

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No. 938 of 2017

Arising out of PS. Case No.-169 Year-2002 Thana- FATUA District- Patna

Brind Paswan Son of Baldeo Paswan, R/o Usfa, P.S.- Gauri Chak, District- Patna.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

Appearance:

For the Appellant/s	:	Sri Arun Kumar Tiwary, Advocate Sri Amar Anand, Advocate Sri Mrityunjay Kumar, Advocate Ms. Jyotsna Kumari, Advocate
For the Respondent/s	:	Sri Abhimanyu Sharma, A.P.P.

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH

and

HONOURABLE MR. JUSTICE SHAILENDRA SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH)

Date: 16-04-2025

The present appeal under Section 374(2) read with Section 389(1) of the Code of Criminal Procedure, 1973 (hereinafter referred to as the Cr.P.C.), has been preferred by the sole appellant against the judgment of conviction and the order of sentence dated 12.06.2017 and 16.06.2017 passed by the learned Court of VIth Additional District and Sessions Judge, Patna City, District-Patna (hereinafter referred to as the 'learned Trial Judge') in Sessions Trial No. 849 of 2003 (arising out of Fatuha P.S. Case No. 169 of 2002). By the said judgment dated



12.06.2017, the aforesaid appellant has been held guilty for commission of offence under Section 302 of the Indian Penal Code (hereinafter referred to as the 'IPC') and Section 27 of the Arms Act, 1959 and he has been sentenced to undergo rigorous imprisonment for life for the offence under Section 302 IPC with penalty of Rs. 10,000/- and in default thereof, the appellant has been directed to undergo further one year imprisonment. The appellant has also been sentenced to undergo three years rigorous imprisonment under Section 27 of the Arms Act, 1959 with penalty of Rs. 2,000/- and in default thereof, the appellant has been directed to undergo further imprisonment of one month. The sentences have been directed to run concurrently.

2. The short facts of the case are that the fardbeyan of Sitaram Paswan was recorded by the Sub-Inspector of Police, Nagendra Singh posted at P.S. Gaurichak, District-Patna on 20.12.2002 at 16:30 hours. In the fardbeyan, the informant, namely, Sitaram Paswan has stated that on 20.12.2002 his grandson at about 07:00-08:00 a.m. had come back to the house after visiting Abdullah Chak, whereafter the co-villagers, namely, Brind Paswan (appellant) son of Baldeo Paswan, Ramanand Paswan son of Jaleshwar Paswan, Ratan Paswan son of Jaleshwar Paswan started making round of the house of the



informant leading to his grand-son hiding in the house itself on account of fear since earlier also quarrel had taken place in between them. In the day time at about 02:00 p.m. the grand-son of the informant had ventured outside the house on the southern side for urinating, however Brind Paswan (appellant) carrying a rifle had tried to kill him, however grand-son of the informant had come running and had hidden himself inside the house. After sometime, the accused persons including the appellant armed with rifle and gun had surrounded the house of the informant and had started engaging in abusing them, however they did not open the door. Subsequently, all the accused persons had gone on the roof of the house of Jaleshwar Paswan and when the grand-son of the informant had gone in the courtyard at about 03:00 p.m. and was spreading *chadar* (cloth-sheet), the accused Jatan Paswan, who was standing on the roof of the house of Jaleshwar Paswan had said that he is standing in the courtyard, whereupon Brind Paswan (appellant) had fired gun shot from his rifle upon the grand-son of the informant with the intention to kill him, whereupon the same had stuck his grand-son Anil in the stomach, whereafter he fell down in an injured condition and then Brind Paswan had also fired more gun shots. After Anil was hit by gun shots, people from the village had arrived and then the



aforesaid accused persons had climbed down from the roof and had fled away through the house of Jatan Paswan and Jaleshwar Paswan. Thereafter, Saraswati Devi and wife of Anil with the help of the villagers had taken Anil for treatment to Patna. The informant has further stated that the motive of occurrence is that his grand-son Anil Paswan had entered into a quarrel earlier with regard to fishing the fishes. The informant has also stated that members of *Kahar* caste are also having hand in killing his grand-son and he would name the witnesses, who had seen the occurrence, later on. The fardbeyan was then read over to the informant and upon finding the same to be correct, he had put his thumb impression over the same.

