but found Rosera police at the scene. Chhotu Kumar was taken to Rosera Government Hospital in the police vehicle. The doctor referred Chhotu Kumar to Samastipur. They were taking Chhotu to Samastipur by ambulance. When they reached near the Shindhiya bridge, her son died. Then they returned back to Rosera Hospital. Her husband and daughter Ritu Devi were also with them. The police took her statement at Rosera Hospital. The Inspector read out the same to her. Finding it to be correct, she put her thumb impression on the statement in front of her husband. Her husband also signed it. The police prepared the *Panchnama* of the dead body. The *Panchnama* was prepared in front of her. The police took her re-statement in which she reiterated her old version. She has identified the accused Shashi Mahto present in Court as the culprit who fired the shot. The second accused is absconding, but she claims to identify him by face.

12.1. In her cross-examination on behalf of the defense, she has stated that she had also stated to the police that last month too, Shashi Mahto had beaten her daughter and her, in relation to which she had filed a case in the police station.



However, she does not remember the date or day of the last incident. There is no land dispute with the accused Shashi Mahto or his family. She has denied that she had stated in the *fardbayan* to the police that the reason for the incident was the land dispute with Shashi Mahto and his family for many years. Her family has no relationship with Shashi Mahto.

12.2. In her further cross-examination, she has stated that her daughter had told her that Shashi Mahto had shot her son. She was at home when the bullet was fired. When she reached the place of occurrence, the accused Shashi Mahto was running across the road after firing the shot. Her daughter had taken the name of Shashi Mahto as the culprit who fired. Her son and daughter had gone to the market to get medicine for her. She was ill since four days before the incident. She was running fever and body ache. She didn't consult any doctor, but was taking medicine. As soon as she heard about the shooting, she left the house alone. No one from the neighborhood was with her. Further, she has stated that apart from her son and daughter, she has her husband in her family. Her husband was at home on the day of the incident. Her husband also reached the place of occurrence with her. Her daughter was the first to reach the place of occurrence. She reached after her daughter,



followed by her husband. She does not know Bhagwan Das, S/o- Ramsundar Das. Vishundev Mahto is her husband. She does not recognize Bhola Prasad Rai, S/o-Ramashray Rai. She also does not recognize Dheeraj Kumar Kamli. Her son died on the Sindhiya bridge. He died an hour after the incident. Many people had reached the place of occurrence after hearing the sound of gunshot, but out of fear they switched off the light and ran away. Her son (deceased) was going towards east and accused Shashi Mahto was coming from west to east. The bullet was fired from the distance of a hand. Her son had sustained two bullet injuries. One bullet hit him on the left side of his forehead. The second bullet hit his left ear. Doctor had taken out the bullets at the time of *post mortem*. Doctor gave the bullet to the police. After being shot, the whole body of her son was covered with blood. The dead body of her son was handed over after *post mortem*. The clothes were still there on the body. She has specifically stated that both the shots were fired by accused Shashi Mahto. She has denied the suggestion that she had not taken the names of other accused in the *fardbeyan* and her re-statement. She further states that Umesh Mahto, the father of accused Shashi Mahto, is the nephew of her husband. She has denied the suggestion that she had not



seen any part of the occurrence and had falsely stated that she had seen the accused fleeing away after committing the crime and no such incident, as stated by her, had taken place.

13. P.W. 3 Ritu Devi has stated in her examination-in-chief that the incident occurred three years and four months ago. It was 8:00 p.m. She had gone to the market with her younger brother Chhotu to get medicine. When both were returning after buying medicine and reached near Ramesh Babu's wholesale shop (*Gaddi*), accused persons Shashi Mahto and Amarjeet Sah came and accused Shashi Mahto took out a pistol from his waist and shot two bullets at my brother Chhotu Kumar. One bullet hit the head and the other bullet hit the temple. Her brother got drenched in blood and fell on the ground. She raised alarm that her brother was shot at. Meanwhile, her mother also reached there. At that point of time her brother was alive and conscious. Her brother told her mother that Shashi Mahto has fired at him and he will not survive now. In the meantime, the police arrived there. The police picked up her injured brother and took him to Sub-divisional Hospital, Rosera. Her brother was referred to Samastipur from Rosera. She, her mother, her father along with the police started taking her injured brother from Rosera to



