[2023] 11 S.C.R. 403 : 2023 INSC 738

CASE DETAILS

HARENDRA RAI

v.

THE STATE OF BIHAR & ORS.

(Criminal Appeal No. 1726 of 2015)

AUGUST 18, 2023*

[SANJAY KISHAN KAUL, ABHAY S. OKA AND VIKRAM NATH, JJ.]

HEADNOTES

Issues for consideration: In a double murder case, wherein it was alleged that accused no.1-respondent no.2 had opened fire from his rifle resulting in injury to three persons, out of which two died, and the trial court had acquitted accused-respondent nos. 2 to 8 of all the charges, which was confirmed by the High Court in criminal revision, the issues before this Court were:

(i) Whether the Supreme Court, in appeal against acquittal, could consider the High Court's judgment dated 13.03.2007 passed in a Habeas Corpus Writ Petition (filed pursuant to abduction of CW1, mother of one of the deceased, ten days before the date fixed for recording her statement), which was not part of the evidence produced (although it was part of the Trial Court record) and was not relied upon by the prosecution before the Trial Court, as a piece of incriminating evidence in the nature of a Public Document and, if yes, up to what extent.

(ii) Whether the previous or subsequent conduct of the accused, established on record, can be treated as a circumstance against the accused in view of Section 8 of the Evidence Act.

(iii) Whether the FIR or *Bayan Tahriri* can be said to be proved as a piece of reliable prosecution evidence and if so, what would be the position of law on the issue of treating the FIR or Bayan Tahriri as the Dying Declaration.

(iv) Whether the testimony of CW1 (an old feeble, rustic, illiterate lady and mother of the deceased and an eyewitness of the incident), who

* Ed.Note: Subsequent judgment reported in [2023] 11 SCR 583 may also be referred to.

stated in the end of her cross-examination that "her son (another alive son) had asked her to take the name of accused before the Court," can be treated to be a reliable evidence against such accused, especially in view of the checkered and abnormal history of the case.

Evidence Act, 1872 – s.56 – Doctrine of judicial notice – Judicial Notice of fact in criminal matters – Maxim *"res judicata pro veritate accipitur".*

Administration of Criminal Justice – Failure of three main stakeholders in a criminal trial – Undesirable favour to accused – Path different from the normal adopted to determine guilt of the accused.

Held: Doctrine of judicial notice, as provided u/s.56 of the Evidence Act, is an exception to general rules of evidence applicable for proving any fact by adducing evidence in the Court of law. Except in the rarest of rare cases, judicial notice of any fact is generally not taken in criminal matters in the normal course of proceeding. The present matter falls in the category of rarest of rare cases. Certain inferences, observations and findings arrived at by the Division Bench of High Court in judgment dated 13.03.2007 in the Habeas Corpus Petition, have a crucial impact on the merit of the present case, as it gives a complete picture as to how the prosecution version in the present case was being demolished brick by brick by using political authority and muscle power with the aid of not only the police administration but also with the aid of Public Prosecutor and, the Presiding Officer of the Trial Court also conducted himself in a manner unbecoming of a Judicial Officer, despite directions and continuous vigil by the High Court. The judgment dated 13.03.2007, which is a public document, is well discussed and is based upon authoritative materials and was passed in consonance with the doctrine of *audi alteram partem*. Moreover, it has a torch bearer effect over the facts of the case. Accordingly, judicial notice taken by the Supreme Court of the inferences, observations and findings arrived at by the Division Bench and the directions issued in its judgment dated 13.03.2007 to the extent of the subsequent conduct of the accused, deplorable functioning of the Public Prosecutor, Police Administration and the Presiding Officer of the Trial Court to extend undesirable favour to the accused. [Paras 66, 67 and 68]

Evidence Act, 1872 – s.8 – Subsequent conduct of accused – Adverse inference – Maxim *"qui sentit commodom, sentire debit et onus.":*

Held: In the case in hand, a double murder case, the conduct of accused-respondent no.2 was not only relevant u/s.8 of the Evidence Act but also one of the major circumstances to arrive at a conclusion about his guilt. Respondent No.2 was instrumental in making all possible efforts to wipe out the evidence against him. The tainted investigation shows the highhandedness of the Respondent no.2, who was a powerful person, being a sitting M.P. of the Ruling Party. The question is why the accused was instrumental, when he was not guilty of the offence to which he was being tried. The obvious answer would be that his guilty mind was fearful about the result. [Paras 70, 72, 73 and 114]

Evidence Act, 1872 – s.74 – *Bayan Tahriri* / Written Statement of deceased – Evidentiary value:

Held: FIR is a public document defined u/s.74 of the Evidence Act. Any public document does not stand proven by the mere fact of its production. At the stage of exhibiting any document as a piece of evidence, the truth of what is stated in the document is not considered. It is left open to final evaluation at the trial after cross-examination, and the entire testimony of the witness about the existence and contents of the document is weighed in conjunction with various other factors emerging during a trial. The marking of a piece of evidence as 'exhibit' at the stage of evidence in a trial proceeding is only for the purpose of identification of evidence adduced in the trial and for the convenience of the Court and other stakeholders in order to get a clear picture of what is being produced as evidence in a trial proceeding. In the present case, considering the failure of State machinery and failure of the Trial Court to ensure a fair trial from the perspective of the victim side, the aspect of non-marking of the FIR and *Bayan Tahriri* as an exhibit, non-production of the formal witnesses, i.e., the Constable Clerk and Investigating Officer to prove the lodging of FIR/*Bayan Tahriri* and flimsy rejection of application filed by a person seeking his examination as a witness along with examination of two persons (who had signed said written statement/*Bayan Tahriri* as attesting persons) as witnesses in the Trial proceeding do not vitiate the genuineness of the FIR and *Bayan Tahriri,* and no discount can be given to the accused persons for non-exhibition thereof. [Paras 82, 83, 85, 87 and 89]

Evidence Act, 1872 – s.32 – Treatment of FIR /*Bayan Tahriri* as dying declaration:

Held: Statement by an injured person recorded as FIR can be treated as a dying declaration and such a statement is admissible u/s.32 of the Evidence Act. On facts, the deceased gave his statement in the form of *Bayan Tahriri* and narrated the entire incident and circumstances of the transaction which resulted in his death. Subsequently, he died on account of injuries suffered by him in the incident in question. FIR lodged on the basis of *Bayan Tahrir* of the injured is liable to be treated as a dying declaration, which itself is a substantive piece of evidence and is admissible u/s.32(1) of the Evidence Act. [Paras 91 and 95]

Evidence – Ocular evidence – Testimony of deceased's mother, an eyewitness, who was abducted by the accused side just before her examination in the trial court.