3. After recording of the fardbeyan a formal FIR bearing Fatuha P.S. Case No. 169 of 2002 was registered under Sections 147/148/149/326/307 of the IPC and Section 27 of the Arms Act on 21.12.2002 at 06:00 p.m., however, on account of the death of the deceased Anil Paswan, Section 302 of IPC was added later on. The FIR was lodged against the appellant and nine other accused persons, as named in the fardbeyan. After investigation and finding the case to be true qua the appellant and one Chhota Paswan, the police had submitted charge sheet on 30.05.2003 under Sections 147, 148, 149, 326, 307/302 of the IPC & Section



27 of the Arms Act. The learned Trial Judge had then taken cognizance of the offence under Sections 147, 148, 149, 326, 307/302 of the IPC and Section 27 of the Arms Act against the appellant and one Chhota Paswan, whereafter the case was committed to the Court of Sessions vide order dated 16.09.2003 and it was numbered as Sessions Trial No. 849 of 2003. After taking into account the charge sheet and the materials collected during investigation, the learned Trial Judge framed charges under Sections, 302, 302/149 and 326 of the IPC as also under Section 27 of the Arms Act, 1959 against the appellant.

4. During the course of investigation, nine witnesses were examined. While PW-1 Satish Pandit, PW-2 Nageshwar Paswan, PW-3 Baleshwar Bind and PW-4 Kashi Mahto have been declared hostile, PW-5 Saraswati Devi is the mother of the deceased, PW-6 Rinku Devi is the wife of the deceased, PW-8 Sheela Kumari is the sister of the deceased and PW-9 Rajeshwar Paswan is the father of the deceased. The doctor who had conducted the postmortem of the dead body of the deceased namely Dr. Radha Raman Singh has been examined as PW-7.

5. The learned counsel for the appellant Sri Arun Kumar Tiwary assisted by Sri Mrityunjay Kumar, Advocate has submitted that there is discrepancy in the description of the



wound of entry as has been mentioned in the inquest report viz-a-viz the postmortem report. As far as the inquest report is concerned, no bruises have been found, however the same has been mentioned in the postmortem report, thus both are contradictory to each other. It is also submitted that neither the fardbeyan nor the formal FIR has been exhibited, which has caused grave prejudice to the appellant. Yet another issue raised by the learned counsel for the appellant is that neither the Investigating Officer nor the informant have been examined in the present case which has also caused great prejudice to the appellant and is also fatal to the case of the prosecution. In this regard, it is submitted that the first prejudice which has been caused to the appellant is that the place of occurrence has not been established thus the incident itself becomes doubtful. It is also submitted that neither blood-stained mud nor any material articles have been found much less seized from the courtyard, where the deceased is stated to have been shot dead so as to corroborate the actual occurrence. Even the *Chadar* which was being spread by the deceased has not been seized much less any diagram of the place of occurrence having been prepared by the Investigating Officer. It has also been submitted that the distance from which the alleged gunshot firing was made is also yet to be



determined so as to prove the mode and manner of occurrence. As far as the bullet in question is concerned, it is submitted that the same was never sent for ballistic examination. Thus, all the aforesaid factors as also non-examination of the Investigating Officer makes the entire occurrence doubtful. It is also submitted that the statements of the witnesses have been recorded after delay thus the possibility of them being tutored cannot be ruled out. It is also submitted that a bare perusal of the fardbeyan would show that the same does not mention as to where the fardbeyan was recorded and the same also becomes suspicious in view of the fact that there are no witnesses to the alleged fardbeyan. It is also submitted that there is grave contradiction in between the fardbeyan and the testimony of the witnesses with regard to the motive inasmuch as in the fardbeyan it has been stated that there was fishing dispute in between the deceased and the accused persons, however in the testimony of the witnesses it has been mentioned that there was land dispute in between the parties.

6. It is further submitted by the learned counsel for the appellant, by referring to the evidence of PW-4, PW-5, PW-6, PW-8 and PW-9 that there are grave inconsistency and contradiction in their evidences. As far as PW-5 is concerned,



her statement was admittedly recorded after 08-10 days and she has said in her deposition that only Brind and Ramanand had climbed the *kotha* whereas the other witnesses have said that many accused persons had climbed the *kotha*. As far as PW-6 is concerned, she has stated in her evidence that 7-8 accused persons had climbed the *kotha*. Thus, it is submitted that the place from where firing was made becomes doubtful. It is also submitted that PW-6 has stated in her evidence that the motive for the occurrence is that the land on which the deceased was shot belongs to her but the accused persons are wrongly laying their claim over it. Thus, it is submitted that the place of occurrence is not the courtyard of the informant. It is next submitted that PW-6 Rinku Devi has not named the appellant to be the person who had shot the deceased. The learned counsel has next referred to the postmortem report as also to the evidence of the doctor (PW-7) to submit that upon external examination one unstitched lacerated wound has been found on epigastric region of abdomen of size 3cm x 2cm x cavity deep, margin of which were blackened. It is thus submitted that blackened wound is found only when the firing is made from close distance and in case firing is made from far away, blackening does not take place. In this regard, the learned



counsel for the appellant has referred to a judgment rendered by the Hon'ble Apex Court in the case of ***Mohan Singh and Anr. vs. State of M.P.*** reported in ***(1999) 2 SCC 428***, paragraph nos. 12 and 13 whereof are reproduced herein below:-

“12. We find as aforesaid, there is another part of the deposition of the same doctor with reference to the same injuries when he records that the shape of the wounds was oval indicating the injuries being caused from a higher pedestal. In Taylor's Principle and Practice of Medical Jurisprudence, 12th Edn., at p. 297, it says:

“The position of the wound of entrance usually marks a part of the body which was at the moment of discharge facing the muzzle of the weapon, and in a straight line with the barrel; it therefore indicates with precision whether the victim was facing the muzzle or with his back or side to it.

