

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (SJ) No.66 of 2004**

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RAM CHANDRA MAHTO, son of late Lakshman Mahto, resident of village Singhiaghat, P.S. Bibhutipur, District – Samastipur (Bihar).

... .. Appellant/s

Versus

STATE OF BIHAR

... .. Respondent/s

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**Appearance :**

For the Appellant/s : Mr.Aakash Kumar, Amicus Curiae  
For the Respondent/s : Ms. Anita Kumari Singh, A.P.P.

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**CORAM: HONOURABLE JUSTICE SMT. G. ANUPAMA CHAKRAVARTHY**  
**ORAL JUDGMENT**

**Date : 22-03-2025**

**1.** The appeal is arising out of the judgment in Sessions Trial No. 298 of 1994/175 of 2002 on the file of Additional Sessions Judge, Fast Track Court No. - II dated 22.01.2004 wherein the appellant Ram Chandra Mahto was convicted for the offences punishable under Sections 307 r/w 34 of the Indian Penal Code and under Section 27 of the Arms Act and was sentenced to undergo rigorous imprisonment for a period of 10 years for the offences punishable under Sections 307 r/w 34 of



Indian Penal Code and to undergo rigorous imprisonment for two years for the offences punishable under Section 27 of the Arms Act. It was further ordered that all the sentences shall run concurrently.

**2.** The case of the prosecution is that the cousin brother of the informant namely Asharfi Mahto was watching TV in the house of the informant on 20.02.1994 and at about 09:15 PM the cousin brother of the informant Asharfi Mahto, P.W. 7, proceeded towards his house. The informant suddenly heard the sound of gunshot and also the cry of P.W. 7 on that he rushed out and saw the injured/P.W. 7 covered in blood. In the meantime, several co-villagers reached to the scene of offence. On confrontation, P.W. 7 informed the informant (P.W. 6)/Baleshwar Mahto that the appellant/Ram Chandra Mahto, and Ram Shankar Mahto along with two other



associates were hiding themselves and when they saw the injured/P.W. 7, the appellant fired a gunshot with the intention to commit murder, and thereby caused an injury on the neck of the injured/P.W. 7. It is further alleged in the Fardbeyan that the injured was taken to the hospital, with the help of the co-villager and the occurrence took place due to a land dispute between P.W. 7 and his elder brother Sonelal Mahto and that the appellant is the elder son in law of Sonelal Mahto. Basing on the fardbeyan of the informant dated 20.02.1994, at about 11:15 PM, a case was registered against the appellant and others vide F.I.R. No. 31 of 1994, on the file of Dalsingsarai Police Station on 21.02.1994 at about 00:45 hours (Mid Night) and further the case was investigated into.

**3.** Upon completion of the investigation, a charge-sheet was filed against five accused persons including the appellant. However, the trial Court has



acquitted all the accused except the appellant for the aforesaid offence.

**4.** It is pertinent to mention that the trial court has taken into consideration the fardbeyan of Baleshwar Mahto i.e. the informant/P.W. 6 as well as the second fardbeyan of the injured/P.W. 7 dated 23.02.1994. The Investigating Officer, after due investigation laid charge-sheet against all the accused persons for the offences punishable under Section 307, 341 r/w Section 34 of the Indian Penal Code and under Section 27 of the Arms Act. Cognizance was initially taken by the Judicial Magistrate, First Class and as the offence punishable under Section 307 is exclusively triable by the Court of Session the case was committed to the Court of Sessions.

**5.** During the trial, charges were framed against all the five accused for the offences



punishable under Sections 307 r/w 34 of the Indian Penal Code and under Section 27 of the Arms Act. The contents of the charges were read over and explained to all the accused to which all the accused pleaded not guilty and claimed to be tried.

6. On behalf of the prosecution, P.Ws. 1 to 9 were examined and Exhibits 1 to 4 and Exhibits 2/1 were marked.

| Prosecution Witness No. | Prosecution Witness Name |
|-------------------------|--------------------------|
| P.W. 1                  | Ajeet Kumar Chaudhary    |
| P.W. 2                  | Ravindra Mahto           |
| P.W. 3                  | Ram Kumar Lal            |
| P.W. 4                  | Dhruv Narayan Lal        |
| P.W. 5                  | Ganga Prasad Mahto       |
| P.W. 6                  | Baleshwar Mahto          |
| P.W. 7                  | Asharfi Mahto            |
| P.W. 8                  | Sohagia Devi             |
| P.W. 9                  | Saryug Mahto             |

| Sl. No | Exhibit for Prosecution | Exhibit Details                             |
|--------|-------------------------|---------------------------------------------|
| 1.     | Exhibit-1               | Formal F.I.R.                               |
| 2.     | Exhibit-2               | Fardbeyan                                   |
| 3.     | Exhibit-3               | Endorsement on fardbeyan                    |
| 4.     | Exhibit-4               | Signature of Asharfi Mahto on the fardbeyan |



|    |             |           |
|----|-------------|-----------|
| 5. | Exhibit-2/1 | Fardbeyan |
|----|-------------|-----------|

