

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.255 of 2017

Arising Out of PS. Case No.-370 Year-2016 Thana- ARA NAGAR District- Bhojpur

Kaushal Kumar Srivastava @ Bittu Srivastava @ Kaushal Kishore Srivastava @ Bittu son of Sri Mithilesh Kumar Srivastava, the Resident of Village- Mah Sagar, Police Station Charpokhari, in the district of Bhojpur present address is Resident of New Area Babu Bazar, Police Station Ara Town, in the District of Bhojpur.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 272 of 2017

Arising Out of PS. Case No.-370 Year-2016 Thana- ARA NAGAR District- Bhojpur

1. Ravindra Prasad @ Nepali, Son of Late Ganga Prasad, Resident of Village- Jahaji Kothi, New Babu Bazar, Ara, Police Station- Ara Town, District- Bhojpur.
2. Chandan Prasad, Son of Binod Prasad, Resident of Village- Baghi Pakar, Police Station- Ara Muffasil, District- Bhojpur.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

with

CRIMINAL APPEAL (DB) No. 303 of 2017

Arising Out of PS. Case No.-370 Year-2016 Thana- ARA NAGAR District- Bhojpur

1. Sonu Prasad
2. Sani Prasad @ Sani Kumar, Both are sons of Late Ganga Prasad, Resident of Village-New Babu Bazar, PS-Ara Nagar, District-Bhojpur.

... .. Appellants

Versus

The State Of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 255 of 2017)

For the Appellant/s	:	Mr. Sanjay Kumar, Advocate
		Mr. Prabhu Narayan Sharma, Advocate
For the State	:	Ms. Shashi Bala Verma, APP
For the Informant	:	Mr. Bindhychal Singh, Sr. Advocate

(In CRIMINAL APPEAL (DB) No. 272 of 2017)

For the Appellant/s	:	Mr. Surendra Kumar Singh, Advocate
		Mr. Prabhat Kumar Singh, Advocate

		Mr. Birendra Kumar Singh, Advocate
For the State	:	Mr. Sri Ajay Mishra, APP
For the Informant	:	Mr. Bindhyachal Singh, Sr. Advocate
(In CRIMINAL APPEAL (DB) No. 303 of 2017)		
For the Appellant	:	Mr. Surendra Kumar Singh, Advocate
		Mr. Prabhat Kumar Singh, Advocate
		Mr. Birendra Kumar Singh, Advocate
For the Respondent/s	:	Mr. Shashi Bala Verma, APP
For the Informant	:	Mr. Bindhyachal Singh, Sr. Advocate

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 20-06-2024

These three appeals have been preferred for setting aside the judgment of conviction dated 31st January, 2017 and the order of sentence dated 07.02.2017 (hereinafter referred to as the 'impugned judgment and order' respectively) passed by learned 3rd Additional District and Sessions Judge, Bhojpur, Ara (hereinafter referred to as the 'learned trial court') in Sessions Trial No. 375 of 2016 (arising out of Ara Town P.S. Case No. 370 of 2016) under Sections 302, 120 (B)/34 of the Indian Penal Code (in short 'IPC') and Section 27 of Arms Act.

2. By the impugned judgment, the learned trial court has been pleased to hold and declare that the prosecution has been able to prove the charges under Section 302 IPC read with Section 34 IPC against accused (i) Ravindra Prasad @ Nepali, (ii) Chandan Prasad (both appellants in Criminal Appeal (DB) No. 272 of 2017), (iii) Sunny Prasad (iv) Sonu Prasad (the appellants in