Samastipur for better treatment, but by the time they reached near the Sindhiya bridge, her brother Chhotu died. So, they returned from there to Sub-divisional Hospital, Rosera. The *post mortem* of her deceased brother was done at Rosera Hospital. Her father signed the inquest report. Twenty-two days before the above said incident, accused Shashi Mahto had fought and assaulted them and also threatened that he would not leave any person from her family alive. A case of the said incident was also registered. She and her mother were also injured in the said incident and the case is still going on. For this reason her brother was murdered.

13.1. In her cross-examination she has stated (in an angry tone) that accused Shashi Mahto is not her agnate nor her family has any relation with him. She had not stated to the police that both the accused persons i.e. Amarjeet Sah and Shashi Mahto took out their pistols and fired at her brother. She denies the suggestion that she had not stated to the police that the police vehicle came and the police took her brother to Sub-Divisional Hospital, Rosera. She has denied the suggestion to have stated to the police that she went home crying & screaming and told her mother about the incident. She has also denied that her mother and she came immediately. She has



stated that no doctor had prescribed the medicine. She has stated that after the incident shooting, the shops started closing. All the shops were open till the incident of shooting. No shopkeeper came to the place of occurrence. Her brother died about an hour after being shot. A lot of blood had come out due to the gunshot. Blood had spilled on the road. She screamed after seeing the pistol. On shouting, no one came. She was not scared after seeing the pistol. Her brother stayed at Rosera Hospital for less than an hour after he was shot. The police could not take her brother's statement in Rosera Hospital as he was not able to speak. Even after that he was never able to speak. For some time after being shot, he was only able to make gesture. She had told her mother and father about the shooting of her brother by the accused Shashi Mahto. Her brother was shot from the front. The bullet was shot in his head from point blank range, but not catching hold of him. Two bullets were fired. One bullet on the temple and the other on the forehead. Bullet hit on the left temple. Both the bullets were shot on the left side. Both the bullets remained stuck in the brother's body, which were removed during *post mortem*. Since the accused has murdered her brother, they have no longer any relation with him. Shashi Mahto's father was her



brother. Accused Shashi Mahto is not from her family. His house is at some distance from her father's house. She has no knowledge about any land dispute with the accused. She did not state before the police that there was a land dispute going on with Shashi Mahto for a long time. She has denied that no such incident, as stated by her, had happened and that she has given false evidence.

14. P.W. 4 Dr. Rakesh Chandra Sahay Verma has stated in his examination-in-chief as follows:

(1) On 02.12.2011 I was posted as Medical Officer, Civil Hospital, Samastipur and conducted the autopsy of the body of deceased Chhotu Kumar S/o Bishundeo Mahto near girls high school, Rosera, ward no. 14 police station, Rosera, Samastipur at 9.00 A.M. on 02.12.2011 in the presence of one observer namely Dr. Rajesh Kumar, and found the following ante-mortem injuries over the corpse externally :-

(i) Rigor mortis present.

(ii) Two lacerated wounds with blackening around the wound:-

over head (a) one lacerated wound $\frac{1}{2}$ " in diameter with blackeish the wound over right temporal region of head, (b) one lacerated wound $\frac{1}{2}$ " in diameter with blackening around the wound in front of right ear, anterior to tragus with evidence of bleeding.

Internally:-

(i) Intracranial haemorrhage.

(ii) Comminuted fracture of right temporal bone of scull.



(iii) Gross contusion and laceration of cerebral cortex, i.e. brain matter (two cartridges recovered from the cranial cavity and handed over to the police personnel in a sealed and duly levelled container).

(iv) All other visera pale.

Time since death - within 36 hours.

Opinion-- In our opinion, death of the above mentioned deceased has been caused due to serious injuries on vital organs, due to fire arm injuries leading consequently to profuse haemorrhage and shocked there upon

Weapon used-- fire arm weapon, like pistol.

