

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.339 of 2023

Arising Out of PS. Case No.-77 Year-2020 Thana- DEEPNAGAR District- Nalanda

Nitish Kumar @ Nimiya, Son of Late Dinesh Prasad, Resident of Village -
Biyawani, P.S.- Deepnagar, District - Nalanda at Biharsharif.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

with
CRIMINAL APPEAL (DB) No. 376 of 2023

Arising Out of PS. Case No.-77 Year-2020 Thana- DEEPNAGAR District- Nalanda

Rajesh Kumar, Son of Dinesh Prasad, Resident of Village- Biyawani, PS-
Deepnagar, Distt- Nalanda at Biharsharif.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

(In CRIMINAL APPEAL (DB) No. 339 of 2023)

For the Appellant : Mr. A.K. Thakur, Advocate
Mr. Abhimanyu Singh, Advocate
Mrs. Akrity Aishwarya, Advocate

For the Informant : Mr. Binay Kumar, Advocate

For the State : Mr. Bipin Kumar, APP

(In CRIMINAL APPEAL (DB) No. 376 of 2023)

For the Appellant : Mr. A.K. Thakur, Advocate
Mr. Abhimanyu Singh, Advocate
Mrs. Akrity Aishwarya, Advocate

For the Informant : Mr. Binay Kumar, Advocate

For the State : Mr. Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and

HONOURABLE MR. JUSTICE PRAVEEN KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 17-02-2026

Heard learned counsel for the appellants, learned counsel
for the informant and learned Additional Public Prosecutor for the
State in both the appeals.



2. The appellants in these two appeals are seeking to set aside the judgment of conviction dated 19.01.2023 (hereinafter referred to as the 'impugned judgment') passed by learned Additional District and Sessions Judge-II, Nalanda at Bihar Sharif (hereinafter referred to as the 'learned trial court') in Sessions Case No. 297 of 2020/ Trial No. 01 of 2021 arising out of Deepnagar P.S. Case No. 77 of 2020 for the offences under Sections 302/34, 448/34, 504/34 and 506/34 of the Indian Penal Code (in short 'IPC') and Section 27 of the Arms Act. The appellants are also praying for setting aside the order of sentence dated 28.01.2023 (hereinafter referred to as the 'impugned order') by which the learned trial court has been pleased to award a sentence of life imprisonment for the offence punishable under Section 302/34 IPC and has further imposed a fine of Rs.1,00,000/- to each of the appellants, the trial court has awarded a sentence of five years rigorous imprisonment and imposed a fine of Rs. 25,000/- for the offence punishable under Section 27 of the Arms Act, for the offence punishable under Section 448/34 of the IPC, one year imprisonment and for the offence punishable under Section 504/34 of the IPC, two years imprisonment with a fine of Rs. 5,000/- and for the offence punishable under Section 506/34 of the IPC, the trial court has awarded imprisonment of five years with a fine of Rs. 10,000/-. All the sentences are to run concurrently.



Prosecution Story

3. The prosecution story is based on the fardbeyan of Mathur Mistri (PW-3) recorded by the Sub-Inspector of Police Anita Kumari (PW-6) of Deepnagar Police Station in Sadar Hospital, Biharsharif, Nalanda, on 09.03.2020 at about 22:50 hrs. In his fardebyan, the informant alleged that on 09.03.2020 during evening time he was in his house, at that time about 7:30 P.M., his co-villagers (1) Rajesh Kumar, (2) Nitish Kumar @ Nimiya and (3) Dinesh Prasad armed with pistol in their hands entered into his house hurling abuses and shot at his son Mahesh Mistri. As a result of this, his son died at the place of occurrence, then he and his family members concealed themselves. The informant further alleged that all the three accused persons left the place by giving life threatening. The informant has given the reason behind the occurrence as purchase of 3 ½ decimal of land by him in the month of November, 2019. He alleged that since the said purchase, the accused persons were harassing him.

