

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.173 of 2016

Arising Out of PS. Case No.-85 Year-1992 Thana- TRIVENIGANJ District- Supaul

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1. Bhupendra Yadav Son of late Domi Yadav
 2. Bhagwat Yadav Son of late Domi Yadav
 3. Rajendra Yadav son of Bhagwat Yadav
 4. Luxmi Yadav son of late Domi Yadav
 5. Binod Yadav son of Luxmi Yadav
 6. Yogendra yadav son of late Notai yadav
 7. Mahendra Yadav son of Late Natai Yadav
- All Residents of Village Macha Police Station -Triveniganj District Supaul.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

with
CRIMINAL APPEAL (DB) No. 315 of 2016

Arising Out of PS. Case No.-85 Year-1992 Thana- TRIVENIGANJ District- Supaul

Vidyanand Yadav Son of Late Natai Yadav Resident of village - Machha,
Police Station - Triveniganj, District - Supaul

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 173 of 2016)

For the Appellant/s : Mr.Alok Kumar, Senior Advocate
Mr.Birendra Kumar Singh, Advocate
Mr.Raghwendra Pratap Singh, Advocate
Mr.Neeraj Kumar, Advocate

For the Respondent/s : Mr.Dilip Kumar Sinha, APP

(In CRIMINAL APPEAL (DB) No. 315 of 2016)

For the Appellant/s : Mr.Alok Kumar, Senior Advocate
Mr.Birendra Kumar Singh, Advocate
Mr.Raghwendra Pratap Singh, Advocate
Mr.Neeraj Kumar, Advocate

For the Respondent/s : Mr.Dilip Kumar Sinha, APP



CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH
and
HONOURABLE MR. JUSTICE NANI TAGIA
CAV JUDGMENT
(Per: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH)

Date : 04-04-2025

1. The aforesaid appeals preferred under Section 374(2) read with Section 389 (1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as “CrPC”) arise out of the same judgment of conviction and the order of sentence dated 29.01.2016 and 09.02.2016 respectively, passed in Sessions Trial No.138 of 1994 (arising out of Triveniganj P.S. Case No.85 of 1992), by the learned Court of Additional Sessions Judge-II, Supaul (hereinafter referred to as the “Ld. Trial Judge”), hence these appeals have been heard together and are being disposed off by the present common judgment and order. By the said judgment dated 29.01.2016, the Ld. Trial Judge has convicted the aforesaid appellants of both the cases for commission of offence under Sections 147, 148, 323, 324, 307 and 302/120B of the Indian Penal Code (hereinafter referred to as the “I.P.C.”) and as far as the appellant of the second case namely, Vidyanand Yadav is concerned, he has also been convicted for commission of offence under Section 27 of the Arms Act, 1959. By the order of sentence dated 09.02.2016, the appellants have been sentenced to undergo Rigorous



Imprisonment (hereinafter referred to as “R.I.”) for two years under Section 147 of the I.P.C., R.I. for three years under Section 148 of the I.P.C., R.I. for six months under Section 120B of the I.P.C., R.I. for 1 year under Section 323 of the I.P.C., R.I. for 3 years under Section 324 of the I.P.C., R.I. for 10 years with fine of Rs.10,000/- each under Section 307 of the I.P.C. and imprisonment for life under Section 302 of the I.P.C. with fine of Rs.10,000/- each and in default thereof, the appellants have been directed to remain in custody for six months. As far as the appellant of the second case namely, Vidyanand Yadav is concerned, he has also been sentenced to undergo R.I. for 3 years under Section 27 of the Arms Act, 1959. The sentences have been ordered to run concurrently.

2. The short facts of the case are that on 05.09.1992, the fardbeyan of Ravi Yadav (the informant herein) was recorded by the Sub-Inspector of Triveniganj Police Station at 10:45 a.m. In the fardbeyan, the informant has stated that about 3-4 years back, he had bought 1 bigha, 18 kathas, 10 dhurs of land from Hanuman Agrawal but the said land was being cultivated on contract basis by Natai Yadav from before, hence even after purchase of the said land Natai Yadav did not allow the informant to plough the field. In connection with the said



dispute, the Panches from the neighbouring villages had got together and Panchayati was held in which it was decided that the informant will pay a sum of Rs. 5000/- to Natai Yadav upon which Natai Yadav became ready and then the informant had deposited a sum of Rs.5,000/- with the Panches. The informant has also stated that the Chief Panch was Mukhiya of Kuswaha Panchayat, namely Shiv Nandan Yadav. The informant has further stated that he had ploughed some portion of the field in question, whereafter his son Dilip Kumar Yadav had gone to the land in question to plough the remaining portion of the said land. In the meantime, he came to know that the amount deposited before the Panches has been taken by Natai Yadav. The informant has next stated that today in the morning, when his son had gone to plough the field then he came to know that Natai Yadav, his sons and other people had also gone to the field in question to ask him not to plough the field. Thereafter, the informant and his wife, namely Murti Devi had gone to the field at about 8 a.m. when they saw that many people have assembled at the spot, whereafter he told his son, Dilip Kumar Yadav that since the said people are armed with weapons he should open the plough since they may kill him, whereafter son of the informant had opened the plough and had started going



towards his house by keeping the plough on his shoulders, however, in the meantime Vidyanand Yadav (appellant of the second case) had taken out pistol from his waist and had fired gun shot on the chest of the son of the informant resulting in son of the informant falling down on the ground, whereafter Bhupendra Yadav (appellant no.1 of the first case) had assaulted the informant in his stomach by *bhala* but instead it hit the ribs of the informant resulting in injury being caused, leading to blood oozing out from the injuries. In the meantime, Yogendra Yadav (appellant no.6 of the first case) had assaulted the informant by *lathi* on his head resulting in breaking of his head. Bhagwat Yadav (appellant no.2 of the second case) and Bhupendra Yadav (appellant no.1 of the first case), armed with *bhala* and Luxmi Yadav (appellant no.4 of the first case), who was holding *lathi* as also Rajan Yadav and Binod Yadav (appellant no.5 of the first case), Yogi @ Yogendra Yadav (appellant no.6 of the first case), Manoj Yadav and Saroj Yadav, who were armed with *lathi*, also started assaulting. The guard of Jitendra Kumar Arvind (Ex-Mukhiya) and Mahendra Yadav (appellant no.7 of the first case) were armed with arrow. The informant has further stated that Natai Yadav was exhorting all the accused persons present there to kill the father



and son. The informant has next stated that upon being hit by *bhala*, he had also fallen down on the ground at some distance from his son Dilip Kumar. Thereafter, Saroj Yadav, Jitendra Kumar Arvind and Luxmi Yadav (appellant no.4 of the first case) had also started assaulting the wife of informant, namely Murti Devi by *lathi*. The accused persons had then said that Dilip Kumar Yadav has died, whereafter all the accused persons had fled away, whereupon the younger son of the informant, namely Rajesh who was hiding at some distance had arrived and he said that his brother has been killed. Thereafter, co-villagers, namely Nunu Lal Yadav, Shambhu Yadav, Bhutai Yadav & Ors. had arrived there and said that Dilip Yadav has died. The informant was then lifted & kept on a bullock cart and Sitaram, Nunu Lal and Bhutai had taken him to the Hospital where his treatment is going on. The informant has next stated that the accused persons had formed a mob, arrived at the said place and murdered his son. The fardbayan of the informant was read over to him, which he had understood and upon finding the same to be correct, he had put his thumb impression in presence of two witnesses.