Where the weapon is set at a slant to the body, the bullet may strike the skin and enter through a distinctly oval hole, the 'approach' side of which is a graze widening out into the actual entry, or it may tear across the surface of the skin leaving only a groove or split.

13. In Modi's Textbook of Medical Jurisprudence and Toxicology, 21st Edn., at p. 264, it says:

“The wound of entrance in distant shot is usually smaller than the projectile due to the elasticity of the skin, and round when the projectile strikes the body at



a right angle and oval when it strikes the body obliquely. The edges of the wound are inverted and the striking bullet covered with grease and smoke causes also a collar of abrasion contusion, which looks like a dark ring, showing two zones, the inner of grease and the outer of abrasion.

When there is a close shot that is in the range of powder blast and flame is within 1 to 3 inches for small arms, there is a collar of soot and grease (if present on the bullet) around the circular wound of entry. Singed hairs may be seen if the body is not covered with clothing.

When it is fired beyond a distance of 12 inches, there are no powder marks of soot or heat effects around the wound.”

7. Referring to the aforesaid judgment rendered in the case of Mohan Singh (supra), it has been submitted by the learned counsel for the appellant that firstly blackening would not take place in case firing is made from beyond a distance of 12 inches and secondly in case firing is made not only from a faraway place but also from a place which is higher than the place where the person who is shot is situated, the projectile would strike the body at a right angle and would create an oval wound, however in the present case the wound has been found to be lacerated which is not possible in case firing is made in the manner it has



been done in the present case. Thus, it is submitted that the entire case of the prosecution is not believable. It is further submitted that consequently the ocular evidence stands at variance with the medical evidence, hence in such cases the guilt of the appellant does not stand proved beyond all reasonable doubt. It is also submitted that no independent witnesses have been examined and only related witnesses have been examined in the present case, which also creates a doubt with regard to the case of the prosecution. Lastly, reference has been made to a judgment rendered by the learned Division Bench of this Court in the case of **Sachidanand Singh & Ors. vs. State of Bihar** reported in **2025 (2) BLJ 817** to submit that non-examination of the Investigating Officer is fatal to the case of the prosecution and moreover, unless and until the medical evidence is irreconcilably in conflict with the oral evidence, the oral testimony of the eye-witnesses cannot be doubted and further unless the medical evidence completely rules out all possibilities of injuries taking place in the manner alleged, the testimony of the eye witnesses cannot be thrown out. It is thus submitted that in the present case the medical evidence is irreconcilably in conflict with the oral evidence, hence the testimony of the prosecution witnesses is not trustworthy, thus the appellant is required to be acquitted.



Therefore, it is the submission of the learned counsel for the appellant that the judgment of conviction & the order of sentence passed by the Ld. Trial Judge is perverse and is fit to be set aside.

8. *Per contra*, the learned APP for the State has submitted that the occurrence in question has been supported by four witnesses i.e. PW-5, PW-6, PW-8 and PW-9. It is also submitted that the evidence of the said eye witnesses is consistent and there is no inconsistency so as to warrant any interference with the judgment and order passed by the learned Trial Judge. It is also submitted that the place of occurrence is well established, hence non-examination of the Investigating Officer has not caused any prejudice to the appellant. It is further submitted that the factum of the appellant having fired gun shots from his rifle upon the deceased has been well established by the testimony of the eye witnesses i.e. PW-5, PW-6, PW-8 and PW-9. It is also submitted that there is no variance in the ocular evidence viz-a-viz the medical evidence and the occurrence stands corroborated from the medical evidence adduced in the present case. Thus, it is submitted that the judgment of conviction and the order of sentence passed by the learned Trial Judge does not suffer from any infirmity and the same is fit to be upheld.

9. Besides hearing the learned counsel for the parties, we



have minutely perused both the evidences i.e. oral and documentary. Before proceeding further, it is necessary to cursorily discuss the evidence.

10. PW-1 Satish Pandit, PW-2 Nageshwar Paswan, PW-3 Baleshwar Bind and PW-4 Kashi Mahto have all been declared hostile, hence their evidence is not being adverted to.

