

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (SJ) No.447 of 2004

1. Anil Kumar @ Manti @ Anil Kumar
2. Sunil Kumar, both are sons of Narayan Sao, resident of Mohalla-
Kadamkuan, Churi Bazar, Police Station- Kadamkuan, District- Patna
... .. Appellant/s
Versus
State Of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. Manu Tripurari, Adv. Mr. Raghu Raj Pratap, Mr. Binod Kr. Sinha, Adv. Mr. Apurv Harsh, Adv.
For the Informant/s	:	Mr. Dileep Kumar Jha, Adv. Mr. Amit Shankar, Adv.
For the State	:	Mrs. Anita Kumari Singh, APP

CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY

ORAL JUDGMENT

Date : 24-09-2025

1. This appeal is arising out of the judgment of conviction and order of sentence dated 07.07.2004 on the file of the Additional Sessions Judge, Fast Track Court No. 3, Patna, in Sessions Trial No. 439/47 of 1994-04, arising out of Kadamkuan P.S. Case No. 354 of 1993 whereunder, the appellants, namely, Anil Kumar and Sunil Kumar were convicted for the offences punishable under Section 27 of the Arms Act and Section 323 of the Indian



Penal Code. They were sentenced to undergo rigorous imprisonment for a period of five years for the offence punishable under Section 27 of the Arms Act, and also sentenced to undergo rigorous imprisonment for a period of one year for the offence punishable under Section 323 of Indian Penal Code (hereinafter referred as 'IPC').

2. The case of prosecution in brief, as per *fardbeyan* is that on 19.06.1993 at about 12:30 PM, the informant/Rajendra Prasad/P.W.1 received information from local persons that appellant No. 1/Anil Kumar @Manti, appellant No. 2/Sunil Kumar, and Narain Sao were demolishing a wall. When the informant and his family members went to stop them, the wall was demolished. Thereafter, the accused persons took guns and fired in the air due to which, the wife of the informant's brother sustained a gunshot injury. The dispute was regarding a street



passing in between the houses of informant and Narain Sao for long time.

3. Basing on the *fardbeyan* of the informant, a case was registered against the appellants, in connection with Kadamkuan Police Station Case No. 354 of 1993, dated 19.06.1993, for the offences punishable under Sections 337, 427, r/w 34 of the IPC as well as under Section 27 of the Arms Act. After completion of the investigation, the police submitted a charge-sheet against both the appellants under Sections 337, 427, 307 r/w 34 of the IPC and under Section 27 of the Arms Act. The Learned Chief Judicial Magistrate, Patna, on 16.07.1997, took cognizance and committed the case on 23.07.1994 for trial. The record reveals that the case was transferred to the several Courts, and was finally placed before the Court of Learned Additional Sessions Judge, FTC-III, Patna, for disposal.



4. On 15.11.1994, the prosecution filed a petition under Section 319 of Cr.P.C. to summon Narain Sao and Dhanua Sao as accused in this case and the same was allowed by the Trial Court, and thereafter, on 04.08.1995, an order was passed to issue summon to them. However, the record reveals that both the accused Narain Sao and Dhanua Sao surrendered before the Court on 05.09.1995.

5. The record further reveals that initially, charges were framed against both the appellants, Anil Kumar and Sunil Kumar, for the offences punishable under Section 307 of IPC and Section 27 of the Arms Act. However, the same was cancelled on the same day by the trial Court, as the other two accused were not included in the charges. Subsequently, charges were again framed against Anil Kumar, Sunil Kumar, Narain Sao and Nand Kishore Kumar for the offences punishable under Section 307 of IPC and Section 27



of the the Arms Act. The charges were read over and explained to them, for which they pleaded not guilty and claimed to be tried.

6. It is pertinent to mention that the petition under Section 319 of Cr.P.C. was allowed on 15.11.1994 for impleading Narain Sao and Dhanua Sao. However, the trial Court has framed charges on 07.09.1995 against Anil Kumar, Sunil Kumar, Narain Sao and one Nand Kishore Kumar. There is no material on record to suggest that Dhanua Sao and Nand Kishore Kumar are one and the same person. Furthermore, the record reveals that the trial commenced on 22.09.1995. During course of trial, the prosecution examined eight witnesses, i.e., P.Ws. 1 to 8 and certain documents in support of its case exhibited, which are as follows:

<u>P.Ws</u>	<u>P.Ws. names</u>	<u>Relation/designation</u>
P.W. 1	Rajendra Prasad	Informant



P.W. 2	Rajnath Singh	The then ASI
P.W. 3	Yogendra Prasad	Relative of informant
P.W. 4	Fulo Devi	Injured witness (sister-in-law of P.W.1)
P.W. 5	Sudhir Kumar Thakur	Doctor
P.W. 6	Rajendra Prasad	Declared hostile
P.W. 7	Krishna Murari Gupta	Investigating Officer
P.W. 8	Kamal Sharma	Advocate clerk

<u>Sl.</u>	<u>Exhibit</u>	<u>Exhibit Details</u>
1.	Ext. 1	Written report (signed by P.W. 1)
2.	Ext. 2	Statement of Fulo Devi
3.	Ext. 3	Signature of Yogendra Prasad on statement of Fulo Devi recorded at PMCH
4.	Ext. 4	Injury report of Fulo Devi
5.	Ext. 5	Formal FIR
6.	Ext. 1/A	Report of SI S.K. Gupta
7.	Ext. 2/A	Report of SI K. Prasad on written report
8.	Ext. 6	Seizure list
9.	Ext. 6/1	Case Diary
10.	Ext. 7	C.C. of FIR of Kadamkuan P.S. Case No. 355 of 1993
11.	Ext. 8	CC of chargesheet
12.	Ext. 9	CC of deposition of Anil Kumar in GR 2586/93
13.	Ext. 10	CC of judgment in GR 2586/93
14.	Ext. 10/1	CC of judgment in T.A. 23/85



15.	Ext. 11	CC of case No. 1429(M)93
16.	Ext. 10/2	CC of judgment of appellate decree 165/87

7. On completion of the prosecution evidence, all the accused were examined under Section 313 Cr.P.C. with respect to the incriminating evidence found against them. All the accused denied the incriminating evidence and did not adduce any evidence in defence.

8. After considering the entire material on record, the trial Court convicted both the appellants for the offences punishable under Section 323 of IPC and Section 27 of the Arms Act, while acquitting them for the offences punishable under Sections 307 and 427 of IPC. However, co-accused Narain Sao and Nand Kishore Sao were acquitted from all the charges. Challenging the judgment of conviction and the order of sentence, the appellants preferred this appeal.



9. The points for determination in this appeal are :-

(i) Whether the trial Court is right in convicting and sentencing the appellants for the offence punishable under Section 323 of IPC and 27 of the Arms Act.

(ii) Whether the prosecution is able to prove the guilt of the appellants for the offences punishable under Section 323 of IPC and Section 27 of Arms Act beyond reasonable doubt?

10. Heard Mr. Manu Tripurari, the Learned counsel for the appellants, Mrs. Anita Kumari Singh, the Learned Additional Public Prosecutor for the State, and Mr. Dileep Kumar Jha, the Learned counsel for the informant.