(2) This post mortem report written by me and bears my signature and as well as signature of above observe Dr. Ranjesh Kumar, in my presence. Mark it as Ext.2.

14.1. In his cross-examination, he has stated as follows:

(3) Time since death within 36 hours means, the deceased has died before 36 hours.

(4)/ There was evidence of bleeding. There was no exit wound, but there was bleeding in both the injuries on entry wound.

(5) I have not mentioned that whether the blood was dried or cloted.

(6) I have mentioned in my report regarding dimation of injuries. Dimation of injury includes length and breadth and depth also.

(7) Que:- In fire arm injuries, charring tattoing is must?

Ans.:- It depends upon distance of firing.

(8) If firing is made in a short distance, charring



and tattooing is must, but firing from long distance it is not possible.

(9) It is very difficult to assess that in the present case that from what distance firing was made.

(10) In present case I cannot say and it is very difficult to say that from what distance actually the firing was made.

(11) It is always not necessary the presence of gun powder on the body.

(12) I have not mentioned in my report regarding the presence of any gun powder.

(13) Bleeding is possible in a living body.

(14) I have not mentioned in my report regarding any dissection.

(15) I have not mentioned in my report whether I did see dried or clotted blood upon the body of deceased.

(16) It is not true that my autopsy report is not true and it is simple a table work.”

15. P.W. 5 Binod Ram has stated in his examination-in-chief that on 1/12/2011, he was posted as an SI in Rosera PS. On 01/12/2011, the then SHO, Rosera Mr. Amar Vishwas had recorded the *fardbeyan* of Smt. Chandrakala Devi. This is the *fardbeyan* which is in the handwriting and signature of Shri Amar Vishwas, the then SHO, Rosera which he identifies (Exhibit-3) and he also identifies the endorsement of Shri Amar Vishwas (Ext-4). He also identifies the signature of the above mentioned SHO Shri Amar Vishwas on the formal



F.I.R. (Exhibit-5). He took the charge of investigation on 01.12.2011 from the then SHO, Rosera Shri Amar Vishwas. It is worth mentioning that the then SHO received a rumor of incident of firing near Girls High School, Rosera, in which one person got injured. Then, he went near Girls High School, Rosera along with the then SHO. On 01/12/11 at 20:45 hrs, as per the orders of the SHO, he recovered a live cartridge from the place of occurrence which appeared to be of a pistol, upon which KF 7.65 was engraved at the bottom, and also recovered the front portion of an exhaust bullet of 303. He prepared its seizure list, on which he obtained the signatures of Bhola Pd. Rai and Dheeraj Kumar Kamti as witnesses. The seizure list (Ext-6) is in his handwriting and signature, which he recognizes. He also recognizes the signatures of witnesses Bhola Pd. Rai and Dheeraj Kumar Kamti. After taking charge of the investigation, he recorded the statement of Ritu Devi at her house on 02/12/2011. He raided the house of the accused Shashi Mahto. He recorded the statement of witness Dinesh Thakur on 02/12/2011 itself. He also recorded the statements of witness Anil Kumar and re-statement of the informant Chandrakala Devi on the same day. Apart from this, statements of witnesses Naresh Sahni and Manish Kumar Jha were also



recorded. He reached the place of occurrence the same day and inspected the place of occurrence. In para-16 and 17, he has detailed the criminal antecedents of accused Shashi Mahto and Amarjeet Kumar Sah in a tabular form. On 12/12/2011, a secret information was received that the FIR accused was hiding in his in-laws' house in Bakhri. On the same day, sub-divisional police officer, Mithilesh Kumar, reached Bakhri PS along with SHO Amar Vishwas with armed forces and with the help of the local PS, the accused Shashi Mahto was arrested from Bakhri itself. The confessional statement of the accused Shashi Mahto was recorded at Rosera police station on 13/12/2011. Accused Shashi Mahto is present in the court is the person whom he had arrested. He recorded the statement of witnesses Jitendra Kumar and Lalan Thakur on 16/12/2011. He received the supervision note of Sub-Divisional Police Officer on 02/01/2012 which he recorded in the case diary. He submitted an application on 09/01/2012 seeking permission from the Hon'ble Court so that the seized exhibit could be sent to FSL for necessary analysis. After getting permission from the court, the seized exhibit was sent to FSL, Patna through the office of Superintendent of Police on 10/01/2012.