3. On the basis of the said fardbayan of the informant, a formal FIR bearing Triveniganj P.S. Case No.85 of 1992 was



registered for commission of offence under Sections 147, 148, 149, 323, 324, 326, 307, 302, 120B, 447 and 114 of the I.P.C. and Section 27 of the Arms Act. After investigation and finding the case to be true qua the appellants of the aforesaid two cases, the police had submitted charge-sheet on 03.12.1992 under Sections 147, 148, 149, 323, 324, 326, 307, 302, 120B, 447 and 114 of the I.P.C. and Section 27 of the Arms Act, 1959. Thereafter, the Ld. Trial Court had taken cognizance by an order dated 19.04.1993 for the offences under Sections 147, 148, 149, 323, 324, 326, 307, 302, 120B, 447 and 114 of the I.P.C. as also Section 27 of the Arms Act. The Ld. Trial Court had then framed charges against the appellants of the aforesaid two cases on 12.08.1996 under Sections 307, 324, 120B, 302, 147, 148 and 323 of the I.P.C. As far as the appellant of the second case, namely Vidyanand Yadav is concerned, charges were also framed separately under Section 302 of the I.P.C. and under Section 27 of the Arms Act.

4. During the course of trial, 12 witnesses were examined on behalf of the prosecution and one witness has been examined on behalf of the defence. PW 1 Rajesh Kumar Yadav is the son of the informant who claims to be an eye witness. PW 2 Nunu Lal Yadav is the nephew of the informant, while



PW 3 Murti Devi is the wife of the informant and PW 4 Ravi Yadav is the informant of the present case as also father of the deceased Dilip Kumar Yadav. PW 5 Anirudh Paswan is an eye witness. PW 6 Kulanand Yadav has been declared hostile. PW 7 Yogendra Yadav is a formal witness. PW 8 Bhagwat Prasad Yadav has been declared hostile. PW 9 Kala Devi is the wife of the deceased, who is stated to be a hearsay witness. PW 10 Kamesh Chandra Yadav is a formal witness and PW 11 Bhutai Yadav had though deposed on behalf of the prosecution, however he did not turn up for further cross examination. PW 12 Dr. Vijay Kumar Agrawal has conducted the post-mortem of the dead body of the deceased. DW 1 Virendra Yadav has been examined on behalf of the defence, however he also appears to be a formal witness.

5. The learned senior counsel appearing for the appellants of both the cases Shri Alok Kumar has submitted that as far as prosecution witnesses i.e. PW3 Murti Devi, PW6 Kulanand Yadav and PW8 Bhagwat Prasad Yadav are concerned, they have been declared hostile and as far as PW7 Yogendra Yadav and PW10 Kamesh Chandra Yadav are concerned, they are formal witnesses who have identified the signature and handwriting of the Inspector on the formal FIR and the



signature made over the Inquest Report. As far as PW2 Nunu Lal Yadav, PW9 Kala Devi and PW11 Bhutai Yadav are concerned, it has been submitted that the said witnesses are hearsay witness. In this connection, it has been submitted that PW2 Nunu Lal Yadav has stated in paragraph no.1 of his deposition that he had arrived at the place of occurrence after hearing the sound of firing, hence obviously he has not seen the person who had fired upon the deceased Dilip Yadav. As far as PW 9 Kala Devi is concerned, she has stated in paragraph No.3 of her deposition that after her brother-in-law had returned back to home, he had told her about the incident, hence obviously she had not witnessed the actual incident. As regards PW11 Bhutai Yadav, it has been submitted that he has stated in his deposition that he had gone to the place of occurrence after hearing the sound of firing of 3 knot pistol, hence he can also not be an eyewitness and moreover, he did not turn up for further cross examination, hence his deposition loses evidentiary value. It is next submitted that PW12 is the Doctor, who had conducted post mortem examination of the dead body of the deceased Dilip Yadav.

6. The learned senior counsel for the appellants has next referred to the evidence of PW1 Rajesh Kumar Yadav, PW4



Ravi Yadav and PW5 Anirudh Paswan, who are stated to be eyewitness. It is submitted that as far as PW1 is concerned, he has stated in paragraph No.10 of his cross examination that at the time when the accused persons were assaulting his father, accused Vidyanand was holding gun in his hand and he had fired in the air to scare the people standing there and on hearing it he had become unconscious. Thus, it is submitted that apparently since PW1 had become unconscious he could not have witnessed the incident regarding murder of his brother. As regards PW4, attention has been drawn to paragraph No.13 of the deposition of PW1 to submit that PW1 has stated therein that his father PW4, i.e. Ravi Yadav had become unconscious and was admitted in the Hospital for 4-5 days and then he had regained consciousness, whereafter the statements of his father and mother were recorded by the police. It has also been submitted by referring to paragraph No.6 of the deposition of PW4 that he had fallen immediately upon being assaulted and had become unconscious and had regained consciousness in the Hospital. Attention has also been drawn to paragraph No.8 of the deposition of PW4 wherein he has stated that his statement was recorded at Police Station after two days. Thus, it is submitted that though PW4 had



remained in the Hospital for 3-4 days, however on the contrary he has stated that he had gone to the Police Station where his statement was recorded after 2 days, thus this witness is not trustworthy.

7. The learned senior counsel for the appellants has contended that as far as PW5 is concerned, he has stated in paragraph no.10 of his deposition that he was irrigating his field on the date of occurrence and at about 12 in the afternoon he heard sound of gunshot firing and then he had gone towards the place of occurrence, however on the contrary, it is apparent from the fardbeyan of the informant and the deposition of other witnesses that gunshot firing had taken place in between 8:00-9:00 a.m. in the morning, hence the said witness is not an eye witness and moreover, he is not trustworthy, inasmuch as there are lot of inconsistencies in his testimony.

8. The learned Senior counsel appearing for the appellants has next submitted that the evidence of PW1, PW4 and PW5 are full of inconsistency, hence the same cannot be relied for the purposes of upholding the conviction of the appellants. It is contended that the Investigating Officer has not been examined which has caused great prejudice to the appellants. In this regard, reference has been made to a judgment dated



21.10.2011, passed by the Ld. Division Bench of this Court in ***Criminal Appeal (DB) No. 592 of 2005 (Tulsi Dhadhi @ Dhari & Ors. Vs. The State of Bihar & Ors. & other analogous cases)***, wherein it has been held that non-examination of Investigating Officer is a serious infirmity in the prosecution case which results in prejudice to the accused. In this connection, it would be relevant to reproduce paragraph No.44, thereof hereinbelow:-

“44. Admittedly, the Investigating officer has not been examined. It is settled law that non-examination of the Investigating Officer ipso facto does not discredit the prosecution version. It is needless to point out the right of bringing on record, the contradictions in the statement of witnesses made before the Investigating Officer, is a very valuable right of the accused and by showing that, the witness has made improvements or has given evidence, which contradicts his earlier statement, the accused is able to satisfy the court that the witness is not a reliable witness. The non-examination of Investigating Officer is serious infirmity in the prosecution case which results in prejudice to the accused. It is clear that the examination of the Investigating Officer is necessary in order to bring on record the contradictions in the evidence of the witnesses, hence it is a valuable right of the accused. Further it is clear that non-



examination of the Investigating Officer is a serious infirmity in the prosecution case, in so far as it deprives the accused of the opportunity to show to the court, that the witnesses were not reliable witnesses, by proving contradictions in the earlier statement. In the present case, non-examination of the Investigating Officer has definitely prejudiced the accused since the place of occurrence has not been proved nor the claim of the eye witnesses that they had seen the occurrence through hole or gap of the window of the room has been proved, due to non-examination of the Investigating Officer. Thus, in our opinion, non-examination of the Investigating Officer in the present case is a serious infirmity resulting in prejudice being caused to the accused. Hence, on this score also conviction of the accused persons also cannot be sustained.”