On behalf of the defence the following exhibits were marked:-

| Sl. No | Exhibit for Defence | Exhibit Details                       |
|--------|---------------------|---------------------------------------|
| 1.     | Exhibit-A           | C.C. of Judgment of Cr. A. No. 259/80 |

**7.** On completion of the prosecution evidence, the accused were examined under Section 313 Cr.P.C. regarding the incriminating evidence found against them. The accused denied the incriminating evidence and reported no defence. Considering the entire material on record, the trial Court convicted the appellant as aforesaid.

**8.** The points for determination in this appeal are that

(I) Whether the prosecution is able to prove the guilt of the appellant for the offence punishable



under Sections 307 r/w 34 of the Indian Penal Code and under Section 27 of the Arms Act?

(ii) Whether the trial court has rightly convicted the appellant for the aforesaid offence?

**9.** As there was no representation for the appellant, this Court was constrained to appoint Mr. Aakash Kumar, as Amicus Curiae vide order dated 05.09.2024.

**10.** Heard the Learned Amicus Curiae, Mr. Aakash Kumar, as well as the Learned Additional Public Prosecutor, Ms. Anita Kumari Singh, for the State.

**11.** It is the specific contention of the Learned Amicus Curiae that Exhibit-1(formal FIR) was marked through an advocate clerk. Exhibit-2(the fardbeyan) of the informant was also marked through P.W. 3 an advocate clerk and Exhibit-3 the endorsement of the Asharfi Mahto on the fardbeyan



was also marked through P.W. 4 a formal witness who had no knowledge about the contents of the documents and contended that it is fatal to the case of the prosecution. It is further contended that P.W. 2 turned hostile and P.W. 5 is a hearsay witness. The evidence of P.W. 1 to 5 nowhere supports the case of the prosecution, however, the trial Court considered their evidences and convicted the appellant alone by acquitting the other accused for the same set of facts. It is further contended that the appellant should also be extended the benefit of doubt as the other accused were acquitted for the charges levelled against them for the similar set of facts.

**12.** It is further contended that even in the absence of any recovery of weapon or any corroborative evidence regarding the seizure of the weapon from the appellant, the appellant was convicted for the offence punishable under Section



27 of the Arms Act, and the judgment of the trial Court was erroneous in convicting the appellant. It is also contended by the Learned Amicus Curiae that there cannot be two fardbeyans and that the second fardeyan of the injured cannot be considered as fardbeyan, and it has to be treated as statement under Section 161 of Code of Criminal Procedure. It is further urged that the evidence of P.W. 6 and 7 clearly disclose that there was a previous enmity between the family members, and as such, the appellant was falsely implicated in this case and therefore, prayed to set aside the judgment of trial court.

**13.** On the other hand, the Learned Additional Public Prosecutor contended that the evidence of injured corroborates with the evidence of informant, as to the manner of the attack by the appellant and therefore, there is no error or



irregularity in the orders passed by the trial Court and prayed to confirm the judgment.

**14.** It is not necessary to reiterate the entire evidence on record and the same shall be discussed and re-appreciated to the extent required for determining the points raised in the appeal.

**15.** As per the criminal jurisprudence, there can be only one fardbeyan which sets the criminal law into motion i.e. after registration of the FIR. Once an F.I.R. has been registered all the statements recorded during the course of the investigation are to be treated as Section 161 of the Code of Criminal Procedure statement of the witnesses and the trial Court or the prosecution cannot change the nomenclature of Section 161 of the Code of Criminal Procedure statement to that of a fardbeyan. Surprisingly, in the present case, the trial Court has made a note that there are two fardbeyan, the first



fardbeyan dated 20.02.1994 at 11:15 PM given by Baleshwar Mahto, the informant/P.W. 6 and the second fardbeyan given by Asharfi Mahto/injured dated 23.02.1994 at about 09:30 PM. The statement dated 23.02.1994 of the injured cannot be treated as fardbeyan and it can be only treated as Section 161 statement of P.W. 7/injured. It is pertinent to note that the statement of the injured/P.W. 7 also bears his signature and the prosecution has miserably failed to explain as to how it can be treated as a fardbeyan. It is the specific case of the prosecution that P.W. 7 was injured on 20.02.1994, at about 09:15 PM, however, there is no mention of this fact either in first fardbeyan or in the statement of the injured that the injured, was unconscious and as such the Investigating Officer was not in a position to record his statement for two days i.e. from 20.02.1994 to 23.02.1994.



