

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**CRIMINAL APPEAL (DB) No.1192 of 2017**

Arising Out of PS. Case No.-149 Year-2016 Thana- NAUGACHIA District- Bhagalpur

Mukesh Kumar @ Tuntun @ Rajvir @ Tuntun Yadav S/o Veda Nand Yadav,  
resident of Village- Latara @ Latra, P.S.- Gopalpur, District- Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

**CRIMINAL APPEAL (DB) No. 1242 of 2017**

Arising Out of PS. Case No.-149 Year-2016 Thana- NAUGACHIA District- Bhagalpur

Arvind @ Arbind Yadav S/o-Jyotish Yadav R/o-Village-Sadhapur, P.S.-  
Rangra, District-Bhagalpur

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

**CRIMINAL APPEAL (DB) No. 1277 of 2017**

Arising Out of PS. Case No.-149 Year-2016 Thana- NAUGACHIA District- Bhagalpur

Nand Kishor Mandal Son of Upendra Mandal, R/o Vill.- Sadhawa, P.S.-  
Rangra, present Lodipur, P.S.- Kharik, District- Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

**CRIMINAL APPEAL (DB) No. 1328 of 2017**

Arising Out of PS. Case No.-149 Year-2016 Thana- NAUGACHIA District- Bhagalpur

Pintu Singh Son of Prakash Singh, Resident of Village- Mill Tola Naugachia,  
P.S.- Naugachia, District- Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar



... .. Respondent/s

with  
**CRIMINAL APPEAL (DB) No. 1360 of 2017**

Arising Out of PS. Case No.-149 Year-2016 Thana- NAUGACHIA District- Bhagalpur

Dhananjay Kumar Son of Daya Nand Singh, R/o Village- Mill Tola  
Naugachia, P.S.- Naugachia, District- Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with  
**CRIMINAL APPEAL (DB) No. 1416 of 2017**

Arising Out of PS. Case No.-149 Year-2016 Thana- NAUGACHIA District- Bhagalpur

Sachin @ Sachcho Yadav S/o Haro @ Hari Lal Yadav, R/o Village- Rasalpur  
P.S.- Naugachia, District- Bhagalpur.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

|                                            |                                       |
|--------------------------------------------|---------------------------------------|
| <b>Appearance :</b>                        |                                       |
| (In CRIMINAL APPEAL (DB) No. 1192 of 2017) |                                       |
| For the Appellant                          | : Mr. Saket Kumar Singh, Advocate     |
| For the State                              | : Mr. Sujit Kumar Singh, APP          |
| (In CRIMINAL APPEAL (DB) No. 1242 of 2017) |                                       |
| For the Appellant                          | : Mr. Surendra Singh, Senior Advocate |
|                                            | Mr. Rajiv Kumar Singh, Advocate       |
| For the State                              | : Mr. Sujit Kumar Singh, APP          |
| (In CRIMINAL APPEAL (DB) No. 1277 of 2017) |                                       |
| For the Appellant                          | : Mr. Dinesh Choudhary, Advocate      |
| For the State                              | : Mr. Sujit Kumar Singh, APP          |
| (In CRIMINAL APPEAL (DB) No. 1328 of 2017) |                                       |
| For the Appellant                          | : Mr. R.P. Sharma, Advocate           |
|                                            | Mr. Mritunjay Kumar, Advocate         |
| For the State                              | : Mr. Sujit Kumar Singh, APP          |
| (In CRIMINAL APPEAL (DB) No. 1360 of 2017) |                                       |
| For the Appellant                          | : Mr. R.P. Sharma, Advocate           |
|                                            | Mr. Mritunjay Kumar, Advocate         |
| For the State                              | : Mr. Sujit Kumar Singh, APP          |
| (In CRIMINAL APPEAL (DB) No. 1416 of 2017) |                                       |
| For the Appellant                          | : Mr. K.N. Sahay, Advocate            |
| For the State                              | : Mr. Sujit Kumar Singh, APP          |



**CORAM: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI**  
**and**  
**HONOURABLE MR. JUSTICE RAMESH CHAND MALVIYA**  
**ORAL JUDGMENT**  
**(Per: HONOURABLE MR. JUSTICE VIPUL M. PANCHOLI)**

**Date : 21-08-2024**

These appeals are filed under Section 374(2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'the Code') against the judgment of conviction dated 19.08.2017 and order of sentence dated 21.08.2017, passed by learned 1<sup>st</sup> Additional District & Sessions Judge, Naugachia in S.T. No.5/17 (Trial No.815/17), arising out of Naugachia P.S. Case No.149/16 dated 20.08.2016 whereby the court has convicted all the appellants for the offences punishable under Sections 147, 148, 149, 302 and 120(B) of the Indian Penal Code as well as under Section 27 of the Arms Act and they have been sentenced to undergo imprisonment for life and also to pay fine of Rs.25,000/- each for the offences punishable under Sections 302/149 read with Section 120(B) of the Indian Penal Code. The appellants have further been sentenced to undergo R.I. for a period of three years for the offence punishable under Section 148 of the Indian Penal Code. The appellants have again been sentenced to undergo R.I. for a period of five years and also to pay fine of Rs.5000/- for the offence punishable under Section 27 of the Arms Act. In case of default of payment of fine,



awarded as above, the appellants have \been sentenced to undergo Simple Imprisonment for a period of three years which will be in addition to the punishment awarded to them. The sentences have been directed to run concurrently.

2. Learned counsel appearing on behalf of the appellant in Criminal Appeal (DB) No.1277 of 2017, at the outset, submits that appellant, namely, Nand Kishor Mandal has died. Therefore, in view of the aforesaid statement, Criminal Appeal (DB) No.1277 of 2017 stands abated.

3. The factual matrix of the present case is as under:-

3.1 *Fardbeyan* of Sunita Devi came to be recorded on 20.08.2016 at 09:00 hours in Sub-divisional Hospital, Naugachia wherein the informant has stated that on 20.08.2016 at about 07:15 a.m., the informant along with her brothers-in-law, namely, Vinod Yadav and Jai Krishna Kumar as also Vijay Yadav were going towards her *Basa*. It is stated in the *fardbeyan* that Vinod Yadav was walking ahead at about 50-60 ft. As soon as Vinod Yadav reached near the house of Shankar Yadav at 07:30 a.m., suddenly three motorcycles from front side and two motorcycles from back side came there and three persons were riding on each motorcycles. They surrounded Vinod Yadav and



started indiscriminate firing. When the informant and others tried to save him, the accused persons pointed their guns towards them and threatened them not to move any more. The informant claims to have identified the accused persons as Ajit Kumar, Sumit Kumar @ Rupesh Kumar, Rajeev Kumar, Sachin @ Sachcho Yadav, Pintu Singh, Saurabh Kumar Singh, Mankeshwar Singh @ Mantu Singh, Kamando Rai, Chhotu Yadav, Kumodi Yadav, Arvind Yadav and Balkeshwar Singh @ Balo Singh. The informant further stated in her *fardbeyan* that she can also identify the three other accused persons. It is further alleged that the accused persons after surrounding her brother-in-law, namely, Vinod Yadav started firing indiscriminately and killed him at the spot. The informant alleged that the reason behind the occurrence is *Panchayat* election and previous enmity.