Held: The High Court ought to have considered the checkered history of events that occurred in the case, resulting in the judgment of the Division Bench of the High Court in the Habeas Corpus Petition containing serious observations about the conduct of all the stakeholders of the said criminal trial. CW-1's first examination was scrapped by the High Court on the allegation of her kidnapping just a few days before that first examination dated 03.11.2006. She was under continuous threat and fear of facing dire consequence, which is apparent on the face of the record. Under these circumstances, in case she had stated in the end of her cross-examination that her son had asked her to take the name of the accused before the Trial Court, there is nothing so contradictory or surprising so as to treat the rest of the substantive ocular evidence as tutored one. There is no serious discrepancy or variation in the testimony of CW-1 with regard to the sequence of events that occurred during the incident in question. When the entire family of CW-1 was facing so many storms, it is quite natural for a son to say to her mother (who was old, illiterate, rustic woman having faced immense trauma) that she should not forget to disclose the name of accused persons, in as much as the second occasion of her examination, as ordered by the Division Bench of High Court under Section 311 of CrPC, was the last opportunity for her to speak the truth before the Trial Court. There is nothing unusual in the statement of CW-1. Her statement is found to be reliable, and the Courts below wrongly discarded it on the ground that it was hearsay and tutored. [Paras 101, 102, 103, 104 and 114]

Code of Criminal Procedure, 1973 – s.311 – Power under – Scope:

Held: s.311 CrPC confers wide powers on any court at any stage of any inquiry, trial or other proceeding under this Code to summon material witness or examine person present. Such person may not be a person summoned as a witness. Power to recall and re-examine is also vested. The concept is that it should be essential for the just decision of the case. This power can be exercised not only by the Trial Court but also by the appellate Court or revisional Court. The logic behind this provision is that the endeavour of the Courts is to find out the truth which would be essential for the just decision of the case. [Para 112]

Penal Code, 1860 – ss.302 and 307 – Double murder – Due to injuries caused by fire arm – Appeal against acquittal.

Held: On facts, the post-mortem reports, show that the deaths were homicidal in nature. The medico legal reports supported the prosecution's story to the extent that the injuries were caused by a fire arm, which proved fatal for two out of the three injured. *Fard Bayan* registered on oral statement given by one of the injured (who died subsequently), which was later converted into an FIR, was admissible in evidence and is to be read as a dying declaration or his last statement. The prosecution had established, even through the hostile witnesses, that the date, time, and place of incidence as given in the *Fard Bayan* were fully established. Adverse inference against the accused is drawn in view of their subsequent conduct. Judicial notice is taken of judgment in the Habeas Corpus petition dated 13.07.2007 regarding the conduct of the accused, the investigating agency, the Public Prosecutor and the Presiding Officer conducting the trial. Statement of CW-1 is found to be reliable, and the Courts below wrongly discarded it on the ground that it was hearsay and tutored. The dying declaration and the statement of CW-1 fully establish that it was Respondent No.2 (accused no.1), who had caused the injuries from his firearm weapon, which proved to be fatal for two out of the three injured and also caused injury to the third surviving injured. Respondent no.2 thus liable to be convicted under ss.302 and 307 IPC. The rest of the accused, although named in the chargesheet after due investigation, since their names were not reflected either in the *Fard Bayan* of the deceased (dying declaration) or in the statement of CW1, therefore, their acquittal is not disturbed. [Para 114]

LIST OF CITATIONS AND OTHER REFERENCES

Arbada Devi Gupta v. Birendra Kumar Jaiswal and Anr. (2003) 8 SCC 745 : [2003] 5 Suppl. SCR 90; *Ram Bihari Yadav v. State of Bihar & Ors* (1998) 4 SCC 517 : [1998] 2 SCR 109 and *Balu Sudam Khalde and Another v. State of Maharashtra* 2023 SCC OnLine SC 355 – relied on.

Channappa Andanappa Siddareddy and others v. State 1980 Crl LJ 1022; *Jayantibhai Lalubhai Patel v. State of Gujrat* 1992 CRl LJ 2377; *Shyam Lal v. State of U.P. and Ors* 1998 Crl LJ 2879; *Court on its Own Motion through Mr. Ajay Chaudhary v. State* 2011 CrlLJ 1347 and *Narendra Rajput v. State of Chhattisgarh through Secretary, Department of Home Affairs (Police) and Others* 2019 SCC Online Chh 16 – approved.

Harendra Rai v. State of Bihar and Others [Decision dated 13-03-2007 of Patna High Court in Cr.WJC No. 717 of 2006] – referred to.

State of Kerala v. Unni (2007) 2 SCC 365 : [2006] 9 Suppl. SCR 931; *Prabhakara v. Basavaraj K.* (2022) 1 SCC 115; *Ved Mitter Gill v. UT, Chandigarh* (2015) 8 SCC 86 : [2015] 5 SCR 73; *Joseph M Puthussery v. T.S. Jhon and others* (2011) 1 SCC 503 : [2010] 14 SCR 427; *Anant Chintaman Lagu v. State of Bombay* AIR 1960 SC 500 : [1960] 2 SCR 460; *Munnu Raja and another v. State of M.P.* (1976) 3 SCC 104 : [1976] 2 SCR 764; *Suresh Chandra Jana v. State of West Bengal and Ors.* (2017) 16 SCC 466 : [2017] 13 SCR 1; *State of Haryana and Ors. v. Ch. Bhajan Lal and Ors* AIR 1992 SC 604 : [1990] 3 Suppl. SCR 259 and *Zahira Habibulla H. Sheikh v. State of Gujarat* (2004) 4 SCC 158 : [2004] 3 SCR 1050 – referred to.

197th Law Commission of India Report on Public Prosecutors' Appointments (2006) and 154th Law Commission of India Report – referred to.

OTHER CASE DETAILS INCLUDING IMPUGNED ORDER AND APPEARANCES

CRIMINAL APPELLATE JURISDICTION: Criminal Appeal No. 1726 of 2015.

From the Judgment and Order dated 02.12.2011 of the High Court of Judicature at Patna in CRRP No. 1345 of 2009.

Appearances:

Abhay Kumar, Rajat Khattry, Shagun Ruhil, Ms. Neetu Jain, Advs. for the Appellant.

R. Basant, Sr. Adv., Neeraj Shekhar, Sunny Choudhary, Manoj Kumar, Devashish Bharuka, Ms. Sarvshree, Ms. Nishi Kashyap, Advs. for the Respondents.

JUDGMENT / ORDER OF THE SUPREME COURT

JUDGMENT

VIKRAM NATH, J.

1. Everything was going as per the plan and wish of the main accused Prabhunath Singh, a political leader and a sitting Member of Parliament at the relevant time as he had mustered full support of the Administration and the Investigating Agency; he had influenced and won over almost all the witnesses of fact mentioned in the chargesheet (who were declared hostile), the relevant formal witnesses including the Investigating Officer were not produced in the trial by the prosecution, the Public Prosecutor prosecuting the case was supporting the defence, the Presiding Officers were completely insensitive towards their pious duty, but everything turned upside down when he committed a glaring mistake and that one mistake cost him heavily. He got the court witness, Smt. Lalmuni Devi, mother of deceased Rajendra Rai abducted ten days before the date fixed for recording her statement. This led to filing of a Habeas Corpus Petition before the High Court, a report submitted by the Inspecting Judge as a result of an unruly incident which occurred in the Trial Court on the date Smt. Lalmuni Devi-CW-1 deposed before the Trial Court and another report of the Inspecting Judge commenting upon the judgment of acquittal by the Trial Court. All these aspects would be dealt in detail at a later stage.

2. This appeal assails the correctness of the judgment and order dated 02.12.2021 passed by learned Single Judge of the Patna High Court in Criminal Revision Petition No. 1345 of 2009, whereby the said Revision Petition was dismissed confirming the judgment of the Additional Sessions Judge, Fast Track Court-III, Patna dated 24.10.2008 passed in Sessions Trial Nos. 469 of 2007 and 470 of 2007, acquitting Respondent Nos. 2 to 8 of all the charges.