**16.** It is important to note that the evidence of advocate clerk and formal witnesses were recorded by the trial Court for bringing the documents on record i.e. Exhibit-1 (formal F.I.R.), Exhibit-2 (fardbeyan) of the informant, Exhibit-3 (endorsement of the Sub Inspector of Police of the fardbeyan through P.W. 1, 3 and 4) all of whom had no knowledge about the contents of documents.

**17.** At this juncture, it is relevant to rely on the judgment passed by this Bench in the case of **Noor Hassan Ansari & Ors. v. The State of Bihar** passed in **Cr. Appeal (SJ) No. 68 of 2004** which reads as follows:-

*15. 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.*

*16. (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."*

17. 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."



18. 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. Admittedly, the documents was said to be marked in 'X' series through P.W.-4.

19. 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."*

*20. 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.*

**18.** Therefore, the evidence of P.W. 1, 3 and 4 cannot be considered for re-appreciation of the evidence. Admittedly, P.W. 2, Rabindra Mahto turned hostile and, as such, his evidence holds no evidentiary value.

**19.** P.W. 5, Ganga Prasad Mahto, testified that he was watching TV at the house of Baleshwar Mahto and later he went to his house. However, the injured and other person were still watching TV and



later the injured left towards his house, and after proceeding about 20-25 steps, five persons surrounded the injured-P.W. 5 stated that he recognized the appellant and two others, further claimed that appellant fired a bullet on the injured which hit him in the neck.

**20.** When compared the evidence of P.W. 5 with that of the fardbeyan, it is evident that there is no mention about P.W. 5 in the fardbeyan. His evidence further disclose that he had left earlier to his house and later the injured left towards his house, making it highly improbable that he could have witnessed the incident. In cross-examination, it was admitted by P.W. 5 that he gave his statement to the police on the next morning but did not state to the police that he witnessed the incident. His evidence further disclose that the injured fell down, after being shot, but he remained conscious. It is



relevant to mention that neither P.W. 6/the informant nor P.W. 7/the injured mentioned about his presence at the place of incident. Therefore, much importance or relevance cannot be given for the evidence of this witness and his evidence is discarded.

**21.** P.W. 6 is the informant. His evidence disclose that the injured was watching TV at his house and later left the house and after sometime, he heard a gunshot and immediately rushed to the place of occurrence, and saw the injured covered with blood. Later, the injured was on a rickshaw to Dalsingsarai Government Hospital and subsequently, injured was referred to Samastipur Government Hospital. The testimony of P.W. 6 indicates, as if he had witnessed the incident i.e., the appellant and others surrounding the injured and firing upon him which appears to be an improvement, upon the fardbeyan dated 20.02.1994 at 11:15 PM, where



such facts were not mentioned. His evidence further disclose that there were disputes between the injured and his brother Sonelal Mahto, and the appellant is the son-in-law of Sonelal Mahto. In cross-examination, P.W. 6 admitted that at the time of incident, he was watching TV and only heard the gunshot and rushed to the place of occurrence and saw the injured/Asharfi Mahto lying on the road. On that, he raised alarm, later Dhaneshwar Mahto, Saryu Mahto, Gaya Prasad and others gathered at the place of occurrence. The evidence of P.W. 6 disclose that P.W. 5 arrived to the place of occurrence in response to his hue and cry. However, there are discrepancies from the evidence of this witness with that of the fardbeyan.

**22.** It is significant to note that P.W. 6 in his cross-examination specifically stated that the case was registered, basing on the statement of the



injured and that his statement was recorded afterwards. However, on perusal of the first and second fardbeyan it can be inferred that statement of Baleshwar Mahto was recorded on 20.02.1994 at 11:15 PM and the statement of Asharfi Mahto/injured was recorded on 22.09.1994 at 09:30 PM. It was also specifically admitted in the cross-examination by P.W. 6 that neither he nor the injured had given statement to the Sub-Inspector of Police that the appellant and the other accused persons were present at the time of incident. It was further admitted by P.W. 6 that Bhola Mahto, father of the accused, Ram Ratan Mahto, filed a case against P.W. 6 and 7 and that a false case was registered due to enmity.