11. PW-5 Saraswati Devi is the mother of the deceased and she has stated in her evidence that her son Anil Paswan was murdered 2-2½ years ago in the day time at about 3:00-4:00 p.m. She has also stated that on that day at about 7:00 a.m. the accused Brind Paswan (appellant) and Ramanand Paswan had chased her son Anil Paswan with gun in their hands, whereafter her son had hidden himself. At about 02:30 p.m., son of PW-5 had come out of the house to attend call of nature but when he saw the said two accused persons watching him, he again came inside the house and hid himself. At about 3:00-4:00 p.m. while the son of PW-5 Anil Paswan was spreading cloth sheet at the door, at that time 20-22 persons surrounded the house and some climbed on the roof of Jaleshwar Paswan and from there the appellant Brind Paswan had fired at the son of the informant which had hit him at the abdomen and then he fell down and laid on the ground while all the accused persons fled away.



Thereafter, the son of PW-5 was taken to P.M.C.H. but he died as soon as he was admitted there. She has also stated that Brind Paswan and other accused persons had surrounded her house and the said occurrence has taken place because of land dispute with Ramanand Paswan. PW-5 had identified the accused Chhote Paswan and Brind Paswan standing in the dock. In cross-examination, PW-5 has stated that one case is pending against her in the Patna Civil Court in which she, her husband, her father-in-law and son Anil and others are accused and the said case has been filed by one Vijay Paswan. She has also stated that three other cases are pending against her son Anil Paswan. In paragraph no. 8 of her cross-examination, PW-5 has stated that she has not filed any other separate case for the occurrence of 07:00 a.m. She has also stated that the stairs of house of Jaleshwar Paswan is Pukka (concrete) and on the roof there were about 10 persons, however, she cannot name all of them. She has next stated that her courtyard is enclosed and nobody had come inside the courtyard, however outside the courtyard there were 10 accused persons.

12. In paragraph no. 11 of her cross-examination, she has stated that she has got no land dispute with Brind Paswan. She has also denied the suggestion that her son was having relation



with I.P.F. and terrorist as also he had kept the rifle of terrorist after stealing the same leading to his son being murdered. In paragraph no. 12 of her cross-examination, PW-5 has stated that her statement was recorded after 8-10 days. PW-5 has also denied the suggestion that she had stated before the police that Anil Paswan had fired by rifle from the side of roof of Jaleshwar Paswan which hit the abdomen of Anil Paswan and the accused persons had further fired two shots but the same did not hit anyone. In paragraph no. 14 of her cross-examination, PW-5 has denied the suggestion that she had stated before the police that Brind Paswan had fired at her son Anil which hit his abdomen.

13. PW-6 Rinku Devi is the wife of the deceased and she has stated in her deposition that the occurrence dates back to four years at about 09:30 in the morning when she was at her house and her husband was coming to his house from outside when she saw that the appellant Brind Paswan and Ramanand Paswan were also coming from outside and thereafter the said two accused persons had chased Anil Paswan, however he quickly came inside the house and hid himself. At about 02:00 p.m. in the afternoon Anil Paswan had gone outside for urination, however, again the said two accused persons had exhorted resulting in Anil Paswan again coming inside the house and



hiding himself. At about 3:00-4:00 p.m., Ratan Paswan, Jatan Paswan, Pawan Paswan, Karoo Paswan, Mahi Paswan, Swarath Paswan, Baldeo Paswan, Nawal Paswan, Pyare Beldar, Siyaram Beldar, Akhilesh Choudhary, Sitaram Choudhary, Chhote Paswan and Umesh Paswan, all armed with various weapons had arrived there and half of them had climbed the *kotha* of Jaleshwar Paswan, whereafter from the *kotha* of Jaleshwar Paswan three gunshot firing was made on Anil, however again PW-6 states that two gunshot firing were made while one gunshot did not hit Anil, the other hit him in his stomach and then the accused persons had ran away while Anil fell down. PW-6 has further stated that with the aid of other persons present there, she had taken Anil to Nalanda Medical College and Hospital, Agamkuan, Patna, however the doctor upon examination said that he has died. She has also stated that the motive for occurrence is that the land on which Anil was hit by gunshot belongs to her but the accused persons are falsely claiming the same to be theirs. PW-6 had recognized Chhote Paswan and Brind Paswan standing in the dock. In her cross-examination, PW-6 has stated that there is only one road to go outside her house. She has also stated that before the occurrence Anil had gone outside the house and he was out for 10 days. She



has also stated that her husband had gone to jail once after their marriage where he had stayed for one-two months. She has stated that she does not know as to whether her husband is an accused in the case pertaining to killing of Lochan Paswan. She has denied the suggestion that her husband was having allegiance with the extremist organization. She has also denied the suggestion that her husband had stolen rifle of the extremist organization and on account of fear of the extremist, he used to stay mostly in the house.