3.2 After registration of the formal FIR on the basis of the aforesaid *fardbeyan*, the Investigating Agency started investigation. During course of investigation, the Investigating Officer recorded the statement of the witnesses, collected the documentary evidence and thereafter filed charge-sheet against the appellants.

3.3 The case was exclusively triable by court of



sessions and, therefore, the learned Magistrate committed the same to the concerned sessions court where the same was registered as Sessions Trial No.5/17.

3.4 During course of trial, the prosecution had examined 7 witnesses, namely, PW-1 Prabhat Kumar @ Pappu Yadav, PW-2 Vijay Yadav, PW-3 Prem Sagar @ Dabloo Yadav, PW-4 Jai Krishna Yadav, PW-5 Sunita Devi, PW-6 Sanjay Kumar Sudhansu and PW-7 Dr. Vijay Prakash Rai. Thereafter further statement of the accused under Section 313 of the Code came to be recorded. After conclusion of the trial, the Trial Court convicted the appellants for the aforesaid offences as stated hereinabove.

3.5 Against the judgment of conviction and order of sentence passed by the learned Trial Court, the appellants have filed the instant appeals.

4. Heard Mr. Surendra Singh, learned Senior Counsel assisted by Mr. Rajiv Kumar Singh for the appellant, namely, Arvind @ Arbind Yadav, Mr. Saket Kumar Singh, Mr. Dinesh Choudhary, Mr. R.P. Sharma and Mr. K.N. Sahay, learned counsels for the appellants in analogous appeals as well as Mr. Sujit Kumar Singh, the learned APP for the State.

5. Mr. Surendra Singh, learned Senior Counsel



appearing on behalf of appellant Arvind @ Arbind Yadav would submit that as per the case of the prosecution, there are three eye witnesses to the incident in question, i.e., PW-2, PW-4 and PW-5 (informant). However, all these three witnesses are near relatives of the deceased and though independent witnesses were available, they have not been examined by the prosecution. It is submitted that from the evidence led by the prosecution, it would reveal that driver of the deceased was also present with him at the time of incident and he was an independent witness and would be the best eye witness as he was present with the deceased despite which the prosecution has failed to examine the independent witness. Learned Senior Counsel would thereafter submit that no specific role has been attributed by the so called eye witnesses to any of the accused. General allegations are levelled against all the accused that all the accused, total 15 in numbers, came on motorcycles, surrounded the deceased and made indiscriminate firing. It is further submitted that from the deposition given by doctor (PW-7), it is revealed that seven firearm injuries were found on the dead body of the deceased. Learned Senior Counsel submits that medical evidence does not support the theory put forward by the so called eye witnesses. It is also contended that in fact three



unknown miscreants killed the deceased which was reported in the newspaper and the said newspaper is exhibited. Learned Senior Counsel would further submit that even otherwise there are major contradictions, inconsistencies and discrepancies in the deposition given by the so called eye witnesses and, therefore, the said witnesses are not trustworthy despite which the Trial Court has placed reliance upon the deposition given by them.

5.1. Learned Senior Advocate would thereafter contend that from the deposition given by the Investigating Officer (PW-6) as well as from the seizure list, it is revealed that four empty cartridges of 315 country made pistol were seized from the place of incident. One country made pistol with one cartridge were found near the place of occurrence. However, though the team of FSL visited the place of incident and aforesaid articles were seized, the same were not sent for necessary opinion of the ballistic experts. Further, blood stained soil/earth was also collected from the place of incident however, the FSL report has not been produced before the Court. It is also contended that as per the case of the prosecution, all the accused used fire arms however, none of the weapons has been recovered or discovered at the instance of the accused. Learned



Senior Advocate, therefore, urged that the prosecution has failed to prove the case against the accused beyond reasonable doubt and, therefore, merely because the FIR was promptly registered wherein the names of the appellants are disclosed, it cannot be said that the appellants have committed the alleged offences. It is also pointed out from the deposition of PW-2 that because of the election of the Panchayat, the incident took place. Learned Senior Counsel, therefore, urged that because of the enmity, the appellants-accused have wrongly been implicated in the incident in question. It is also pointed out from the record that number of FIRs. were registered against the deceased Vinod Yadav and, therefore, there are all chances that there are enemies of the deceased who must have killed him.

5.2. Mr. Singh, the learned Senior Counsel has placed reliance upon the following decisions in support of his case:

- (i) AIR 1956 SC 526 (Santa Singh v. State of Punjab)
- (ii) AIR 1971 SC 1891 (Tara Chand v. State of Haryana)
- (iii) AIR 1991 SC 4 (Budhwa v. State of M.P.)
- (iv) AIR 2007 SC 3234 (Dilawar Singh v. State of



Delhi)

(v) AIR 2024 SC 1176 (Ram Singh v. State of U.P.)

(vi) 2024 (3) PLJR 588 (Md. Babar vs. The State of Bihar)

5.3. Learned Senior Counsel lastly submits that while recording the further statement of the appellants-accused under Section 313 of the Code, all the evidence/material were not put to them as a result of which serious prejudice has been caused to the defence.

5.4. Learned Senior Advocate, therefore, urged that the appeal filed by appellant Arvind @ Arbind Yadav be allowed and the impugned judgment of conviction and order of sentence be quashed and set aside.

5.5. Learned Advocates Mr. Saket Kumar Singh, Mr. R.P. Sharma, Mr. Dinesh Choudhary and Mr. K.N. Sahay appearing on behalf of the appellants have also adopted the submissions canvassed by learned Senior Advocate. Mr. Saket Kumar Singh and Mr. R.P. Sharma, learned counsel appearing on behalf of appellants Mukesh Kumar and Dhananjay Kumar have contended that both these appellants-accused are not named in the *fardbeyan*. In the *fardbeyan*, PW-5 (informant) has given names of 12 accused and it was stated by the informant



that three other unknown persons were also present but who had disclosed the names of these two appellants as well as another accused Nand Kishor Mandal is not coming out from the record. None of the prosecution witnesses has deposed that he had identified these three persons and, therefore, their names were disclosed to the Investigating Agency. Learned counsel, therefore, urged that this would be an additional ground qua appellants Mukesh Kumar and Dhananjay Kumar are concerned.