Criminal Appeal (DB) No. 303 of 2017) and the charges under Section 120B IPC read with Section 302 IPC against accused Sonu Prasad and Kaushal Kishore Srivastva @ Bittu and under Section 27 of the Arms Act against accused Sonu Prasad. The learned trial court has awarded imprisonment for life to four accused persons, namely, Sonu Prasad, Chandan Prasad, Sunny Prasad and Ravindra Prasad @ Nepali for the offence under Section 302/34 IPC and a fine of Rs. 20,000/- each. Accused Sonu Prasad and Kaushal Kishore Srivastva @ Bittu have been held guilty for offence of conspiracy punishable under Section 120B IPC read with Section 302 IPC and for that they have been awarded imprisonment for life and a fine of Rs. 20,000/- each. Further, accused Sonu Prasad has been held guilty for committing an offence under Section 27 of the Arms Act in contravention of Section 5 of the Arms Act for which he has been awarded a sentence of three years rigorous imprisonment and fine of Rs. 2,000/-. The sentences have been ordered to run concurrently.

Prosecution Story

3. As per the prosecution story, on 09.07.2016 at about 8:00 am, the informant (PW-8) was in the *verandah* of his house and was talking to Subhash Singh (PW-4). In the meanwhile, his elder brother Sanjay Prasad @ Munna Sai (deceased) came

towards the house by his scooty bearing number BR035 4551 and as soon as he reached near Jahazi Kothi, New Area Babu Bazar, accused (i) Ravindra Prasad @ Nepali, (ii) Sonu Prasad, (iii) Sani Prasad, all sons of Late Ganga Prasad, Resident of Village Sakhua, PS-Udhwantnagar District-Bhojpur and Chandan Prasad surrounded the deceased and pulled him down from the scooty, they started assaulting him by hand and fist. The informant claimed that he and Subhash Singh came raising *hulla*, his brother Sanjay Prasad @ Munna Sai was also crying and on hearing the *hulla* Sonu Singh, Ajay Kumar Singh (PW-6) and Ashutosh Pandey (PW-2) reached there to rescue him. It is alleged that the accused persons instigated co-accused Sonu Prasad to fire on which Sonu Prasad took out a pistol from his waist and fired at the chest of the deceased Sanjay Prasad @ Munna Sai and fled away towards the southern lane. The informant with the help of others brought his brother to Sadar Hospital where the doctors declared him dead.

4. On the basis of the *fardbeyan* of Anjay Prasad @ Guddu (PW-8) Ara Town P.S. Case No. 370 of 2016 was registered under Sections 302/120B/34 IPC and Section 27 of the Arms Act against four accused persons. After investigation, Police found that accused Kaushal Kishore Srivastava @ Bittu (the sole appellant in

Criminal Appeal (DB) No. 255 of 2017) was also involved in the crime and he had not only indulged in the conspiracy, but had also supplied the firearm hence a charge-sheet was submitted against five accused persons for committing offence under Sections 302/120B/34 IPC and Section 27 of the Arms Act.

5. On 28.08.2016, the learned Chief Judicial Magistrate, Ara took cognizance of the offences and on 03.09.2016 committed the record to the court of Sessions. On 21.09.2016, charges were framed against all the accused persons that they had committed murder of Sanjay Prasad @ Munna Sai on 09.07.2016 at Mohall New Area, Babu Bazar and it was Sonu Prasad who had opened fire by a country-made pistol in furtherance of common intention of all other accused persons and they were charged for committing offence under Section 302/34 IPC. A further charge was framed saying that they had made a conspiracy under which Kaushal Kishore Srivastava @ Bittu had supplied a country-made pistol which was used for killing of Sanjay Prasad @ Munna Sai. Sonu Prasad was charged for committing use of country-made pistol for illegal purpose of committing murder. The accused persons denied the charges and claimed to be tried. Their common defence was that they had been falsely implicated in this case.

6. On behalf of the prosecution, as many as ‘12’ witnesses were examined and ‘18’ documents were marked exhibits. The list of witnesses and the exhibits marked on behalf of prosecution are being shown hereunder in a tabular form.