3. FIR was registered on 25.03.1995 at the Police Station Masrakh (Panapur) District Saran at Chapra, Bihar as Case No. 62 of 1995 under Sections 147, 148, 149/307 of Indian Penal Code, 1860[1] and Section 27 of the Arms Act. Later on, Section 302 IPC was added as two out of three injured died during treatment. The said FIR was registered based on the statement of one of the injured Rajendra Rai at about 10AM, who subsequently succumbed to injuries. The statement was recorded at the corridor of Camp Rajkiya Hospital, Panapur by Sub-Inspector N.N. Thakur of Police Station, Panapur in the presence of two other injured namely Daroga Rai and Smt. Devi and also before two other persons namely Narendar Singh and Sanjeev Kumar Singh who had signed as witnesses in the FIR.

4. The prosecution version, as recorded in the FIR in the statement of Rajendra Rai, narrated that the informant along with eight-nine other persons of his village was returning after casting their vote in the election on 25.03.1995 at around 9AM; when they reached south east of his residence, five persons came in a car armed with rifles and guns and stopped the car; Prabhunath Singh (accused no.1), who was the contesting candidate for Bihar People's Party (BPP), while sitting in the car enquired as to whom all of them had cast their votes; the informant answered that they had cast their votes in favour of Janta Dal Party having symbol of Chakrachap; on hearing this, the car moved towards south and stopped at a little distance; Prabhunath Singh (accused no.1) opened fire from his rifle pointing towards the informant and others and thereafter the car sped away. As a result of the firing, three persons got injured.

5. On the basis of the FIR, investigation was taken up. Inspection was made of the spot of occurrence. Three used cartridges were recovered from the place of occurrence, they were sealed and a recovery memo was prepared. The Investigating Officer recorded the statement of the witnesses. The injured were provided medical treatment, the doctor prepared the injury report and after two of the injured expired, the post-mortem reports of the two deceased persons were also prepared. Daroga Rai died soon after the incident and his post-mortem was conducted on 26.03.1995. Rajendra Rai died after about five months on 21.08.1995 and his post-mortem was conducted on 22.08.1995.

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1 In short, "IPC"

6. Prabhunath Singh (accused no.1) was avoiding the arrest, nor was he surrendering as he was the member of the ruling party. The District Magistrate, considering the amount of influence being yielded by the accused, found that it was not feasible to conduct the cases in District Saran at Chapra and hence recommended the transfer of all the six cases to Hazaribagh. In all these cases Prabhunath Singh was an accused. The transfer was approved by the High Court. However, later in the year 2000, upon re-organization of the State of Bihar, as Hazaribagh fell in the State of Jharkhand, the present trial was transferred to District Bhagalpur in Bihar.

7. It was only after 11 years that charges could be framed by the Trial Court on 26.03.2006 against all the accused for offences under various Sections of IPC as stated above. The prosecution examined 11 witnesses. It would be relevant to note that out of these 11 witnesses, PW-1 to PW-7 were examined on a single day i.e. 27.06.2006. The statement of all these seven witnesses were more or less similar to the effect that they saw the incident of firing but did not see who killed the two deceased. All seven witnesses were declared hostile by the Prosecution. PW-8 to PW-10 (three witnesses) were examined on 10.08.2006.

8. In the meantime, on an application under Section 311 of the Code of Criminal Procedure, 1973[2], the Trial Court, *vide* order dated 23.10.2006,summoned Lalmuni Devi (CW-1), mother of deceased (Rajendra Rai) as court witnessand03.11.2006 was fixed for recording her statement. On 24.10.2006, Lalmuni Devi (CW-1) and her husband were abducted from their residence by none other than the brother of Prabhunath Singh (accused no.1) and his associates. The appellant (son of CW-1) made a complaint to the local police and when no action was taken, he approached the Superintendent of Police of District Saran and also the Director General of Police and the State Home Secretary which also went unattended. This resulted into filing a petition seeking a writ of Habeas Corpus before the Patna High Court.

9. The said Habeas Corpus Petition was registered as Cr.WJC No. 717 of 2006, **Harendra Rai** Versus **State of Biharand Others**.

10. The said Habeas Corpus Petition was decided by the Division Bench of the Patna High Court vide the detailed judgment dated 13.03.2007.

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2 CrPC

The Division Bench issued certain directions with respect to the trial in question. The said judgement would be dealt with in detail at a later stage.

11. Pursuant to the direction issued vide judgment dated 13.03.2007, the trial proceeded but again in a most shabby manner, not even complying with the directions of the High Court. The Special Public Prosecutor for the State, instead of getting the witnesses examined before the Court, filed affidavits on their behalf reiterating their earlier statements. Only two witnesses were re-examined namely PW-1 and PW-10. With respect to PW-2, PW-4 to PW-7, affidavits were filed stating that they had nothing further to add and they reiterated their deposition given earlier. Shrimati Lalmuni Devi (CW-1) was again examined and cross-examined on 29.09.2008 where she fully supported the prosecution story. Prosecution evidence was closed on 29.09.2008. The Trial Court, vide judgment dated 24.10.2008, acquitted all the accused in both the Sessions Trials bearing no. 469 of 2007 and 470 of 2007. There was no challenge to the judgment of acquittal by the State.

12. During the trial, on the date of the statement of CW-1 i.e. 03.11.2006, there was some altercation in the Trial Court where the lawyers and pairokar of the accused, assaulted the family members of CW-1 inside the Courtroom. This was reported in the newspapers inviting attention of the Inspecting Judge. The Inspecting Judge set up an inquiry in which he collected evidence and recorded statements. Based upon the same, he gave a detailed report dated 21.02.2007 criticizing the conduct of the Presiding Officer of the Trial Court. The judgement in the Habeas Corpus petition incorporates the findings of the Inspecting Judge in the report dated 21.02.2007. Relevant extract from the judgment in the Habeas Corpus petition is reproduced hereunder:

> "On coming to learn, through some newspaper report about the fracas created in the Court of 7th Additional Sessions Judge, Bhagalpur while the court proceedings were going on, Mr. Justice C.K. Prasad, Inspecting Judge of the judgeship called for reports and ordered an enquiry in the matter. After a thorough and painstaking enquiry, he gave a report, dated 21.2.2007. In the beginning of the report, he noted the circumstances in which the trial arising from Masrakh (Panapur) P.S. Case No.62 of 1996, that should normally have taken place at Chapra, was first transferred to Hazaribagh and when as a result of the bifurcation of the State Hazaribagh fell in Jharkhand, it was brought

to Bhagalpur. After taking into account the reports submitted by the District and Session Judge, the 7th Additional Sessions Judge, the Public Prosecutor, statements of witnesses and the report of Dr. D.N. Gautam to whom he entrusted the enquiry, the Hon'ble Judge, in his report, found and held as follows.