6. On the other hand, the learned APP for the State has vehemently opposed the present appeals. It is submitted that there are three eye witnesses to the incident in question and they have fully supported the case of the prosecution. Thus, merely because said eye witnesses are near relatives of the deceased, their version may not be discarded. It is further submitted that medical evidence also supports the case of the prosecution. In fact, from the medical evidence, it is revealed that the deceased sustained seven fire arm injuries. It is further submitted that merely because there are minor contradictions in the deposition of the prosecution witnesses, benefit of the same may not be given to the appellants accused. It is also contended that in the present case, *fardbeyan* of PW-5/informant was immediately



recorded wherein the informant has given the names of 12 accused. Thus, the defence taken by the appellants that they have falsely been implicated may not be accepted. Learned APP submits that when the prosecution has proved the case against the appellants-accused beyond reasonable doubt, the Trial Court has not committed any error while passing the impugned judgment of conviction and order of sentence. He, therefore, urged that all these appeals be dismissed.

7. We have considered the submissions canvassed by learned counsel appearing for the parties, we have also perused the materials placed on record, the evidence led by the prosecution and the defence before the Trial Court. From the materials placed on record, it transpires that the prosecution has examined seven witnesses.

8. PW-1, Prabhat Kumar @ Pappu Yadav has deposed in his examination-in-chief that occurrence took place on 20.08.2016 at 07:30 a.m. He and Dablu @ Prem Sagar Yadav sat on the *Basa* of Vinod Yadav. They heard the sound of firing. Thereafter they ran towards village Rasalpur. As soon as they reached on PCC road, they saw five motorcycles coming from west to east and three persons sat on each motorcycles. This witness further stated in his examination-in-chief he identified



Mantu Singh @ Mankeshar Singh, Arvind Yadav, Kumodi Yadav, Pintu Singh, Chhotu Yadav, Rupesh Yadav, Ajit Yadav, Rajiv Yadav, Sachin @ Sachche Yadav, Kamando Singh and Nand Kishore Mandal. The persons who were not driving the motorcycles had *Daviya* in their hands. They were shouting that they killed Vinod Yadav. This witness further deposed that when he reached near Vinod Yadav, he saw blood oozing out from his body and Vinod Yadav also sustained bullet injuries. Vinod Yadav died at the place of occurrence.

8.1. During cross-examination, the said witness has stated that he reached at the *Basa* of Vinod Yadav at 07:00-07:15 hours. The *Basa* of Vinod Yadav was situated 1 k.m. away from his house. When he reached at the *Basa*, Dablu Yadav and Pankaj were present there. He heard the sound of firing after 10-15 minutes. The place where firing took place was situated 200 feet away from the *Basa* of Vinod Yadav. He went towards Rasalpur after hearing the sound of firing. When this witness reached at the place of incident, he saw the accused on five motorcycles. This witness further stated in his cross-examination that he did not see anybody shooting with his own eyes. He claims to have identified the persons who were driving motorcycles. His statement was recorded by the police near the



dead body on the same day at 11:30 hours.

9. PW-2, Vijay Yadav has deposed in his examination-in-chief that the occurrence took place on 20.08.2016 at about 07:30 a.m. and he was present at the place of incident. He saw that three motorcycles from front side and two motorcycles from back side came and three persons were sitting on each motorcycles. The accused persons started indiscriminate firing and killed his brother Vinod Yadav. Thereafter the accused persons fled away towards Rasalpur Dhaka saying that they killed Vinod Yadav. This witness claims to have identified accused Ajit Yadav, Sumit Yadav @ Rupesh Yadav, Rajiv Yadav, Sachcho @ Sachin Yadav, Saurabh Singh, Pintu Singh, Mantu Pramukh @ Mankeshwar Singh, Balo Singh, Kamando Rai, Kumodi Yadav, Arvind Yadav, Purushottam Yadav @ Chhotu and three others. This witness further deposed in his examination-in-chief that the reason for the occurrence is *Panchayat* election.

9.1. During cross-examination, this witness has stated that his house is situated 400 feet away from the place of incident and Rasalpur village is situated at a distance of 100 feet. He was with Sunita Devi 50 feet behind Vinod Yadav in the western side. Vinod Yadav sustained seven gunshot injuries.



This witness stated at para-11 that he heard 13-14 round of firing. Four bullets were recovered from the place of occurrence. He read in newspaper that firing took place in the election of Pramukh for which Gopalpur P.S. Case No.142/16 was lodged and Vinod Yadav was main accused in that case.

10. PW-3, Prem Sagar @ Dabloo Yadav has deposed in his examination-in-chief that occurrence took place on 20.08.2016 at about 07:30 a.m. He went to the *Basa* of Vinod Yadav with Pappu Yadav at that time. At about 07:30, he heard the sound of firing and ran towards PCC road. As soon as they reached on the PCC road, they saw five motorcycles and three persons sat on each motorcycles. The accused were saying that they have killed Vinod Yadav. The motorcycles were going towards railway cabin in the east direction. Chhotu Yadav, Kamando Singh and Ajit Yadav were sitting on the first motorcycle, Arvind Yadav, Kumodi Yadav and Sachcho Yadav were sitting on the second motorcycle, Mankeshwar Singh, Balo Singh and Saurabh Singh were sitting on the third motorcycle, Rajiv Kumar, Rupesh Kumar and one unknown person were sitting on the fourth and Pintu Singh, Nand Kishor Mandal and one unknown person were sitting on the fifth motorcycle.

10.1. During cross-examination, PW-3 stated that



he reached at the Basa of Vinod Yadav at 07:15 hours. He did not see anybody shooting with his own eyes. This witness further stated in his cross-examination that 25-30 rounds of firing took place. He could not say that whose bullet hit whom. He knows Arvind, Rajvir, Pintu Singh and Dhananjay from before. There was house where Vinod Babu fell down. Due to election of Pramukh of Rangra, case was lodged against Vinod Babu. He cannot say that who lodged the case. His statement was recorded by the police on the same day at 11:30 hours at the place of incident. The statement of Sunita Devi was recorded in the hospital at 09:00 a.m.