1.	Sanjay Srivastava	PW-1
2.	Asutosh Pandey	PW-2
3.	Sonu Singh	PW-3
4.	Subhash Singh	PW-4
5.	Prashant Ranjan	PW-5
6.	Ajay Kumar Singh	PW-6
7.	Anjana Srivastava (Wife of Deceased)	PW-7
8.	Anjay Prasad (Informant and Brother of Deceased)	PW-8
9.	Dr. Mobinul Haque (Medical Officer)	PW-9
10.	Satendra Kumar Shahi (Investigating Officer)	PW-10
11.	Pitamber Choudhary (Police Personell who prepared Inquest Report and recorded <i>Fardbeyan</i>)	PW-11
12.	Raj Narain Choudhary (Formal Witness)	PW-12

List of Exhibits:

Ext-1	Inquest Report (Carbon copy) Signature of witness Sanjay Kumar Srivastva	27.09.16	State	3 rd ADJ, Ara 27.9.16
Ext-2	<i>Fardbeyan</i> Signature of witness Subhash Singh	25.10.16	State	3 rd ADJ, Ara 25.10.16
Ext-3	<i>Fardbeyan</i> Signature of Witness Anjay Prasad	04.11.16	State	3 rd ADJ, Ara 04.11.16
Ext-4	Postmortem Report	9.11.16	State	3 rd ADJ,

				Ara 9.11.16
Ext-5	Seizure list Signature of Satendra Kumar Shahi	14.11.16	State	
Ext-6	Seizure list	14.11.16	State	3 rd ADJ, Ara 14.11.16
Ext-7	Fardbeyan		State	
Ext-8	Seizure list Signaute of Bauval Ram and L.T.I. of Pramod Prasad		State	
Ext-9	Copy of F.S.L. Report		State	
Ext-10	Call detail Mark (A) Page-8 (Rabindra @ Nepali)		State	
Ext-11	Call detail Mark (B) Page-5 (Phone Sonu Kumar)		State	
Ext-12	Call detail Mark (c) Page-2 (Phone Sunny Prasad)		State	
Ext-13	Call detail Mark-d Page-3 (Phone Chandan Prasad)		State	
Ext-14	Seizure list		State	
Ext-15	F.S.L. Report		State	3 rd ADJ, Ara 14.11.16
Ext-16	Fardbeyan Signature of S.I. Pitambhar Choudhary		State	
Ext-17	Inquest Report (Signature of S.I. Pitambhar Choudhary and witness Sanjay Kumar Srivastva and Pankaj Kumar)		State	3 rd ADJ, Ara 17.11.16

Ext-18	Certified copy of Ara Town P.S. Case No-371/16 (Signature of S.I. Satendra Kumar Shahi		State	3 rd ADJ, Ara 18.11.16
Ext-19	Certified copy of Ara Town P.S. 370/16, Seizure list		State	3 rd ADJ, Ara 18.11.16

7. The prosecution had also produced the material objects (in short 'M.O') which are M.O-(i) T-Shirt, M.O-(ii) Janghiya, M.O-(iii) blood clotted cotton, M.O-(iv) mobile of Chandan Prasad, M.O-(v) and (v/A) two mobiles recovered from Kaushal Kishore Srivastava @ Bittu, M.O-(vi) Firearms, M.O-(vii) bullet recovered from the dead body of the deceased.

8. On behalf of the accused persons, two defence witnesses were produced who are Algu Prasad Rawani (DW-1) and Chandradeo Prasad (DW-2).

Findings of the Learned Trial Court

9. Having examined and analysed the evidences available on the record the learned trial court held that death of Munna Sai was caused by firearm injury on 09.07.2016 and the same stands corroborated from the postmortem report (Exhibit-4) and evidence of the Doctor (PW-9). The learned trial court found that evidences adduced on behalf of the prosecution, particularly, the evidence of the I.O. (PW-10) would show that there were two