15.1. In his cross-examination, he has stated that



the *fardbeyan* of this case was recorded on 01/12/2011 at 22:15 hrs. He got the charge of investigation on the same date at 22:30 hrs. He prepared the inquest report on 01/12/2011 at 22:00 hrs. i.e., this report was prepared half an hour before taking the charge of investigation. He prepared the seizure list on 01/12/2011 at 20:45 hrs. Even before taking the investigation charge, he had gone to the place of occurrence. There is no mention in his diary of any station diary being mentioned. He had not received the F.S.L report of live cartridge and used bullet till the charge-sheet was submitted. He did not send the recovered bullet-cartridge to the senior attendant for examination. Though he had found traces of blood at the place of occurrence, but he has not mentioned it in the case diary. The informant (female) had said in her re-statement that the land dispute with accused Shashi Kumar Mahto has been going on for many years and Shashi Mahto is trying to grab her land. In paragraph-3, there is mention of a bandage being tied around the head of the deceased, but there is no mention of bleeding. In paragraph 11 of the diary, it is written that since it was night, the place of occurrence could not be recorded in the diary because there was not enough light there. Tobacco shopkeeper Anil Kumar had said in his statement that



he was selling tobacco at the time of the incident. Later he came to know that Shashi Mahto had fired shot. Witness Naresh Sahni had said in his statement that there was chaos at the place of occurrence and two persons ran towards Mahavir Chowk. Vishnudev Mahto, the father of the deceased, had said that he got information from his daughter that his son had been shot by Shashi Mahto. There is a dense settlement around the place of occurrence. He had seized the recovered bullets and cartridges from the place of occurrence itself. He had found marks of violence at or around the place of occurrence, but did not mention it in the diary. After the shooting, the shops around the place of occurrence got closed. He has denied the suggestion that his investigation is faulty and due to a land dispute, the charge sheet was submitted against the accused, even though he is innocent.

15.2. In his re-examination on recall on fresh oath, he has stated that on 01/12/2011, he had recovered a live cartridge with KF 7.65 engraved on it, which appeared to be of a pistol, and the front portion of 303 bullet shell of exhaust bullet from the place of occurrence and with the permission of the learned Additional Chief Judicial Magistrate, Rosera, the same were sent in a sealed box to the FSL, Patna through the



office of the Superintendent of Police, Samastipur. After examining, the sent material was received by him after completing the investigation from the Forensic Science Laboratory, Patna, which he had kept safe in the storeroom (*malkhana*) of Rosera PS. He has identified the sealed box which bears the signature of Asstt. Director, F.S.L., Patna, whose F.S.L. No. is 11/12, but he does not recognize the signature or handwriting of the Asstt. Director. This sealed box was marked as Exhibit 'x' (with objection). He also identified the live cartridge on which K.F. 7.65 is written, which he had recovered and had sent to the F.S.L Department for examination. The same is marked as Exhibit 'M' with objection. He has also identified the empty bullet shell of fired bullet which he had recovered and had sent to F.S.L Department for examination which is marked Exhibit-M/1 with objection.

15.3. In his Re-cross examination, he has stated that, as per diary, he had prepared the seizure list on 01/12/2011 at 20:45 hrs. The above said bullet was recovered from the place of occurrence. The source of light while preparing the seizure list is not mentioned in the diary. He had recovered both the above mentioned bullets from near the place of occurrence. At what distance both the bullets were lying from each other is