> "I do not have the slightest hesitation in endorsing the reports of the District and Sessions Judge, Bhagalpur as also the Additional Director General of Police that the witness Lalmuni Devi was not produced under proper security. She was frightened and under heavy stress prior to her examination. She was intimidated inside the Court room prior to her examination. She was not normal and the Court atmosphere was highly tensed and abnormal. The materials on record led him to conclude that evidence of Lalmuni Devi cannot be said to have been voluntarily made.
>
> I am of the considered opinion that had the Presiding Officer of the Court exercised little discretion, this untoward incident ought not have taken place. The Presiding Officer of the Court having found that the witness was not looking normal and, in fact, looking frightened and having not been produced under proper security, he ought to have taken these facts seriously and prevented deflecting the Court of Justice.
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> The direction of this Court to record evidence cannot be construed to mean that the Court was obliged to record her statement despite the fact that she was produced without proper security. I am of the opinion that the Presiding Officer of the Court had also failed miserably in the matter."

13. The proceedings of the Habeas Corpus petition also need to be appropriately referred to. After the incident of abduction of Lalmuni Devi (CW-1) on 24.10.2006, the Habeas Corpus petition was filed on 31.10.2006 and was taken up by the Court on 01.11.2006. On the said date, it was adjourned on the request made by the Advocate General. On 02.11.2006, the Advocate General stated before the Court that, on receiving report of abduction of Lalmuni Devi and Rama Rai, investigation was started and in the night itself Rama Rai appeared before the Officer In-Charge and the Sub Divisional Police Officer. He stated that, apprehending some threats from different quarters, he and his wife had gone underground for self-protection.

Rama Rai said that he had come forward on his own to speak the truth about going into hiding on their own accord on account of certain rumors that were spread. Rama Rai, however, refused to disclose the whereabouts of his wife Lalmuni Devi. The Advocate General assured the Court that Lalmuni Devi would be given full protection not only for appearing before the Court but also otherwise so that she may not be harmed by anyone. On the above statement of the Advocate General, the Division Bench of the Patna High Court hearing the Habeas Corpus Petition directed for the production of Rama Rai to record his statement. The next date fixed was 08.11.2006 for production of Rama Rai. It was further provided by the Division Bench that in the meantime if Lalmuni Devi appears before the Trial Court on 03.11.2006, the Court may proceed with the case but if she failed to appear on the said date, the prosecution case should not be closed till further orders by the Court.

14. On 08.11.2006, it was reported that the statement of Lalmuni Devi was recorded on the date fixed i.e. 03.11.2006. Thereafter she was taken from Bhagalpur to Chapra from where she had been abducted and her statement was recorded under Section 164 CrPC before the Magistrate at Chapra. In the said statement, she stated that she was not abducted by anyone. The said statement was filed before the High Court along with the counter affidavits. On the above submissions, the Advocate General stated that the petition had become infructuous.

15. The Division Bench was further informed that on 03.11.2006, the deposition of Lalmuni Devi was not normal and smooth. Her appearance had led to a clash between two groups of people although the said incident was not reported by the Trial Judge. However, it had attracted the attention of the Inspecting Judge, Bhagalpur through newspaper reports and based on the same he called for reports and directed for enquiry. The final report dated 21.02.2007 given by the Inspecting Judge has already been referred to above.

16. On behalf of the writ petitioner before the High Court, it was submitted that their parents were not made free and they were still under the clutches and remote control of the accused. The Division Bench, therefore, did not close the proceedings of the case and adjourned the matter awaiting the result of the enquiry by Justice C.K. Prasad, as he was the Inspecting Judge.

17. The Division Bench further records that in the meantime two complaints were filed regarding the abduction of Lalmuni Devi and her husband; one was filed by their daughter in law Girija Devi at Panapur Police Station registered as Case No. 81 of 2006 and the other was lodged at Masrakh Police Station Dist. Saran registered as Case No.129 of 2006 at the instance of one Shankar Rai. Later on Shankar Rai retracted and had filed a written note stating that he had filed the complaint under some misunderstanding. The said Shankar Rai was one of the persons from the side of the abductees accompanying Lalmuni Devi at the time of her appearance before the Trial Court on 03.11.2006. The Division Bench directed that both these complaints be thoroughly investigated and the reports of investigation be submitted under the signature of the Deputy Inspector General of Police, Saran range.

18. On 17.11.2006, Lalmuni Devi appeared before the Division Bench and filed an affidavit duly sworn in by her. In the said affidavit, it was stated that she and her husband Rama Rai were abducted by the men of Prabhunath Singh and were under their complete control all along. She appeared before the Court and gave oral statement before the Division Bench. The Court has recorded that she was an old and rustic village woman and seemed to be under stress and looked quite vulnerable. She spoke only Bhojpuri in which one of the members of the Division Bench Justice S.P. Singh was fluent. She stated before the Court that she and her husband were in fact abducted by the men of Prabhunath Singh. They had used force against her and had threatened her. Both her statements before the Trial Court on 03.11.2006 and her statement under Section 164 CrPC were not free and voluntary but under duress and intimidation.

19. At this stage also the Advocate General reiterated that nothing further survives in the matter with regard to the abduction. However, the Division Bench declined to close the proceedings noting that it was evident that lurking behind the surface, were much larger and far better issues than the alleged abduction of two old villagers. The Registrar General of the High Court was given direction for making arrangements of stay of Lalmuni Devi at the Judges' Guest House at Patna so that she was isolated from any influence and that her statement was to be recorded at the Guest House on 20.11.2006 by a Magistrate. The conduct of the Police was also noticed by the Division Bench that they were not willing to see the reality and

continued to work under the influence of Prabhunath Singh. The Division Bench directed the Additional Director General of Police Dr. D.N. Gautam to supervise the proceedings.

20. On 20.11.2006, the statement of Lalmuni Devi was recorded in writing as also a video cassette by the Magistrate was prepared of the same and submitted in a sealed cover. The Advocated General on 05.12.2006 submitted the interim report by Dr. Gautam. He had severely criticized the supervision report and described it as one of the shallowest of the shallow pieces of investigation. It was then that the Court directed the investigation of two cases would be made under the overall charge of Dr. Gautam.

21. On 24.01.2007, the Advocate General submitted the report by Dr. Gautam. In the meantime, report of the Inspecting Judge dated 21.02.2007 was also received by the Division Bench. The orders passed on 08.11.2006, 17.11.2006 and 05.12.2006 were challenged before this Court by way of Special Leave Petition (Criminal) Nos. 187, 377 and 378 of 2007 respectively. All the SLPs were dismissed by some observations by a common order dated 15.01.2007.

22. The Division Bench had three materials before it namely affidavit of Lalmuni Devi, her statement recorded by the Magistrate on 20.11.2006, the reports of Dr. Gautam, Additional Director General of Police dated 30.11.2006, 16.12.2006 and 22.01.2007 and the enquiry report by Justice C.K. Prasad, the Inspecting Judge, Bhagalpur dated 21.02.2007.