places of occurrence, (i) where the assault was committed and (ii) where the victim was assaulted by firearm. PW-10 had proved nazri naksha of the place of occurrence. He had also recorded the evidence of the witnesses. PW-10 had recovered a Hero Honda Motorcycle and Nokia mobile from Chandan Prasad and on the basis of the information revealed by Ravindra Prasad in his confessional statement recorded by PW-10, PW-10 along with S.I. Narendra Prasad and other officials proceeded for Bhagwa Gali where Sunny Prasad and Sonu Kumar were residing in a rented house of Rakesh Kumar Ranjan @ Santu. In course of search of the said room a 'desi pistol' was recovered in a plastic *dibba* and a fired cartridge was found there, of which seizure list was prepared and firearm was seized. A separate Arms Act case was recorded as Arrah Town P.S. Case No. 371 of 2016. PW-10 had also proved that on 13.07.2016 he received a bullet recovered at the time of postmortem by the Doctor who had conducted the postmortem and that was sent to FSL, Patna. FSL forwarding has been exhibited as Exhibit-9 and PW-10 has proved the CDR of the accused persons as Exhibit-10 to Exhibit-13. He also proved the call details of Kaushal Kishore Srivastava @ Bittu which was exhibited as Exhibit-14.

10. The learned trial court having perused the evidences on the record considered the manner of occurrence and concluded that the death was caused from the firearm injury through a firearm recovered from the room of Sonu Prasad. It has been held that Sonu Prasad had opened fire upon Sanjay Prasad @ Munna Sai and in this regard, the prosecution witnesses are consistent. The FSL report, postmortem report and inquest report corroborate these facts and accordingly the prosecution evidence proved the fact that death of Sanjay Prasad @ Munna Sai was committed by Desi Katta on 09.07.2016 and the bullet penetrated in the body of deceased which was recovered at the time of postmortem. FSL report proved that recovered bullet was fired from desi katta recovered from the room of Sonu Prasad. As regards the involvement of the accused persons, the learned trial court found that the accused Sonu Prasad, Ravindra Prasad and Sunny Prasad are full brothers and one Chandan Prasad is brother-in-law of Ravindra Prasad @ Nepali, they were present before coming of the deceased on the spot, therefore it is proved that there was a pre-plan to give a lesson to the deceased and in furtherance of common intention to kill Sanjay Prasad @ Munna Sai, the firing was done by Sonu at the instigation of the other three accused persons.

11. The learned trial court held that the PWs 1, 2, 3, 4, 5 and 6 have stated nothing about accused Kaushal Kishore Srivastava @ Bittu and in the *fardbeyan* also his name is not mentioned but his name has revealed in the confessional statement of other co-accused, namely, Ravindra Prasad @ Nepali and accused Shanti Prasad. Referring to the CDR the learned trial court held that from the CDRs it is found that he had committed conspiracy to kill Sanjay Prasad @ Munna Sai. It revealed that on 09.07.2016 Sonu Prasad had a talk with Kaushal Kishore Srivastva @ Bittu at 9:49 am and thereafter in the night at 8:11 (Exhibit-11). From this the learned trial court held that Kaushal Kishore Srivastva @ Bittu had talked with main accused Sonu Prasad just after occurrence at about 10:00 am and after recovery of the firearm at about 8:00 pm and it shows that he had actively participated in the commission of the offence and had been involved in conspiracy. On the strength of aforementioned discussions, the learned trial court has held the appellants guilty and sentenced them as stated hereinabove.

Submissions on behalf of the appellants

12. While assailing the impugned judgment on behalf of Kaushal Kumar Shrivastava @ Bittu Srivastava in Criminal Appeal (DB) No. 255 of 2017, Mr. Sanjay Kumar, learned