**23.** P.W. 7, Asharfi Mahto, testified that he had gone to the house of P.W. 6 for watching the TV and at about 09:15 PM while returning home he was



surrounded by five persons on a Kaccha road and the 5<sup>th</sup> person pointed a pistol at his shoulder joint and fired at him. He identified Ramvilash Mahto and Tufani Mahto and also named Ramchandra Mahto, Ram Shankar Mahto and Ram Ratan Mahto. He stated that the appellant shot him while Ram Shankar Mahto and Ram Ratan Mahto fired in the air. Initially, he was not aware of the names of the other accused i.e. Tufani Mahto and Ramvilash Mahto. He also testified that he was shifted to Dalsingsarai Hospital for treatment and later, referred to Samastipur Hospital. He admitted that the Jamadar of Bihta Police Station recorded his statement on 23.02.1994 on which he signed and the signature is Exhibit 4 and the 2<sup>nd</sup> fardbeyan is Exhibit 2/1. It is also testified by P.W. 7 that there were land disputes and Civil and criminal case were also pending between them. In cross-examination, it was testified



by P.W. 7 that he and his brothers have got partitioned their houses and business, and the appellant is the son-in-law of his brother. It is specifically testified by him that he filed a criminal case against his brother, the appellant and Ram Shankar Mahto, in which they were acquitted. It is also admitted by P.W. 7 that the father of Ram Ratan Mahto i.e. Bholu Mahto was convicted in a criminal case filed by him. He specifically admitted that he informed the Inspector that the incident occurred near the house of Rabindra Mahto and that only one person fired at him. He also admitted that he had only disclosed the names of three persons and did not name Rambilash Mahto and Tufani Mahto to the Investigating Officer and that he identified the accused in the source of a torch-light and moon-light, but could not give a statement earlier to the police because he was injured.



**24.** P.W. 8 is the wife of the injured, is a hearsay witness. She was later intimated about the incident, therefore, much reliance need not be given to the evidence of P.W. 8. P.W. 9, Saryu Mahto, turned hostile.

**25.** On perusal of the entire record, it is evident, apart from the evidence of P.W. 6 and P.W. 7 there is no other credible evidence on record. Admittedly, the evidence of P.W. 6 and 7 contradicts with each other, as to whose statement was recorded first. One hand, the informant in his cross-examination admits that initially statement of injured was recorded followed by his statement, if that is so, the F.I.R. ought to have been registered only after 23.02.1994 and not prior to that. If at all, the statement of P.W. 7 was recorded on 20.02.1994, it is for the prosecution to explain why the same was not brought on record. The incident occurred in a dark



night. The presence of any source of light was not disclosed. Furthermore, in this case, neither the doctor nor the Investigating Officer were examined. The weapon used in the offence was neither seized nor produced before the Court to attract the provision of Section 27 of the Arms Act. The charge framed against the appellant was under Section 307 r/w 34 of the Indian Penal Code. It is for the prosecution to establish that the appellant committed the offence under Section 307 with an intention to cause the death of the injured in order to sustain a conviction for an attempt to murder. The evidence of P.W. 6 and 7 clearly disclose that there is rivalry and enmity between the parties, and in view of the enmity between the parties the alleged incident took place. P.W. 6 is not an eye witness to the incident. P.W. 7 is the injured but his statement was recorded only after two days though despite



being conscious after the incident. There is no other evidence on record to show that P.W. 7 was medically unfit or otherwise incapable of making a statement immediately after the incident. The trial Court after considering the entire material on record has acquitted four of the co-accused while convicting the appellant alone for the offences punishable under Sections 307 r/w 34 of the Indian Penal Code and under Section 27 of Arms Act.

**26.** At this juncture, the Learned Amicus Curiae has placed his reliance on the judgment of the Hon'ble Apex Court in the case ***Bahadur Naik Vs. The State of Bihar*** reported in ***(2000) 9 SCC 153***, wherein their lordships have held at paragraph 2 which reads as follows:-

*"2. The appellant has not been able to shake the credibility of the eyewitnesses. No material contradiction in the case of the prosecution has been shown to us. Under*



*these facts and circumstances, the non-examination of the investigating officer as a witness is of no consequence. It has not been shown what prejudice has been caused to the appellant by such non-examination."*

In the case of **Yogarani Vs. State by the Inspector of Police** reported in **2024 SCC Online SC 2609** wherein the Lordships have held at paragraph 10 as follows:-

**"10.** *The Court cannot convict one accused and acquit the other when there is similar or identical evidence pitted against two accused persons. In the case of Javed Shaukat Ali Qureshi v. State of Gujarat reported in 2023 INSC 829, this Court has held that:*

**"15.** *When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the Court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the Criminal Court should decide like cases alike, and in such*



*cases, the Court cannot make a distinction between the two accused, which will amount to discrimination.”*

*In the case on hand, allegations against the appellant being the same as made against Accused No. 3 & 4, the Courts below could not have convicted the Appellant while acquitting the other two.”*

In the case of **Javed Shaukat Ali Qureshi**

***Vs. State of Gujrat*** reported in **(2023) 9 SCC 164,**

wherein their Lordships have held at paragraph 15,

which reads as follows:-

*“15. When there is similar or identical evidence of eyewitnesses against two accused by ascribing them the same or similar role, the court cannot convict one accused and acquit the other. In such a case, the cases of both the accused will be governed by the principle of parity. This principle means that the criminal court should be decide like cases alike, and in such cases, the court cannot make a distinction between the two accused, which will amount to discrimination.”*