11. PW-4, Jai Krishna Yadav has recognized his signature on the *fardbeyan* (Ext.1) and deposed that the occurrence took place on 20.08.2016 at about 07:30 a.m. At that time, he, Sunita Devi and Vijay Yadav were going towards the *Basa*. When they reached near the house of Shankar Yadav, suddenly three motorcycles from front side and two motorcycles from back side came. Three persons were sitting on each motorcycles carrying arms in their hands and they started shooting his brother. He tried to save his brother. Some accused persons chided them not to move, otherwise they will be shot. They stopped at a distance of 50-60 *Gaj*. He recognized Ajit



Yadav, Rupesh Yadav @ Sunita Yadav, Rajiv Yadav, Sachcho @ Sachin Yadav, Pintu Singh, Saurabh Kumar Singh, Mantu Singh, Balkeshwar Singh, Kamando Rai, Arvind Yadav, Kumodi Yadav and Chhotu Yadav amongst the accused persons.

11.1. The said witness stated at para-5 of his cross-examination about the news printed in the newspapers with regard to murder of Vinod Yadav. It has written in the newspaper that three unknown persons killed Vinod Yadav due to land dispute and the driver of Vinod Yadav was with him at that time. He married his elder sister-in-law Sunita Devi. His wife was also alive. Pramod Yadav was the husband of Sunita Devi. It is further stated by this witness in his cross-examination that when Vinod Babu was walking, his driver was with him and they were 50-60 *Gaj* behind. He saw seven gunshot injuries on the body of the deceased. The police seized T-shirt and pant and he did not put his signature on the seizure list. Puso Singh, Shankar Yadav and the driver are not witnesses in this case. When he reached near Vinod Yadav, Pappu Yadav and Dabloo Yadav were present there. This witness has stated in para-15 of his cross-examination that he heard the sound of 15-20 rounds of firing and the sounds of firing were different. In para-16, this witness has stated that the police recorded his statement in the



hospital at 09:30 hours. In para-18, this witness has stated that it is not true that his brother had land dispute and he was murdered by unknown persons. It is also wrong to say that none of them have seen the murder taking place.

12. PW-5, Sunita Devi is the informant of the case and she has deposed in her examination-in-chief that the occurrence took place on 20.08.2016 at 07:30 a.m. At that time, she alongwith her brothers-in-law, Vinod, Jai Krishna and Vijay Yadav were going. When Vinod Yadav reached near the house of Shankar Yadav, three motorcycles from front side and two motorcycles from back side came and the accused persons started firing indiscriminately due to which the deceased sustained gunshot injuries. They also ran but the accused threatened them to stop otherwise they would also be shot. When the accused persons fled away, they went near Vinod Yadav and brought him to hospital. She claims to have identified Ajit Kumar, Sumit Kumar, Rajiv Kumar, Sachiv Yadav, Mankeshwar Singh, Balkeshwar Singh, Kamando Singh, Pintu Singh, Saurabh Singh, Chhotu Yadav, Kumodi Yadav and Arvind Yadav amongst the accused. She gave her statement to the police and put her signature on the *fardbeyan* (Ext.1/2).

12.1. During cross-examination the said witness



stated in para-4 that her husband Pramod Yadav was also murdered. This incident did not occur on the place where Pramod Yadav was murdered. It is further stated that she was not married Vinod Yadav. She could not remember the colour and number of the motorcycles. When she reached near the dead body of Vinod Yadav, Vijay and Dabloo @ Prem Sagar were present there. The police did not come there. She heard sound of 15-20 rounds of firing and the sound of each firing was different. The deceased sustained 7-8 gunshot injuries. She did not see any bullet where Vinod Babu died. Blood fell on the road near the house of Shankar Yadav. She saw that police did not bring blood from the place of incident. This witness further stated in her cross-examination that she could not say about the contents of the *fardbeyan* on which she has put her signature. Except herself, no other woman of her family went to the hospital.

13. PW-6, Sanjay Kumar Sudhanshu is the Investigating Officer of this case and he has deposed in his examination-in-chief that on 20.08.2016, he was posted as S.H.O. in Naugachia police station. He took charge of investigation of Naugachia P.S. Case No.149/16. Before taking charge of investigation, he recorded the *fardbeyan* of Sunita



Devi in Naugachia hospital. He prepared a seizure list at the place of incident mentioning the seized articles. After taking charge of investigation, he recorded re-statement of the informant and thereafter he recorded the statement of Vijay Yadav and Jai Krishna. He found blood at the place of incident. He also found four empty cartridges at the place of occurrence. He also recovered a country made pistol from a bush. He recorded the statement of Prem Sagar @ Dabloo Yadav and Prabhat Kumar Yadav after inspecting the place of occurrence. At that very time, team of FSL, Bhagwanpur also came at the spot and inspected the place of occurrence. Thereafter he recorded the statement of Bipin Yadav, Santosh Kumar Yadav, Indradeo Yadav and Dr. Kailash Sharma and all have supported the case of the prosecution. Thereafter this witness conducted raid and arrested Nand Kishore Mandal. He also recovered a motorcycle on the disclosure made by Nand Kishore Mandal. It is further stated by this witness in his examination-in-chief that he arrested accused Sachcho Yadav and Dhananjay Kumar and motorcycle was also recovered from them. Both the accused confessed their guilt. The FSL has submitted its report which he mentioned in the case diary. Thereafter he arrested Mukesh Yadav @ Rajvir and also recovered a motorcycle from the house



of accused Chhotu Yadav. He also arrested accused Arvind Yadav. After finding the case true, he submitted charge-sheet against Sachcho @ Sachin, Nand Kishore Mandal, Dhananjay Kumar, Pintu Singh, Arvind Yadav and Mukesh Yadav.

13.1. PW-6, the Investigating Officer has stated in his cross-examination that house of Shankar Yadav and Manijar Yadav are situated near the place of occurrence. He had not recorded the statement of Shankar Yadav and Anijar Yadav in the case diary. He recorded the statement of Prem Sagar, Prabhat Kumar and Pappu. During investigation, he had not inquired about the relation between Prem Sagar and Pappu Yadav with the deceased. According to formal FIR, occurrence took place on 07:30 hours. He received information about the incident in the police station on 20.08.2016 at 10:30 hours. He started investigation at 09:00 hours. FIR was lodged at 10:30 hours. This witness has further stated in his cross-examination that he did not send the recovered *Katta* (country made pistol) and cartridge to FSL. He has written in para-166 that cases of murder and other serious offences are against Vinod Yadav. He has also written that Vinod Yadav is called the don of Naugachia. It is also stated that in the entire case diary, he had not recorded the statement of wife and children of Vinod Yadav.