not mentioned in the diary. He had seen the bullet in the street light and also in the torch light, but there is no mention of the same in his diary. He had kept the seized material with himself in a polythene bag, but it is not mentioned in the diary. This material remained with me for a day. After going to the police station, he kept the seized cartridges in the safe custody of the storeroom of the police station. On 09/01/2012, he had presented the above seized material in the court of learned Additional Chief Judicial Magistrate, Rosera. It was presented in the court after being sealed in a flavoured tobacco (*jarda*) box and after opening in the court it was shown there and it was again sealed by the court. It was sealed by the court staff. The sealed box in which he has brought the cartridge to the court today, was kept in the same box. There is no seal etc. or even signature of the said court on this box nor it bears his signature. There is only signature of F.S.L. Department on this. He has denied the suggestion that the above material has no relevance to this case and its examination is not done in F.S.L. and no such incident, as stated by him, has happened.

16. We have considered the submissions canvassed by the learned counsels for the parties. We have re-appreciated the entire evidence led by the prosecution. We have



also perused the material placed on record.

17. From the evidence led by the prosecution, it transpires that the prosecution has examined father, mother and sister of the deceased. Thus, they are interested witnesses. No other independent witnesses have been examined by the prosecution. It is true that merely because witnesses are near relatives or interested witnesses, only on that ground their version cannot be discarded, however, such deposition is required to be scrutinized closely.

17.1. It transpires from the record that the incident in question took place at 08:15 p.m. (20:15 hours). The version of the informant, P.W. 2, came to be recorded at 22:15 hours at Sub-divisional Hospital, Rosera. If the said version is carefully examined, it is revealed that it is the specific case of the informant that her son and daughter went to market for purchasing medicine and thereafter when the informant was in her house, her daughter came shouting and informed that Shashi Mahto had fired bullet at the son of the informant and in the said incident the son of the informant sustained injuries on his head and both the assailants were having pistol in their hand. After receiving the said information, the informant, along with her family members, rushed to the place of incident and



when they reached there, they found her son Chhotu in injured condition. It is further her case in the *fardbeyan* that she asked her son as to how the incident took place. At that time he told her that Shashi Mahto and Amarjeet Kumar Sah have fired at him and thereafter the injured was taken to Sub-divisional Hospital, Rosera for treatment and the concerned doctor, looking to the critical condition of the injured, referred to Samastipur Sadar Hospital. However, when he was being taken to the said hospital in ambulance, on the way he died and thereafter they returned in the ambulance to the Sub-divisional Hospital.

17.2. Keeping in view the aforesaid *fardbeyan*, if the deposition given by P.W. 1 is carefully examined, it is revealed that P.W. 1 has specifically stated that his daughter came to the house by saying that Shashi Mahto had fired at her brother and, therefore, he went to the place of occurrence and asked about the incident from his son. It is his specific case that his son told him “Shashi Mahto has fired bulled on me.” He also informed that Shashi Mahto was accompanied with three other miscreants. Chhotu Mahto disclosed the name of the other miscreant as Amarjeet Sah. He also added that he could not identify two others.



17.3. Thus, from the aforesaid deposition given by P.W. 1, it can be said that the injured narrated about the manner of incident and number of assailants.

18. At this stage, we would like to refer the deposition given by P.W. 2, the informant, who is mother of the deceased, that her daughter came near the house and thereafter informed that Shashi Mahto has fired upon Chhotu. Therefore, she immediately rushed to the place of incident and when she enquired of her son, he has stated "Shashiya has shot bullet, now I shall not survive." The injured further stated to P.W. 2 that there were two accused and Shashi Mahto shot at him and other accused was Amarjeet Sah.

19. In this context, if the deposition given by P.W. 3, so-called eye-witness, is carefully seen, she has deposed that accused Shashi Mahto and Amarjeet Sah came at the place of incident and accused Shashi Mahto took out the pistol and shot at her brother. Two bullets were fired from the pistol out of which one hit the forehead and the other near the left ear. Therefore, she raised alarm upon which her mother came at the place. Till then, her brother was conscious and when her mother asked him, he said that Shashi Mahto has shot at him, now he will not survive. At that time police came and



took her brother to the Sub-divisional Hospital, Rosera.