In the case of **Munna Lal Vs. State of UP** reported in **2023 SCC OnLine SC 80**, wherein their lordships have held at paragraph 38, which reads as follows:-

*“38. First, statement of P.W. -3 under Section 161, Cr.P.C. was recorded nearly 24 days after the incident. Since the Investigating Officer did not enter the witness box, the appellants did not have the occasion to cross-examine him and thereby elicit the reason for such delay. Consequently, the delay in recording the statement of PW-3 in course of investigation, is not referred to and, therefore, remains unjustified. The possibility of PW-3, being fixed up as an eye-witness later during the process of investigation, cannot be totally ruled out.”*

**27.** All the above citations squarely apply to the facts and circumstances of the present case.

**28.** Where similar or identical evidences of witnesses is adduced against all the accused attributing similar roles, the Court cannot convict



one accused and acquit the others. The principle of parity applies, and the criminal court must decide like cases alike and in such cases, the court cannot make any distinction between two accused, as it would amount to discrimination.

**29.** Furthermore, if the Investigating Officer was not examined, it would prejudice the defence especially in eliciting as to why there were two fardbeyans or what caused the delay in recording the statement of the injured.

**30.** In criminal jurisprudence it is a cardinal principle that the burden is on the prosecution to prove the guilt of the accused beyond reasonable doubt and the accused shall be presumed to be innocent until guilty is proven. Furthermore, it is for the prosecution to connect the accused with that of the crime. In the present case although P.W. 7 sustained a firearm injury, there is no evidence on



record as to whether any bullet was recovered or whether there was an entry or exit wound. The injury report was also not brought on record. The non-examination of doctor and investigating officer though not always fatal to the case becomes crucial when the prosecution case rests heavily on the injured witnesses testimony. In such case corroborative evidence is necessary to inspire the confidence of the Court.

**31.** In this regard the Learned Amicus Curiae relied on the judgment of the Apex Court in the case of ***Habib Mohammad Vs. State of Hyderabad*** reported in ***(1953) 2 SCC 231***, wherein their lordships have held at Paragraph 15, which reads as follows:-

*“15. In a long series of decisions the view taken in India was, as was expressed by Jenkins, C.J. in Ram Ranjan Roy v. Emperor [Ram Ranjan Roy v. Emperor,*



*ILR (1915) 42 Cal 422 : 1914 SCC OnLine Cal 211] , that the purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and to determine the guilt or innocence of the accused and the duty of a Public Prosecutor is to represent not the police but the Crown, and this duty should be discharged fairly and fearlessly with a full sense of the responsibility attaching to his position and that he should in a capital case place before the court the testimony of all the available eyewitnesses, though brought to the court by the defence and though they give different accounts, and that the rule is not a technical one, but founded on common sense and humanity. This view so widely expressed was not fully accepted by their Lordships of the Privy Council in Stephen Seneviratne v. R. [Stephen Seneviratne v. R., AIR 1936 PC 289 : (1936) 44 LW 661 : 1936 SCC OnLine PC 57] that came from Ceylon, but at the same time their Lordships affirmed the proposition that it was the duty of the prosecution to examine all material witnesses who could give an account of the narrative of the events on which the prosecution is essentially based and that the question depended on the circumstances of each case. In our opinion, the appellant was*



*considerably prejudiced by the omission on the part of the prosecution to examine Biabani and the other officers in the circumstances of this case and his conviction merely based on the testimony of the police jamedar, in the absence of Biabani and other witnesses admittedly present on the scene, cannot be said to have been arrived at after a fair trial, particularly when no satisfactory explanation has been given or even attempted for this omission."*

It is the duty of the prosecution to examine all material witnesses who can give an account of narrative of the events on which the case of prosecution is initially based.

In the case of **Baldev Singh. Vs. State of Haryana** reported in **(2008) 14 SCC 768**, wherein their lordships have held at paragraph 6 to 10, which read as follows:-

*"6. "9. It has been consistently laid down by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when*



*all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person. (See Hukam Singh v. State of Rajasthan [(1977) 2 SCC 99 : 1977 SCC (Cri) 250 : AIR 1977 SC 1063] , Eradu v. State of Hyderabad [AIR 1956 SC 316] , Earabhadrapa v. State of Karnataka [(1983) 2 SCC 330 : 1983 SCC (Cri) 447 : AIR 1983 SC 446] , State of U.P. v. Sukhbasi [1985 Supp SCC 79 : 1985 SCC (Cri) 387 : AIR 1985 SC 1224] , Balwinder Singh v. State of Punjab [(1987) 1 SCC 1 : 1987 SCC (Cri) 27 : AIR 1987 SC 350] and Ashok Kumar Chatterjee v. State of M.P. [1989 Supp (1) SCC 560 : 1989 SCC (Cri) 566 : AIR 1989 SC 1890] ) The circumstances from which an inference as to the guilt of the accused is drawn have to be proved beyond reasonable doubt and have to be shown to be closely connected with the principal fact sought to be inferred from those circumstances. In Bhagat Ram v. State of Punjab [AIR 1954 SC 621] it was laid down that where the case depends upon the conclusion drawn from circumstances the cumulative effect of the circumstances must be such as to [negate] the innocence of the*