Before murder, election of Pramukh was held in which wife of Arvind Yadav, namely, Shila Devi lodged a case against Vinod Yadav and his supporters.

14. PW-7, Dr. Vijay Prakash Rai is the doctor who has stated in his cross-examination that on 20.08.2016, he was posted as M.O. and In-charge Deputy Superintendent of Sub-divisional Hospital, Naugachia. On that day, he conducted postmortem on the dead body of Vinod Yadav and found following ante-mortem injuries:

“I. Lacerated Wound with inverted chared margin just antierour of right ear 1/2”x1/2”xcommunicating.

II. Lacerated Wound with inverted margin 1-1.5” x1” communicating on left side of face. Wound no. I is wound of entry and wound no. II is wound of exit.

III. Lacerated Wound with inverted margin chared margin 3/4”x1/2”xcommunicating on right side of face lateral right eye-wound of entry.

IV. Lacerated Wound with inverted margin on posterior and lower part of scalp 1.5”x1.5”xcommunicating-wound of exit.

V. Lacerated Wound with inverted chared margin on cheek 1/2”x1/2”xcommunicating -wound of entry.



VI. LW with everted margin in to nect interiorly  
2.5"x2"- wound of exit.

VII. LW with inverted charred margin on left eye  
3/4"x1/2"x- wound of entry.

VIII. LW with everted margin on posterior and left  
side of scalp with foreign body metallic in nature lodged in the  
wound- wound of entry.

IX. LW with inverted margin 3/4"x3/4"x  
communicating on posterior part of right Arm- wound of entry.

X. LW with everted margin on medial part of right  
arm anteriorly communicating 1.5"x1/2" wound of exit.

XI. LW with everted margin on chest anteriorly  
1/2"x1/2"xcommunicating- wound of entry.

XII. LW with everted margin on right side of back  
below scapular region 1.5"x1.5"xcommunicating- wound.

XIII. LW with inverted margin right side of  
abdomen 1/2"x1/2" communicating- wound of entry

XIV. LW with everted margin on back  
1"x1"xcommunicating- wound of exit.

On Dissection of above injuries clotted blood  
found underneath the tissues, cranial cavity full of dark blood.  
Brain is lacerated fracture of occipital bone and fracture of



opthalmic part of frontal bone. Fracture of mandible and fracture of right temporal and maxillary bone. Laceration of trachea laceration of right lung, thoracic cavity full of dark coloured blood, laceration of right kidney and part of large gut abdominal cavity filled with dark coloured blood. Metallic substance like bullet lodged in wound No.8 and other metallic substance like bullet is recovered under the clot which was shield in container and duly signed by me and handed over to police. All the injuries (illigible) No.1-2, 3-4, 5-6, 7-8, 9-10, 11-12, 13-14 are communicating to each other.

Cause of death- Haemorrhage and shock due to above injuries caused by Fire arm.

Time within 6 hours.”

15. We have re-appreciated the evidence led by the prosecution before the Trial Court. We have also considered the submissions canvassed by learned counsel appearing for the parties. From the evidence led by the prosecution, it would emerge that PW-5/informant gave her *fardbeyan* in the hospital before PW-6, the concerned police inspector. The said *fardbeyan* was recorded at 09:00 a.m. for the incident which took place at 07:00 a.m. In the said *fardbeyan*, the informant disclosed the names of 12 assailants and also mentioned that



three other unknown persons were also present on the motorcycle. It has been specifically alleged that all the accused started indiscriminate firing and in the said incident, the deceased Vinod Yadav sustained bullet injuries. The informant has specifically stated in the *fardbeyan* that the said incident was seen by the villagers and passers by. As per the case of the prosecution, there are three eye witnesses to the incident in question, i.e., PW-2, PW-4 and PW-5. It is further revealed from the record that PW-4 Jai Krishna Yadav specifically admitted in paragraph-8 of his cross-examination that at the time when the deceased Vinod Babu was walking, his driver was present and the said witness and the other persons were at the distance of 50-60 *Gaj*. It is relevant to note that the driver who was with the deceased did not sustain any injury in the incident in question. Even his statement was not recorded by the police nor he was examined by the prosecution. It is also relevant to note that the incident took place near the house of Shankar Yadav, the prosecution has also failed to examine the said independent witness. Further, none of the independent witnesses who have seen the incident have been examined by the prosecution. Further, from the deposition given by PW-6, the Investigating Officer, it transpires that he had recorded the statement of



witness Bipin Yadav, Santosh Kumar Yadav, Indradeo Yadav and Dr. kailash Sharma. However, the prosecution has failed to examine the aforesaid witnesses.

16. From the evidence led by the prosecution, it would reveal that the team of FSL, Bhagwanpur was called at the place of occurrence and the said team has collected certain materials. It is further revealed that four empty cartridges with 315 country made pistol were seized from the place of incident and one 315 country made pistol with one cartridge were seized from a bush situated near the place of incident. Even the blood stained soil/earth was also collected, however, the Investigating Officer has admitted that the fire arm and the empty cartridges which were seized from the place were not sent for necessary analysis to FSL for ballistic opinion. It is also not in dispute that there is no recovery or discovery of fire arm from the present appellants.

17. From the deposition given by so called eye witnesses, i.e., PW-2, PW-4 and PW-5, it transpires that all the accused came at the place of incident on five different motorcycles and all the accused started firing from the fire arms which they were carrying and there was an indiscriminate firing which took place at the place of incident in which the deceased



sustained injuries and died. However, as observed hereinabove, admittedly the driver of deceased Vinod Yadav was present along with him despite which he had not sustained any injury in the said indiscriminate firing. Further, except four empty cartridges and the one country made 315 pistol having one cartridge were found from the place, there is nothing on record to suggest that any other empty cartridge or bullet or pellet was found from the place. Thus, as per the case of the prosecution, all the 15 accused came on five different motorcycles with fire arms and none of the witnesses has stated that any of the accused got down from the motorcycle and shot at the deceased from a close range.

17.1. Thus, keeping in view the aforesaid aspects, the deposition given by PW-7, the doctor is to be examined. It is revealed that the deceased sustained seven fire arms injuries. The doctor has pointed out 14 injuries in the postmortem, i.e., 7 wounds of entry and other are wounds of exit. From the injuries sustained by the deceased, from the deposition of the doctor, it can be said that the injuries sustained by the deceased on his chest and abdomen have been caused by fire arm and the bullet was fired from some distance whereas most of the injuries sustained by the deceased can be caused when the fire arm was



used from a close range. Thus, we are of the view that medical evidence does not support the version given by the so called eye witnesses.