Advocate, would submit that the name of this appellant had not come in the depositions of PW-1 to PW-6. There was no whisper about this appellant and for the first time his name came during trial in the deposition of PW-7, namely Anjana Srivastava, wife of the deceased. She has stated in her examination-in-chief that the appellant also fled away following the other four accused persons after the occurrence. In paragraph '2' of her deposition, she has stated that one week prior to occurrence the deceased had stated that he had mediated between Bittu and one rickshaw puller over which Bittu became angry. PW-7 further stated that the deceased had apprehension that Nepali is doing something at the instigation of Bittu. She has further stated in paragraph '3' that Sanjay Srivastava (PW-1) had stated that when he was coming to her house, he had seen Bittu giving something wrapped in paper which was kept by Sonu. Here learned counsel for the appellants submits that when Sanjay Kumar Srivastava himself deposed in course of trial as PW-1, he has not made any such statement, therefore what has been stated by PW-7 in paragraph '3' of her deposition on the basis of the information received from PW-1 is highly doubtful and the same is not getting corroborated from the testimony of PW-1. Learned counsel further submits that PW-8 has also deposed in similar manner as PW-7 has deposed in course of trial.

He has stated that Bittu also fled away after occurrence following all other four accused persons. In paragraph '2' PW-8 deposed that there was an altercation with Ravindra @ Nepali over maintenance of inverter and Bittu was accompanying him from the previous night of occurrence i.e. 08.07.2016. PW-8 has also stated in paragraph '4' of his deposition that after postmortem Sanjay Kumar Srivastava (PW-1) had told him that he had seen Bittu handing over packet to Sonu which was kept by Sonu in his waist. Learned counsel submits that again the evidence of PW-8 is not getting corroborated from the statement made by PW-1 in his evidence.

13. As regards the evidence of the I.O. (PW-11) learned counsel submits that according to this witness there was a talk between the appellant and Sonu after murder. It is submitted that due to this reason the appellant has been dragged in this case. The I.O. has extracted confession from Sonu in police custody which is not in accordance with law and such confessional statements made in police custody is not admissible in evidence, thus, there is no evidentiary value of the confessional statement of Sonu on the basis of which the appellant Bittu has been involved in this case. The I.O. (PW-11) has denied in paragraph '47' of his evidence that Anjana Srivastava (PW7) had said during investigation about the

presence of Bittu after occurrence who fled away with other accused persons. PW-11 has also denied in paragraph 50 of his deposition that during investigation PW-7 Anjana Srivastava had said that Sanjay Srivastava had told her that Bittu had supplied something wrapped in paper to Sonu while going to the informant's house. The -PW11 has also denied in paragraph '51' and '52' that the informant had said during investigation about an altercation with Nepali and that Bittu was present there. PW-11 has also denied that informant (PW-8) had said during investigation about the handing over of the wrapped article to Sonu. Learned counsel therefore submits that as far as his brief is concerned, the sole appellant in Criminal Appeal (DB) No. 255 of 2017 namely Kaushal Kumar Srivastava @ Bittu is concerned, the prosecution has failed to establish the charge against him beyond all reasonable doubts, therefore his conviction by the learned trial court is liable to be set aside.

14. On behalf of the appellants in Criminal Appeal (DB) No. 272 of 2017 and Criminal Appeal (DB) No. 303 of 2017, learned counsel for the appellants have assailed the impugned judgment on various grounds. It is submitted that in this case the FIR was lodged on 11.07.2016 at 11:35 am whereas the inquest was prepared at 8:45 am therefore prior to lodging of FIR, inquest

was made. It is submitted that PW-1 is signatory to the inquest report and he is only a chance witness. The prosecution case is that all the accused assaulted the deceased indiscriminately but no injury other than one firearm injury has been found on the body of the deceased.

15. Learned counsel submits that regarding the place of occurrence, the prosecution witnesses have given different boundaries of the place of occurrence. It is submitted that occurrence took place all of a sudden, no one had seen the occurrence and even the informant came later. Learned counsel submits that had the informant been there, then his *fardbeyan* would have been recorded prior to preparing the inquest report but in this case *fardbeyan* had been recorded at 10:15 AM on 09.07.2016 which is after making of the inquest report at 8:45 AM.