14. In paragraph no. 13 of her cross-examination, PW-6 has stated that at about 02:00 p.m. in the afternoon there were about 19 people outside the house, who had surrounded the house. In paragraph no. 15 of her cross-examination, PW-6 has stated that at 02:00 p.m. nobody had ventured outside the house. She has also stated that though 19 persons had surrounded the house, however no alarm was raised by any person of the house. She has next stated that she cannot say as to how many times the police had come to the house after the occurrence. She has also stated that her statement was recorded on the second day of the occurrence and it is not a fact that her statement was recorded after five months. In paragraph no. 18 of her cross-examination, PW-6 has stated that it is not a fact that she had told the police



that Anil Paswan had fired gun shots from the house of Jaleshwar Paswan which hit Anil Paswan in the stomach. In paragraph no. 19 of her cross-examination, PW-6 has stated that no articles were seized by the police in her presence. In paragraph no. 20 of her cross-examination, PW-6 has stated that the day on which her statement was recorded, on that day statement of her father-in-law, sister-in-law, younger father-in-law and grand-father/grand-mother was also recorded by the police, however her statement was recorded first.

15. PW-7 Dr. Radha Raman Singh is the doctor who had conducted the postmortem of the dead body of the deceased and he has stated that on the fateful day he was posted as Lecturer-cum-Tutor in Nalanda Medical College and Hospital, Agamkuan in the Department of F.M.T. On that day, at 11:00 a.m. he had conducted autopsy on the dead body of Anil Paswan and had found the following ante-mortem injuries on the dead body:-

External Examination:-

(1) *One unstitch lacerated wound found on epigastric region of abdomen of size 3 cm x 2cm x Cavity deep margin of which was blackened. The wound was stitch 3cm below the Xiphoid process and 11 cm above the umbilicus on mid abdominal line.*

(2) *Bruise on left side of back on 11 cm enter costal*



space 11cm left from mid line. Size was 5cm x 4cm. Under the skin the metallic material was full from exterior and on dissection of the skin a bullet like folded metallic material was recovered which was sealed labelled and handed over to the constable deputed.

Internal examination:-

- (I) Abdominal cavity was full of blood and blood clot rice food stuff was also found in abdominal cavity.*
- (II) Stomach was perforated on anterior and posterior wall.*
- (III) Mesentery was massively ruptured and bruised.*
- (IV) Pancreas left kidney spleen lower margin of left lobe, of liver were ruptured.*
- (V) There was hole in eleventh inter costal muscle layer at the level of injury no.2 from which bullet like metallic material was found.*
- (VI) Visceras, were pale.*
- (VII) Heart was empty.*
- (VIII) Brain was pale.*

PW-7 has opined that all the injuries are ante-mortem and cause of death is severe abdominal injuries causing severe hemorrhage and shock and the weapon used is fire arm. PW-7 has assessed the time since death to be 2 hours to 24 hours. PW-7 has stated that the postmortem report dated 21.12.2002 is in his writing and bears his signature, which has been marked as



Exhibit-1. In cross-examination, PW-7 has stated that he has not mentioned about the name of fire arm as the same can be detected only by Ballistic Expert. PW-7 has also stated that the distance from which firing was made is not mentioned in the postmortem report.

16. PW-8 Sheela Kumari is the sister of the deceased and she has stated in her deposition that the occurrence dates back to 4-5 years at about 07:00 a.m. in the morning when her brother Anil Paswan was coming from Abdullah Chak and at that time the appellant Brind Paswan and Ramanand Paswan were roaming around with rifle in their hands, whereafter they had chased him leading to him coming inside the house and hiding there. At about 01:00-2:00 p.m. in the day time Anil Paswan had gone outside the house for urinating, however he saw that Brind Paswan and Ramanand Paswan were roaming around with rifle in their hands, who had again chased him, leading to him again coming inside the house and hiding there. Thereafter, at about 03:00-4:00 in the day time while the deceased was spreading *Chadar* in the courtyard, Ramanand, Biren, Mahil, Ratan, Jatan, Karoo, Chhote, Swarath, Vijay, Baldeo, Nawal and Sakal Paswan had surrounded the house and then the appellant Brind Paswan, from the roof of Ramanand Paswan, had started firing



gun shots on Anil Paswan, however the first shot passed by while the second shot hit him below the chest leading to him falling down and then the accused persons fled away. Thereafter, PW-8 had taken his brother to Nalanda Medical College and Hospital, Agamkuan, Patna along with mother, father, sister-in-law etc., however at the hospital the doctor said that Anil has died. PW-8 had recognized the accused persons standing in the dock. She has also stated that the motive of occurrence is land related dispute with Ramanand Paswan. She has stated in her cross-examination that his brother had been out for 10 days and he had returned on the day of occurrence. She has also stated that she does not know whether her brother has gone to jail or not. In cross-examination, PW-8 has stated that the house of Ramanand Paswan is situated towards the north of her house and the house of the appellant Brind Paswan is adjacent to her house on the eastern side. She has also stated that her house is not surrounded on the four sides by wall. In paragraph no. 5 of her cross-examination, PW-8 has stated that land dispute was going on with Ramanand Paswan from before. She has also stated that she had seen Ramanand Paswan and Brind Paswan roaming around at about 07:00 a.m. in the morning with rifle in their hands. In paragraph no. 10 of her



cross-examination, PW-8 has stated that no rifle or gun is present in her house. In paragraph no. 18 of her cross-examination, PW-8 has stated that she cannot say as to at how much distance from her brother, the persons firing gunshot were present. In para no. 19, PW-8 has stated that at the time when the accused persons had surrounded the house, she was inside the house.