*accused and bring the offences home beyond any reasonable doubt.*

10. We may also make a reference to a decision of this Court in *C. Chenga Reddy v. State of A.P.* [(1996) 10 SCC 193 : 1996 SCC (Cri) 1205] wherein it has been observed thus : (SCC pp. 206-07, para 21)

*'21. In a case based on circumstantial evidence, the settled law is that the circumstances from which the conclusion of guilt is drawn should be fully proved and such circumstances must be conclusive in nature. Moreover, all the circumstances should be complete and there should be no gap left in the chain of evidence. Further, the proved circumstances must be consistent only with the hypothesis of the guilt of the accused and totally inconsistent with his innocence.'*

11. In *Padala Veera Reddy v. State of A.P.* [1989 Supp (2) SCC 706 : 1991 SCC (Cri) 407 : AIR 1990 SC 79] it was laid down that when a case rests upon circumstantial evidence, such



*evidence must satisfy the following tests :  
(SCC pp. 710-11, para 10)*

*'(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*

*(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

*(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and*

*(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.'*

*12. In State of U.P. v. Ashok Kumar Srivastava [(1992) 2 SCC 86 :*



*1992 SCC (Cri) 241 : 1992 Cri LJ 1104] it was pointed out that great care must be taken in evaluating circumstantial evidence and if the evidence relied on is reasonably capable of two inferences, the one in favour of the accused must be accepted. It was also pointed out that the circumstances relied upon must be found to have been fully established and the cumulative effect of all the facts so established must be consistent only with the hypothesis of guilt.*

*13. Sir Alfred Wills in his admirable book Wills' Circumstantial Evidence (Chapter VI) lays down the following rules specially to be observed in the case of circumstantial evidence:*

*'(1) the facts alleged as the basis of any legal inference must be clearly proved and beyond reasonable doubt connected with the factum probandum; (2) the burden of proof is always on the party who asserts the existence of any fact, which infers legal accountability; (3) in all cases, whether of direct or circumstantial evidence the best evidence must be adduced which the nature of the*



*case admits; (4) in order to justify the inference of guilt, the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation, upon any other reasonable hypothesis than that of his guilt; and (5) if there be any reasonable doubt of the guilt of the accused, he is entitled as of right to be acquitted.'*

14. *There is no doubt that conviction can be based solely on circumstantial evidence but it should be tested on the touchstone of law relating to circumstantial evidence laid down by this Court as far back as in 1952.*

15. *In Hanumant Govind Nargundkar v. State of M.P. [(1952) 2 SCC 71 : AIR 1952 SC 343] it was observed thus : (AIR pp. 345-46, para 10)*

*'10. ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should*



*be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words, there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.'*

16. A reference may be made to a later decision in *Sharad Birdhichand Sarda v. State of Maharashtra* [(1984) 4 SCC 116 : 1984 SCC (Cri) 487 : AIR 1984 SC 1622] . Therein, while dealing with circumstantial evidence, it has been held that the onus was on the prosecution to prove that the chain is complete and the infirmity of lacuna in prosecution cannot be cured by false defence or plea. The conditions precedent in the words of this Court, before conviction could be based on circumstantial evidence, must be fully



*established. They are : (SCC p. 185, para 153)*

*(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established. The circumstances concerned 'must' or 'should' and not 'may be' established;*

*(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty;*

*(3) the circumstances should be of a conclusive nature and tendency;*

*(4) they should exclude every possible hypothesis except the one to be proved; and*

*(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused."*



**7.** *In the background of what has been stated above relating to the law on circumstantial evidence, the only question to be examined is whether the presence of the injuries on the accused can be held to be sufficient to hold the appellant guilty. The trial court held that the accused was examined on 24-3-1993 by the doctor, PW 3 who found abrasions on the thighs and hip joints of the accused, as the injuries must have been received in a scuffle. This circumstance found support from the finding of chappals and other articles. It was held that recovery of utensils and chappals of the deceased does not lead to the guilt of the accused but that circumstances show the involvement of the accused who was found to have injuries on the person corresponding with the injuries on the deceased.*

**8.** *The High Court noted as follows:*

*"In our considered view, a very strong circumstance which connects the appellant with the commission of offence is the presence of injuries on his person especially thigh and hip joints.*