4. On the basis of the *fardbeyan* of Mathur Mistri, police registered Deepnagar P.S. Case No. 77 of 2020 dated 09.09.2020 for the offences punishable under Sections 302/34, 448/34, 504/34 and 506/34 IPC. Upon completion of the investigation, police submitted a charge sheet bearing Chargesheet No. 138 of 2020 dated 09.06.2020 against the accused persons,



whereafter cognizance of the offences were taken by the learned Additional Chief Judicial Magistrate-V, Biharsharif, Nalanda. Finding that the case is exclusively triable by the Court of Sessions, the learned Magistrate committed the records on 14.12.2020.

5. Upon registration of the case as Sessions Trial No. 297 of 2020, charges were explained to the accused persons who denied the charges and claimed to be tried.

6. The Learned trial court, thereafter, framed the charges on 28.02.2022 under Sections 302, 448, 504 and 506 of the IPC. It was later noticed by the learned trial court that inadvertently at the time of framing of charge with all the Sections of the IPC, Section 34 of the IPC and Section 27 of the Arms Act could not be recorded. The trial court noted the fact that the accused persons had fired upon the deceased by pistol was well within the knowledge of the accused persons and this is mentioned right from the beginning in the FIR till the filing of the chargesheet and in such condition, it is in the interest of justice to exercise the power under Section 216 of the Code of Criminal Procedure (in short 'CrPC'). Thus, on the date fixed for the delivery of judgment, the trial court passed the order dated 19.01.2023 and the charges were



altered as under Sections 302/34, 448/34, 504/34, 506/34 and Section 27 of the Arms Act.

7. In course of trial, the prosecution examined as many as 10 witnesses and produced some documentary evidences which have been marked as Exhibit ‘1’ to Exhibit ‘5’ on behalf of the prosecution. On behalf of the defence, no witness has been examined, however, two material exhibits i.e. the seized empty cartridges (Material Exhibit ‘1’) and pellet (Material Exhibit ‘2’) were brought. The description of prosecution witnesses and the exhibits are given hereunder in tabular form:-

List of Prosecution Witnesses

PW-1	Sunita Devi
PW-2	Mahesh Prasad
PW-3	Mathur Mistri
PW-4	Brijnandan Thakur
PW-5	Chhote Mahto @ Rajkumar Prasad
PW-6	Anita Kumari (Sub-Inspector of Police)
PW-7	Dr. Dharam Prakash
PW-8	Dharmendra Kumar
PW-9	Murlidhar Ray
PW-10	Sher Singh Yadav

List of Exhibits on behalf of the Prosecution

Exhibit ‘1’	Signature of Mahesh Prasad on inquest report
Exhibit ‘1/1’	Writing and Signature of Sub-Inspector Anita Kumari on carbon copy of inquest report
Exhibit ‘2’	Signature of witness Rishu Kumar on fardbeyan
Exhibit ‘2/1’	Writing and signature of witness Anita Kumari on fardbeyan
Exhibit ‘3’	Signature of witness Brijnandan Thakur on



	seizure list
Exhibit '3/1'	Signature of Chhote Mahto on seizure list
Exhibit '3/2'	Signature of Chhote Mahto on production-cum-seizure list
Exhibit '3/3'	Signature of Brijnandan Thakur on production-cum-seizure list
Exhibit '3/4'	Writing and signature of Anita Kumari on entire seizure list
Exhibit '4'	Production-cum-seizure list
Exhibit '4/1'	Signature of Mahesh Prasad on inquest report
Exhibit '4/2'	Signature of Rishu Kumar on inquest report
Exhibit '4/3'	Signature of Anita Kumar on inquest report
Exhibit '5'	Post-mortem report in writing of PW-7/Doctor Dharam Prakash.

Findings of the Learned Trial Court

8. Having examined the evidences adduced on behalf of the prosecution and the defence, the learned trial court came to a conclusion that Mahesh Mistri a man of 27 years was killed one day before the Holi festival inside his house at the second floor. The learned trial court has held that the father of the deceased who is informant in this case and has appeared as PW-3 has made it clear that he was at the ground floor of the house when Dinesh Prasad, Rajesh Kumar and Nitish Kumr @ Nimiya armed with pistol entered into the house, they were hurling abuses while going upstairs and they were saying that why he had purchased the land. On the direction of Dinesh, Rajesh Kumar had fired which hit on the right side of the face of the deceased and died thereafter.