17. PW-9 Rajeshwar Paswan is father of the deceased and he has stated in his deposition that the occurrence dates back to 20.12.2002 at about 08:00 a.m. in the morning when his son Anil Paswan was coming back from the house of his sister and on the way Ramanand Paswan, Chhote Paswan, Randheer Paswan, Rambhawan Paswan, Umesh Paswan, Mahil Paswan, Ramswaroop Paswan, Siyaram Bind, Pyare Bind, Sitaram Choudhary, Akhilesh Choudhary, Anil Bind, Munna Pandit, Sakal Paswan, Baldev Paswan and Nawal Paswan, all together 16 persons had tried to surround his son, however his son, in order to evade them, had suddenly entered the house and at that time the accused persons started accumulating more persons. At about 02:00 p.m. in the afternoon, son of PW-9 had the urge to urinate, however he saw that the accused persons had surrounded the house from all sides, hence without urinating he came back into the house. PW-9 has further stated that at about 03:00-4:00



p.m. in the day time, while his son was cleaning/spreading *chadar*, Ramanand Paswan and Brind Paswan (appellant) as also 3-4 persons had climbed upon the roof of the house of Ramanand and Randheer, whereafter Ramanand Paswan exhorted to fire gunshot leading to Brind Paswan (appellant) firing gun shot, whereupon one bullet had hit in the stomach of the son of PW-9 leading to him falling down and then PW-9 had taken his son to the hospital, however he died during the course of treatment. PW-9 has stated that the reason for occurrence is land dispute with Ramanand Paswan, which is going on since 25 years. PW-9 has stated that Ramanand Paswan used to tell his son to leave the land and withdraw the case. PW-9 had recognized the appellant Brind Paswan and Chhote Paswan standing in the dock.

18. PW-9 has also stated that the inquest report was prepared by the police in his presence and he had put his signature on the carbon copy which he has identified and the same also bears the signature of his brother Ram Ishwar Paswan, whose signature has also been recognized by him, which has been marked as Exhibit-2. In cross-examination, PW-9 has stated that the informant of this case is his father late Sitaram Paswan, whose fardbeyan was recorded at his house and his father had put his



thumb impression over the same. In paragraph no. 2 of his cross-examination, PW-9 has stated that he had given his statement in the present case at the hospital once. In cross-examination, PW-9 has reiterated what he has stated in his examination-in-chief and has also stated that while his son was cleaning *chadar*, Ramanand Paswan climbed on the roof of Randheer and exhorted to fire gun shots, whereafter Brind Paswan (appellant) had fired gun shots which hit the stomach of the son of PW-9. PW-9 has stated in his cross-examination that the house of Ramanand Paswan is at a short distance from his house, at about 200 yards. PW-9 has also stated that the statement of his father was recorded by the police in his presence and he was at that time at his house and his father had put his thumb impression on the statement. PW-9 has also stated in his cross-examination that the firing was made from the northern side and the roof is at a height of 12 feet from his courtyard, from there the firing was made and at that time his father, his wife, his daughter-in-law, his daughter and two cousin brothers were present there.

19. After closing the prosecution evidence, the learned Trial Court recorded the statement of the appellant on 29.02.2016 under Section 313 of the Cr.P.C. for enabling him to personally explain the circumstances appearing in the evidence against him,



however, he claimed to be innocent.

20. The learned Trial Court upon appreciation, analysis and scrutiny of the evidence adduced at the trial has found the aforesaid appellant guilty of the offences and has sentenced him to imprisonment and fine, as stated above, by its impugned judgment and order.

21. We have perused the impugned judgment of the learned Trial Court, the entire materials on record and have given thoughtful consideration to the rival submissions made by the learned counsel for the appellant as well as the learned APP for the State.