16. Learned counsel submits that there is no genesis of occurrence and the motive prescribed by the informant is different from the motive attributed by the wife of the deceased. Learned counsel submits referring to paragraph '37' of the deposition of the I.O. (PW-10) that he had recorded confessional statement of Sonu Prasad without any independent witness. No step was taken to get recorded his statement before a Magistrate under Section 164 CrPC.

17. It is submitted that it was PW-11 who had prepared the inquest report at 8:30 am, he had sent the dead body for post-mortem and then recorded the *fardbeyan*. PW-11 had not found any injury (refer paragraph '9') and he has also contradicted the statement of the wife of the deceased (PW-7). It is submitted that the distance between the place of occurrence and the house of the deceased is about 150 metre, there is no independent witness and all the prosecution witnesses in this case are related witness. Learned counsel submits that the prosecution witnesses in this case are not wholly reliable witnesses, hence, it would not be safe to convict the appellants on the strength of the testimony of these related witnesses.

Submissions on behalf of the State and Informant

18. Learned Additional P.P. for the State as well as learned Senior counsel for the informant have jointly opposed these appeals. It is submitted that the prosecution witnesses are quite consistent with respect to date, time, place and manner of occurrence as also with regard to sharing of common intention by the accused persons. The prosecution witnesses have been able to establish and prove the place of occurrence which is the concrete lane near the house of the deceased and the witnesses. Investigating Officer (PW-10) had visited the place of occurrence

and had found the blood there. He had made seizure of the blood from the place of occurrence and the seizure list was made in presence of witnesses which has been marked as Exhibit-6 material exhibit no. (iii). In this regard, paragraph '3' of the deposition of PW-10 has been referred.

19. It is submitted that the accused persons had got motive to commit the crime as one of the accused namely Rabindra Prasad @ Nepali had a quarrel with the deceased on the previous night and the motive behind the occurrence has been duly shown in the FIR (Exhibit-3). This has been further corroborated by the evidences of the prosecution witnesses particularly the informant who has been examined as PW-8. Learned counsel submits that on the basis of the revelations made in the confessional statement of Sonu Prasad, firearm and cartridges were recovered from the house of Sonu Prasad. Learned counsel has relied upon the judgment of the Hon'ble Supreme Court in the case of **State of M.P. Vs. Ramji Lal Sharma and Anr.** reported in **(2022) 14 SCC 619**, **Bhaktu Gorain and Anr. Vs. the State of West Bengal** reported in **(2023) 10 SCC 749**, **Sanjay @ Kaka Shri Nawabuddin @ Nawab Vinod Kumar Vs. The State (N.C.T. of Delhi)** and **State of Gujarat Vs. Mohammed Atik and Others** reported in **(1998) 4 SCC 351**. It is submitted that in

the light of the clinching evidences and there being no specific lacunae in the testimony of the witnesses and the documentary evidences adduced on behalf of the prosecution, no fault may be found with the judgment of the learned trial court. It is, thus, submitted that the judgment of the learned trial court needs no interference.

Consideration

20. We have heard learned counsel for the appellants, the informant and learned Additional P.P. for the State and perused the trial courts records. From the materials available on the record, it would appear that Anjay Prasad @ Guddu (PW-8) is the brother of the deceased who gave his *fardbeyan* (Exhibit-7) before Shri Pitambar Choudhary (PW-11). In his *fardbeyan*, the informant (PW-8) alleged that he was standing in the *verandah* of his house and was talking to Subhash Singh (PW-4) at about 8:00 am on 09.07.2016. During this time, his brother Sanjay Prasad @ Munna Sai (deceased) came towards the house by his scooty bearing number BR035 4551 and as soon as he reached near Jahazi Kothi, New Area Babu Bazar, accused (i) Ravindra Prasad @ Nepali, (ii) Sonu Prasad, (iii) Sunny Prasad, all sons of Late Ganga Prasad, Resident of Village Sakhua, PS-Udhwantnagar District-Bhojpur surrounded the deceased and pulled him down from the scooty,