20. Thus, from the aforesaid evidence led by the prosecution, it can be said that there are major contradictions and inconsistencies in the story of the prosecution. It appears that P.W. 1 and P.W. 2 were examined by the prosecution with a view to prove that injured (deceased) made oral dying declaration before them at the place of incident. If that is the case, then we are of the view that the actual words used by the injured (deceased) are required to be brought on record and there should not be any inconsistency with regard to the number of assailants and the manner in which the incident took place. From the deposition of P.W.1, P.W. 2 and P.W. 3, it would reveal that as per the case of P.W. 1 the injured (deceased) informed him that there were four assailants. As per P.W. 2, the injured (deceased) informed about only two assailants.

21. At this stage, it is also pertinent to note that, as per the case of the prosecution, on the basis of the information received by the police, police came at the place of occurrence immediately and the injured was taken to hospital in the police vehicle. Now, it is the case of the prosecution that the injured narrated the story before P.W.1, P.W.2 and P.W. 3



and at that time he was conscious. However, when immediately the police came at the place, he did not give his version to the police. There is nothing on record to suggest that the police has recorded the dying declaration of the injured (deceased) at the place of occurrence.

22. It further reveals from the record that the information which was received by the police was not recorded in the station diary and the same has not been produced before the Court. Further, while injured was taken to the hospital in the police vehicle to hospital at Rosera, the informant or the relatives of the deceased have not disclosed anything to the police. It is the specific case of the prosecution through P.W. 3 that injured was in Rosera Hospital for approximately one hour during which period police did not record the statement of the injured as he was not in a position to speak. At this stage, it is also relevant to note that when the injured was in Rosera Hospital, *fardbeyan* of the relative of the injured was not recorded and the same was recorded after the death of the deceased i.e. at 22:15 hours. At this stage, if the inquest report is examined, it is revealed that the same was prepared at 22 hours, i.e. prior to the recording of the *fardbeyan* of the informant (P.W.2). It is also relevant to observe at this stage



that any document with regard to the type of treatment given to the injured (deceased) at Rosera Hospital has also not been produced by the prosecution before the Court. From the inquest report, it is revealed that the injury on the head around which the strip is wrapped, appears to be a bullet injury.

23. Thus, in view of the aforesaid, we are of the view that the so-called oral dying declaration given by the injured (deceased) before prosecution witnesses cannot be believed.

24. Thus, now we have to examine the deposition given by P.W.3, the so-called eye-witness, who is sister of the deceased. As observed hereinabove, there is major discrepancy with regard as to how she had informed her parents about the occurrence after the incident took place. Further, it is the specific case of P.W. 3 that appellant Shashi Mahto took out the pistol from his waist and thereafter shot two bullets at Chhotu Kumar, one hit his forehead whereas the other hit near the left ear. Thus, it is the specific case of the eye-witness that the present appellant only shot at her brother from pistol and both the said bullets were recovered from the dead body of the deceased. Now, at this stage, if the deposition given by P.W. 5, the investigating officer, is carefully examined, it would reveal



that in his examination-in-chief he has stated that when he visited the place of occurrence at 20:40 hours, he found one live cartridge of pistol upon which K.F. 7.65 was engraved and he also found one projectile of 303. He prepared the seizure list and both the aforesaid arms are marked as Ext. M and M/1. After the investigating officer, P.W. 5, was recalled, once again he has stated about the said aspects in para-54 of his deposition. Thus, from the aforesaid deposition of P.W.5, it is clear that one projectile of 303 was found which cannot be said to have been fired from the pistol. That means two different weapons may have been used by the assailants. At this stage, it is required to be noted that as per P.W. 4, the doctor who conducted the *post mortem* of the dead body of the deceased, two cartridges were recovered from the dead body which were handed over to the police personnel in a sealed and duly levelled container. However, it is pertinent to note that the said cartridges were not sent for necessary analysis to the F.S.L. The investigating officer, though sent one live cartridge of the pistol and one projectile of 303 to F.S.L., the report of F.S.L. was not produced before the Court. It is also relevant to note that P.W. 4 has specifically stated in his examination-in-chief that time since death is within 36 hours and during cross-examination he



has clarified that 'time since death within 36 hours' means the deceased has died before 36 hours. It is relevant to note that the prosecution has not re-examined the said witness with regard to the said aspect. Thus, from the aforesaid independent evidence, it is evident that one projectile of 303 was found from the place of occurrence. Thus, the story put forward by the prosecution through P.W. 3, the so-called eye-witness, that there was only one assailant who fired two bullets from the pistol cannot be believed and doubt is raised with regard to the theory of the prosecution.