22. At the outset we would deal with the issue pertaining to the mode and manner of the occurrence and the number of accused persons present at the alleged place of occurrence. A bare perusal of the statement of PW-5 Saraswati Devi would show that she has stated that 10 persons were present on the roof, however she said that she cannot name all of them while PW-6 Rinku Devi has though named several accused persons to be present on the roof and outside the house, however she has not taken the name of the appellant and moreover, she has also not stated that the appellant had fired gun shots on the deceased. As far as PW-8 is concerned, she has stated that 12 accused persons



were present, however PW-9 Rajeshwar Paswan has stated in his examination-in-chief that about 5-6 persons were present on the roof but in his cross-examination, he has stated that only Ramanand Paswan had climbed on the roof of Randheer Paswan and exhorted to fire gun shots, whereafter the appellant had fired gun shots. In fact PW-6 has stated in her evidence that the motive is that the land on which the deceased was shot belongs to her but the accused persons are wrongly laying their claim over it, which definitely casts a doubt about the place of occurrence being the courtyard of PW-6. Thus, this Court finds that there is grave inconsistency in the statement of the witnesses, as far as the mode and manner of occurrence and the number of accused persons present at the alleged place of occurrence is concerned, especially in light of the testimony of PW-6, who though claims to be an eye witness but she has not mentioned either about the appellant being present at the alleged place of occurrence or having fired any gun shot on the deceased.

23. Now coming to the issue of motive qua the appellant, we find that PW-5 has stated that land dispute was existing with Ramanand Paswan and there was no land dispute with the appellant i.e. Brind Paswan and similarly PW-6, PW-8 and PW-9



have also stated that land dispute was existing with Ramanand Paswan, hence motive also does not stand established as far as the appellant is concerned so as to warrant killing of the deceased by him.

24. Yet another aspect of the matter is that PW-6 has categorically stated in her evidence that no articles were seized by the police, meaning thereby that neither any examination/ investigation was made with regard to the place of occurrence much less any blood-soaked mud etc. were seized by the police including the *chadar* in question. Moreover, neither the Investigating Officer has been examined nor the informant has been examined nor the fardbeyan/FIR has been exhibited much less the arms in question having been recovered by the police apart from the fact that even the bullet which was recovered by the doctor from the dead body of the deceased has not been sent for FSL/Ballistic Examination. Thus we find that the said infirmities and lacuna in the case of the prosecution has led to grave prejudice to the appellant. We would also like to point out that though the witnesses have narrated the version mentioned in the fardbeyan/FIR, however in absence of the fardbeyan/FIR being proved much less exhibited as also in absence of the informant being examined (on account of his death), mere



reiteration of the contents of the fardbeyan by the witnesses would not suffice. In this regard, it would be relevant to refer to a judgment rendered by the Hon'ble Apex Court in the case of ***Miran Bux vs. Laloo @ Shagir Ahmad and others***, reported in ***(1993) suppl. 3 SCC 379***, paragraph no. 4 whereof is reproduced herein below:-

“4. Apart from these infirmities, there is one other major drawback in this case. Manzoor Ahmed who gave the FIR putting forward this story has not been examined on the ground that his presence could not be secured as he was abroad. It must be noted that the version given by him in his report is being repeated by all the eyewitnesses. In a case of this nature unless the version given in the FIR, is found to be reliable, the same version repeated by these eyewitnesses cannot be accepted outrightly. At any rate in this case, it is difficult to accept the evidence of the other witnesses who are all relatives and whose version suffers from many infirmities, unless the court is satisfied that the version given in the FIR is true. The High Court has considered in great detail under what circumstances the report was given by Manzoor Ahmed.”

25. As far as non-examination of the Investigating Officer is concerned, we find that the same has also caused prejudice to the appellant inasmuch 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. In the present case, in absence of examination of the Investigating Officer, the defence has been precluded from drawing his attention to the statements made by the witnesses under section 161 of the Cr. P. C., especially that of PW-5, PW-6, PW-8 and PW-9, in order to bring on record the contradictions in the evidence of the witnesses, especially in view of the fact that the testimony of the prosecution witnesses are full of material contradictions. In this regard, we would like to refer to a judgment rendered by the Hon'ble Apex Court in the case of ***Lahu Kamlakar & Anr. vs. State of Maharashtra*** reported in ***(2013) 6 SCC 417***, paragraph no. 18 whereof is reproduced herein below:-

“18. Keeping in view the aforesaid position of law, the testimony of PW 1 has to be appreciated. He has admitted his signature in the FIR but has given the excuse that it was taken on a blank paper. The same could have been clarified by the investigating officer; but for some reason, the investigating officer has not been examined by the prosecution. It is an accepted principle that non-examination of the investigating officer is not fatal to the prosecution case. In Behari Prasad v. State of Bihar [(1996) 2 SCC], this Court has stated 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. In Bahadur Naik v. State of



Bihar [(2000) 9 SCC], it has been opined that when no material contradictions have been brought out, then non-examination of the investigating officer as a witness for the prosecution is of no consequence and under such circumstances, no prejudice is caused to the accused. It is worthy to note that neither the trial Judge nor the High Court has delved into the issue of non-examination of the investigating officer. On a perusal of the entire material brought on record, we find that no explanation has been offered. The present case is one where we are inclined to think so especially when the informant has stated that the signature was taken while he was in a drunken state, the panch witness had turned hostile and some of the evidence adduced in the court did not find place in the statement recorded under Section 161 of the Code. Thus, this Court in Arvind Singh v. State of Bihar [(2001) 6 SCC 407], Rattanlal v. State of J&K [(2007) 13 SCC 18] and Ravishwar Manjhi v. State of Jharkhand [(2008) 16 SCC 561], has explained certain circumstances where the examination of investigating officer becomes vital. We are disposed to think that the present case is one where the investigating officer should have been examined and his non-examination creates a lacuna in the case of the prosecution.”