they started assaulting him by hand and fist blow. The informant claimed that he and Subhash Singh (PW-4) came raising *hulla*, his brother Sanjay Prasad @ Munna Sai was also crying and on hearing the *hulla* Sonu Singh (PW-3), Ajay Kumar Singh (PW-6) and Ashutosh Pandey (PW-2) reached there to save him. They were trying to take away Sanjay Prasad @ Munna Sai from the clutch of the assailants but at this stage, the accused persons instigated co-accused Sonu Prasad saying that "देखते क्या हो गोली मारो" on which Sonu Prasad took out a pistol from his waist and fired at the chest of the deceased Sanjay Prasad @ Munna Sai. After that the accused persons fled away towards the south to the street/lane. The informant with the help of others brought his brother to Sadar Hospital where the doctors declared him dead.

21. In course of trial, the prosecution witnesses have supported the prosecution case which would be evident from the depositions of the prosecution witnesses. Sanjay Kumar Srivastava (PW-1) is an eyewitness to the occurrence who has stated that he had gone to meet the informant to his house on 09.07.2016 at 08:00 am when the occurrence took place, he had seen the occurrence. In his cross-examination, he has stated to have seen the accused persons who were indulged in killing of the deceased. In paragraph '7' of his cross-examination he has stated that the

deceased was shot at two minutes after this witness had reached to the place of occurrence. He denied the suggestion that he was not present at the place of occurrence. Ashutosh Pandey (PW-2) has also deposed in his examination-in-chief that he had seen the occurrence and in his presence, the three accused persons instigated Sonu Prasad to kill the deceased on which Sonu Prasad took out the pistol from his waist and shot at the deceased. This witness has given the description of the place of occurrence. In his cross-examination, he withstood the test and has reiterated that he had seen the occurrence.

22. Sonu Singh (PW-3), Subhash Singh (PW-4), Prashant Ranjan (PW-5), Ajay Kumar Singh (PW-6) and Anjana Srivastava (PW-7) are the eye witnesses to the occurrence. At this stage, it is worth-mentioning that while PW-1 to PW-6 have not named Kausal Kumar Srivastava @ Bittu Srivastava, it is PW-7 who has stated in her examination-in-chief that she had seen Bittu Srivastava in a corner and he had also fled behind the other four accused persons. In paragraph '3' of her examination-in-chief, she has stated that when she had already given her statement before police after the occurrence, Sanjay Srivastava (PW-1) had told her that when he was coming to her house, he had seen that Bittu Srivastava had given something wrapped in a paper to Sonu which

he had kept with himself. So far as evidence of PW-1 is concerned, it has already been discussed hereinabove. In his evidence, PW-1 has not taken name of Kaushal Kumar Srivastava @ Bittu Srivastava.

23. Anjay Prasad @ Guddu (PW-8) who is the informant of the case has supported the prosecution case. In paragraph '4' of his examination-in-chief, he has stated that after postmortem when he was preparing to bring the dead body to his house, at that time, Sanjay Kumar Srivastava had told him separately that when he was coming to the house of this witness, he had seen Kaushal Kumar Srivastava @ Bittu Srivastava and Sonu Prasad talking to each other at the southern end of the lane north to the place of occurrence and Bittu Srivastava had given something wrapped in a paper to Sonu Prasad which he had concealed. As regards the involvement of Kaushal Kumar Srivastava @ Bittu Srivastava when he was cross-examined, in paragraph '47' of his cross-examination, the I.O. (PW-10) has stated that Anjana Srivastava (PW-7) had not told him that Bittu Srivastava was standing in a corner and had also fled behind the accused persons. In paragraph '49', this PW-10 has further stated that Anjana Srivastava had not told him that after she had already made statement before the police, she was told by Sanjay Srivastava that on the date of

occurrence, he had seen Bittu Srivastava giving something wrapped in a paper to Sonu. Similar, statements have been made by PW-10 in paragraph '52' regarding the statement of the informant (PW-8).