25. At this stage, we would like to examine the applicability of the judgments relied upon by the learned senior counsel for the informant to the facts of the present case. In the case of **Ravasaheb @ Ravasahebgouda & Ors. (supra)**, the Hon'ble Supreme Court has observed in para-23 and 25 as follows:-

“23. The evidence examined as a whole, must reflect/ring of truth. The court must not give undue importance to omissions and discrepancies which do not shake the foundations of the prosecution's case.

25. A witness being a close relative is not a ground enough to reject his testimony. Mechanical rejection of an even “partisan” or “interested” witness may lead to failure of justice. The principle of “*falsus in*



uno, falsus in omnibus” is not one of general application.”

25.1. In the case of **Dhanaj Singh @ Shera & Ors. (supra)**, the Hon’ble Supreme Court has observed in para-5 as follows:-

“5. In the case of a defective investigation the Court has to be circumspect in evaluating the evidence. But it would not be right in acquitting an accused person solely on account of the defect; to do so would tantamount to playing into the hands of the Investigating Officer if the investigation is designedly defective.”

25.2. In the case of **Amar Singh V. Balwinder Singh & Ors. (supra)**, the Hon’ble Supreme Court has observed in para-15 as follows:-

“Coming to the last point regarding certain omissions in the DDR, it has come in evidence that on the basis of the statement of PW4 Amar Singh, which was recorded by PW14 Sardara Singh, S.I. in the hospital a formal FIR was recorded at the Police Station at 9.20 p.m. In accordance with Section 155 Cr.P.C. the contents of the FIR were also entered in the DDR, which contained the names of the witnesses, weapons of offence and place of occurrence and it was not very necessary to mention them separately all over again. It is not the case of the defence that the names of the accused were not mentioned in the DDR. We fail to understand as to how it was necessary for the investigation officer to



take in his possession the wire gauze of the window from where A-1 is alleged to have fired. The wire gauze had absolutely no bearing on the prosecution case and the investigating officer was not supposed to cut and take out the same from the window where it was fixed. It would have been certainly better if the investigating agency had sent the fire arms and the empties to the Forensic Science Laboratory for comparison. However, the report of the Ballistic Expert would in any case be in the nature of an expert opinion and the same is not conclusive. The failure of the investigating officer in sending the fire arms and the empties for comparison cannot completely throw out the prosecution case when the same is fully established from the testimony of eye-witnesses whose presence on the spot cannot be doubted as they all received gun shot injuries in the incident. In *Karnel Singh v. State of M.P.* (1995) 5 SCC 518 it was held that in cases of defective investigation the court has to be circumspect in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect and to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. In *Paras Yadav & Ors. v. State of Bihar* (1999) 2 SCC 126 while commenting upon certain omissions of the investigating agency, it was held that it may be that such lapse is committed designedly or because of negligence and hence the prosecution evidence is required to be examined de hors such omissions to find out whether the said evidence is reliable or not. Similar view was taken



in Ram Bihari Yadav v. State of Bihar (1998) 4 SCC 517 when this Court observed that in such cases the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials, otherwise, the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice. In our opinion the circumstances relied upon by the High Court in holding that the investigation was tainted are not of any substance on which such an inference could be drawn and in a case like the present one where the prosecution case is fully established by the direct testimony of the eye-witnesses, which is corroborated by the medical evidence, any failure or omission of the investigating officer cannot render the prosecution case doubtful or unworthy of belief.”