9. The learned senior counsel for the appellants has next contended that in his fardbeyan, PW4 i.e. the informant, namely Ravi Yadav has stated that the appellant Vidyanand Yadav had taken out a pistol from his pocket and fired gunshots on the deceased Dilip Yadav, however in his deposition PW4 has stated that he cannot say as to whether the pistol was one barrel or two barrel. Thus, admittedly the evidence of the informant is full of inconsistency with respect of the nature of weapon. It is stated that neither blood has been



seized from the place of occurrence nor the clothes, which were handed over by the injured person to the police have been examined by the forensic department much less exhibited before the Ld. Trial Court during the course of trial. It is also submitted that even the bullet which was taken out from the body of the deceased and handed over to the constable in a sealed foil has neither been exhibited nor has been examined by the forensic experts. Thus, the nature of weapon used has not been established apart from the fact that weapon has also not been recovered which has also caused grave prejudice to the appellants. In this regard, the learned senior counsel for the appellants has referred to a judgment rendered by the Hon'ble Apex Court in the case of ***Munna Lal Vs. The State of Uttar Pradesh***, reported in (2023) 3 SCR 224, paragraph nos.38 and 39 whereof are reproduced hereinbelow:-

“38. First, statement of PW-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.

39. Secondly, though PW-4 is said to have reached the place of occurrence at 1.30 p.m. on 5th September, 1985 and recovered a bullet in the blood oozing out from the injury at the hip of the dead body, no effort worthy of consideration appears to have been made to seize the weapons by which the murderous attack was launched. It is true that mere failure/neglect to effect seizure of the weapon(s) cannot be the sole reason for discarding the prosecution case but the same assumes importance on the face of the oral testimony of the so-called eye-witnesses, i.e.. PW-2 and PW-3, not being found by this Court to be wholly reliable. The missing links could have been provided by the Investigating Officer who, again, did not enter the witness box. Whether or not non-examination of a witness has caused prejudice to the defence is essentially a question of fact and an inference is required to be drawn having regard to the facts and circumstances obtaining in each case. The reason why the Investigating Officer could not depose as a witness, as told by PW-4, is that he had been sent for training. It was not shown that the Investigating Officer under no circumstances could have left the course for recording of his deposition in the trial court. It is worthy of being noted that neither the trial court nor the High Court considered the issue of non-examination of the



Investigating Officer. In the facts of the present case, particularly conspicuous gaps in the prosecution case and the evidence of PW-2 and PW-3 not being wholly reliable, this Court holds the present case as one where examination of the Investigating Officer was vital since he could have adduced the expected evidence. His non examination creates a material lacuna in the effort of the prosecution to nail the appellants, thereby creating reasonable doubt in the prosecution case.”

10. It is contended by the learned senior counsel for the appellants that the place of occurrence remains to be established inasmuch as neither the prosecution witnesses have delved upon the said aspect of the matter except PW1, nonetheless the same was required to be proved by the Investigating Officer, however he has not been produced by the prosecution. In this regard, the Ld. senior counsel for the appellants has referred to a judgment rendered by the Hon’ble Apex Court in the case of ***Ravishwar Manjhi and Others Vs. State of Jharkhand***, reported in ***(2008) 16 SCC 561***, paragraph no.27, whereof is reproduced hereinbelow:-

“27. The investigating officer in a case of this nature should have been examined. His examination by the prosecution was necessary to show that there had been a fair investigation. Unfortunately, even no site



plan was prepared. There is nothing on record to show as to the exact place where the occurrence had taken place. It is stated that the house of the parties is divided by a road. If that be so, it was all the more necessary to pinpoint the exact place of occurrence to ascertain who was the aggressor.”

11. It is next contended by the learned senior counsel for the appellants that neither any injury report has been produced with regard to the injured persons nor the injuries of PW3 and PW4 have been proved and moreover, there is nothing on record to suggest that they had received treatment at the Hospital, hence it is submitted that in absence of examination of the injuries of PW3 and PW4 as also in absence of any injury report having been brought on record during the course of trial, no case is made out under Section 307 of the IPC. It is also contended that the fardbayan has neither been exhibited nor proved. Similarly, inquest report has also not been brought on record, which has also caused great prejudice to the appellants. It is stated that PW1, in paragraph No.2 of his examination-in-chief has stated that Vidyanand Yadav had fired on the deceased from a very close distance and similarly PW4 has also stated in his deposition that bullet was fired by the pistol in question by bringing the same near the chest of the deceased, however the evidence of PW12 Dr. Vijay Kumar



Agrawal would show that there is no sign of charring or burning, gun powder has not been found and only Lacerated punctured wound 1 ½”x ¾” x Thoracic cavity deep over the right side of the chest wall has been found and the doctor has stated in his cross examination that it appears that the deceased was shot at from a distance beyond 6 feet, thus the entire prosecution story is falsified and appears to be cooked up. Lastly, the learned senior counsel for the appellants has submitted that Section 120B of the IPC shall not to be attracted in the present case in view of the fact that for constituting conspiracy, previous meeting of mind is necessary, which has not been proved in the present case. In this regard, the learned senior counsel for the appellants has referred to a judgment rendered by the Hon’ble Apex Court in the case of ***Parveen @ Sonu Vs. The State of Haryana***, reported in ***2021 SCC OnLine SC 1184***, paragraph no.12, whereof is reproduced hereinbelow:-

“12. It is fairly well settled, to prove the charge of conspiracy, within the ambit of Section 120-B, it is necessary to establish that there was an agreement between the parties for doing an unlawful act. At the same time, it is to be noted that it is difficult to establish conspiracy by direct evidence at all, but at the same time, in absence of any evidence to show



meeting of minds between the conspirators for the intended object of committing an illegal act, it is not safe to hold a person guilty for offences under Section 120-B of IPC. A few bits here and a few bits there on which prosecution relies, cannot be held to be adequate for connecting the accused with the commission of crime of criminal conspiracy. Even the alleged confessional statements of the co-accused, in absence of other acceptable corroborative evidence, is not safe to convict the accused. In the case of Indra Dalal v. State Of Haryana, this Court has considered the conviction based only on confessional statement and recovery of vehicle used in the crime. In the said case, while setting aside the conviction, this Court has held in paragraphs 16 & 17 as under:

"16. The philosophy behind the aforesaid provision is acceptance of a harsh reality that confessions are extorted by the police officers by practising oppression and torture or even inducement and, therefore, they are unworthy of any credence. The provision absolutely excludes from evidence against the accused a confession made by him to a police officer. This provision applies even to those confessions which are made to a police officer who may not otherwise be acting as such. If he is a police officer and confession was made in his presence, in whatever capacity, the same becomes inadmissible in evidence. This is the substantive rule of law



enshrined under this provision and this strict rule has been reiterated countlessly by this Court as well as the High Courts.

17. The word "confession" has nowhere been defined. However, the courts have resorted to the dictionary meaning and explained that incriminating statements by the accused to the police suggesting the inference of the commission of the crime would amount to confession and, therefore, inadmissible under this provision. It is also defined to mean a direct acknowledgment of guilt and not the admission of any incriminating fact, however grave or conclusive. Section 26 of the Evidence Act makes all those confessions inadmissible when they are made by any person, whilst he is in the custody of a police officer, unless such a confession is made in the immediate presence of a Magistrate. Therefore, when a person is in police custody, the confession made by him even to a third person, that is, other than a police officer, shall also become inadmissible."