18. It is true that merely because eye witnesses are near relatives or interested witnesses, their deposition cannot be discarded only on that ground. However, as observed hereinabove, their version is required to be scrutinized closely. In the present case, as discussed hereinabove, though driver, who was an independent witness, was present with the deceased, he has not been examined by the prosecution. Further, admittedly other villagers and the neighbours were present at the place despite which they have not been examined by the prosecution. Thus, it can be said that the prosecution suppressed material witnesses for the reasons best known to it. Thus, in the facts of the present case, corroboration of other evidence is required. In the present case, as observed hereinabove, medical evidence does not support the version of the so called eye witnesses and, therefore, simply relying upon the deposition given by the so called eye witnesses, who are near relatives and interested witnesses, conviction cannot be recorded.

19. At this stage, we would like to refer the decisions upon which reliance has been placed by learned



counsel for the appellants. In the case of Santa Singh (supra), the Hon'ble Supreme Court has observed in paragraphs-4, 5, 6 and 11 as under:

“4. There are, however, some features in this case which make it unsafe in our opinion to uphold the conclusion of guilt.

5. The circular wound of entry at the back of the deceased,  $\frac{1}{4}$ ” in diameter, had burnt inverted margins according to the doctor who conducted the postmortem examination. The ballistic expert, Dr Goyle, examined as PW 11, said that if there were burnt edges of the wound, the distance between the muzzle and the victim would only be a few inches and not more than nine inches. This opinion is in substantial accord with what is found in some of the text books on medical jurisprudence. For instance, it is stated in *Taylor's Principles and Practice of Medical Jurisprudence*, Vol. I, 10th Edn., at p. 441, under the heading “Burning of the Wound” — “It is impossible to state rules as to the precise distance from which it is possible to produce marks of burning, for this depends on the quantity and nature of the powder, the method of charging, and the nature of the weapon. It is unusual, however, to get marks of burning beyond a yard or a yard and a half with a shot gun, or at more than half a yard with a revolver.”

6. There are two plans in the case, one called the site plan prepared by the Sub-Inspector of Police PW 20 and another prepared by the draftsman, PW 10 on 14th September. All the three eyewitnesses say that they pointed out to the Head Constable and the Sub-Inspector the places where the accused was standing when he fired the rifle and where the deceased was standing when he was shot; but when it comes to the draftsman it is only Uttam Singh (PW 16) and Khem Singh (PW 18) who state that they showed



the two places to him. The draftsman's evidence is that all the three pointed out to him the two places and that the marginal notes which he appended to the plan were correct. The distance between the two places is shown as 25 feet. Even if we rule out under Section 162 of the Cr PC as inadmissible what the witnesses told the Head Constable and the Sub-Inspector, there is no such bar to the evidence given by the draftsman. If the draftsman is asked to prepare a sketch map of the place of the occurrence, and if after ascertaining from the witnesses where exactly the assailant and the victim stood at the time of the commission of the offence and the draftsman measures the distance between the two places thus shown to him and puts it down on the plan, and further, if the witnesses corroborate his statement that they showed him the places, it is somewhat difficult to see how this is not legal evidence and why it is inadmissible. The decisions cited by Mr Bindra for the State are distinguishable.

**11.** According to the medical evidence, therefore, the shot was fired from very close range about 9 inches to a yard and a half but according to what was shown to the draftsman by the eyewitnesses, the rifle was fired from a range of about 25 feet. In the judgment of the High Court this difficulty is sought to be surmounted by the observation that it might not be safe to act on the pointing out of the places four days after the occurrence; but this attempt is not of much avail as they were not giving an estimate of the distance but showed to the draftsman the particular spots where the appellant and the deceased stood at the time of firing.”

**20.** In the case of Tara Chand (supra), the Hon’ble Supreme Court has observed in paragraph-11 as under:

“**11.** We are not impressed with the view of the High Court that a great deal of importance should be



attached in the present case to the promptness with which the first information was lodged. Suresh Chander was an Advocate and Patram was his clerk. They could certainly have quickly thought out what version to give. It is true that the importance of a first information report made promptly cannot be minimised. The object of Section 154 Criminal Procedure Code is to obtain early information of alleged criminal activity, to record the circumstances before there is time for them to be embellished or forgotten. But as we shall presently indicate, we are not satisfied that the version given by the prosecution as well as by the defence is correct with regard to the origin of the incident and the manner in which the occurrence took place.”

21. In the case of Budhwa (supra), the Hon’ble Supreme Court has observed in paragraphs-4 and 5 as under:

“4. We have considered these arguments in the light of the material evidence analysed and discussed by the courts below. We find that the conviction of the appellants is principally based on the evidence of PW 1 and PW 5, the mother and sister of the deceased. Though their evidence is not to be discarded as interested, the necessary caution has to be observed in accepting the evidence of these witnesses. It is an accepted proposition that in the case of group rivalries and enmities, there is a general tendency to rope in as many persons as possible as having participated in the assault. “The courts have, therefore, to be very careful and if after a close scrutiny of the evidence, the reasonable doubt arises with regard to the participation of any of those who have been roped in, the court would be obliged to give the benefit of doubt to them”, vide *Baldeo Singh v. State of Bihar* [(1972) 4 SCC (N) 19 : AIR 1972 SC 464]. This Court has in several decisions pointed out that “where there is enmity between the two factions then there is a tendency on the part of the aggrieved victim to give an



exaggerated version and to rope in even innocent members of the opposite faction in a criminal case and that therefore the court has in all such cases to sift the evidence with care and convict only those persons against whom the prosecution witnesses can be safely relied upon without raising any element of doubt”, vide *Raghubir Singh v. State of U.P.* [(1972) 3 SCC 79 : 1972 SCC (Cri) 399 : AIR 1971 SC 2156] On a perusal of the judgment of the High Court, we find that the necessary caution had not been observed in the approach to the evidence.