24. On analysis of the evidences of the prosecution witnesses involving the appellant Kaushal Kumar Srivastava @ Bittu Srivastava, we find that the name of this appellant has been introduced at a much belated stage. PW-7 and PW-8 have implicated the appellant Kaushal Kumar Srivastava with all other appellants but as regards the appellant Kaushal Kishore Srivastava, they have been contradicted by the I.O. (PW-10). Thus, on the point of involvement of this appellant, the evidence of PW-7 and PW-8 cannot be safely relied upon. PW-10 has proved the CDR (Exhibit '13') and has stated in his evidence that Sonu Kumar had a talk with Kaushal Kumar Srivastava @ Bittu Srivastava after the occurrence and also after recovery of the firearm and cartridge but from the evidence of PW-10 we do not find that there is any clinching evidence to record a finding that Kaushal Kumar Srivastava @ Bittu Srivastava had entered into a criminal conspiracy with Sonu Prasad to kill the brother of the informant. In absence of clinching materials on the record as against Kaushal Kumar Srivastava @ Bittu Srivastava, we are of the considered

opinion that he has made out a case for giving him benefit of doubt.

25. Learned counsel for the appellants in other two Criminal Appeals have raised a submission that in this case, the *fardebyan* was recorded at 10:15 am by PW-11 whereas the inquest report had already been prepared at 08:45 am on 09.07.2016. In this regard, we have noticed from the evidences on the record that immediately after the occurrence took place, the deceased was brought to the hospital. Police directly reached there and since the doctor had declared the brother of the informant dead, PW-11 had prepared the inquest report and sent the dead body for postmortem. Immediately thereafter, the *fardebyan* of the informant PW-8 was recorded, FIR was registered and investigation begun. The delay in recording of the *fardebyan* in this case is not such that it would take away the authenticity of the prosecution case. Some of the prosecution witnesses are independent witnesses of the locality and all of them have deposed consistently. The ocular evidences are consistent with the documentary evidences on the record. The FSL report (Exhibit '15') and other materials on the record have duly established that the firearm recovered from the house of Sonu Prasad was the weapon of crime from which the firing was done. In the opinion of

this Court, the defence is not able to create a doubt in the prosecution evidence as against the appellants in Criminal Appeal (DB) No. 272 of 2017 and Criminal Appeal (DB) No. 303 of 2017. The impugned judgment and order, so far as it relates to the appellants in these two appeals, does not suffer from any infirmity and no interference is required with regard to the finding of guilt against the appellants, namely, (i) Ravindra Prasad @ Nepali, (ii) Chandan Prasad, (iii) Sonu Prasad and (iv) Sani Prasad @ Sani Kumar.

26. We, accordingly, allow Criminal Appeal (DB) No. 255 of 2017, partly set aside the judgment and order with respect to the appellant Kaushal Kumar Srivastava @ Bittu Srivastava @ Kaushal Kishore Srivastava @ Bittu acquit him of the charge under Sections 302 and 120B IPC and direct his release forthwith if not wanted in any other case.

27. The Criminal Appeal (DB) No. 272 of 2017 and Criminal Appeal (DB) No. 303 of 2017 are dismissed. Conviction and sentence of the appellants in these appeals for the offences punishable under Sections 302/34 IPC and the conviction as well as sentence of appellant Sonu Prasad under Section 27 of the Arms Act are hereby affirmed.

28. The appellant, namely, Sunny Prasad in Criminal Appeal (DB) No. 303 of 2017 is on bail. His bail bond stands cancelled and he is directed to surrender within two weeks from the date of uploading of judgment in the learned court below whereafter he will be taken into custody and sent to jail for undergoing the sentence. If he fails to surrender within the stipulated period, the learned trial court shall take coercive action to procure his arrest.

29. Let the trial court records be sent back.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

Rishi/Sushma-

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CAV DATE	
Uploading Date	28.06.2024
Transmission Date	