23. The Division Bench proceeded to record in detail the version of Lalmuni Devi as to how she had been abducted along with her husband by Dina Nath Singh (brother of Prabhunath Singh) and Chotelal, MLA from Parsa. She had stated in detail as to what all places they had been taken to and how they were ill-treated. She also described that Prabhunath Singh, his security guard, the Mukhiya and Shankar told her to change her statement and if she would not do the same, then Prabhunath Singh would kill her other son (Harendra Rai) as well. She also described how she was taken to Court room where the incident took place in which the men of Prabhunath Singh assaulted her son, daughter-in-law and son-in-law who wanted to take her with them. The Judge was sitting in Court and in his presence her family members were assaulted but the Judge said nothing. She was also threatened that she would also be killed. She was again taken by Prabhunath Singh and his men from the Court on 03.11.2006. She also stated that she had not

given any statement on 03.11.2006 and only her thumb impressions were taken as she was frightened and afraid that she might lose her other son, daughter-in-law and son-in-law who were being continuously assaulted. It was after three-four days that she reached her home. She also narrated in her statement in the enquiry report about the working of Prabhunath Singh and that he was again preparing to get her abducted. The honest and true version of Lalmuni Devi has been recorded above. In the report submitted by the Additional Director General of Police, he had condemned the report of D.I.G., Saran range, Chapra. He had concluded the report by observing that the investigation of the two cases was quite casual and the supervision and control of the investigation was also pitiable. He had also recorded the statements of Lalmuni Devi and Rama Rai which was again reproduced in the order and the same is not being repeated as it is more or less the same as recorded above. Dr. Gautam in his report also commented that the sequence of events started only after the application under Section 311 CrPC was allowed and Lalmuni Devi was called as a court witness on 03.11.2006.

24. Further, according to the report of Dr. Gautam, after abduction of Lalmuni Devi, her son and daughter-in-law represented not only to the officer-in-charge, Panapur Police Station but also to the Superintendent of Police, the Director General of Police and the Home Secretary at Patna. The Director General of Police forwarded the petition given by the son and daughter-in-law to the Superintendent of Police, Chapra by fax for taking necessary action on 25.10.2006. The same was communicated and received in the office of Superintendent of Police, Chapra on the same day but it remained unattended till 02.11.2006. It was only after the petition was instituted on 31.10.2006 that formal notice was taken of the said petition by the Superintendent of Police. The report further notices that from 24.10.2006 till 03.12.2006, the son of Lalmuni Devi had been running from pillar to post between Chapra, Patna and Bhagalpur but no public authority paid any heedto his complaints. Dr. Gautam stated that he had tried to put the investigation of the two cases back on the right track and also pointed out the glaring omissions and deficiencies in the investigation. He had also observed in his report that the cases instituted against the witnesses and the attitude of the Police was another cause of grave concern. He also made a request to the Court to be spared from being involved in the matter any further as he had no machinery of his own by which he could conduct an independent and impartial investigation.

25. The Division Bench further proceeds to record the findings of the Inspecting Judge given in his report dated 21.02.2007, which we have already reproduced in the earlier part of this order.

26. The Division Bench further records the finding that the above facts and circumstances and the evidence placed on record clearly establish the connection between abduction of Lalmuni Devi at Chapra and the murder trial taking place before the Bhagalpur Court. Lalmuni Devi had been abducted to prevent her from deposing freely in the trial relating to the murder of her son. The abductors of the Lalmuni Devi succeeded in their design to make sure that she was not allowed to make a free deposition before the Bhagalpur Court. The finding of the Division Bench is extracted from the order and reproduced hereunder: -

> "…The reports of Dr. D.N. Gautam and the statement of Lalmuni Devi clearly establish the connection between her abduction at Chapra and the murder trial taking place before the Bhagalpur Court. It is evident that Lalmuni Devi was abducted to prevent her from deposing freely in the trial relating to the murder of her son. Her statement made in the Court and recorded by the Magistrate at the Judges' Guest House, Patna and the report of Justice C.K. Prasad, the Inspecting Judge of Bhagalpur Judgeship further make it clear that the abductors of Lalmuni Devi succeeded in their design and she was not allowed to make a free deposition in the Bhagalpur Court."

27. Despite the above material which had come on record, the senior counsel appearing for Prabhunath Singh before the High Court continued to oppose any directions to be issued by the Division Bench. He reverted to the old theme that the petition had been rendered infructuous and the Court was needlessly proceeding further in the matter. The submission was that both the reliefs claimed in the petition namely, recovery of Lalmuni Devi and the other for getting a case registered and investigation carried out regarding her abduction stood already granted and the proceedings may be brought to an end. He also objected to the Court's previous orders calling for reports from Dr. D.N. Gautam, Addl. Director General of Police. He also made an effort to argue that the report was based upon material which was in the nature of hearsay evidence and as such on its basis the Court may not hold that deposition of Lalmuni Devi before the Trial Court on 03.11.2006 was not free and voluntary.

28. The Division Bench rejected the submissions of Mr. Vindhya Kesari Kumar, learned senior counsel appearing for Prabhunath Singh as being without any substance or merit. The Division Bench further proceeded to record the finding that the deposition of Lalmuni Devi on 03.11.2006 before the Trial Court was not voluntary but was made under duress and intimidation while she was under the control of the accused. Following is the relevant extract from the said judgment:

> "…Every criminal trial, specifically a trial relating to a double murder is supposed to be held fairly and impartially. The present trial was not held at Chapra, in departure from the normal, but was transferred to Hazaribagh and then to Bhagalpur in order to ensure that it should be held fairly. But the materials before the court leave no room for doubt that the proceedings of the trial were violently interfered with and the trial's sanctity has been badly abused. In light of the materials before it, the court has no hesitation in finding that the deposition of Lalmuni Devi on 03.11.2006 in Sessions Trial No.19 of 2003 before the 7th ADDL. Sessions Judge, Bhagalpur was not voluntary. It was made under duress and intimidation while she was fully under control of the accused. What this court finds indescribably regrettable is that the subversion of the trial was made possible only with the abetment, by acts of omission and commission, of those who were primarily responsible to ensure that it should be held independently, fairly and impartially. The unholy drama that took place in the Trial Court was not possible without the inaction and connivance of the Chapra Police, the active help and co-operation by the P.P. conducting the trial and the defence lawyer appearing for the accused. The saddest part in the entire episode is that the Presiding Judge turned a Nelson's eye to what was happening in the Court room. He not only remained a silent spectator in the Court room but did not even report the matter to this Court. When an enquiry was directed there was an apparent attempt to cover up by all concerned..."

29. Towards the end, the Division Bench recorded that the Advocate General by the said time, having perused the material which was placed, became fully alive to the seriousness of the matter. He gave up his earlier stand which was similar to the stand of the counsel for the accused Prabhunath Singh that the petition had been rendered infructuous and

further proceeded to give some useful suggestions. It would be worthwhile to reproduce the stand of the Advocate General, as recorded by the Division Bench, which reads as follows:

> "…Here, I am pleased to note that the Advocate General was fully alive to the gravity of the matter. He completely gave up his earlier stand that with the appearance of Lalmuni Devi, the writ petition had become infructuous and gave some useful suggestions to the Court. The Advocate General submitted that though there was an apparent connection between the abduction of Lalmuni Devi at Chapra and the trial taking place at Bhagalpur, the two matters were required to be dealt with separately as one was still at the stage of police investigation while the other was a trial before a Court. With regard to the abduction case at Chapra, he stated that the Government is willing to accept investigation by any mode and by any agency as may be directed by the Court. With regard to the trial at Chapra, he submitted that the Government was willing to change the P.P. and to appoint a Special P.P. to conduct the trial in his place. He also submitted that prima facie the statement made by Lalmuni Devi before the Trial Court on 03.11.2006 was not free and voluntary and hence, she was required to be re-examined. He also said that there was need to change the Presiding Judge by transferring the case to another Court.…"