26. With regard to the aforesaid aspect of the matter, it would also be apt to refer 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. It would be relevant to reproduce paragraph No.44, of the said Judgment, herein below:-

“44. Admittedly, the Investigating officer has not been examined. It is settled law that nonexamination 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 nonexamination 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 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.”

27. Now, coming back to the present case, we find that on account of the aforesaid inconsistencies in the statement of PW-5, PW-6, PW-8 and PW-9 and there being conspicuous gaps in the case of the prosecution, it was imperative that the Investigating Officer ought to have been examined which in our view is vital since he could have adduced the expected evidence, however, in absence of examination of the Investigating Officer, we find that material lacuna has been created in the effort of the prosecution to nail the appellant, thereby creating reasonable doubt in the case of the prosecution.

28. We now advert to yet another issue raised by the learned counsel for the appellant i.e. fardbeyan/FIR not being exhibited, which has also led to grave prejudice to the prosecution inasmuch as Fardbeyan is a crucial piece of evidence that



provides the foundation for the prosecution's case and without it being formally exhibited, there is no formal proof of the alleged occurrence of the crime. In the present case, though the fardbeyan was recorded on 20.12.2002 at 04:30 hours and the information was received at the police on the same day i.e. 20.12.2002 at 19:30 hours, nonetheless the FIR was belatedly registered in the evening of the next day i.e. on 21.12.2002 at 18:00 hours. The delay in lodging the FIR coupled with the fact that the witnesses have also been examined after some delay by the police creates a doubt about the veracity of the case of the prosecution. In fact, PW-5 namely Saraswati Devi has stated that her statement was recorded by the police after 08-10 days. Even PW-6 has stated that her statement was recorded by the police on the second day of the incident and only after recording of her evidence, the evidence of her father-in-law, sister-in-law, younger father-in-law, grand-father/grand-mother was recorded by the police.

29. In fact one another issue which arises for consideration is that in absence of examination of the Investigating Officer and the informant, the prosecution has not been able to prove the exact place of occurrence inasmuch as in case the Investigating Officer would have been examined, it could have transpired as to



whether he had prepared any map of the place of occurrence or not, as to where the actual occurrence had taken place and as to whether any cartridge shell (khoka) was found or not. The investigating officer in a case of this nature should have been examined, since his examination would have shown that there had been a fair investigation. Unfortunately, even no site plan was prepared and moreover, there is nothing on record to show as to the exact place where the occurrence had taken place. We thus find that the prosecution has failed to lead cogent, credible and trustworthy oral evidence to establish the commission of the offence alleged beyond all reasonable doubt, nor any circumstantial evidence has been brought on record by the prosecution to bring home the guilt of the appellant beyond all reasonable doubt.

30. Thus, taking into account an overall perspective of the entire case, emerging out of the totality of the facts and circumstances, as indicated herein above and having perused the entire evidence on record, we find that the prosecution has failed to prove beyond all reasonable doubts the commission of the offence by the appellant. Therefore, we find that the learned Trial Judge has committed a gross error in holding that the prosecution has proved the offence under section 302 of the IPC,



inasmuch as it is clear from the statement of the witnesses that the appellant had fired upon the deceased resulting in his death and that the defence has not been able to prove its innocence beyond all reasonable doubt.

31. Thus, in the facts and circumstances, as discussed herein above and for the foregoing reason, we are of the view that there are compelling reasons in the present case which necessitates that the appellant of the aforesaid appeal be given the benefit of doubt.

32. Accordingly, we find that the findings of conviction recorded by the learned Trial Court, in our opinion, is not sustainable and requires interference. Therefore, the judgment of conviction dated 12.06.2017 and the order of sentence dated 16.06.2017, passed by the learned Court of VIth Additional District and Sessions Judge, Patna City, District-Patna in Sessions Trial No. 849 of 2003 (arising out of Fatuha P.S. Case No. 169 of 2002), are set aside. The appellant of the aforesaid appeal is acquitted of the charges levelled against him.

33. The appellant, namely, Brind Paswan, who is in custody, is directed to be released from jail forthwith, unless required in any other case.

34. Accordingly, the aforesaid appeal i.e. Criminal Appeal



(DB) No. 938 of 2017 stands allowed.

(Mohit Kumar Shah, J)

(Shailendra Singh, J)

S.Sb/-

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