26. From the aforesaid decisions, it can be said that in a case of defective investigation, the Court has to be circumspect in evaluating the evidence, but it would not be right in acquitting an accused person solely on account of defect. To do so would tantamount to playing into the hands of the investigating officer, whose investigation is designedly defective. If primacy is given to such designed or negligent investigation, to the omission of lapses by perfunctory



investigation or omissions, the faith and confidence of the people would be shaken. It can further be said that where the prosecution is fully established by the direct testimony of the eye-witnesses, which is corroborated by the medical evidence, any failure or omission of the investigating officer cannot render the prosecution case doubtful or unworthy of belief. It is further held that a witness may be close relative, is not a ground enough to reject his testimony.

27. We cannot dispute the aforesaid proposition of law laid down by the Hon'ble Supreme Court in the aforesaid cases. However, as discussed hereinabove, in the present case, though the investigating officer has recorded statement of the independent witnesses, whose presence at the place of occurrence would be natural, have not been examined by the prosecution. Further, the sole eye-witness, who is sister of the deceased, has specifically stated that the present appellant only, i.e. Shashi Mahto, fired two bullets from his pistol. However, it is revealed from the deposition given by the investigating officer that he had seized one live cartridge of pistol upon which K.F. 7.65 was engraved and one projectile (front portion) of 303 was also found from the place of occurrence. Thus, from the aforesaid evidence, which is



independent in nature, the theory of the prosecution creates doubt. Thus, we are of the view that the aforesaid decisions would not render any assistance to the learned counsel for the informant in the facts of the present case.

28. At this stage, it is also relevant to note that it is the specific case of the prosecution that because of the land-dispute between the parties, the incident took place and even it is the defense of the appellant that because of the land dispute he has been falsely implicated. Thus, there are all chances that because of the land-dispute the appellant may have been implicated in the incident in question.

29. Further, it is the case of the prosecution that the incident took place at 20:15 hours and immediately police reached at the place of incident. However, there is nothing on record to show as to who had informed the police and what was the information written in the station diary. Further, if the police was already present at the place of occurrence and the injured was taken to the hospital in the police vehicle itself, why did the police not take his statement. There is no explanation for the same.

30. It is further revealed that injured remained in the hospital at Rosera for approximately one hour during which



period also, police was present in the hospital despite which *fardbeyan* of the informant was not recorded and only after the death of the injured, *fardbeyan* of the informant was recorded. It is also revealed from the record, i.e. from the deposition of P.W.5, the investigating officer, that he had recorded the statement of the independent witnesses. However, the prosecution has failed to examine the independent witnesses. Now it is contended by the learned counsel for the informant that because of the fear of the appellant such witnesses have not come forward to depose before the Court. However, we find that there is nothing on record to support such contention that such type of application was given by the prosecution before the Trial Court. Merely because some affidavit was filed in the present proceedings while opposing the bail application, the same cannot be accepted while deciding the appeal finally.

31. Further, merely because there are antecedents reported against the appellant, his appeal cannot be dismissed, if there is no evidence available against him, in the present case.

32. Looking to the aforesaid facts and circumstances of the present case, we are of the view that the prosecution has miserably failed to prove the case against the



appellant beyond reasonable doubt, despite which the Trial Court has recorded the impugned judgment of conviction and order of sentence. Hence, the same are required to be quashed and set aside and the appeals deserve to be allowed.

33. Accordingly, the impugned judgment of conviction dated 12.07.2017 and order of sentence dated 18.07.2017, passed by the learned Additional Sessions Judge- Rosera, Samastipur, in connection with Sessions Trial No. 177 of 2013 (arising out of Rosera P.S. Case No. 207 of 2011 corresponding to G.R. No. 976 of 2011) are quashed and set aside. The appellant is acquitted of the charges levelled against him.

33.1. Since the appellant, namely Shashi Mahto, is in jail custody, he is directed to be released from jail custody forthwith, if his presence is not required in any other case.

34. Accordingly, the present appeal is allowed.

(Vipul M. Pancholi, J)

(Ramesh Chand Malviya, J)

K.C.Jha/-

AFR/NAFR	A.F.R.
CAV DATE	N.A.
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