*This certainly is a very strong circumstance which by itself can be said to be conclusive in its nature pointing towards the guilt of the accused.*



*The recovery of chappals, dolu (steel container) and certain other articles from the fields of the appellant speak volumes of the fact of a strong corroborative circumstance against the appellant.*

*The aforesaid strong circumstances can very well be taken into account for upholding the conviction of the appellant."*

**9.** *Circumstances on which the trial court and the High Court had relied on to hold the accused guilty by no stretch of imagination can be determinative of the fact that the accused was responsible for the commission of rape. Even if it is accepted that the chappals and the utensils were found in the fields of the appellant, the dead body was found at another place i.e. in the field of Sheo Ram.*

**10.** *Above being the position that the judgment of the trial court affirmed by the High Court cannot be maintained and are set aside. The appeal is allowed. The appellant who is in custody shall be released forthwith unless required to be in custody in connection with any other case."*



In the case of **Gandipally Srinivas Vs. The State of A.P.** reported in **2009 (4) A.P.L.J. 94 (HC)**

wherein their lordships have held at paragraph-12, which reads as follows:-

*“12. Coming to the next submission of the learned counsel for the accused that non-examination of the Investigating Officer is fatal to the case of the prosecution, it has to be seen that the learned Magistrate had assigned valid reasons for non-examination of the Investigating Officer. In a criminal case, the evidence of the Investigating Officer has its own importance, but non-examination of the Investigating Officer is not fatal in all the cases. It all depends on facts and circumstances of the case. If there are any omissions and contradictions in the evidence of prosecution witnesses, then for marking such contradictions or omissions, the examination of the Investigating Officer becomes necessary. As seen from the cross-examination of the witnesses examined in this case, no contradictions and omissions have been brought on record in their evidence. That means no suggestion was given to these witnesses that they are giving different version or contradictory version to*



*the version already given by them before the police under Section 161(3) Cr.P.C.. Similarly, no suggestion was given to the witnesses that they did not state certain facts to the police as stated by them before the Court. In view of the same, I am of the view that non-examination of the Investigating Officer is not fatal to the case of the prosecution.”*

In the case of **S.K. Rashid @ Abdul Rashid and another Vs. State of Bihar** reported in **1986 SCC OnLine Pat 221** wherein their Lordships have held at paragraph-8 which reads as follows:-

*“8. True, non-examination of Investigating Officer is not necessarily fatal to the prosecution. A Court has to see whether the evidence of the Investigating Officer is essential for the case of the prosecution to succeed or not. The Court has to see at the same time that the accused is not unnecessarily harassed and unless it seems that for unavoidable reasons the prosecution fail to produce the Investigating Officer, it may pronounce the judgment without the evidence of the investigating Officer. The Court, if it is satisfied that the evidence of the Investigating Officer is essential, must take*



*coercive measures to compel his attendance as a witness. Difficulty, however, which the Courts in Bihar face, is that even for executing the process of the Court help of police hierarchy is necessary. Without them and without they desiring to implement the summons and warrants of the Courts, all efforts of the Courts for securing the attendance of the witnesses fail. What has alarmed us, however, is the recessive tendency of the police personnel. They are taking the process of the Courts as lazily and as casually as they can, they have no priorities for the proceedings in the Courts over attending to other works for which they have their reasons of preference. As in this case in many cases Courts have to face a predicaments which the prosecution done can solve, when it does however, is but to tell the Court that it has no other witnesses to examine and to take summons only to inform the Court that it has heard nothing from the police about the service thereof. Several adjournments given by the Court at the instance of the prosecutor only for ensuring the attendance of the official witnesses including the Investigating Officer keep the trials pending for years and even after inordinate wait, the Courts are compelled to*



*decide the cases without their evidence. A certain amendment has been made in the Code of Criminal Procedure by the State of Uttar Pradesh and for such defaulting witnesses adequate provisions have been made to punish both judicially and administratively. It is high time that in the State of Bihar also some provisions are made and in the case it is found that a certain officer of the State has ignored the summons or warrant of the Court, adequate action is taken against him. The administration of the State, even without any such amendment, is fully empowered and competent to take notice of the defaults of its officers in responding to the summons and warrants of the Court and it can immediately start taking notice of the conduct of the Investigating Officers of the police by suitably punishing them by awarding Black marks at least two for default in each case. We cannot satisfy our concern by nearly making these observations and we feel that in the ends of justice a direction to this effect to the State of Bihar is necessary and we, accordingly, direct the State of Bihar to take administrative notice of the default of its officers in not responding to the summons and warrants of the Courts for their appearance as witnesses*