5. The occurrence happened on a narrow track. The deceased Hanuwa was going ahead of his mother and his sister was still behind. The witnesses noticed the assailants only when they approached the deceased. The evidence is not clear that the assailants were seen by Baiyanbai or Birjhabai hiding behind the bushes and emerging from the hiding place. The witnesses stated that the accused persons surrounded the victim and each one of them assaulted him with the weapon they had. PW 1 stated that some of the assailants had given more than one blow and Parsadi assaulted her when she tried to intervene. If a group of more than 15 persons encircled the victim and simultaneously attacked him with tabbals and lathis without any resistance or any intervention, there would have been certainly corresponding injuries of the concerted attack on the person of the victim. We have referred to the medical evidence which shows that besides the two incised wounds on the scalp which proved fatal Hanuwa had only five minor injuries on his person. PWs 1 and 5 did not state who caused the head injuries. They have not attempted to attribute any one of the injuries to any particular assailant. The evidence is in general terms. Even in the first information report, PW 1 only stated that the persons named therein attacked Hanuwa with tabbals and lathis and caused his death. In a melee where several people are giving blows



at one and the same time it will be impossible to particularize the blows. If any witness attempts to do it, his veracity is doubtful. But it cannot be forgotten that it is simpler to make an omnibus statement that all the accused assaulted with their weapons because that obviates close cross-examination. Therefore, the nature of the injuries sustained by the victim assumes importance. The nature of the injury sustained in spite of the assertion of the concerted attack with lathis and tabbals by several assailants numbering over 15 renders the evidence doubtful about the participation of such a large number of persons. When the several blows with lathis and tabbals could produce only seven injuries on the person of the deceased, Hanuwa, the necessary inference is that not more than seven persons might have participated in delivering the blows. Therefore, the presence of more than seven persons is doubtful. This aspect of the case has not been given due weight by the High Court while appreciating the evidence in the case.”

22. In the case of Dilawar Singh (supra), the Hon’ble Supreme Court has observed in paragraph-8 as under:

“8. The effect of not adducing material to show that in fact the grievance was made before the police and the FIR was not recorded has been considered by this Court in several cases. Section 304 CrPC mandates that when the accused is not represented, the court has to appoint a counsel so that the accused does not go undefended. In criminal trial one of the cardinal principles for the court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in



either coming before the police or before the court, the courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case. In *Thulia Kali v. State of Tamil Nadu* (AIR 1973 SC 501, it was held that the delay in lodging the first information report quite often results in embellishment as a result of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation. In *Ram Jag and others v. The State of U.P.* (AIR 1974 SC 606) the position was explained that whether the delay is so long as to throw a cloud of suspicion on the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay can be condoned if the witnesses have no motive for implicating the accused and/or when plausible explanation is offered for the same. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness or authenticity of the version of the prosecution.”

23. In the case of Ram Singh (supra), the Hon’ble Supreme Court has observed in paragraphs-19, 21, 22, 23, 24 and 25 as under:

“19. Interestingly, neither Desh Raj, brother of PW 1 and son of the deceased, who was very much present at the place and time of occurrence was examined by the police nor the other brother Sunder Lal, the scribe, who had written the first information, was examined by the police. Omission to examine Desh Raj by the prosecution is most crucial as according to the prosecution version he was very much present when the incident occurred. We may also



mention that the behaviour of Sunder Lal is also very unusual. He did not accompany PW 1 to the police station. There is also no evidence that he had rushed to the place of occurrence where his mother was killed. An adverse inference will have to be drawn against the prosecution for not examining material witnesses. Be that as it may, it was only PW 1 and PW 2 who had stated that Ram Singh had fired from a country-made pistol at PW 1 but the bullet had hit mother of PW 1, who died of the bullet wound. On the other hand, PW 3 categorically stated that he did not see accused Ram Singh carrying any country-made pistol. Further, it has come on record that there was previous enmity between PW 1 and the accused relating to election of village Pradhan because of which there were cross-cases between them.

**21.** At this stage, what is noticeable is that the weapon of offence i.e. the country-made pistol used by the accused in the offence, could not be recovered by the police and therefore not exhibited. Thus, the main material evidence i.e. the weapon of offence was not exhibited. In the seizure memo, it was mentioned that a 12 bore cartridge was lying on the cot and along with the tikli of the cartridge which was stuck on the wound of the deceased, were seized by the police. On the other hand, in the evidence of the doctor, PW 6, as well as from the post-mortem report, it has come on record that 55 small pellets were taken out from the body of the deceased during post-mortem. The bullet wound was bone-deep which clearly reveals that the deceased was shot at from close range. In his evidence, PW 4 Sub-Inspector B.D. Verma deposed that during preparation of the inquest report, one tikli and 12 pellets were seized from the wound of the deceased. The pellets as well as the tikli of the cartridge were not sent to any ballistic expert, as a result of which there is no ballistic report on the basis of which it could be said for sure that the pellets found



outside the body and from within the body could be traceable to the tikli of the 12 bore cartridge which in turn could be traced to the country-made pistol from which the shot was allegedly fired by the appellant. There is no explanation of the prosecution regarding the 55 pellets retrieved from the body of the deceased during post-mortem; whether those could be linked to the 12 bore cartridge and the tikli. Importantly, the country-made pistol was never recovered. The prosecution has not said anything in this regard. That apart, as per the version of PW 4, the bloodstained clothes of the deceased which were seized were sent to the chemical examiner but the report from the chemical examiner was not received till the date and time of his deposition.

**22.** From the above, it is evident that there are glaring inconsistencies in the prosecution version which have been magnified by the absence of the testimony of the material witnesses and the ballistic report coupled with the non-recovery of the weapon of crime.

***Case law***

**23.** In *Munna Lal v. State of U.P.*, (2023) SCC Online SC 80 : (2023 CriLJ 1726 (SC)), this Court opined that since no weapon of offence was seized in that case, no ballistic report was called for and obtained. This Court took the view that failure to seize the weapon of offence on the facts and in the circumstances of the case, had the effect of denting the prosecution story so much so that the same together with non-examination of material witnesses constituted a vital circumstance amongst others for granting the appellants the benefit of doubt.

**24.** On the aspect of non-examination of ballistic expert and its impact on the prosecution case, one of the earliest decisions of this Court was rendered in *Gurucharan Singh v. State of Punjab*, AIR 1963 SC 340. This Court observed that there is no inflexible rule that in



every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused by a gun and those *prima facie* appeared to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. However, in what cases the examination of a ballistic expert is essential for the proof of the prosecution case must naturally depend upon the circumstances of each case. This Court held as under:

41. ... These observations do not purport to lay down an inflexible rule that in every case where an accused person is charged with murder caused by a lethal weapon, the prosecution case can succeed in proving the charge only if an expert is examined. It is possible to imagine cases where the direct evidence is of such an unimpeachable character and the nature of the injuries disclosed by post-mortem notes is so clearly consistent with the direct evidence that the examination of a ballistic expert may not be regarded as essential. Where the direct evidence is not satisfactory or disinterested or where the injuries are alleged to have been caused with a gun and they *prima facie* appear to have been inflicted by a rifle, undoubtedly the apparent inconsistency can be cured or the oral evidence can be corroborated by leading the evidence of a ballistic expert. In what cases the



examination of a ballistic expert is essential for the proof of the prosecution case, must naturally depend upon the circumstances of each case.....