30. Here an apt Latin Maxim which means he who acts through another, acts himself, may be quoted **"qui facit per alium facit per se".**

31. Insofar as the investigation regarding the incident of abduction is concerned, the Division Bench, although noticed that the same was deplorable at that time but as it was still at the stage of investigation, the Advocate General assured that it would be done in a fair and impartial manner and also expeditiously. Directions were also issued that the report of Dr. Gautam along with the copy of the judgment, be sent to the Director General of Police and the Home Secretary, Bihar to take curative measures in the matter without any loss of time. The last part of the judgment contains the directions issued by the Division Bench with respect to the murder trial which was pending at Bhagalpur. The Division Bench found the suggestions given by the Advocate General positive and fully acceptable. Apart from transferring the trial out of Bhagalpur, the Court also issued a couple of other directions. The said directions are reproduced hereunder:

"…In light of the discussions made above, it becomes necessary to give the following directions with regard to Sessions Trial No.19 of 2003 arising from Masrakh (Panapur) Police Station Case No.62 of 1995.

i. The proceedings of Sessions Trial no.19 of 2003 pending before the 7th Additional Sessions Judge, Bhagalpur is directed to be transferred to Patna. The records of the case should be transmitted forthwith to the Sessions Judge, Patna who should either keep the case in his own court or assign it to some Additional Sessions Judge or a Fast Track Court who would hold the trial on a propriety basis so as to conclude it without any undue delay and preferably within three months from the date of receipt of the records

ii. The Statement Government is directed to appoint a Special P.P. to conduct the trial. The Government shall take into account the way the trial was tried to be subverted in the past and would appoint as P.P. an experienced lawyer of reputed integrity.

iii. The deposition of Lalmuni Devi taken on 03.11.2006 would stand scrapped and she will be examined afresh before the Trial Court at Patna under Section 311 of the Code of Criminal Procedure.

iv. The order passed by the Bhagalpur Court closing the prosecution case is set aside and the trial shall proceed from the stage of examination of Lalmuni Defendant vi as directed above.

v. It will be open to the Special P.P. to make an application for recall of witness(establishment) earlier examined. In case such a petition is filed, the Trial Court shall pass appropriate orders, in accordance with law.

vi. The report of Hon'ble Mr. Justice C.K. Prasad is directed to be placed before the Standing Committee of the Court for consideration and suitable action.

vii. The Bihar State Bar Council is directed to examine the roles of the P.P. and the defence counsel who were conducting Sessions Trial No.19 of 2003 before the 7th Additional Sessions Judge, Bhagalpur and to take appropriate action in the matter.

This writ petition is disposed of with the aforesaid observations and directions."

32. The above completes the proceedings which were undertaken in the Habeus Corpus petition resulting into the judgment of the Division Bench dated 13.03.2007 of the Patna High Court.

33. Pursuant to the directions of the Division Bench, the trial was transferred to Patna from Bhagalpur. The proceedings at the Sessions Court, Patna were equally disappointing and the conduct of the State Government, the Public Prosecutor so appointed and the investigating agency, including that of the Trial Judge, remained unchanged. Although in the earlier part of the judgment, the proceedings, after the judgment dated 13.03.2007 of the Division Bench, before the Trial Court have been incorporated but in order to maintain the continuity the same at the cost of repetition are reproduced here again:

34. Pursuant to the direction issued, vide judgment dated 13.03.2007, the trial proceeded but again in a most shabby manner and not complying with the directions of the High Court in letter and spirit. The Special Public Prosecutor for the State, instead of getting the witnesses examined before the Court, filed affidavits on their behalf reiterating their earlier statements. Only 2 witnesses were re-examined namely PW-1 and PW-10. With respect to PW-2, PW-4 to PW-7, affidavits were filed stating that they had nothing further to add and they reiterated their deposition given earlier. Shrimati Lalmuni Devi (CW-1) was again examined on 29.09.2008. Prosecution evidence was closed on 29.09.2008. The Trial Court, vide judgment dated 24.10.2008, acquitted all the accused in both the Sessions Trials bearing no. 469 of 2007 and 470 of 2007.

35. It would be appropriate to refer to the investigation, proceedings and evidence led during the trial right from the stage of FIR till the second statement of CW-1 Lalmuni Devi which was recorded on 29.09.2008. After the incident on 25.03.1995 at about 09.00 AM, the three injured were taken to the State Hospital Camp, Panapur. The Fard Bayan was registered on the oral statement given by one of the injured (later deceased) Rajendra Rai as recorded by Sub-Inspector N.N. Thakur at 10.30 AM. The said Fard Bayan was signed by the injured Rajendra Rai, two witnesses Narendra Singh, Sanjiv Kumar Singh and by the officer in-charge, Panapur Police Station, Camp Panapur. The Fard Bayan also bears the endorsement of Sub-Inspector N.N. Thakur forwarding it to the Police Station In-charge

Masrakh under Sections 147, 148, 149, 307 IPC and Section 27 of the Arms Act for registering the report. Contents of the Fard Bayan have already been reproduced in the earlier part of this judgment.

36. On its basis, FIR was registered at P.S. Panapur as Case No. 62 of 1995 on 26.03.1995. The FIR contains endorsement of various authorities and Courts of its perusal. It also bears the endorsement that Section 302 IPC was added on 30.03.1995. On record is also available the Fard Bayan of Lalmuni Devi recorded during the investigation on 21.08.1995.

37. The statement of one Baidyanath Tiwari and one of the injured Smt. Devi recorded under Section 164 CrPC is also available on record. Baidyanath Tiwari stated that the incident of firing had taken place at around 09.00 AM. He was a teacher of Sanskrit in Gogal Singh High School Nayagaon, Chapra and on the relevant date was the Presiding Officer at the Polling Booth No.100. Around 09.00 AM, he noticed that four-five anti-social elements, armed with fire-arm weapons, started indiscriminate firing. In that group, there was one short height person who had covered his face. He further stated that the CRPF deputed at the Polling Booth and the patrolling party started firing in retaliation which created a stampede. At some distance, he noticed a couple of people having fallen down in which one was a woman. He further stated that he did not know whether the injured had received the injury from the firing of anti-social elements or the CRPF men. He however states that Prabhunath Singh was not one of those who were firing. He also states that he knew Prabhunath Singh from before. This statement was recorded on 23.05.1996 i.e. after more than one year from the date of the incident.

38. Smt. Devi's statement under Section 164 CrPC was recorded on 17.05.1996. She had also stated that when she was returning home after casting her vote, a little ahead of the school where the polling was taking place from the field of Raher (kind of Pulse), four-five persons came out, they were armed. Some of them had covered their faces with piece of cloth and they started firing,as a result of which, she along with Rajendra Rai, Kadama Rai and Daroga Rai received injuries. Daroga Rai had died on the spot and Rajendra Rai fell unconscious. At that time, Prabhunath Singh was not there. She further stated that she knew Prabhunath Singh ever since he became a Member of the Legislative Assembly.

39. The chargesheet dated 29.08.1995 is also on record and bears an endorsement of the CJM dated 30.08.1995. The injury reports of Daroga Rai, Smt. Devi and Shri Rajendra Rai are also on record. The Post-mortem reports of both Rajendra Rai and Daroga Rai are on record.