9. The trial court has held that the wife of the informant (PW-1) and Mahesh Prasad (PW-2) have partly corroborated the



evidences of PW-3. The I.O. has identified the place of occurrence which is the house of the deceased and this place of occurrence is not in dispute.

10. Learned trial court further found that the post-mortem report made by the Doctor (PW-7) corroborates the ocular evidence of PW-1, PW-2 and PW-3. One pellet was taken out from his head which has been produced as Material Exhibit '2'. The learned trial court has also found that from the place of occurrence 0.315 bore empty cell of the fired arms cartridges was seized. The learned trial court found that the reason behind the killing has also been disclosed by the prosecution witnesses. The FIR was lodged within 4-5 hours of the occurrence at the Sadar Hospital, seizure list-cum-production has been prepared, the inquest report and the post-mortem report were also prepared, therefore, there is no chance of any embellishment over the prosecution story.

11. The learned trial court found that there is no independent witness of this occurrence but this cannot be a ground to disbelieving the statement of the mother and father of the deceased because they were very much present in the house at 7:30 P.M. The learned trial court has held that the offences for which the appellants were charged have been duly proved beyond all reasonable doubts.



Submissions on behalf of the Appellants

12. Mr. Ajay Kumar Thakur, learned counsel for the appellants assisted by Mr. Abhimanyu Singh, learned Advocate and Mrs. Akriti Aishwarya, learned Advocate, has submitted that in this case, the prosecution has suppressed the first version. It is submitted that police had reached the place of occurrence immediately and had seized the empty shell of the cartridges at the staircase of the house. The police officer Anita Kumari (PW-6) has deposed that she had recorded the fardbeyan of Mathur Mistri and had explained the same to him whereafter he had put his left thumb impression on the same.

13. It is submitted that PW-6 has stated that she had prepared the production-cum-seizure list in the Sadar Hospital showing recovery of one pellet from the head of the deceased (Mahesh Mistri), it was kept in a sealed plastic *dabba*. She had also prepared the inquest report on which Mahesh Prasad (PW-2) and Rishu Kumar in examination stood witnesses, their signatures have been exhibited- 4/1 and exhibited- 4/2 respectively on the inquest report. This witness identified his signature on the inquest which has been marked as Exhibit-4/3. In paragraph No. 7 of her deposition, PW-6 has stated that at the time of preparation of the inquest report nobody had given any statement, it was said that



they will later give it in writing. It is submitted that the evidence of PW-6 would show that the prosecution side withheld the lodgement of the FIR and the fact that the FIR has though been shown to have been lodged on 09.03.2020 at 23:15 hrs, it reached the court of learned Judicial Magistrate only on 11.03.2020. It is, therefore, submitted that the delay in lodging of the FIR and sending the same to the Court of the learned Judicial Magistrate, would prove fatal to the prosecution.

14. Learned counsel further submits that in this case, nothing was found at the place of occurrence when the I.O. reached there for the first time. In this regard, the evidence of the I.O. (PW-8) has been pointed out. PW-8 has said in paragraph '8' on his deposition that on the next day of the occurrence, when he had inspected the place of occurrence, he had not found any blood. This witness has stated that when he reached the place of occurrence, wife of the deceased was present but at that time, her statement was not recorded.