11. It is argued by the Learned counsel for the appellants that there are major contradictions in the evidence of P.W. 1, 3, 4 and 7, which creates



serious doubts regarding the place and manner of occurrence, as well as the nature of injury sustained by the injured. It is further submitted that the trial Court erred in not following the due procedure as contemplated under Section 319 of Cr.P.C. for impleading the accused, as well as under Section 216 of Cr.P.C. for alteration of charges, which is fatal to the case of prosecution. Further, the prosecution has miserably failed to prove the guilt of the appellants for the offences under Section 307 and 427 of the IPC, which undermines the case of the prosecution. Consequently, there could not have been any conviction against the appellants under Section 323 of IPC. It is further urged by the Learned counsel for the appellants that the trial Court has framed charges against all four accused persons, however, disbelieving the prosecution evidence, trial Court acquitted co-accused for the major charges under



Sections 307 and 427 of the IPC, as well as under Section 27 of the Arms Act, therefore, the same benefit ought to have been extended to the present appellants as well. The Learned counsel for the appellant further submitted that the trial Court has miserably failed to establish the offence under Section 27 of the Arms Act, as the medical evidence is completely inconsistent with the testimony of the injured witness regarding the nature of the injury caused by a firearm, and therefore, prayed to acquit both the appellants.

12. On the other hand, the Learned Additional Public Prosecutor, Mrs. Anita Kumari Singh, contended that the trial Court has given weightage to the evidence of injured witness (P.W.4) and the injuries sustained by her corroborate with the oral evidence of the Doctor/P.W. 5 as well as the injury report/Exhibit-4, and therefore, prayed to confirm the



judgment of the trial Court.

13. The Learned counsel for the informant contended that P.W. 4 is the injured witness who sustained simple injuries, and her evidence cannot be brushed away, as it is trustworthy and reliable. It is further urged that the trial Court, after considering the evidence of P.W. 4, has rightly convicted the appellants, and therefore, prayed to uphold the conviction.

14. In order to decide the aforesaid points for determination, it is just necessary to re-appreciate the evidence on record.

15. P.W. 1/Rajendra Prasad is the informant of this case. His evidence disclose that on 19.06.1993, while he was sitting at his shop in *Churi* Market, he heard *hulla* that his wall was being demolished. On that he rushed to the spot, saw Sunil Kumar @Fanta firing gun, as a result, the wife of his



younger brother sustained injury. His evidence further disclose that an altercation took place between them, while the accused persons were demolishing the wall with hammer and shovel; however, they did not assault him with the hammer, shovel or lathi which they were carrying. A crowd gathered at the spot, due to the exchange of hot words, and police also arrived at the place of occurrence. The police apprehended the accused, while they were demolishing the wall. He specifically testified that he went to the police station to submit the *fardbeyan*, which was written by himself in the police station, but the Sub Inspector tore and threw it away. He admitted that his brother was employed as an clerk with an advocate, but did not inform his brother about the incident of the *fardbeyan* being torn. His evidence further disclose that he later went to the office of the Superintendent of Police, and orally informed him about the incident, though he did



not mention that the Sub-Inspector torn the *fardbeyan*. He also admitted that the facts mentioned in Exhibit-1 are correct and that he wrote it a the instance of the police. Further, P.W. 1 admitted that the wall was demolished and the Sub-Inspector had seen the demolished wall.

16. The evidence of P.W. 2/Rajnath Singh (the then Sub-Inspector of Kadamkuan Police Station) disclose that on 20.06.1993, while he was on duty, he recorded the *fardbeyan* of Fulo Devi (P.W. 4), which was read over and explained to her, and upon finding the contents correct, she affixed her thumb impression on it. Later, Yogendra Prasad also put his signature on he *fardbeyan* of Fulo Devi, which is Exhibit-2.

17. It is relevant to mention that the *fardbeyan* of the informant is Exhibit-1 dated 19.06.1993, whereas the *fardbeyan* of Fulo Devi,



recorded on 20.06.1993, is Exhibit-2.

18. As per the criminal jurisprudence, there can be only one *fardbeyan* which sets the criminal law into motion, leading to the registration of the FIR. Once a criminal case is registered, all subsequent statements recorded during the course of investigation must be treated as statements under Section 161 of Cr.P.C. The trial Court or the prosecution cannot alter the nomenclature of a statement recorded under Section 161 Cr.P.C. as that of *fardbeyan*. Surprisingly, in this case, the trial Court has treated two statements as *fardbeyans*, one by the informant dated 19.06.1993 and another by the injured, Fulo Devi (P.W.4) dated 20.06.1993. The latter statement, allegedly recorded by P.W. 2, (the Sub-Inspector), cannot be treated as a *fardbeyan* and must be treated as statement under Section 161 Cr.P.C. It is also relevant to note that the statement



of the injured (P.W. 4) also bears her signature. This Court is unable to understand as to how the trial Court treated both the statements, one made by the informant and another by the injured witnesses, as *fardbeyans*.

19. The second *fardbeyan*, given by Fulo Devi/P.W. 4, recorded as on 20.06.1993 at about 06:00 PM, while she was at Patna Medical College and Hospital. It reveals that on 19.06.1993 at around 12:30 PM, while she was taking meal, she heard a loud sound and went to the second floor of the house, and from there, she saw Narain Sao, Fonta, Dhanua, and Langda demolishing the wall with iron shovel. When she questioned them, Narain Sao allegedly abused her and ordered his son to kill her. Thereafter, Fonta fired with a country made pistol, which hit her on the right side of her head and near the left ear. She sustained injuries and fell on the terrace. Her brother-



in-law/Yogendra Prasad, and her elder son witnessed the incident from the other side of the terrace. Thereafter, she became unconscious. Her *fardbeyan* further disclose that she does not remember, who brought her from the place of occurrence and, after regaining consciousness on 20.06.1993, she found herself on Bed No. 5 in C.V. Ward of PMCH, Patna. She specifically stated in her *fardbeyan* that Fonta shot her with intention to kill her.

20. On perusal of the contents of the alleged second *fardbeyan*, it is evident that the informant, Rajendra Prasad (P.W. 1), did not witness the incident.

21. The evidence of P.W. 3/Yogendra Prasad disclose that the P.W. 4/injured is his sister-in-law and the incident occurred on 19.06.1993. He stated that while he was at his shop, he heard a *hulla* upon which, he rushed to the place of occurrence and



saw Narain Sao, Anil, Sunil and others demolishing the wall with shovel and hammer. The persons who accompanied the accused started abusing him, and Sunil @Fonta fired a shot, due to which P.W. 4 sustained injury beside her head and above right side of her ear and fell down. Thereafter, she was taken to PMCH, Patna. His evidence further disclose that there were disputes between the parties regarding a pathway for more than a year, which was decided by the High Court, and the wall in question was situated on the said path belonging belongs to him.

22. In the cross examination, P.W. 3 admitted that Rajendra Prasad is his elder brother, who lodged the *fardebayan* in this case, and he was not aware whether the informant declared himself as eye witness to the police or not. He stated that his statement was recorded at the next day and that they did not lodge a report to the police on the date of the



incident. His evidence further disclose that there was a wall, in front of the place where the gun was fired, and he was not aware whether the bullet hit near the ear of the injured or not. He also admitted that he was at his tea shop, when the *hulla* took place and that the firing did not occurred by that time. He said he saw P.W. 4 lying on the eastern side of the room and could not say whether blood was spilled over there or not. He specifically testified that he never saw the police, at the place of occurrence.