*and after giving them opportunity to show cause to award suitable punishment, as their defaults cause injury to justice. Such defaults, undoubtedly, are acts of indiscipline and inefficiency. To begin with the Sessions Judges in each Sessions Division of the State shall be well advised to furnish to the District Magistrate and the Superintendent of Police of each administrative district of the State a list of pending cases in which official witnesses have not responded to the summons and the warrants and also the list of the case which for default in serving summons and warrants the cases are awaiting disposal and the District Magistrate and District Superintendent of Police shall be well advised to take administrative action to ensure attendance of such official witnesses in the Court and execution of the proceeding this Court should issue a circular forthwith to all Sessions Judges to comply with this procedure and the State of Bihar should issue circulars to the District Magistrate and the District Superintendents of Police to comply with the demands of the Courts for examination of the Witnesses in the trials.”*



In the case of ***Jamuna Chaudhary And others Vs. State of Bihar*** reported in **(1974) 3 SCC 774**, wherein their Lordships have held at Paragraph Para 11, 12 and 15, which read as follows:-

*“11. The duty of the Investigating Officers is not merely to bolster up a prosecution case with such evidence as may enable the Court to record a conviction but to bring out the real unvarnished truth. It is apparent that the prosecution witnesses had tried to omit altogether any reference to at least the injuries of the appellant Ramanandan because there was a cross case in which such an admission could have been made use of to support the prosecution in that case. Dukharan, however, made a very feeble and obviously untruthful attempt to account for the injuries of Ramanandan by saying that he had snatched a pharsa from one of the members of the crowd and had started swinging it around. He could not, however, state whether any one was injured by it. He*



*even stated that he did not recognise the man from whom he had snatched the pharsa. Although he said that he knew Ramanandan from his childhood, he could not say whether all his fingers were present on the day of occurrence. It was apparent that he was trying to conceal some occurrence over the Shikmi land that morning in which the fingers of Ramanandan were chopped off. He admitted that there was a dispute between Raghubir, Jamuna, and Rajdhari which had lasted 2½ to 3 years over the Shikmi land. In fact, this dispute was given as the only cause of the incident set up by the prosecution.*

**12.** *As neither the prosecution nor the defence have, in the case before us, come out with the whole and unvarnished truth, so as to enable the Court to judge where the rights and wrongs of the whole incident or set of incidents lay or how one or more incidents took place in which so many persons, including Laldhari and Ramanandan, were injured, Courts can only try to guess or conjecture to decipher the truth if possible. This may be done, within limits, to determine whether any reasonable doubt emerges on any point*



*under consideration from proved facts and circumstances of the case.*

**15.** *In the circumstances brought out from the total evidence in the case, both ocular and circumstantial, we think that it will not be safe to convict any person for any offence other than that revealed by the injuries he is shown to have inflicted upon an actually injured witness deposing against him. An injured witness, in any case, would not easily substitute a wrong person for his actual assailant. It has not been shown to us that there was motive for such substitution. It also appears to us that, although, the actual quarrel originated and the assault began somewhere in the Shikmi land where Ramanandan was overwhelmed by the party of Dukharan, yet, when a large number of persons came to the help of Ramanandan, out of sympathy for him, it must have extended further so that the party of Dukharan must have been chased. By that time, a number of women folk, who may have been working in and around the field of Dukharan may have come to the scene and tried to take the side of their men folk. Hence, they too were injured. The injured witnesses could be relied upon only for what they depose about injuries inflicted*



*upon them at this last stage of the whole occurrence. There may have been even short gaps of time between the different stages."*

**32.** All the above citations squarely applies to the present facts and circumstances of the case. Though ordinarily the non-examination of Investigating Officer and the doctor may not vitiate the prosecution case, but in certain circumstances, whenever the prejudice is caused to the appellant their non-examination becomes fatal to the case of the prosecution.

**33.** Taking into consideration that there is previous enmity between the parties and there exists a strong likelihood of false implication of the appellant by the injured as well as the informant. Moreover, the delay in recording the statement of the injured is also not explained by the prosecution.



**34.** Additionally, when the trial court has acquitted four of the co-accused on the similar set of facts and evidence, the same benefit of doubt has to be extended to the appellant.

**35.** In view of the aforesaid observations and discussion, this Court is of the considered view that the conviction and sentence imposed by the trial Court in Sessions Trial No. 298 of 1994/175 of 2002 on the file of Additional Sessions Judge, Fast Track Court No. - II vide judgment dated 22.01.2004, is liable to be set aside.

**36.** In result, the appeal is allowed setting aside the judgment of the trial Court dated 22.01.2004 passed by the trial Court is hereby set aside and the appellant is hereby acquitted of all the charges under Section 307 of the Indian Penal Code and Section 27 of the Arms Act.



**37.** The record reveals that the appellant was enlarged on bail on 23.03.2005, therefore, the bail bond of the appellant shall stand cancelled.

**38.** In result, the appeal is allowed.

**(G. Anupama Chakravarthy, J)**

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