15. It is submitted that PW-8 has stated in his deposition (paragraph 8) that when he reached the place of occurrence for the first time, he found that the victim was lying in the *varanda*, he claimed that he had lifted the victim and sent him to hospital in his police vehicle. He could not ascertain as to whether before sending



the victim to the hospital, he was alive or dead. From the place of occurrence, he along with the Sub Inspector Anita Kumari, had gone to the Sadar Hospital. It is submitted that contrary to the claim of PW-8 that he had sent the victim to the hospital, the father of the victim (PW-3) has stated that after hearing the sound, it was Mahesh who had entered the house for the first time, thereafter, several people came and they lifted away the dead body to the hospital. Prior to taking the dead body to the hospital, no family members of this witness has given any information to police. It is, thus, submitted that while PW-8 claims that he had sent the victim to the hospital in his police vehicle, the informant claims that he along with other villagers had taken the victim to the hospital and no information in this regard was given to police. On the date of occurrence, he had returned with the dead body from the hospital at 11:00 P.M.

16. It is submitted that the mother of the victim has been examined as PW-1. In her examination-in chief, she claims to be a witness to the occurrence but in the cross-examination, she has stated in paragraph no. '6' that she heard the sound of firing when she was sleeping on the ground floor and when she got awoken, she saw her son dead and in fallen condition. It is stated that PW-1 is not an eye-witness to the occurrence.



17. Mahesh Prasad (PW-2) is a hearsay witness. He has signed the inquest report, his signature has been marked as Exhibit-‘1’ and this witness has stated in his cross-examination that police had recorded his statement after 10-15 days in the village itself. He has also stated that he had made his statement on the basis of the *hulla* in the village that Mahesh Mistri has been shot dead by the younger son of Dinesh Prasad and he had died. It is, thus, submitted that even PW-2 is only a hearsay witness.

18. It is submitted that so far as PW- 4 and PW-5 are concerned, they are the signatories to the seizure list. PW-4 has been declared hostile while PW-5 has not supported the prosecution case.

19. P.W.6 is the police officer who had prepared the inquest report, had recorded the *fardbeyan* of the informant and prepared the production-cum-seizure list. Learned counsel submits that Dr. Dharam Prakash (P.W.7) was examined on behalf of the prosecution, who has proved the post-mortem report of Mahesh Mistri, which has been marked Exhibit-5. The doctor had found entry wound on right side of forehead 1 inch x ½ inch, bleeding from occipital region of head and the cause of death was due to the said injury caused by fire-arm. Bullet was extracted and sealed and handed over to *hawaldar*. It is submitted that Dharmendra Kumar



(P.W.8) was the then S.H.O. of Deepnagar police station who had put his signature on the formal FIR. P.W. 8 has stated that he had not tried to know anything by sending the empty shell and the recovered pellet from the body of the deceased to the FSL as to whether the pellet found from the body was fired at the place of occurrence.

20. P.W.9 is said to be a formal witness who had produced the Material Exhibit '2' and identified the signature of the Chief Judicial Magistrate put on the seal of the *dabba*. Sher Singh Yadav (P.W.10) is a formal witness who has stated that even prior to his investigation, the Sub-Divisional Police Officer had in his progress report dated 30.05.2020 directed for submission of charge-sheet against the accused. He has also stated that all those witnesses whose statements were recorded on 07.06.2020 and steps were taken in this case by the previous I.O. This witness had not recorded statement of any of the witnesses earlier.

21. Learned counsel for the appellant has relied upon the judgments of the Hon'ble Supreme Court in the case of **Takhaji Hiraji vs. Thakore Kubersing Chamansing and Others** reported in (2001) 6 SCC 145, **Kanhai Mishra Alias Kanhaiya Misar v. State of Bihar** reported in AIR 2001 SC 1113 (paragraphs 7 and 18), **Mohan Lal and Others v. State of**



Rajasthan reported in **2000 Criminal Law Journal 2982 SC**, **Nallabothu Ramulu Alias Seetharamaiah and Others v. State of Andhra Pradesh** reported in **(2014) 12 SCC 261** (paragraph 17 to 21) and **Deny Bora v. State of Assam** reported in **(2014) 14 SCC 42** to submit that if material witnesses were not examined, an adverse inference is required to be drawn by the learned trial court. On these grounds, learned counsel for the appellant submits that the impugned judgment and order are liable to be set aside.