23. On perusal of evidence of P.Ws. 1 and 3, it is evident that the testimony of P.W. 1 contradicts with the P.W. 3 on the aspect of the presence of the police at the place of incident on the date of incident, i.e., 19.06.1993. Both P.W. 1 and 3 are real brothers, and both have claimed to themselves to be the eye witnesses to the occurrence. P.W. 1, in his evidence, categorically stated that the



police had reached the place of occurrence while the dispute was ongoing, and police apprehended the accused on the spot. However, the evidence of P.W. 3 clearly disclose that police did not arrive at the place of incident, which can be treated as a major contradiction from the case of prosecution.

24. As stated Supra, P.W. 4/Fulo Devi is the injured eye witness. Her evidence disclose that on the date of incident, while she was having her meal, she heard the sound of wall being demolished, thereafter, she went to roof and saw Narain Sao and his sons demolishing the wall, with the help of a shovel and *fasli*. When she raised an alarm, Narain Sao started abusing and asked to fire. Thereupon, Sunil Kumar fired a shot, which hit the right side of her ear, causing her to fell unconscious. She regained consciousness on the next day in the hospital, where the police recorded her statement. She affixed her



signature on the statement after it was read over to her. She specifically testified that she was treated in the hospital for 6-7 days.

25. In the cross examination, she testified that Narain Sao ordered Sunil Kumar to fire. She also stated that she had mentioned the names of Anil and Sunil while giving her statement to the police. The bullet was fired from ground while she was on the roof and that she sustained injuries above both ears. She never asked her family members, whether the bullets were removed or not, but she affirmatively stated that the bullets were removed from her wounds.

26. P.W. 5/ Sudhir Kumar Thakur is the doctor who examined P.W. 4 on 19.06.1993 at Indra Gandhi Central Surgical Emergency at PMCH, Patna, and found the following injuries on her body:

(i) One $\frac{1}{2}$ ”x $\frac{1}{2}$ ” skin deep lacerated wound on the left parietal region.



(ii) Three lacerated wounds $\frac{1}{2}$ "x $\frac{1}{4}$ " skin deep on right parietal region. No internal communication.

He opined that the injuries sustained by P.W. 4 were within four hours old and were simple in nature. The injuries were caused by a hard and blunt substance. He further stated that such injuries could have been caused if the culprits hit her by firearm, while standing on the ground. He added that such injuries could theoretically be caused by firearm but it was also a natural possibility of blunt force impact. Ext. 4 is the injury report of the P.W. 4 issued by P.W. 5.

27. In the cross examination, it is specifically testified by the P.W. 5 that he did not find any pellets. X-ray sheet did not show any bullet or metallic object inside the body of the injured (P.W.4). He further stated that a laceration can be caused by hard blunt substance. Usually, there is a clear



distinction between laceration injuries caused by a hard blunt object and those caused by a firearm. He also testified that, upon clinical examination of the above injuries, he did find any distinctive features to indicate that the injuries were caused by a firearm.

28. The evidence of P.W. 5 completely rules out, the use of a firearm by the accused. The injuries sustained by P.W. 4 are lacerated wounds. One on the left parietal region and three on the right parietal region. There is no evidence on record to prove that these injuries were caused by a firearm. Admittedly, in this case, the Investigating Officer has not recovered any bullets or pellets either from the hospital or from the place of occurrence. Even the injury report does not disclose any charring or blackening near the injured area of the victim/P.W. 4. If at all a firearm had been discharged in close proximity to the body, there would ordinarily be



evidence of charring or blackening, near wounds.

Exhibit-4 does not indicate any such sign.

29. P.W. 6/Rajendra Prasad has turned hostile. Therefore, this Court finds it unnecessary to discuss his evidence in detail.

30. P.W. 7/Krishna Murari Prasad, is the Investigating Officer. His evidence disclose that on 19.10.1993, he registered Police Case No. 354 of 1993 basing on the fardbeyan of P.W. 1. The formal FIR bears signature of constable Krishna Dev Prasad and is countersigned by Sri Santosh Kumar (S.H.O.). P.W. 7 took up investigation, examined the written report of the informant (P.W. 1) and FIR is as Exhibit-5. His evidence further disclose that the endorsement made by Santosh Kumar Gupta on the *fardbeyan* of P.W. 1, was marked as Exhibit 1/A. He inspected the place of occurrence, which was situated about 22-25 feet south of the main road, where 4 feet wide lane



joins near the place of occurrence. It is specifically testified by P.W. 4 that a dilapidated toilet belonging to P.W. 1 was subject of the dispute. His evidence further disclose that there was a 4 feet wide corporation lane running from south to north, towards the place of occurrence, which was on a plot under construction. The accused fired the gun in the air from that location. His evidence further disclose that he seized an old DBBL gun bearing No. A20-3262(3)262, four empty cartridges, a belt, L.G., and two small live bullets in the presence of one Naresh Kumar and Pawan Kumar, and the seizure list was marked Exhibit-6. P.W. 7 further stated that he recorded the statements of witnesses and also received *fardbeyan* of Fulo Devi from PMCH, thereafter, he made an entry of this case in the case diary. The endorsement on that *fardbeyan* by Sri Kedar Prasad, then SHO of Kadamkuan Police



Station, was marked as Exhibit-2/A. He further testified that after receiving the injury report of P.W.4, he submitted the charge-sheet with the approval of senior officers.

31. In the cross-examination, P.W. 7 denied the testimony of P.W. 1 that he had torn the written report given by him or that he had forcibly made P.W. 1 written the *fardbeyan*. It is specifically testified that the informant revealed the names of Sunil Kumar and Anil Kumar as those who allegedly fired shots with a firearm, but there was no evidence of any bullet being fired at the place of occurrence. He also seized the firearm licenses of the accused persons. P.W. 7 further testified that he saw Narain Sao, a heart patient and was on bed rest. He also perused the prescription of Dr. Suresh Kumar regarding illness of Narain Sao. During the course of investigation, P.W. 7 found that Monta, Dhanua, and



Langda were not the sons of Narain Sao, only Anil Kumar and Sunil Kumar were his sons. It is admitted by P.W. 7 that in the *fardebayan* of Fulo Devi, the names of Fonta, Dhanua and Langda were mentioned for demolishing the wall, and that when she objected, the son of Narain Sao, i.e., Fonta who fired a shot from country made pistol. However, Fulo Devi did not name any of the present appellants as the shooters. However, there is no description in the case diary regarding the opening and inspection of the gun, though he did send the gun to a Ballistic Expert.

32. It is also admitted by P.W. 7 that P.W. 3/Yogendra Prasad did not give any statement to him. He received the injury report of Fulo Devi from PMCH, and did not received her X-ray report. The wounds of Fulo Devi appeared to have been inflicted by scratching or a blunt object when she returned from PMCH.



33. It is the specific contention of the Learned counsel for the appellants that though a firearm was alleged to have been recovered from the place of occurrence by the Investigating Officer, it was never sent to a Ballistic Expert for examination, which is fatal to the case of prosecution.

34. The Learned counsel for the appellants relied on the citation of the Hon'ble Apex Court in the case of ***Sukhwant Singh v. State of Punjab***, reported in ***(1995) 3 SCC 367*** wherein the Lordships have held as follows:

In cases where injuries are caused by firearms, the opinion of the Ballistic Expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect and accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent.