12. Per contra, the learned APP for the State, Shri Dilip Kumar Sinha has submitted that PW1, PW3, PW4 and PW5 are material witness as also eyewitnesses and they have fully supported the case of the prosecution. It is also submitted that the ocular evidence stands fully corroborated by the medical evidence. It is contended that all the material witnesses have



supported the case of the prosecution, their testimonies are consistent and no contradictions are present. It is submitted that minor omissions or variations or infirmities in the evidence are never considered to be fatal and the same cannot be ground for rejection of evidence in entirety. In this regard, reference has been made to a judgment, rendered by the Hon'ble Apex Court in the case of ***State of Uttar Pradesh Vs. Krishna Master and Ors.***, reported in ***AIR 2010 SC 3071***. Reference has also been made to a judgment, rendered by the Hon'ble Apex Court in the case of ***State of Madhya Pradesh Vs. Dal Singh and Ors.***, reported in ***2013 (14) SCC 159*** and it has been submitted that in every criminal case discrepancy, embellishment and emphasis are bound to occur hence the Court should form its opinion about the credibility of a witness and record a finding with respect to whether his deposition inspires confidence. In this regard, it would be relevant to reproduce paragraph No.13 thereof, which is reproduced hereinbelow:-

“13. So far as the discrepancies, embellishments and improvements are concerned, in every criminal case the same are bound to occur for the reason that witnesses, owing to common errors in observation i.e. errors of memory due to lapse of time, or errors owing to mental disposition, such as feelings of shock or horror



that existed at the time of occurrence. The court must form its opinion about the credibility of a witness, and record a finding with respect to whether his deposition inspires confidence. "Exaggeration per se does not render the evidence brittle. But it can be one of the factors against which the credibility of the prosecution story can be tested, when the entire evidence is put in a crucible to test the same on the touchstone of credibility." Therefore, mere marginal variations in the statements of a witness cannot be dubbed as improvements, as the same may be elaborations of a statement made by the witness at an earlier stage. "Irrelevant details which do not in any way corrode the credibility of a witness cannot be labelled as omissions or contradictions." The omissions which amount to contradictions in material particulars i.e. which materially affect the trial, or the core of the case of the prosecution, render the testimony of the witness as liable to be discredited. Where such omission(s) amount to contradiction(s), raising serious doubts about the truthfulness of a witness, and other witnesses also make material improvements before the court in order to make their evidence acceptable, it cannot be said that it is safe to rely upon such evidence. (Vide A. Shankar v. State of Karnataka [(2011) 6 SCC 279])"



13. The learned APP for the State has next contended that it is a well settled law that the evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and had cross examined him, however the same can be accepted to the extent their version is found to be dependable on a careful scrutiny thereof. In this regard, reference has also been made to a judgment rendered by the Hon'ble Apex Court in the case of ***Selvamani Vs. State Rep. by the Inspector of Police***, reported in ***2024 SCC online SC 837***. The learned APP for the State has further submitted that since the place of occurrence is not disputed and moreover, no suggestion was put in cross examination about the veracity of the place of occurrence as disclosed by the prosecution witnesses, non-examination of the Investigating Officer will not cause any prejudice to the appellants. It is also submitted that the manner of occurrence has been described by the witnesses in their evidence and there is no discrepancy to the said effect. Thus, it is submitted that the records would bear it out that ample materials are available on record to connect the appellants with the alleged crime, hence their conviction and sentence should be upheld. It is next submitted that the Ld. Trial Judge has passed the impugned judgment and the order of



conviction and sentence by considering the materials on record and the same is a reasoned order, thus both the appeals are fit to be dismissed.

14. Besides hearing the learned counsel for the parties, we have minutely perused both the evidence i.e. oral and documentary. Before proceeding further, it is necessary to cursorily discuss the evidence.

15. P.W.1 Rajesh Kumar Yadav is son of the informant and brother of the deceased, who claims to be an eye witness and he has stated in his deposition that the occurrence dates back to 4 1/4th years at about 8 a.m. in the morning when his brother Dilip Yadav had gone to Machahadhar for ploughing field and at that time Natai Yadav had arrived there with a mob and when his father came to know that Natai Yadav had arrived at the place of occurrence along with the mob, he and his father also went there and saw that Natai Yadav, Vidyanand Yadav, Yogendra Yadav, Mahendra Yadav, Laxmi Yadav, Bhagwat Yadav, Bhupendra Yadav, Rajendra Yadav, Vinod Yadav, Rajan Yadav, Manoj Yadav, Saroj Yadav and Jitendra Kumar Arvind were present there. PW 1 had then hidden himself in the bushes out of fear, had started watching the incident and in the meantime his father had told his brother Dilip Yadav to run



away. Thereafter, his brother Dilip started returning back to his home along with *Hal* (plough) and in the meantime Natai Yadav exhorted to kill him, whereupon Vidyanand Yadav had taken out a pistol from his back and had gone near Dilip Yadav, whereafter he had fired gun shot on his chest leading to Dilip being injured and then he fell down. Bhupendra Yadav had then assaulted father of PW 1 with *bhala* which hit him on his right ribs. Yogendra Yadav had also assaulted father of PW 1 on his head which had hit his forehead. Thereafter, Bhupendra Yadav and Laxmi Yadav had assaulted the mother of PW1 by *farsa* which had hit the right hand finger of his mother leading to injury being inflicted and then the accused persons had run away. PW 1 has next stated that thereafter, he had come out of bushes and gone near his brother and saw that he had died. Thereafter, Shambhu Yadav and Nunu Lal Yadav had lifted his father and put him on a vehicle and taken him away. PW 1 has recognized the accused persons standing in the dock.

16. In cross examination, PW 1 has stated that prior to the said incident, he had neither seen his father ploughing the field where killing had taken place nor he had seen his deceased brother Dilip Yadav ploughing the said field. PW 1 has next stated that he was hiding in the bushes situated towards east-



southern corner of the field in question and from there he was watching the accused persons who were also watching him. PW 1 has also stated that his mother was present on the western-southern corner of the field adjacent to the field in which the incident was taking place and the same belongs to Raghuni Yadav. He has also stated that his father was standing in the field of Raghuni Yadav along with his mother and they were telling his brother to return back and at that time the accused persons had caught hold of his father, whereafter they had started assaulting his father and when his mother tried to save his father, the accused persons started assaulting her as well. It is next stated by PW 1 that at the time when the accused persons were assaulting his father, appellant Vidyanand Yadav had arrived in field of Raghuni Yadav and was holding a gun in his hand, whereafter he had fired in order to scare the people present there and after hearing the noise of the gun he had become unconscious. He has also stated in his cross examination that police had recorded his statement. PW 1 has also stated that *bhala* was thrown on the body of his father which had got embedded and then the other accused persons had assaulted his father on his head by *lathi*, whereafter he had fallen down on the ground, blood was also dropping on the



ground as also his father had become unconscious, whereupon he was admitted in a Hospital where he remained for 4-5 days and after he regained consciousness, his statement as also the statement of his mother was recorded by the police. He has also stated that his sister-in-law's statement was not recorded.

17. PW 2 Nunulal Yadav is stated to be the nephew of the informant and he has stated in his deposition that the occurrence dates back to about 4 years, which had taken place in the morning when he was ploughing his field and after he heard the sound of gunshot firing he had gone to the place of occurrence and from the Nahar (canal) he had seen Dilip Yadav, Ravi Yadav and his elder mother having fallen down. He had also seen that bullet was embedded in the chest of Dilip and he had died as also blood was oozing out from his chest. He had also seen injury inflicted by *bhala* on the ribs of Ravi (PW 4), whereafter he had torn his towel and tied the wound of Ravi. PW 2 has also stated that injury was present on the forehead of Ravi and on the right hand of his elder mother and then Ravi was taken on a bullock cart to the Hospital. PW 2 has recognized the accused persons standing in the dock. In cross examination, PW 2 has stated that he had gone to the place of occurrence after he heard the sound of gunshot firing



and he had taken half an hour to reach there, however when he reached there, no accused person was present and his elder mother had become unconscious.