25. This issue was again examined by this Court in Sukhwant Singh v. State of Punjab, (1995) 3 SCC 367 : (AIR 1995 SC 1601). In that case, this Court observed that though the police had recovered an empty cartridge from the spot and a pistol along with some cartridges were seized from the possession of the appellant at the time of his arrest, yet the prosecution did not send the recovered empty cartridges and the seized pistol to the ballistic expert for examination and expert opinion. This Court was of the view that if such opinion would have been called for, comparison could have been made which in turn could have provided link evidence between the crime and the accused. It was noted that this again was an omission on the part of the prosecution for which no explanation was furnished. It was thereafter that this Court declared as follows:

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

24. In the case of Md. Babar (supra), this Court has observed in paragraphs-25, 26 and 27 as under:

“25. At this stage, we would like to refer the decision rendered by the Hon’ble Supreme Court in the case of **Sujit Biswas Vs. State of Assam**, reported in **AIR 2013 SC 3817**, wherein it has been stated in **Para-12** as under:-



“12. It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 CrPC, is to meet the requirement of the principles of natural justice i.e. audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. The circumstances which are not put to the accused in his examination under Section 313 CrPC, cannot be used against him and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.”

26. We would also like to refer the decision rendered by the Hon'ble Supreme Court in the case of **Naresh Kumar Vs. State of Delhi**, reported in **2024 SCC OnLine SC 1641**, wherein it has been stated in **Para-21, 22 & 23** as under:-

“21. We have already held that whether non-questioning or inadequate questioning on incriminating circumstances to an accused by itself would not vitiate the trial qua the accused concerned and to hold the trial qua him is vitiated it is to be established further that it resulted in material prejudice to the accused. True that the onus to establish the prejudice or miscarriage on account of non-questioning or inadequate questioning on any incriminating circumstance(s), during the examination under Section 313,



Cr. P.C., is on the convict concerned. We say so, because if an accused is ultimately acquitted, he could not have a case that he was prejudiced or miscarriage of justice had occurred owing to such non-questioning or inadequate questioning.

22. In the light of the above view of the matter, we are inclined to consider the further question whether the non-questioning on the aforesaid twin incriminating circumstances to the appellant during his examination under Section 313, Cr. P.C., had caused material prejudice to him. The decision of this Court in State of Punjab v. Swaran Singh, constrain us to consider one another factor while considering the question of prejudice. In Swaran Singh's case (supra), this Court held that where the evidence of the witnesses is recorded in the presence of the accused who had the opportunity to cross examine them but did not cross examine them in respect of facts deposed, then, omission to put question to the accused regarding the evidence of such witnesses would not cause prejudice to such an accused and, therefore, could not be held as grounds vitiating the trial qua the convict concerned. We have already found that Anil Kumar (PW-7), Smt. Prem Devi (PW-8), Mrs. Madhu (PW-19) and Anand Kumar (PW-22) have deposed about the said circumstances. A scanning of their oral testimonies, available on record, would undoubtedly reveal that on both the points, on behalf of the appellants they were cross examined.

23. The position, as above, would take us to the last question whether material prejudice was caused to the appellant on account of non-questioning him on the aforesaid incriminating circumstances and thereby depriving him an opportunity to explain. This question can better be considered by referring to paragraph 31 of the judgment of the Trial Court, which virtually got confirmance from the High Court under the impugned



judgment. It reads thus:—

“31. As far the part played by accused Naresh is concerned, this has come in the evidence of PWs that he (Naresh) is the man, who called his brother Mahinder and exhorted “Mahender came out and kill them today” and thereafter his taking part in the incident, by catching hold of deceased Arun Kumar, clearly goes to show the common’ intention of the two, i.e. Naresh and Mahinder and even the Learned Defence Counsel, cannot be benefited from the above noted authorities.”

27. We have also examined the statement of the accused recorded under Section 313 of the Code. From the said statement, it would reveal that all the incriminating materials/circumstances against the appellant were not put to him and it is a specific case of the appellant/accused that, because of the same, great prejudice has been caused to him. Now, it is well settled that recording of the statement of the accused under Section 313 of the Code is not mere formality and if the prejudice has been caused to the defence by not putting all the incriminating material to him, on this ground also, case of the convict can be considered.”

25. We have gone through the aforesaid decisions rendered by the Hon’ble Supreme Court. We have also examined the evidence led by the prosecution, as discussed hereinabove. Keeping in view the aforesaid principles led down by the Hon’ble Supreme Court in the aforesaid cases, if the facts of the present case or if the evidence in the present case, as discussed hereinabove, are examined, we are of the view that the prosecution has failed to prove the case against the



appellants-accused beyond reasonable doubt and, therefore, merely because FIR was promptly filed, it cannot be said that version given in the said FIR is correct version. Even medical evidence does not support the version of the so called eye witnesses. Only relatives and interested witnesses have been examined and the driver, who was present with the deceased, has not been examined by the prosecution. The deposition given by the so called eye-witnesses who are near relatives is not trustworthy and there are improvement, inconsistencies and contradictions in their deposition.

26. Thus, in the aforesaid facts and circumstances of the present case, the appeals stand allowed. The impugned judgment of conviction dated 19.08.2017 and the order of sentence dated 21.08.2017 passed by learned 1<sup>st</sup> Additional District & Sessions Judge, Naugachia in connection with S.T. No.5/17 (Trial No.815/17), arising out of Naugachia P.S. Case No. 149/16 dated 20.08.2016 are quashed and set aside. The appellants, named above, are acquitted of the charges levelled against them by the learned trial court.

26.1. Since appellants, namely, Mukesh Kumar @ Tuntun @ Rajvir @ Tuntun Yadav and Dhananjay Kumar of Cr. Appeal (DB) No. 1192 of 2017 and Cr. Appeal (DB) No. 1360



of 2017 respectively are on bail, they are discharged from the liabilities of their respective bail bonds.

26.2. Since appellants, namely, Arvind @ Arbind Yadav, Pintu Singh and Sachin @ Sachcho Yadav of Cr. Appeal (DB) No.1242 of 2017, Cr. Appeal (DB) No.1328 of 2017 and Cr. Appeal (DB) No.1416 of 2017 respectively are in jail, they are directed to be released from custody forthwith, if their presence is not required in any other case.

**(Vipul M. Pancholi, J.)**

**(Ramesh Chand Malviya, J.)**

Sanjay/-

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