35. On perusal of evidence of all the



witnesses, i.e., P.W. 1(informant), P.W. 3 (alleged eye witness), P.W. 4 (injured), as well as P.W. 7 (Investigating Officer), it can be construed that the prosecution has failed to establish the exact place of occurrence. On one hand, the evidence of the alleged eyewitness and the injured witness disclose that when the appellants were obstructed while demolishing the wall, they fired a shot, as a result of which P.W. 4 sustained injuries on her left and right parietal regions. It has also been stated that the wall at the alleged place of occurrence, was demolished. On the other hand, the evidence of P.W. 7 contradicts the evidence of the alleged eyewitness, as his investigation reveals that the dispute was with respect to dilapidated toilet and not the wall, and that the place of occurrence was said to be under construction. Insofar as P.Ws. 1 to 4 are concerned, their consistent stand is that the occurrence took place



beside the lane where the wall was situated, and not on the plot. Furthermore, the evidence of P.W. 4 clearly disclose that appellant No. 2/Sunil Kumar had fired a shot from a country-made gun, whereas the firearm alleged to have been seized by the Investigating Officer was a licensed DBBL gun bearing No. A20-3262(3)262, along with four empty cartridges, a belt, and two live bullets, which were seized in the presence of witnesses under the seizure list, marked as Exhibit-6. The said firearm was never sent to the Ballistic Expert, to ascertain whether any bullets had been fired from it. Moreover, the country-made gun, as alleged by the injured witness, was not seized during the course of investigation, which creates a material contradiction regarding both the manner and the place of occurrence.

36. At this Juncture, the Learned counsel for the appellants relied on the judgment of the



Hon'ble Apex Court in case of ***Pritinder Singh @Lovely V. The State of Punjab***, reported in ***2023 INSC 614***, wherein their Lordships have held as follows:

22. We find that the conviction on the basis of such evidence cannot be sustained. Apart from that, it is to be noted that even according to PW-11, the gun which was recovered from the car had two empty cartridges (Ex. P10 and P11). Furthermore, the evidence of Dr. Rakesh Kumar Goel (PW-5), who had conducted the post-mortem of the deceased, would show that there was no external exit wound, and wad and pellets were preserved and sealed. It is to be noted that apart from not collecting any evidence as to whether the said gun belonged to the appellant Manjit Kaur, even the Ballistic Expert has not been examined to show that the wad and pellets were fired from the empty cartridges (Ex. P10 and P11).

*23. It will be relevant to refer to the following observations of this Court in the case of ***Sukhwant Singh v. State of Punjab***³:*

“21.It hardly



needs to be emphasised that in cases where injuries are caused by firearms, 21 the opinion of the Ballistic Expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent.”

24. No doubt that this case has been recently distinguished by a three-Judges Bench of this Court in the case of **Gulab v. State of Uttar Pradesh**⁴, relying on the earlier judgments of this Court in the cases of **Gurucharan Singh v. State of Punjab**⁵ and **State of Punjab v. Jugraj Singh**⁶.

25. However, it is to be noted that the case of **Jugraj Singh** (supra) was a case of direct evidence, where there was evidence of two eye-witnesses. The present case is a case based on circumstantial evidence. In view of the serious doubt with regard to the credibility of the witnesses on the issue of extra-judicial confession and last seen theory, the failure to examine



Ballistic Expert would, in our opinion, be a glaring defect in the prosecution case. We are, therefore, of the considered view that the prosecution has failed to prove the case beyond reasonable doubt and, as such, the accused are entitled to benefit of doubt.

37. The above citation squarely applies to the present facts and circumstances of the case. In the present case also, the weapon was not sent to the Ballistic Expert for examination and the police did not recover any pellets from the place of occurrence.

38. It is pertinent to mention that the date of alleged offence is 19.06.1993. The evidence of P.W. 7 clearly disclose that he was posted as Sub-Inspector at Kadamkuan Police Station on 19.10.1993, and he took up the investigation in this case and proceeded to the place of occurrence. If at all the Investigating Officer in fact proceeded to to the place of occurrence on 19.10.1993, it is difficult to comprehend how he could have recovered the the



weapon and other materials mentioned in Exhibit-6 from the place of occurrence. This aspect has not been properly explained or established by the prosecution. Admittedly, the Investigating Officer visited the place of occurrence nearly four months after the incident, which was an open area. It is highly improbable that a firearm would remain lying in such an open place for four months without being noticed or removed by anyone, which renders the alleged recovery doubtful and illogical. Furthermore, the seizure list witnesses, i.e., Naresh Kumar and Pawan Kumar were not examined before the Court to support the case of prosecution.

39. Section 100 of Cr.P.C. deals with the mandatory procedure for conducting searches and seizures, and as per the Section, it is necessary for the prosecution to conduct search in the presence of two independent witnesses. Though the Investigating



Officer followed the prescribed procedure, those witnesses were not examined before the Court to prove the contents of Exhibit-6. In the absence of examination of these witnesses, Exhibit-6 cannot be held to have been duly proved by the prosecution.

40. The last witness in this case is P.W. 8/ Kamal Sharma, who is an advocate clerk. His evidence disclose that he knew Krishna Murari Gupta, the Sub-Inspector of Kadamkuan Police Station, and was well acquainted with his handwritings. The case diary in Case No. 354 of 1993 of Kadamkuan Police Station, bears the signature of Krishna Murari Gupta, and the case diary was marked as Exhibit 6/1.

41. It is pertinent to mention that followings are criteria for marking a document:-

In order to have a documents marked by the Court as an Exhibit, a party must satisfy the Court that there is sufficient material in order for the Court to arrive at a prima facie



view that:-

“It is evident that in order to have the documents marked by the Court as Exhibits, a party must satisfy the Court that there is sufficient material in order for the Court to arrive at a prima facie view that :

(a) The "contents" of the document are proved (i.e. the document exists).

(b) The signature or handwriting on the document, if any, are proved (i.e. the document is genuine).

(c) In some cases, the witness who seeks to tender the document in evidence has personal knowledge of the document (i.e. that the witness is in a position to prove the accuracy or truth of the contents of the document);

(d) The document is not inherently or ab initio inadmissible on some other legal ground (e.g. irrelevance, privilege, non-registration) and,

(e) The document has been appropriately stamped, if so required by law.

42. (i). In order to prove contents of a document, the witness through whom the document is



sought to be tendered must produce the document in court. The Evidence Act provides, in essence, that the "contents" of documents must ordinarily be proved by "primary" evidence.

(ii). As the second step in getting a document marked, the witness who introduces the document must identify the signature or handwriting on the document, if there is any. 19 The mere production of a document is not sufficient for the document to be marked as an exhibit.

(iii). Thirdly, in order to lay a foundation for marking a document, if the document contains any statement(s) of fact, and the party propounding the document relies on the truth or accuracy of those statements, then the witness. who tenders the document must demonstrate personal knowledge and the familiarity of the document.

(iv). Fourthly, in some cases, irrespective of a party's ability to satisfy the criteria set out above, a law might prohibit some documents from being considered admissible in evidence. Such documents cannot be marked in evidence. Once a document is marked, it becomes the part of the record but has to be considered by the Court about its admissibility and relevancy of the such document. Marking of document alone will not give any right to read the contents of the documents or about the admissibility of the documents."