18. PW 3 Murti Devi is wife of the informant and mother of the deceased, who has stated in her examination-in-chief that the occurrence dates back to 4 ½ years at about 8 a.m. in the morning when his son Dilip had gone to plough the field at Machahadhar and from behind her husband had also gone. Subsequently, she came to know that his son has been shot by gunshot firing and then she had also gone there where she saw that Dilip and her husband had been assaulted. PW 3 has further stated that Bhagwat, Bhupendra and Yogendra had also assaulted her husband on his back and chest, resulting in her husband falling on the ground. She has next stated that she had not seen her son being hit by gunshot, however she had seen the accused persons who had assaulted her husband. PW 3 has also stated that Bhupendra and Luxmi had also assaulted her with *lathi* and the entire incident was witnessed by the villagers, apart from her and her younger son having witnessed the said occurrence and after they had fallen down on the ground, the accused persons had run away after the villagers had arrived there. Though the said witness has been declared



hostile by the Public Prosecutor, but he was permitted to cross examine this witness and in her cross examination she has stated that she had disclosed before the police that at the time when she and her husband had gone to the place of occurrence, the accused persons were assaulting her son Dilip. She has also stated that Vidyanand Yadav had taken out pistol from his waist and had fired gun shot on the chest of her son, whereafter he had fallen down. She has next stated that she does not remember as to whether she had disclosed the aforesaid facts before the police and whether she had told the police that Natai Yadav was asking the accused persons to kill the father and son. PW 3 has recognized the accused persons standing in the dock. In her cross examination by the accused persons, PW 3 has stated that nobody had gone with his son and at the time of sunrise he had eaten food and left for his field and then her husband had gone after 5-10 minutes of departure of Dilip, whereafter Rajesh had also gone from behind. Thereafter, PW 3 came to know from someone that her son had been shot at and after she heard *hulla* (alarm), she had gone to the place of occurrence. She has also said that she had heard that her husband and son have been killed. She has also stated that upon hearing alarm, her son Rajesh and 20-25 people had



rushed to the place of occurrence and when she reached the field, where occurrence had taken place, she saw that her son Dilip and husband had fallen down.

19. PW4 Ravi Yadav is the father of the deceased and informant of the present case, who has stated in his deposition that about 4 ½ years back at about 8-9 am in the morning he and his son Dilip had gone to Machahadhar for ploughing the field, which had been purchased by them from Gopal Marwadi for a sum of Rs.48,000/-, however the same was being earlier ploughed by Natai Yadav on contract basis. Natai Yadav was preventing the informant and his family members from ploughing the field, hence panchayati was held and it was decided that they should give a sum of Rs.5,000/- to Natai Yadav, whereafter he will let them plough the field and then they had deposited a sum of Rs.5,000/- with the Panches but still he did not allow them to plough the field. On the fateful day the son of the informant had gone towards the field in question and then he and his wife and son Rajesh had also gone towards the said field, where they saw the accused persons, namely, Natai Yadav, Vidyanand Yadav, Yogi Yadav, Bhagwat Yadav, Laxmi Yadav, Bhupendra Yadav, Rajan Yadav, Binda Yadav, Guard of Mukhiya and son of Mukhiya, namely Saroj,



who were armed with various weapons. Thereafter, the informant had told his son to dismantle his plough and take it away otherwise the said accused persons would kill him. Then Dilip Yadav had opened the plough and started going back, however at that moment Natai Yadav exhorted the other accused persons to kill the informant and his son, whereupon Vidyanand had fired gunshots on the chest of the son of the informant resulting in his son, namely Dilip Yadav falling down dead on the ground. Thereafter, Bhagwat Yadav armed with *farsa* and Bhupan armed with *bhala* had assaulted the informant, however he shifted towards the side, resulting in the *bhala* hitting him on his side, whereafter he had fallen down and then Bhupan and Laxmi had assaulted his wife. The accused persons had then said that both father and son have died, hence they decided to leave the place and then they had left the place of incident. PW4 has further stated that his son Rajesh Yadav, upon seeing weapons being brandished by the accused persons, had hid in the bushes nearby and after the accused persons had left, he had come running to the place of occurrence and had said that his brother has died, whereafter co-villagers and others had arrived there.

20. In cross examination, PW4 has stated that after being



assaulted he had become unconscious and he regained consciousness in the Hospital, however he cannot say as to after how much time he regained consciousness in the Hospital. He has also stated that he did not return back from the Hospital on the same day and had stayed at the Hospital for 3-4 days. PW4 had next stated in his cross examination that his statement was recorded by the police thrice. First statement was recorded by the police at the Hospital. Second statement was recorded at the Police Station and third statement was recorded in presence of the Superintendent of Police and the Deputy Superintendent of Police. He has also stated that his statement was recorded at the Police Station after two days of the occurrence. He has next stated that he had disclosed in his statement made before the police that Bhagwat Yadav had hit him on his forehead by *farsa* and this fact was stated by him in all the three statements. PW4 has also stated that he had not stated in his restatement that Yogi @ Yogendra Yadav had hit him on his head by *lathi*, resulting in his head being damaged. He has also stated that Bhagwat Yadav was holding *bhala* in his hand and he was also holding *farsa*. While, Bhagwat was holding *farsa* in his right hand, he was holding *bhala* in the other hand. PW4 has stated that he does not remember whether



he had stated in his fardbayan that Bhupendra Yadav had assaulted his wife. PW4 has further stated in his cross examination that on the day of occurrence his children had told him that Natai Yadav had gone to the place of occurrence with a mob. PW 4 has stated that after some time he had gone to the place of occurrence with Rajesh and his wife and upon reaching the place of occurrence he stood at the field and had seen his son from a distance of 2-3 bamboo length and while Rajesh, upon seeing the mob had hid himself in the bushes, the mob had surrounded Dilip Kumar. PW4 has also stated that during the course of the accused persons assaulting his son, he had witnessed firing of gunshots, however he did not go to save his son.

21. PW4 has next stated that Dilip Yadav had fallen at the place where he was shot, however he does not remember as to whether Anirudh and Kulanand had arrived there to save them. PW4 has also stated that the accused persons were hiding the weapons in their *pyjamas* and had fired gunshots on his son from a close distance i.e. from a distance of 2-3 hand length. PW4 has stated that he was assaulted by *lathi* on his head and body. He has also stated that he was wearing *dhoti* and *banyan* while his son Dilip was wearing *lungi* and *banyan* and after



being assaulted, blood stains were present on the *banyan* and *dhoti*. PW4 has also stated that people from the neighbouring place were also standing at the place of occurrence. PW4 has next stated that Dilip Yadav had gone to plough the field at 6-7 am in the morning. PW4 has also stated that he had given the blood stained clothes to the police including *dhoti* and *banyan*. He has also stated that there was no hole of *bhala* in the *banyan*. PW4 in his cross examination has stated that except Vidyanand, no other accused had assaulted Dilip and rest of the accused persons were quietly standing at a distance of 2-3 bamboo length. PW4 has stated that he had gone to the place where Vidyanand was standing, however he had not held his son by hand since he was standing at a distance of 5-6 hand length and had not gone near his son. He has next stated that no accused person had caught hold of him but he had not gone to save his son Dilip, who had died. PW4 has also stated that he was hit by *bhala*, while he was standing and blood stains had spread over his *banyan*, which he had handed over to the police after 3-4 days, in the Hospital. He has also stated that he does not remember whether seizure list of *banyan* was prepared or not and whether he had signed the same or not. He has stated that during the course of occurrence, he had seen firing being