Submissions on behalf of the State and the Informant

22. The judgment of the learned trial court has been defended by learned Additional Public Prosecutor for the State and learned counsel for the informant. It is submitted that the informant who is the father of the deceased was present in the house and both father and son had returned home after closing their shops at about 07:00 PM. It is submitted that the informant (P.W.3) had withstood the test of cross-examination, the star witness of this case and his testimony is a wholly reliable piece of evidence in terms of Section 134 of the Indian Evidence Act.

23. Learned counsel submits that even as the wife of the deceased happened to be a material witness but her non-production would not result in drawing of any adverse inference because in presence of more than one material witnesses if the prosecution has brought some of them and has proved its case beyond all reasonable



doubts, then no adverse inference may be drawn only because some of them have been left out and not examined in trial.

24. Learned counsel further submits that the ocular evidence of the prosecution witnesses are getting fully corroborated from the post-mortem report proved by the doctor (P.W.7). It is submitted that the S.H.O. of Deepnagar police station who has deposed as P.W.8 seems to have committed some negligence in the matter of conduct of investigation and had made certain statements which are indicative that P.W.8 had not visited the place of occurrence on the very first day and it was Anita Kumari (P.W.6) who had reached the place of occurrence and from there, she had gone to the Sadar Hospital. It is submitted that the prosecution has been able to establish its case beyond all reasonable doubts on the strength of the evidence of P.W.3 alone which is getting corroborated from the post-mortem report. The defence has not taken out any contradiction in the statement of P.W.3 recorded at the stage of Section 161 CrPC and then in course of trial. P.W.3 has, therefore, remained consistent.

Consideration

25. Having heard learned counsel for the appellants, learned counsel for the informant and the learned Additional Public Prosecutor for the State as also on going through the records which we have taken note of hereinabove, we find that in



this case the informant made his *fardbeyan* in the Sadar Hospital on 09.03.2020 at 22:50 hours. The informant has stated categorically that when he was on the ground floor of the house, the three named accused persons who were armed with pistol entered into the house, hurling abuses and shot at his son Mahesh Mistri, as a result whereof Mahesh Mistri died, whereafter he and his family members concealed themselves as all the three had gone giving threat that whosoever will speak or lodge a case shall be killed. The informant has given the reasons about the occurrence as according to him he had purchased three and half decimal of land in the month of November 2019, since then the accused persons were harassing him and his family members.

26. In course of trial, the informant has been examined as P.W.3. He has stated in his examination-in-chief that Dinesh Prasad, Rajesh Kumar and Nitish Kumar all the three had pistol in their hands and they were going on the stairs of the house hurling abuses and were saying that why he had purchased the land. This witness has stated that on the asking of Dinesh Prasad, Rajesh Kumar shot at the deceased Mahesh which hit on the right side of his face. This witness has further stated that when they were returning from the second floor of the house then they said that whosoever will lodge a case or will stop them they would be



killed. This witness has identified all the accused in the dock. In his cross-examination this witness has stated that his statement was recorded in Sadar Hospital and at that time his wife was not there in the hospital. In his village hospital Mahesh ji, Chandan Sipahi and 8-10 persons were there, who had brought the dead body to the hospital. His son had died in the village itself and in the house the female members, who are wife of the deceased and the wife of the informant had remained. He was aware that when he had gone to the hospital, in his absence police had come to the house and had enquired. In paragraph-5 of the deposition, he has stated that when police had come in his absence in the village, statement of the wife of the deceased was taken. At that time, police had not enquired from the wife of the informant. On that very day in the night, he had returned with the dead body from the Sadar Hospital in the village whereafter police had not come, police came after two days.

27. This Court finds that Anita Kumari (P.W.6) and the S.H.O. (P.W.8) have stated that they had gone to the place of occurrence and according to S.H.O. (P.W.8), he had sent the victim to the hospital in the police vehicle, however, in course of her examination-in-chief, the S.I., Anita Kumari (P.W.6) has not stated that she had gone to the place of occurrence with the S.H.O.