43. Furthermore, Rule 58 of the Criminal



Rules Of Practice and Circular Orders, 1990 envisages about marking of exhibits which reads as follows:-

"58 Marking of exhibits:-

(1) Exhibits admitted in evidence shall be marked as follows:-

(i) if filed by the prosecution with the capital letter 'P' followed by a numeral, P1, P2, P3 and the like;

(ii) if filed by defence with the capital letter 'D' followed by a numeral, D1, D2, D3 and the like;

(iii) in case of Court exhibits with the capital letter 'C' followed by a numeral C1, C2, C3 and the like;

(2) All the exhibits filed by the several accused shall be marked consecutively.

All material objects shall be marked in Arabic numbers in continuous series as M.O. 1, M.O.2 and M.O.3 and the like, whether exhibited by the prosecution or the defence or the Court."

44. This Court is unable to understand as to why the trial Court has not followed the procedure,



while marking the Exhibits as per Rule 58 of Criminal Rules of Practice.

45. At this juncture, it is relevant to rely on the judgments of Hon'ble Division Bench of this Court in the case of ***Sukhi Yadav v. The State of Bihar*** reported in ***2014 SCC OnLine Pat 5721*** wherein their Lordships have held as follows:-

“9. We fail to appreciate as to which law permits such a thing and how a Judge of standing of Additional Sessions Judge could do such a thing. First thing we must notice that P.W.9 is an Assistant to an Advocate Clerk, who has nothing to do with the case, yet the Court permits him to step in as a prosecution witness. Moreover we have coined such witness as “Sankat Mochan witness”. What more scandalized us is the trial court, which permits a person, who was nobody, to pick up the entire case diary from paragraphs 1 to 121 and prove it and make it a part of evidence. The court then proceeds further to mark it as Ext. 3 and then



the court sits down to read entire case-diary in order to appreciate evidence. Nothing can be more scandalous. No such step is permissible in law. The trial court forgot the true import of section 172(2) of the Code of Criminal Procedure (for short 'Cr.P.C.'), which clearly states that any criminal Court may use such diaries, not as evidence in the case, but to aid it in such enquiry or trial. What the trial court has done is using it as evidence, making it as evidence and appreciating it as evidence, which is wholly impermissible in law. The diary can never be proved in a Court, for it cannot be used as evidence. No part of diary can be proved because if any one is proving it for the purposes of making it an evidence, such act is prohibited by law. The law contemplates a reference to the diary only for the purposes of refreshing memory or contradicting the statements of witnesses in the Court with the statements made during the course of investigation. Only when it is used for refreshing memory, the procedure as envisaged under section 145 of the Evidence



Act is to apply but that does not mean that diary can become evidence. Law prohibits such thing. We have found in cases after cases that in the State of Bihar, the Sessions Courts do not know or understand this distinction in law and in cases after cases the statements of witnesses recorded under section 161 of the Cr.P.C. are proved as evidences or other materials in the case-diary are proved as evidence and marked as exhibits. This is a practice that should end, the sooner the better. The other thing is that as to who is permitted to prove a document. It appears that in this State every Tom, Dick and Harry, the expression we have formed now "Sankat Mochan Witness", could come and prove any official document. In this case, an Assistant to Clerk of an Advocate, who has nothing to do in the case, has been permitted by the trial court to prove the entire case-diary and mark it as exhibit. This practice is deprecated and it must come to an end. A person, who is author of a document or in absence of author, which absence has to be explained, a



person familiar with the handwriting of the author can only prove the document. The procedure adopted by the trial court is unknown to law. No sooner this practice ends than better it would be.”

46. The above citation squarely applies to the facts of the present case. Their Lordships have held that a person who is author of the document, or in absence of the author, (whose absence has to be explained), a person familiar with the hand-writing of author can prove the documents. Their Lordships have further held that the procedures adopted by the trial Court are unknown to law, and such practices have to be ended.

47. Admittedly, P.W. 5 had no knowledge about the facts of the incident. However, exhibit 6/1, the case diary, was marked through him. As per the settled law laid down by the Division Bench of this Court, a case diary can never be marked as an exhibit,



and it can only be used for the purpose of refreshing the memory of the Investigating Officer before depositing the evidence before the trial Court.

48. The documents were also not properly marked by trial Court. Exhibit-6 is the seizure list, and if at all the case diary is marked, it must be assigned and independent exhibit number, as it cannot be the part of the seizure list. The trial Court committed an error in marking the documents. On perusal of the judgment of the trial Court, it is evident that some of the documents were marked separately from Exhibit-6. Exhibit-7 is the certified copy of the FIR of Kadamkuan Police Station in Case No. 355/1993, and Exhibit-8 is certified copy of charge-sheet in the same case.

49. On perusal of Exhibits 7 and 8, it can be construed that a counter case was filed by the appellants against P.W. 1/Rajendra Prasad,



P.W.3/Yogendra Prasad, Mahendra Prasad (husband of P.W.4) and Binod Kumar (son of P.W. 4). The trial Court also erred in following the procedure for dealing with a case and its counter case. It is the settled principle of criminal jurisprudence that when a case and its counter case arise from the same incident, the trial Court has to conduct the trials simultaneously in both cases and separate judgments must be pronounced in each case. This procedure was also not followed by the trial Court.

50. Further, Exhibit-9 is the certified copy of deposition of Anil Kumar in GR No. 2586/1993. Exhibit-10 is the certified copy of judgment in GR No. 2586/1993. Exhibit-10/1 is the certified copy of judgment in T.A. No. 23/85. Exhibit-10/2 is the certified copy of judgment of Appellate Decree No. 165/87, and Exhibit-11 is the certified copy of case No. 1429(M)93. The record further reveals that the



Learned Additional Public Prosecutor had filed objections before the trial Court under Section 294 of Cr.P.C. for marking the documents as Exhibits 9 to 11. However, there is no discussion or reasoning in the impugned judgment with regard to these exhibits except for a mere narration of their existence.

51. Another error committed by the trial Court, as evident from the record, is that on 17.12.2000, a DBBL gun produced before the Court was marked as Material Exhibit-I under Section 294 of the Cr.P.C. It is relevant to reproduce Section 294 of Cr.P.C., which read as follows:

294. No formal proof of certain documents.—(1) *Where any document is filed before any Court by the prosecution or the accused, the particulars of every such document shall be included in a list and the prosecution or the accused, as the case may be, or the pleader for the prosecution or the accused, if any, shall be called upon to admit or deny the genuineness of each*



such document.

(2) The list of documents shall be in such form as be prescribed by the State Government.

(3) Where the genuineness of any document is not disputed, such document may be read in evidence in inquiry, trial or other proceeding under this Code without proof of the signature of the person to whom it purports to be signed:

Provided that the Court may, in its discretion, require such signature to be proved.

52. As per the above Section, it is evident that when any document is filed before the Court either by the prosecution or the accused, the Court shall call upon the opportunity to admit or deny the genuineness of each such documents, and if the genuineness of the document is not disputed, such document may be read in evidence during the enquiry, trial, or other proceedings. Section 294 of the Cr.P.C. thus confers discretion on the Court to mark



documents only when their genuineness is not in dispute. The said provision does not extend to the marking of material objects. The trial Court committed a grave error by marking a material object under Section 294 of Cr.P.C. which is contrary to the procedural law.

53. Furthermore, the record reveals that the accused No. 3/Narain Sao filed a petition on 06.09.1994 for release of the gun, and said gun was ordered to be returned to him vide order dated 15.11.1994, with a direction to furnish a bond of Rs. 15,000/- along with an undertaking to produce the said gun as and when required by the Court.