40. The Trial Court had framed charges against the accused Krishna Nandan Singh, Shatrughan Singh, Santosh Singh, Sheetal Singh, Satyendra Singh and Harendra Singh on 26.05.2006 under Section 302/149, 147, 148 IPC and Section 27 of the Arms Act. On the same day separately, a charge was framed against Prabhunath Singh by the same Trial Court under Section 302 IPC and Section 27 of the Arms Act. On 27.07.2006, the statement of seven witnesses were recorded as follows:

PW-1 - Parma Rai;]

PW-2 - Harinath Rai;

PW-3 – Kedama Ram;

PW-4 – Harinder Rai;

PW-5 – Dinanath Bhagat;

PW-6 – Smt. Devi;

PW-7 – Tarkeshwar Rai.

41. These witnesses i.e. PW-1 to PW-7 are mentioned as witnesses in the chargesheet. It is interesting to note that their statements are almost identical. The opening line is that they were giving this evidence on their own free will; that they had not come to depose under any coercion or threat; that nobody has kidnapped them and brought them for giving evidence. Very unusual opening of deposition by all these seven witnesses.

42. They further stated that on 25.03.1995 which is the date of incident, at about 09-09:30AM, they were returning after casting their votes when they heard shots being fired; that they did not see who fired the shots; Daroga Rai, Rajendra Rai and Smt. Devi had received fire arm injuries; that they were returning along with the injured after casting their votes; that Police did not record their statements.

43. The prosecution requested for these seven witnesses to be declared as hostile and sought permission to cross-examine them, which was granted.

The cross-examination by the prosecution of PW-1, PW-2, PW-4, PW-5, PW-6 and PW-7 is similar. However, insofar as PW-3 Kadama Ram is concerned, he was neither sought to be declared hostile nor was he cross-examined. All six witnesses denied having narrated to the Police regarding the incident supporting the prosecution story.

44. It would further be relevant to mention here that PW-1 was re-examined on 24.09.2008 pursuant to the directions issued by the Division Bench of the High Court on 13.03.2007. This time, he again came up with a similar statement that he had come to depose on his own accord and that he was not giving the statement under any coercion. The prosecution again was trying to further help the accused and tried to make up for the lacuna left earlier, as this time PW-1 mentioned the names of the persons he was accompanied with and deliberately did not take the name of CW-1. He further stated that all of a sudden firing started from the fields of Raher as a result of which Rajendra Rai, Smt. Devi and Daroga Rai received injuries. He further stated that the fields of Raher were dense and one feet higher than his height and as a result he could not see the persons who were firing. He further stated that he took the injured to the hospital at Panapur where the Doctor had referred them to the Chapra Sadar Hospital. He further states that the Police did not make any further inquiry from him. He further denied that he had not given any statement that it was Prabhunath Singh of BPP who had come in the car. At this stage, on the request of the Special Public Prosecutor, he was sought to be declared hostile with liberty to cross-examine. In the cross-examination, he denies his statement recorded by the Police during the investigation. Rest of the statement is with respect to the treatment provided to the injured at different stages. He also denied the suggestion that earlier he had stated that CRPF had also fired in retaliation. He also denied the suggestion that under the influence of the accused he is hiding the true facts. During cross-examination by the defence, whatever was not stated earlier to protect the accused was stated in this round of statement. He stated that all three of them, after receiving injuries, had become unconscious and were not in a position to speak anything. He further stated that the Police Inspector did not record their statement at the hospital as he was throughout with the injured. He further goes on to state that Lalmuni Devi was not accompanying them when they were returning after casting their vote when the incident took place. He also goes on to state that Lalmuni Devi was not there even

during the course of the treatment. He, however, admits that his leader was Lalu Yadav and he was a worker of his party.

45. Rest of the witnesses did not come forward to give their statement pursuant to the directions of the High Court. However, they filed their affidavits stating that they have nothing further to add and would only reiterate their earlier statements.

46. PW-8 and PW-9 were the security personnel who were on duty at the Polling Station. They only stated that they heard the sound of firing. They did not know who had fired and who had been injured.

47. PW-10 is Dr. Sudhir Kumar, who had examined the injuries of three injured and had proved the injury report which was marked as Ex.2 (Smt. Devi), Ex.2/1 (Daroga Rai) and Ex.2/2 (Rajendra Rai). In the cross-examination, he states that all the injured were in sensitive condition and were badly injured so he immediately referred them to the Chapra Hospital for better treatment. He further states that no police person came to his hospital and recorded statement of any of the three injured persons. Again, he was re-examined on 24.09.2008 on the request of the Public Prosecutor in which statement he further strengthened the case of the defence by repeatedly stating that all the three injured were unconscious (at least three times).

48. PW-11 is Dr. Ashok Kumar Gada, who had conducted the post-mortem on the body of Daroga Rai, proved the post-mortem report that it was under his signature which was marked as Ex.3.

49. CW-1 Lalmuni Devi, in her original statement dated 03.11.2006,had stated that she had come to depose on her own; nobody has brought her; that she did not know anything about the case; that the Police had not recorded her statement at the Patna Medical College; that she did not put her thumb impression or signature on any document.

50. It would also be worthwhile to briefly refer to the proceedings before the Trial Court after the judgement of the High Court dated 13.03.2007.

a) Actual proceedings started on 13.06.2008 before the Trial Court at Patna. On the said date, on the request of the six accused they were allowed to remain on their previous bail. Thereafter five-six dates were fixed on which nothing substantial happened.

b) On 08.09.2008, the Special Public Prosecutor moved an application under Section 311 CrPC stating that the prosecution wants to examine evidence of CW-1 Lalmuni Devi, PW-1 Parma Rai and PW-10 Dr. Sudhir Kumar who had already been examined earlier before the High Court. The case was ordered to be put up on 10.09.2008. The Trial Court allowed the application under Section 311 CrPC and ordered for recalling of the witnesses Parma Rai (PW-1) and Dr. Sudhir Kumar (PW-10). It further directed the Superintendent of Police, Chapra to produce the prime witness Lalmuni Devi (CW-1) and fixed 24.09.2008 for their evidence. On 24.09.2008, the order sheet records that both the witnesses PW-1 and PW-10 were cross-examined and discharged. It is in this statement that the prosecution, by producing them, further strengthened the case of the defence instead of strengthening the case of the prosecution. Further Lalmuni Devi (CW-1) could not be produced on the said date. Further directions were issued for her production on the next date, which was fixed for 29.09.2008. Another application filed by the Special Public Prosecutor for re-examining PW-2, PW-4, PW-5, PW-6, and PW-7, was allowed.

c) On 29.09.2008, the Special Public Prosecutor filed affidavits of PW-2, PW-4, PW-5, PW-6 and PW-7. Further on the said date, CW-1 Smt. Lalmuni Devi was examined, cross-examined, and discharged. Briefly the contents of the deposition of CW-1 may be reproduced here. In her examination-in-chief, as per the translated copy provided by the appellant which we have verified from the original record, she stated that:

> "I am deposing willingly by and without any coercion in the Court. I had given my statement before the Assistant Sub-Inspector of Pirbahore Police Station on 21.08.1995. The A.S.I. of Police had recorded my statement. I affixed my thumb impression thereon after giving my statement. I had stated before the A.S.I. of police that my Dewar (husband's younger brother) namely Kedama Rai had gone with my son to caste their votes at middle school in the village Dhanuki at about 10.00 o'clock in the day. We were returning after

casting our votes. Motor vehicles came there from village Satzora. Prabhunath Singh asked as to how the votes were seing caste. I responded that people were casting their votes on "Chakra" (wheel). The motor vehicle entered into the rahar (a kind of pulse) field. Thereafter Prabhunath Singh fired shot from his vehicle. Three persons namely Rajendra Rai, Daroga Rai and Srimati Devi sustained bullet injuries however Srimati Devi sustained bullet injury on her arm. I had taken the dead-body of my son to Panpur P.S. from the booth and the dead-body was sent to Patna from the Police station. My son was given medical treatment at Patna but he succumbed to his injury. His post mortem examination was conducted. My statement was recorded by the police after the demise of my son. Now I do not have to give my statement before the Court. I had given my statement before the Judge at Bhagalpur. My son died after six months of the occurrence."