made from the fire arm but he does not remember whether the same was single barrel or double barrel gun. He has also stated that firing was made on the chest of his son. He has next stated that only one accused person was holding a gun. In his cross examination PW4 has stated that he cannot say as to how many pellets had pierced the body of his son Dilip Yadav. PW4 has also stated that the land which he had purchased from marwadi belongs to Natai Yadav. PW4 has next stated that he alongwith his son and wife had gone to the place of occurrence, however he does not remember whether he had disclosed the said fact before the police. PW4 has stated that he was also assaulted and upon being assaulted he had fallen down, whereafter he had become unconscious, however he does not remember as to when he regained consciousness, nonetheless, he has stated that he had regained consciousness in the Hospital. He has also stated that his son and his wife were also beaten and his wife had also become unconscious, however Rajesh Yadav was not assaulted.

22. PW5 Anirudh Paswan has stated in his deposition that the occurrence dates back to 14 years at about 7-8 am in the morning when he was working in his field and weeding out grass from the field which he had taken on contract basis and at



that time Dilip Yadav had arrived for ploughing his field which he had bought from Hanuman Agrawal, whereafter from behind accused persons, namely, Natai Yadav, Bhagwat Yadav, Bhupendra Yadav, Mahendra Yadav, Yogi Yadav, Vidyanand Yadav, Rajeshwar Yadav, Saroj Yadav, Manoj Yadav, Jitendra Yadav and one unknown person had arrived there, who were armed with *farsa*, *lathi* and country made pistol. Then, Vidyanand Yadav had fired gunshot from his 3 knot pistol on Dilip Yadav leading to bullet piercing his chest, whereafter Dilip Yadav had fallen down and died. PW5 has also stated that thereafter, alarm was raised and then father of Dilip Yadav and his mother had arrived there, whereafter the accused Bhupendra Yadav had assaulted Ravi Yadav (PW 4) by *bhala* which had struck his ribs. Thereafter, Saroj Yadav had assaulted Murti Yadav, wife of Ravi Yadav by *lathi* and when Ravi Yadav had fallen down, accused Bhagwat Yadav had assaulted him with *lathi* and then Manoj Yadav had also assaulted Murti Devi by *lathi*. PW5 has also stated that Dilip Yadav had died on the spot and after seeing the same the accused persons ran away. He has also stated that the younger son of Ravi Yadav, namely Rajesh Yadav had arrived there and said that his brother has died. Thereafter, the nephew of Ravi



Yadav, namely Shambhu Yadav, Nunu Yadav and others had arrived there and taken the injured to the Hospital. In his cross examination, PW5 has stated that he was cultivating his field since morning, the period was Sawan-Bhado and he continued to irrigate his crops till 12:00 in the day time, whereafter he heard sound of gunshot firing at 12:00 in the day time, whereupon he went towards the place of occurrence. In paragraph No.12 of his cross examination, PW5 has stated that he had seen firing of gunshots which had pierced the chest of the deceased, namely Dilip Yadav.

23. PW 6 Kulanand Yadav has stated in his deposition that he does not know anything with regard to death of Dilip Yadav, hence he was declared hostile by the prosecution, nonetheless he was cross examined by the prosecution, during the course whereof, he has stated that it is not a fact that he had disclosed before the police that on 05.09.1992, upon hearing sound of gunshot firing, he had reached near the canal on the eastern side of the village and seen the accused persons standing there as also had heard them saying that both father and son have died.

24. PW 7 Yogendra Yadav is a formal witness, who has proved the formal FIR and has identified the signature of the



then Sub-Inspector of Police, Triveniganj Police Station and the same has been marked as Exhibit No.1.

25. PW 8 Bhagwat Prasad Yadav has stated in his deposition that he does not know anything about the incident, hence he was declared hostile. In his cross examination conducted by the Ld. Additional Public Prosecutor, he has stated that he had not given any statement before the police, although he was confronted with his statement made under Section 161 Cr.P.C.

26. PW 9 Kala Devi is wife of deceased Dilip Yadav and she has stated in her deposition that the occurrence dates back to 18 years at about 8-9 a.m. in the morning. She has stated that her father-in-law had purchased land from Marwari which was being ploughed by Natai Yadav on contract basis. Thereafter, Panchayati was held and it was decided that her father-in-law would give a sum of Rs.5,000/- to Natai for the purposes of ploughing the field, whereafter her father-in-law Ravi Yadav had deposited a sum of Rs.5,000/- with the Panches. She has further stated that on Saturday her husband had gone to plough the field when the accused persons including the appellants had surrounded him and then Rajesh said that his brother has been shot dead by them, while she was also coming from behind.



She has also stated that the accused persons had assaulted her father-in-law and mother-in-law by *lathi* and Bhupendra Yadav had hit on the ribs of her father-in-law Ravi Yadav by *bhala* and then he was assaulted by *lathi* on his head. In cross examination, PW 9 has stated that her statement was recorded by the police on the date of occurrence. She has also stated that she had told the police that her brother-in-law Rajesh Yadav had returned from the place of occurrence and had told her about the incident. She has next stated that she also went to the Hospital when her mother-in-law Murti Devi and father-in-law Ravi Yadav were being taken there in an injured condition for treatment.

27. PW 10 Kamesh Chandra Yadav is a formal witness and has stated in his deposition that the murder of Dilip Yadav had taken place 18 years back and he had put his signature on the inquest report of the deceased, apart from Shambhu Kumar Yadav having also put his signature over the same, however he has stated that he does not know about the occurrence.

28. PW 11 Butai Yadav is the brother of the informant, who has though been examined in chief but he was cross examined partially and then he did not turn up for further cross examination, nonetheless he has stated in his deposition that



Dilip Yadav was murdered and the occurrence had taken place 18 years back at about 8-9 a.m. in the morning when he was at his house. He has stated that he had gone to the place of occurrence after alarm was raised, where he saw that Ravi Yadav was being assaulted by *bhala*. He has also stated that Dilip Yadav had died and Murti Devi was also injured. PW 11 has also named the accused persons, who had arrived at the place of occurrence, variously armed including the appellants herein. He has stated that Bhagwat Yadav was saying that father and son have been killed. The injured were then taken to the Hospital. PW 11 has next stated that Dilip Yadav had received gunshot injury in his ribs. Ravi Yadav had received *bhala* injury in his ribs and blood was oozing out from his head. In cross examination, PW 11 has described the location of one canal of the village and has stated that he does not remember as to when he heard the sound of firing of 3 knot, prior to the occurrence.

29. PW 12 Doctor Vijay Kumar Agrawal is the Doctor, who has conducted the post mortem examination of the dead body of the deceased Dilip Kumar Yadav. He has stated in his deposition that on 06.09.1992, he was posted as Medical Officer, Sub-Divisional Hospital, Supaul and he had performed



post-mortem on the dead body of the deceased Dilip Yadav and had found anti-mortem injuries on his person. The injuries found on the dead body of deceased Dilip Kumar Yadav were (1) Lacerated punctured wound 1 ½"x ¾" x Thoracic cavity deep over the right side of the chest wall, 3" medial to the right nipple inverted in shape indicating wound of entry. PW 12, on dissection, had come to the following findings, apart from noting his conclusion which are being reproduced hereinbelow:-

- (i) Skull bones meninges in the brain matter was pale and intact.
- (ii) All chambers of heart were empty.
- (iii) Lungs right lung lacerated from the middle, the bullet was recovered.
- (iv) Stomach contain fully digested food particles.
- (v) Liver was pale but intact.
- (vi) Kidneys were intact.
- (vii) Spleen was congested.
- (viii) Urinary bladder was empty.