54. On perusal of the entire evidence on record, it is evident that there are major contradictions and descriptions from the evidence of P.Ws. 1, 2, 4 and 7. This Court is of the considered opinion that the prosecution has miserably failed to



prove the place and manner of the occurrence. The evidence of P.W. 4/injured and P.W.5/Doctor is also contradicting to each other, regarding the nature of the injuries sustained by the injured in the said incident. As per the evidence of P.W. 5, the victim sustained lacerated wounds and not firearm injuries. While the oral evidence of P.W.4 suggests that the injury was caused by a shot fired by appellant No. 2/Sunil Kumar, however, the medical evidence contradicts this aspect, as the nature of the injuries are lacerated wounds. Further, it is specific evidence of P.W. 4 that she sustained only one injury; however, the injury report (Exhibit-4) records two distinct injuries on her left and right parietal region.

55. Furthermore, the weapon seized by the Investigating Officer was a DBBL gun, whereas the gun referred to by the injured witness was a country-made pistol. The prosecution has failed to established



that P.W. 4 sustained injury by a bullet fired from country-made pistol. The evidence of P.W. 3 also disclose that no case was lodged before the police on the date of incident, i.e., 19.06.1993, which directly contradicts the evidence of the informant, as the *fardbeyan* was dated 19.06.1993.

56. The Learned counsel for the appellants relied on judgment of Hon'ble Apex Court in the case of ***Asraf Ali v. State of Assam***, reported in ***(2008) 16 SCC 328*** wherein their Lordships have held as follows:

21. *Section 313 of the Code casts a duty on the court to put in an enquiry or trial questions to the accused for the purpose of enabling him to explain any of the circumstances appearing in the evidence against him. It follows as a necessary corollary therefrom that each material circumstance appearing in the evidence against the accused is required to be put to him specifically, distinctly and separately and failure to do so amounts*



to a serious irregularity vitiating trial, if it is shown that the accused was prejudiced.

22. *The object of Section 313 of the Code is to establish a direct dialogue between the court and the accused. If a point in the evidence is important against the accused, and the conviction is intended to be based upon it, it is right and proper that the accused should be questioned about the matter and be given an opportunity of explaining it. Where no specific question has been put by the trial court on an inculpatory material in the prosecution evidence, it would vitiate the trial. Of course, all these are subject to rider whether they have caused miscarriage of justice or prejudice. This Court also expressed a similar view in S. Harnam Singh v. State (Delhi Admn.) [(1976) 2 SCC 819 : 1976 SCC (Cri) 324 : AIR 1976 SC 2140] while dealing with Section 342 of the Criminal Procedure Code, 1898 (corresponding to Section 313 of the Code). Non-indication of inculpatory material in its relevant facts by the trial court to the accused adds to the vulnerability of the prosecution case. Recording of a statement of the accused under Section 313 is not a purposeless*



exercise.

23. *“16. Contextually we cannot bypass the decision of a three-Judge Bench of this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033] as the Bench has widened the sweep of the provision concerning examination of the accused after closing prosecution evidence. Learned Judges in that case were considering the fallout of omission to put to the accused a question on a vital circumstance appearing against him in the prosecution evidence. The three-Judge Bench made the following observations therein : (SCC p. 806, para 16).*

‘16. ... It is trite law, nevertheless fundamental, that the prisoner’s attention should be drawn to every inculpatory material so as to enable him to explain it. This is the basic fairness of a criminal trial and failures in this area may gravely imperil the validity of the trial itself, if consequential miscarriage of justice has flowed. However, where such an omission has occurred it does not ipso facto vitiate the proceedings and prejudice



occasioned by such defect must be established by the accused. In the event of evidentiary material not being put to the accused, the court must ordinarily eschew such material from consideration. It is also open to the appellate court to call upon the counsel for the accused to show what explanation the accused has as regards the circumstances established against him but not put to him and if the accused is unable to offer the appellate court any plausible or reasonable explanation of such circumstances, the court may assume that no acceptable answer exists and that even if the accused had been questioned at the proper time in the trial court he would not have been able to furnish any good ground to get out of the circumstances on which the trial court had relied for its conviction.'

18. What is the object of examination of an accused under Section 313 of the Code? The section itself declares the object in explicit language that it is 'for the purpose of enabling the accused personally to explain any



circumstances appearing in the evidence against him'. In Jai Dev v. State of Punjab [AIR 1963 SC 612] Gajendragadkar, J. (as he then was) speaking for a three-Judge Bench has focussed on the ultimate test in determining whether the provision has been fairly complied with. He observed thus : (AIR p. 620, para 21)

'21. ... The ultimate test in determining whether or not the accused has been fairly examined under Section 342 would be to enquire whether, having regard to all the questions put to him, he did get an opportunity to say what he wanted to say in respect of prosecution case against him. If it appears that the examination of the accused person was defective and thereby a prejudice has been caused to him, that would no doubt be a serious infirmity.'

19. Thus it is well settled that the provision is mainly intended to benefit the accused and as its corollary to benefit the court in reaching the final conclusion.

20. At the same time it should be borne in mind that the provision is not intended to nail him to any position, but



to comply with the most salutary principle of natural justice enshrined in the maxim audi alteram partem. The word 'may' in clause (a) of sub-section (1) in Section 313 of the Code indicates, without any doubt, that even if the court does not put any question under that clause the accused cannot raise any grievance for it. But if the court fails to put the needed question under clause (b) of the sub-section it would result in a handicap to the accused and he can legitimately claim that no evidence, without affording him the opportunity to explain, can be used against him. It is now well settled that a circumstance about which the accused was not asked to explain cannot be used against him."

57. The above citation squarely applies to the present facts and circumstances of the case. It is for the trial Court to bear in mind that the incriminating evidence of the prosecution must be put to the accused in the manner of questions while examining under Section 313 of Cr.P.C. In the present case, on perusal of examination of accused under Section 313 of Cr.P.C., it is evident that the



incriminating evidence was not properly put to the accused except for the following question which were asked to them:

Question 1: The witness say that on 19.06.1993, you along with other accused persons were demolishing the wall of the informant with shovel and fasuli. What have you got to say?

Answer: This is false allegation.

Question 2: The witnesses also say that on the order of Narain Sao, Sunil Kumar fired a shot from his gun with intention to kill which hit Fulo Devi. What have you got to say?

Answer 3: This is false allegation.

Question 3: The witnesses say that you (Sunil Kumar) were present at the place of occurrence on the day of the incident, armed with an illegal gun which was recovered by the police along with an empty fired cartridge. What have you got to say?

Answer: This is false.

58. Except for the above questions, the other incriminating materials were not put to the accused. Consequently, the accused were deprived of their opportunity to explain to the Court as to what



had happened. It has to be kept in mind that the object of the examination under Section 313 of Cr.P.C. is to establish a direct communication between the Court and the accused on the important points of the evidence upon which a conviction is proposed to be based.

59. On perusal of the record, it is also evident that on 16.04.1999, a petition was filed by the Additional Public Prosecutor before the Court seeking to add a charge under Section 427 of IPC. The trial Court allowed the petition on 16.04.1999 by adding the charge under Section 427 of IPC. The initial charges framed by the trial Court against the appellants were under Section 307 of IPC and 27 of Arms Act, which were read over and explained to accused. The record further reveals that the trial was commenced on 22.01.1995, and the examination of all the witnesses was completed on 03.08.1998. The



examination under Section 313 of Cr.P.C. was conducted on 06.11.1998. However, the charge under Section 427 of the IPC was added on 16.04.1999, after the completion of the Section 313 examination. There is no evidence on record to show that the procedure under Section 216 of Cr.P.C. was followed. It is necessary to reproduce Section 216 of Cr.P.C., which reads as follows:

216. Court may alter charge.-

(1) Any Court may alter or add to any charge at any time before judgment is pronounced.