(P.W.8). P.W.6 has stated that she had recorded the *fardbeyan* of Mathur Mistri and had explained him. She has stated that she had prepared the seizure list on 09.03.2020 showing recovery of the empty shell of the cartridge on which Chhote Mahto and Brij Nandan Mahto had stood as witnesses. It is evident from the statement of P.W.6 that she does not say that she had gone to place of occurrence with P.W.8, therefore, this Court is of the opinion that the statement of P.W.8 saying that he had gone to the place of occurrence and had sent the victim to the hospital is not believable. To this Court, it appears that after the dead body of the victim had already been taken away to the Sadar Hospital, Bihar Sharif, Nalanda, behind the back of the informant and other male members, Anita Kumari (P.W.6) had come, she had prepared the seizure list of the empty shell and, thereafter, she had left for the Sadar hospital, Bihar Sharif, where she had recorded the *fardbeyan* of the informant. In her cross-examination, P.W.6 has stated that when she had gone to the place of occurrence, family members were present inside the house but who were those family members inside the house she had not recorded and she had not made any of the family members of the house a witness to the seizure list. She had called the two seizure list witnesses at the time of seizure. It is evident from the evidence of P.W.6 that she



does not talk about even meeting with the wife of the deceased or with the wife of the informant at the time of preparation of the seizure list. It is evident that she had not asked for any statement by the female members of the family when she had gone to the place of occurrence. In such circumstance, this Court is of the opinion that the plea that the prosecution has suppressed the first version of the prosecution case and that would give a blemish to the FIR is liable to be rejected.

28. To this Court, it appears that P.W.3 is the star witness of this case, his presence in the house has not been questioned and he seems to be natural in saying that because of the threat of life, he and his other family members had concealed themselves. He had seen the three accused persons armed with pistol going upstairs in his house and then on the order of Dinesh Prasad, the appellant Rajesh Kumar shot at the deceased, which proved fatal to his life. P.W.3 has withstood the test of cross-examination and this Court does not find any material contradiction in his evidence.

29. Learned counsel for the appellants has relied upon several judgments of the Hon'ble Supreme Court, which we have taken note of, to strengthen his submission that if the material witnesses were not examined, an adverse inference is required to be drawn by the learned court. We have carefully gone through the



judgments of the Hon'ble Supreme Court. It is well settled that if the prosecution has brought some of the material witnesses and has proved its case beyond all reasonable doubt, then no adverse inference may be drawn only for the reason that one of them has not been examined in trial. Therefore, in the facts of this case, we are not impressed with this submission of the learned counsel for the appellants.

30. The ocular evidence of P.W.3 is getting fully corroborated from the medical evidence brought on the record. Dr. Dharam Prakash (P.W.7) has proved the postmortem report of the deceased, which has been marked Exhibit '5'. The doctor has found entry wound on the right side of the forehead 1"×1/2", bleeding from the occipital region of head and the cause of death was due to the said injury caused by firearm. The bullet was extracted and sealed and the same has been produced as a material exhibit in course of trial through P.W.9.

31. We have noticed that in this case, the S.H.O. Dharmendra Kumar (P.W.8) has himself stated that he had not tried to know anything by sending the empty shell and the recovered pellet from the body of the deceased to the FSL. This is indicating that P.W.8 was not taking appropriate steps as required in course of investigation, from his deposition itself, it is evident



that he had gone for inspection of the place of occurrence on the next day of the occurrence. Learned counsel for the defence has tried to take advantage of this lapse on the part of P.W.8, however, we are of the considered opinion that this delay on the part of P.W.8 in inspecting the place of occurrence and then in sending of the FIR would not endure benefit to the accused-appellant. The prosecution has proved its case beyond all reasonable doubts and we find no reason to interfere with the judgment of the learned trial court.

32. Both the appeals are dismissed.

33. Let the trial court’s records along with the copy of the judgment be sent down to the learned trial court.

(Rajeev Ranjan Prasad, J)

(Praveen Kumar, J)

Jyoti/-

AFR/NAFR	
CAV DATE	
Uploading Date	24.02.2026
Transmission Date	24.02.2026