Cause of death:- Haemorrhage and shocks leading to cardio respiratory failure caused by fire arm.



Time elapsed since death to P.M. held - within 48 hours.

Note: A sealed voil which bears the name of deceased and bears my signature containing the bullet, handed over to the constable as per Ext.

PW12 has identified the post mortem report, which has been prepared in his writing as also bears his signature and the same has been marked as Exhibit No.2. In his cross examination PW12 has stated that sealed voil bearing the name of the deceased and his signature, containing the bullet in question was handed over to a constable. He has also stated that he has not mentioned in his report as to by what type of arms, injury has been caused. He has also stated that the dead body was in the process of decomposition, rigor mortis had disappeared and it was the month of September. He has also stated that rigor mortis is the solitary means for determination of hours of death and rigor mortis differs from season to season and from weather to weather. PW12 has also stated that velocity and distance of various types of arms are different. He has next stated that the deceased was shot at from a distance of beyond 6 feet.

30. After closing the prosecution evidence, the Ld. Trial Court recorded the statement of the appellants on 06.10.2012,



under Section 313 of the Cr.P.C. for enabling them to personally explain the circumstances appearing in the evidence against them, however, in their respective statements they claimed to be innocent and stated that they would produce witness.

31. The defence has though produced one defence witness, however, the learned senior counsel for the appellants has not placed reliance on the same.

32. The Ld. Trial Court, upon appreciation, analysis and scrutiny of the evidence adduced at the trial has found the aforesaid appellants guilty of the offences and has sentenced them to imprisonment and fine, as noted above, by its impugned judgment and order.

33. We have perused the impugned Judgment of the Ld. Trial Judge, the entire materials on record and have given thoughtful consideration to the rival submissions made by the Ld. Counsel for the Appellants as well as the Ld. APP for the State.

34. A bare perusal of the evidence of the prosecution reveals that on 05.09.1992 at around 8 a.m. in the morning, son of the informant, namely Dilip Kumar Yadav (deceased) had gone to plough his field, whereafter the informant, his wife and his



younger son Rajesh Kumar Yadav had also gone behind him towards the said field, where accused Natai Yadav (now dead) had exhorted Vidyanand Yadav (appellant of the second case) to kill the informant and his son, whereupon Vidyanand Yadav had fired gun shots on the chest of the son of the informant resulting in his son, namely Dilip Yadav falling down dead on the ground. It is stated that the appellants of the first case were also present there and then Bhagwat Yadav, armed with *farsa* and Bhupendra Yadav (appellant no.1 of the first case) armed with *bhala* had assaulted the informant by *bhala*, whereupon he had fallen down, whereafter Bhupendra Yadav and Luxmi Yadav (appellant no.4 of the first case) had assaulted the wife of the informant. We find that admittedly, PW 7 (Yogendra Yadav) and PW 10 (Kameshwar Chandra Yadav) are formal witnesses, who have proved the formal FIR and the Inquest Report, apart from PW 12 being the Doctor who has conducted the post-mortem examination of the dead body of the deceased. As far as PW 2 (Nunu Lal), PW 9 (Kala Devi) and PW 11 (Bhutai Yadav) are concerned, their evidence shows that they are hearsay witnesses. Thus, the present case rests on the evidence of PW 1 Rajesh Kumar Yadav, PW 4 Ravi Yadav and PW 5 Anirudh Paswan. As far as PW 5 Anirudh Paswan is



concerned, he has stated in his cross examination that while he was irrigating his crops till 12:00 in the afternoon, he heard sound of gunshot firing at 12 in the day time and then he went towards the place of occurrence, whereas the fact, as is apparent from the fardbeyan and the evidence on record, is that the incident had taken place around 8 a.m. in the morning, hence it is not possible that PW 5 had witnessed the alleged occurrence more particularly firing of gunshot by Vidyanand Yadav (appellant of the second case) on the chest of Dilip Yadav (deceased), thus his testimony is not trustworthy.

35. As far as PW 1 Rajesh Kumar Yadav is concerned, we find from his evidence that he is an eye witness to the alleged occurrence and he had hid himself in the bushes near the place of occurrence out of fear from where he had watched the entire incident as also had seen Vidyanand Yadav (appellant of the second case) taking out a pistol from his back and then firing gunshot on the chest of Dilip Yadav (deceased), leading to him being injured and falling down on the ground. Though the learned senior counsel for the appellants has tried to draw contradiction in the evidence of PW 1 to the effect the PW 1 has stated in his cross examination that Vidyanand Yadav (appellant of the second case) had arrived in the field of



Raghuni Yadav holding a gun in his hand, whereafter he had fired in order to scare the people present there and on hearing the noise of gunshot firing he had become unconscious, however we find from the evidence of PW 1 that he has stated that at the time when the accused persons were assaulting his father, meaning thereby that after Vidyanand Yadav (appellant of the second case) had already fired gunshot on the chest of the deceased, appellant Vidyanand Yadav had fired from the gun he was holding in his hand in order to scare the people and only then he had become unconscious, thus we do not find any contradiction in his statement, hence his evidence cannot be stated to be untrustworthy. As regards PW 4, Ravi Yadav, the learned senior counsel for the appellant has pointed out that PW 1 has stated in his cross examination that his father had become unconscious after *bhala* was thrown on his body and he was assaulted by others and had regained consciousness in the hospital as also PW 4 has stated in his deposition that he had fallen immediately upon being assaulted and had regained consciousness in the hospital, however we find that the appellants have not been able to draw any major inconsistency in the evidence of PW 4 and moreover by the time PW 4 had been assaulted, Vidyanand Yadav (appellant of the second



case) had already fired gunshot on the chest of the deceased, thus we find that PW 4 has deposed consistently. It is a well settled law that minor divergences, if any in the prosecution's evidence being insignificant in nature, cannot have any effect on the case of the prosecution, in case overwhelming incriminating evidences have been adduced at the trial to establish the guilt of the appellants. It would not be out of place to mention that it is the case of the defence, as canvassed by the Ld. Senior Counsel for the appellants that PW 4 Ravi Yadav and his wife Murti Devi (W 3) had not been assaulted, thus in such view of the matter, PW 4 could not have become unconscious.

36. We, thus find that the prosecution's narrative in the FIR with regard to Vidyanand Yadav (appellant of the second case) having fired gunshot on the chest of Dilip Kumar Yadav (deceased), leading to his death is fully supported by the ocular evidence adduced at the trial, especially that of PW 1 Rajesh Kumar Yadav and PW 4 Ravi Yadav and the same stands corroborated by the medical evidence inasmuch as PW 12 Dr. Vijay Kumar Agrawal, who had conducted post-mortem examination of the dead body of the deceased has not only found lacerated punctured wound 1 ½" x ¾" x Thoracic cavity



deep over the right side of the chest wall, 3” medial to the right nipple inverted in shape indicating wound of entry but has also opined that the cause of death is hemorrhage and shock leading to cardio-respiratory failure caused by fire arm, apart from the fact that the said Doctor had also taken out a bullet from the dead body and handed over the same to the constable.