(2) Every such alteration or addition shall be read and explained to the accused.

(3) If the alteration or addition to a charge is such that proceeding immediately with the trial is not likely, in the opinion of the Court, to prejudice the accused in his defence or the prosecutor in the conduct of the case, the Court may, in its discretion, after such alteration or addition has been made, proceed with the trial as if the altered or



added charge had been the original charge.

(4) If the alteration or addition is such that proceeding immediately with the trial is likely, in the opinion of the Court, to prejudice the accused or the prosecutor as aforesaid, the Court may either direct anew trial or adjourn the trial for such period as may be necessary.

(5) If the offence stated in the altered or added charge is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the altered or added charge is founded.

60. As per the aforesaid provision, the Court may alter or add any charge before pronouncement of judgment, and after alteration or addition, the charge shall be read over and explained to the accused. The trial court has followed the procedure as contemplated under Section 216(1) as well as 216(2) of Cr.P.C. but did not follow Section



216(3) and 216(4) of Cr.P.C. Section 211 of Cr.P.C. specifies that every charge shall state the offence with which the accused is charged. Admittedly, the initial charges framed against the accused, were under Section 307 of IPC and 27 of Arms Act. The subsequent charge added under Section 427 of IPC is distinct from initial charges. Therefore, it was necessary for the trial Court to follow the procedure prescribed under Sections 216(3) and 216(4) of Cr.P.C., which the trial Court has failed to do.

61. The Learned counsel for the appellants also relied on the judgment of Hon'ble Apex Court in the case of ***Shamnsaheb M. Multtani v. State of Karnataka***, reported in ***(2001) 2 SCC 577***, wherein their Lordships have held as follows:

12. Initially we thought that there might have been some typographical or other errors in the above first extracted portion of the judgment produced before us but we



found the said portion remaining the same even in the judgment sent up by the High Court along with the records. We may take it that learned Judges did not intend to speak what is seen recorded in para 14 of the judgment (extracted above) and that the High Court only proposed to convict the appellant under Sections 304-B and 498-A IPC. But even on that aspect Saldana, J., made an observation which is, unfortunately, not true to facts. That observation is this: "Coming to the charge under Section 304-B IPC, this section was incorporated in the year 1986 by the legislature for the purpose of dealing with instances of dowry death." Counsel for both sides submitted that no charge was framed against the accused for the offence under Section 304-B IPC. We perused the original charge framed by the Sessions Court and noticed that there was no such count included in the charge at all. If so, we may say, euphemistically, that learned Judges committed a serious error in assuming that Section 304-B IPC was included in the charge framed against the appellant.

13. *Be that as it may. The question raised before us is whether in a*



case where prosecution failed to prove the charge under Section 302 IPC, but on the facts the ingredients of Section 304-B have winched to the fore, can the court convict him of that offence in the absence of the said offence being included in the charge.

32. *The serious consequence which may ensue to the accused in such a situation can be limned through an illustration: If a bride was murdered within seven years of her marriage and there was evidence to show that either on the previous day or a couple of days earlier she was subjected to harassment by her husband with demand for dowry, such husband would be guilty of the offence on the language of Section 304-B IPC read with Section 113-B of the Evidence Act. But if the murder of his wife was actually committed either by a dacoit or by a militant in a terrorist act the husband can lead evidence to show that he had no hand in her death at all. If he succeeds in discharging the burden of proof he is not liable to be convicted under Section 304-B IPC. But if the husband is charged only under Section 302 IPC he has no burden to prove that his wife was murdered like that as he can have his traditional defence that the*



prosecution has failed to prove the charge of murder against him and claim an order of acquittal.

33. *The above illustration would amplify the gravity of the consequence befalling an accused if he was only asked to defend a charge under Section 302 IPC and was alternatively convicted under Section 304-B IPC without any notice to him, because he is deprived of the opportunity to disprove the burden cast on him by law.*

62. The above citation squarely applies to the present facts and circumstances of the case. Even for the conviction for minor offence, trial Court has to frame a specific charge. In the present case, although the charge was framed under Section 307 of IPC, the conviction was recorded under Section 323 of IPC, for which, the appellants lost the opportunity to prove their innocence. Furthermore, it is noticed from the record that the initial charge-sheet was filed against the appellants, namely, Anil Kumar and Sunil Kumar. Subsequently, a petition under Section 319 of Cr.P.C.



was filed by the Additional Public Prosecutor before the trial Court on 05.11.1994, which was allowed by the trial Court on 04.08.1995, and summons were issued against Narain Sao and Dhanua on 04.08.1995. The record further reveals that the said accused surrendered on 05.08.1995 before the Court. This Court once again reiterates that the trial commenced on 22.01.1995 and ended on 03.08.1998. It is necessary to reproduce Section 319 of the Cr.P.C. for better appreciation which reads as follows:

319. Power to proceed against other persons appearing to be guilty of offence.—(1) *Where, in the course of any inquiry into, or trial of, an offence, it appears from the evidence that any person not being the accused has committed any offence for which such person could be tried together with the accused, the Court may proceed against such person for the offence which he appears to have committed.*

(2) *Where such person is not*



attending the Court, he may be arrested or summoned, as the circumstances of the case may require, for the purpose aforesaid.

(3) Any person attending the Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of the inquiry into, or trial of, the offence which he appears to have committed.

(4) Where the Court proceeds against any person under sub-section (1), then—

(a) the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard;

(b) subject to the provisions of clause (a), the case may proceed as if such person had been an accused person when the Court took cognizance of the offence upon which the inquiry or trial was commenced.

63. The said provision confers ample power to the Court to implead any person as an accused who is not named in the charge-sheet and to summon such



person for trial. However, on a plain reading of the section, it can be construed that in the course of any enquiry or trial of an offence, if it appears from the evidence of any person, not being one previously named as an accused has committed the offence, the Court may proceed to try such person together with the accused. As on 15.11.1994, there was neither any enquiry nor trial pending in the present case, therefore, the question of impleading any person could not arise. This Court is unable to understand as to how a petition under Section 319 Cr.P.C. was filed by the Additional Public Prosecutor prior to the commencement of the trial, and how the Court allowed the petition without following the procedure under Section 319 of Cr.P.C. The Court cannot implead any person as an accused prior to the commencement of the trial. It is necessary to incorporate the contents of such petition to determine



whether the trial Court committed an error or not. The petition under Section 319 of Cr.P.C. reads as follows:

1. That in the present case, Smt. Fulo Devi, wife of Mahendra Prasad is a victim and her statement was recorded in the case diary at para No. 18.

2. That the victim Fulo Devi has been examined before the Court.

3. This witness has specifically named accused Narain Sao and Dhanua in participation of the occurrence.

4. Since the investigating officer has not investigated the case properly as such, he has not forwarded the accused Narain Sao and Dhanua before the Court.

5. The city S.P., Patna also condemned the action of investigating officer in his supervision note dated 30.06.1993.

6. The other witnesses have also named Narain Sao and Dhanua along with the accused persons who have been facing trial.

7. Prosecution has been able to collect material for proceeding against Narain Sao and Dhanua also and therefore, prayed to issue summons



against them and then proceed with trial.