It is a well settled law that it is not the number or quantity but the quality that is material while considering the testimony of an eye witness though he may be the sole/single witness, which is the mandate and logic of Section 134 of the Indian Evidence Act, 1872. In the present case, as far as evidence of PW 1 and PW 4 is concerned their evidence is truthful, cogent, credible and trustworthy, hence relying on their testimony, we can safely conclude that the allegation levelled against Vidyanand Yadav (appellant of the second case), regarding him having fired gunshot on the chest of Dilip Yadav (deceased) leading to his death stands proved beyond pale of any reasonable doubt, thus as far as conviction of Vidyanand Yadav (appellant of the second case) under Section 302 of the I.P.C. and Section 27 of the Arms Act is concerned, we do not find any apparent error in the impugned judgment of conviction and sentence, hence the same does not require any



interference. We also find that Vidyanand Yadav (appellant of the second case) has been convicted by the Ld. Trial Judge under Sections 147, 148, 323, 324, 307 and 120B of Indian Penal Code, however in view of the fact that we have upheld his conviction under Section 302 of I.P.C. and Section 27 of the Arms Act, the same loses significance apart from the fact that a bare perusal of the evidence would show that though it stands proved that Vidyanand Yadav (appellant of the second case) had fired gunshot on the chest of Dilip Yadav (deceased) leading to his death, however there is no evidence to show that he had either assaulted the informant or any other family member.

37. At this juncture, we may hasten to add that as far as the appellants of the first case are concerned, though some of them have been alleged to have assaulted the informant (PW 4) and his wife, however the prosecution has failed to bring on record/ exhibit any Injury Report of the said injured witnesses much less produce or adduce the evidence of the Doctor who had treated them, thus we find that no evidence is available on record of the case to show their complicity in the said occurrence, hence it would not be safe to hold the appellants of the first case guilty of the offences alleged qua them, especially



in view of the testimony of PW 4 (Ravi Yadav), who has categorically stated in his cross examination that except Vidyanand Yadav (appellant of the second case) none of the other accused had assaulted Dilip Yadav and rest of the accused persons were standing quietly at a distance of 2-3 bamboo length, meaning thereby that the appellants of the first case had no role to play in the alleged occurrence and moreover, we find that neither any evidence has been brought forth to show meeting of minds between the aforesaid Appellants for the intended object of committing an illegal act nor there is any evidence to establish that there was an agreement between the Appellants for doing an unlawful act, therefore the charge of conspiracy under Section 120-B of IPC also does not stand proved, consequently, the Appellants of the first case cannot also be convicted under Section 302 of IPC with the aid of Section 120B of IPC. Inexorably, we are of the considered opinion that the Ld. Trial Judge was required to acquit the appellants of the first case by extending the benefit of doubt, however the Ld. Trial Judge has committed error in not appreciating the evidence, especially that of PW 4, as aforesaid in its right perspective, hence the impugned judgment of conviction and sentence, as far as the appellants of the first



case i.e Criminal Appeal (DB) No. 173 of 2016 are concerned, is fit to be set aside.

38. Now coming to the issues raised by the learned senior counsel for the appellants, it has been firstly contended that non-examination of the Investigating Officer has caused great prejudice to the appellants. In this regard it would suffice to state that merely arguing such an issue without pointing out any prejudice to have been caused to the defence on account of non-examination of the Investigating Officer would not hold any ground. In fact, defence has failed to raise any doubt upon the oral testimony of PW 1 and PW 4 and moreover, it has not been able to elicit any contradictions in the testimony of the said witnesses thus non-examination of the Investigating Officer in the present case will not be fatal to the prosecution case. Thus, we have no hesitation to hold that in the backdrop of cogent, creditworthy and unshaken testimony of PW 1 and PW 4, the issue of non-examination of Investigating Officer gets relegated to the background and is not a vital consideration in the facts of the present case.

39. As far as the law laid down by the Hon'ble Apex Court, on the issue of non-examination of the Investigating Officer is concerned, we would like to refer to a Judgment rendered by



the Hon'ble Apex Court in the case of ***Behari Prasad Vs. State of Bihar***, reported in ***(1996) 2 SCC 317***, wherein it has been held that non-examination of the Investigating Officer is not fatal to the prosecution case, especially when no prejudice is likely to be suffered by the accused. It has also been clarified in the said judgment that a case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal straight jacket formula should be laid down that non examination of Investigating Officer per se vitiates a criminal trial. The view of the Hon'ble Supreme Court in yet another judgment, reported in ***(2000) 9 SCC 153***, rendered in the case of ***Bahadur Naik vs. State of Bihar*** is that non-examination of the Investigating Officer as a witness for prosecution is of no consequence when no material contradictions have been brought out and it has also not been shown as to what prejudice has been caused to the appellant due to such non-examination, especially in a situation when the accused has not been able to otherwise shake the credibility of the prosecution witnesses.

40. As far as the issue of non-determination of the nature of weapon used as also the place of occurrence not being established, we find that in view of the overwhelming evidence



of PW 1 and PW 4, the said issue does not gain any importance. Now coming to the other issue raised by the learned senior counsel for the appellants that the fardbeyan has neither been exhibited nor been proved, we find that PW 7 Yogendra Yadav has proved the formal FIR and has also identified the signature of the then Sub-Inspector of Police, Triveniganj Police Station, which has also been marked as Exhibit-1 and fardbeyan is a part of the same. Moreover, we would like to refer to the observations of the Hon'ble Supreme Court of India in the case of ***Krishna Mochi and Ors. vs State of Bihar***, reported in **(2002) 6 SCC 81**, wherein it has been held that even if the First Information Report is not proved, it would not be a ground for acquittal but the case would depend upon the evidence led by the prosecution. In the present case, PW 1 and PW 4 have fully supported the occurrence as narrated in the fardbeyan/FIR as far as the allegations levelled against the appellant of the second case is concerned, hence merely because the fardbeyan has not been exhibited, the same has neither caused any prejudice to the appellants nor it makes any material difference.

41. Thus, taking into account an overall perspective of the entire case, emerging out of the totality of the facts and



circumstances, as indicated hereinabove we, by way of extending benefit of doubt, acquit all the appellants of the first case i.e. appellants of Criminal Appeal (DB) No.173 of 2016 and set aside the judgment of their conviction and sentence dated 29.01.2016 and 09.02.2016 respectively, passed by the Ld. Trial Judge in Sessions Trial No.138 of 1994, consequently the said appeal stands allowed. The appellants of the first case, namely (1) Bhupendra Yadav (2) Bhagwat Yadav (3) Rajendra Yadav (4) Luxmi Yadav (5) Binod Yadav (6) Yogendra Yadav (7) Mahendra Yadav, respectively are on bail, hence they are discharged from the liability of their bail bonds.

42. As far as Vidyanand Yadav (appellant of the second case) is concerned, based on a conspectus of the aforesaid facts and circumstances and for the reasons mentioned hereinabove, we find that there is no reason to create any doubt about the guilt of the said appellant (Vidyanand Yadav) in the alleged occurrence, which stands proved beyond all reasonable doubts, hence we do not find any error apparent in the impugned judgment of conviction and sentence qua Vidyanand Yadav (appellant of the second case), thus the same does not require any interference. Accordingly, the said appeal i.e. Criminal Appeal (DB) No.315 of 2016 stands dismissed and the



appellant (Vidyanand Yadav), who is already in custody is directed to serve the remaining sentence i.e. imprisonment for life under Section 302 of I.P.C. with fine of Rs.10,000/- as also rigorous imprisonment for 3 years under Section 27 of the Arms Act, however both the sentences shall run concurrently.

(Mohit Kumar Shah, J)

I agree
Nani Tagia, J:

(Nani Tagia, J)

sonal/-

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