64. This Court has gone through the depositions of the P.Ws. 1 to 4. P.W. 1 was examined on 22.01.1995, and the evidence of the subsequent witnesses was recorded up to 03.08.1998. Therefore, the question of filing a petition under Section 319 of Cr.P.C. on 15.11.1994 would not arise, and the trial Court erred in allowing such a petition. Furthermore, a part of the case diary cannot be treated as evidence, as stated in para-1 of that petition. If at all Dhanua was a participant in the occurrence, it was for the Court to ensure that he surrendered. However, the record reveals that Nand Kishore Kumar, who was nowhere connected to the incident, surrendered before the Court. Charges were framed against Nand Kishore Kumar, and he was examined under Section 313 of Cr.P.C. which constitutes a grave procedural error on the part of the trial Court.



65. On perusal of evidence and material available on record, it is evident that the prosecution has miserably failed to establish the case either under Section 323 of IPC or under Section 27 of Arms Act, and therefore, the convictions recorded by the trial Court for the said offences are liable to be set aside. Furthermore, for the same set of evidence and charges, two of the co-accused were acquitted by the trial after disbelieving the evidence of prosecution. In such circumstances, the same benefit must be extended to the present appellants as well.

66. It is relevant to cite some judgments of the Hon'ble Apex Court. In the case of ***Umar Mohammad v. State of Rajasthan***, reported in ***(2007) 14 SCC 711***, wherein their Lordships have held as follows:

37. *We are, however, of the opinion that in view of the fact that Daud had been given the benefit of doubt, as*



Jamalu stands on the same footing, he is also entitled to similar benefit and should, thus, be accorded benefit of doubt.

67. In the case of **Hatti Singh v. State of Haryana**, reported in **(2007) 12 SCC 471**, wherein their Lordships have held as follows:

32. *The learned counsel for the State would submit that recovery of the articles would raise a presumption under Section 114 of the Evidence Act. Application of such a presumption is limited. A presumption may be in respect of commission of theft or receipt of stolen property; if a person is found to be in possession of the property belonging to the deceased, but on such presumption alone, the appellant could not have been convicted for commission of murder, particularly when on the same evidence other persons had been given benefit of doubt.*

33. *Having regard to the peculiar facts and circumstances of the case, we are inclined to extend the same benefit to the appellant herein.*

34. *The impugned judgment of the High Court, therefore, cannot be*



*sustained, which is set aside accordingly.
The appeal is allowed. The appellant shall
be released forthwith, if not required in
any other case.*

68. In the case of **Sunil Kumar
Sambhudayal Gupta v. State of Maharashtra**,
reported in **(2010) 13 SCC 657**, wherein their
Lordships have relied on the citations of the Hon'ble
Ape Court with respect to material contradictions
which reads as follows:

30. *While appreciating the
evidence, the court has to take into
consideration whether the
contradictions/omissions had been of
such magnitude that they may materially
affect the trial. Minor contradictions,
inconsistencies, embellishments or
improvements on trivial matters without
effecting the core of the prosecution case
should not be made a ground to reject
the evidence in its entirety. The trial
court, after going through the entire
evidence, must form an opinion about
the credibility of the witnesses and the
appellate court in normal course would
not be justified in reviewing the same*



again without justifiable reasons. (Vide State v. Saravanan¹).

31. *Where the omission(s) amount to a contradiction, creating a serious doubt about the truthfulness of a witness and the other witness also makes material improvements before the court in order to make the evidence acceptable, it cannot be safe to rely upon such evidence. (Vide State of Rajasthan v. Rajendra Singh²).*

32. *The discrepancies in the evidence of eyewitnesses, if found to be not minor in nature, may be a ground for disbelieving and discrediting their evidence. In such circumstances, witnesses may not inspire confidence and if their evidence is found to be in conflict and contradiction with other evidence or with the statement already recorded, in such a case it cannot be held that the prosecution proved its case beyond reasonable doubt. (Vide Mahendra Pratap Singh v. State of U.P.³).*

33. *In case, the complainant in the FIR or the witness in his statement under Section 161 CrPC, has not disclosed certain facts but meets the prosecution case first time before the court, such version lacks credence and is liable to be discarded. (Vide State v.*



*Sait*⁴).

34. *In State of Rajasthan v. Kalki [(1981) 2 SCC 752 : 1981 SCC (Cri) 593 : AIR 1981 SC 1390] , while dealing with this issue, this Court observed as under : (SCC p. 754, para 8).*

“8. ... In the depositions of witnesses there are always normal discrepancies however honest and truthful they may be. These discrepancies are due to normal errors of observation, normal errors of memory due to lapse of time, due to mental disposition such as shock and horror at the time of the occurrence, and the like. Material discrepancies are those which are not normal, and not expected of a normal person.”

35. *The courts have to label the category to which a discrepancy belongs. While normal discrepancies do not corrode the credibility of a party's case, material discrepancies do so. (See Syed Ibrahim v. State of A.P.⁶ and Arumugam V. State⁷)*

36. *In Bihari Nath Goswami v.*



Shiv Kumar Singh [(2004) 9 SCC 186 : 2004 SCC (Cri) 1435] this Court examined the issue and held : (SCC p. 192, para 9).

“9. Exaggerations per se do not render the evidence brittle. But it can be one of the factors to test the credibility of the prosecution version, when the entire evidence is put in a crucible for being tested on the touchstone of credibility.”

69. All the above citations lay down clear guidelines as to how the trial Court is required to appreciate the evidence of the witnesses, and it is incumbent upon the Court to apply the same while adjudicating the case. Mere marginal variations in statements cannot be treated as improvements. However, omissions which amount to contradictions on material particulars, i.e., those which materially affect the trial or the core of the prosecution's case, render the testimony of the witness to be discredited.



In the present case also, the evidence of the P.W.4/injured witness is liable to be discredited, as it completely contradicts the medical evidence of P.W.5/doctor, who testified that it would be unnatural to suggest that the injuries sustained by P.W. 4 were likely to be caused by a firearm. Exhibit-4 also disclose that the injuries sustained by the P.W. 4 were lacerated. Moreover, the evidence of P.W. 4 is also inconsistent regarding the weapon allegedly used by the appellants. She specifically testified that it was a country-made pistol, whereas the recovery made by the Investigating Officer indicates that it was a DDBL gun. Such contradictions between the evidence of P.W. 4 and that of the Investigating Officer, amounts to major discrepancy in the prosecution's case.

70. In view of the foregoing discussions, this Court is of the considered opinion that the conviction of the appellants Nos. 1/Anil Kumar, and



appellant No. 2/Sunil Kumar for the offences punishable under Section 323 of IPC, and Section 27 of the Arms act, is not sustainable in law. Accordingly, the Judgment of conviction and order of sentence dated 07.07.2004 passed by the Additional Sessions Judge, Fast Track Court No. 3, Patna in Sessions Trial No. 439/47 of 1994-04, arising out of Kadamkuan P.S. Case No. 354 of 1993, is hereby set aside, and the appellants are acquitted of all the charges.

71. In result, the appeal is allowed.

72. The record reveals that the appellants were released on bail by this Court vide order dated 29.07.2004. Hence, the bail bonds of the appellants shall stand cancelled.

(G. Anupama Chakravarthy, J)

AMANDEEP/-

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