In her cross-examination, she was subjected to many suggestions to which she gave satisfactory explanation. The defence could not elicit any major discrepancies in her examination-in-chief. The cross-examination is as under:

"I went back to my house with the police after adducing evidence at Bhagalpur. I had not gone to the Magistrate with the S.I. of police of Panapur P.S. after three days of coming back to my house. My Dewar Kedama Rai had come to the hospital with Rajendra Rai. Parma Rai is not my relative. There was no one with me at the time I was giving my statement to the police at hospital. Kedama rai was present with me at the time I was giving my statement. I had given my statement on the day on which my son died. I disclosed all the facts whatsoever relating to the occurrence before the S.I. of Police. The S.I. of police had read over the content of my statement to me. I affixed my thumb impression thereon after understanding the content to be true. Besides the statement given at hospital.

The S.I. of Police did neither ask anything to me nor record my statement again in course of investigation.

I had not given any petition against the police in the court that the police did not record my statement correctly.

It is not a fact that I had not given such statement before the police that we were returning after casting our votes and a which came from the side of the village Satzora and Prabhunath Singh had asked how the voting was going on and I responded that I had caste my vote in favour of "Chakra" mark. The vehicle went into the rahar (a kind of pulse) field and thereafter Prabhunath Singh fired shot which hit three persons. The shots hit the arms of Rajendra Rai, Daroga Rai and Srimati Devi. I took the deadbody of my son to Panapur P.S. from the booth and the deadbody was sent to Patna from the police station but he succumbed to his injury.

Harendra Rai is my son. Harendra Rai himself had told me that I had to utter the name of Prabhunath Singh among the shooters. It is not a fact that I have deposed falsely in the Court."

d) On the same date i.e. 29.09.2008, the Trial Court closed the prosecution evidence and fixed 15.10.2008 for examination of the accused under Section 313 CrPC. On 15.10.2008 examination of the accused under Section 313 CrPC was recorded. The defence also filed a certified copy of the statement of Lalmuni Devi recorded under Section 164 CrPC by Shri Sampat Kumar, Judicial Magistrate, Chapra on 06.11.2006 in connection with the abduction case in Panapur P.S. Case No. 81 of 2006.

e) Further an application was filed by private counsel Shri Ranjan Kumar Sinha, advocate on behalf of the informant, that additional evidence may be recorded for meeting the ends of justice. He also submitted that the Investigating Officer of the case is not examined, although liberty was given by the High Court for

taking any additional evidence in the case. The Trial Court did not find it necessary to summon the Investigating Officer. The Trial Court further closed the evidence of the defence and fixed 17.10.2008 for arguments.

f) On 17.10.2008, another petition was filed by the private counsel for the informant, stating that the prosecution evidence was closed without taking proper steps for the evidence of the Investigating Officer, the Doctor, PW-3 Kadama Rai and seizure list witnesses and prayed for them being called for recording their statements as court witnesses. This petition was also rejected by the Trial Court on the ground that private counsel has no locus standi to file such a petition. It completely failed to be sensitive to the facts and circumstances of the case as was apparent from the material on record.

g) The Trial Court also rejected another petition, moved on behalf of one Kishori Rai for recording his statement, on the ground that he was a stranger. Although Kishori Rai had prayed for transfer of the case as they had lost faith in the Court, the case was fixed on 18.10.2008 for further arguments.

h) On the said date, again an application was filed by Narendra Singh and Kishori Rai through their private counsel under Section 311 CrPC for recording statement of Narendra Singh, Kishori Rai and Sanjeev Kumar Singh two of them being witnesses of Fard Bayan, and Kishori Rai had produced the cartridges found at the place of occurrence of which the seizure list was prepared in presence of Janki Rai and Chabili Rai. This application was also rejected on 18.10.2008 on the same ground that it was moved by strangers, who were not witnesses in the chargesheet and the application was not filed by the Special Public Prosecutor. On the same date, arguments were heard and 20.10.2008 was fixed for parties to file their written arguments. Thereafter the Trial Court proceeded to deliver the judgment on 24.10.2008.

51. With respect to the judgment of the acquittal dated 24.10.2008, a grievance petition was submitted by the seizure list witnesses, which was acknowledged by the then Inspecting Judge,Justice Navin Sinha, as he was then. The entire Sessions Trial Court records were called for and duly examined and studied by the Inspecting Judge. The Inspecting Judge noticed the glaring deficiencies both deliberate and malicious, step by step. The Inspecting Judge not only noticed the deliberate mischief on the part of the Investigating Agency but also the Public Prosecutor and the Presiding Judge of the Trial Court in not discharging their pious duty of doing justice. The Inspecting Judge recorded that the trial that had been conducted by the Presiding Officer leads to only two possible conclusions, either the judgment is based on extraneous considerations or the Officer completely lacks judicial acumen. He then goes on to record that he examined seven random Sessions Trial judgments of the Officer and was of the view that it cannot be said that he does not know the law which meant the conduct of the Trial Judge was for extraneous consideration. The Inspecting Judge, vide his report dated 04.05.2009, recommended appropriate action against the Officer. The said report dated 04.05.2009 deserves to be reproduced and it is so done:

> "Hon'ble the Chief Justice,
>
> Re: Judgment and order dated 24.10.2008 by Sri Man Mohan Chaudhary, Additional Sessions Judge, F.T.C. III, Patna in Sessions Trial No.469-470 of 2007 arising out of Panapur P.S. Case No.62 of 1995 - GR No.819 of 1995 under Sections 147, 148, 149, 302, 307 of the Penal Code and Section 27 of the Arms Act.
>
> In a Sessions Trial, normally it is the accused, who are on trial. Occasionally, apart from the accused, the judiciary, as an institution, is also on trial and its credibility is put to test. The present is definitely one such case.
>
> On a grievance petition by a seizure list witness, as the Inspecting Judge, Patna Judgeship, the entire Sessions Trial records were called for. I have gone through and studied the records.
>
> The informant Rajendra Rai, was deceased soon after the incident. Another injured Daroga Rai was also deceased subsequently. Three other persons were injured. The F.l.R. is in the nature of a dying declaration. One person was specifically named as accused, having

fired at the deceased. Three persons were named as F.l.R. witnesses, and another two persons signed the FIR as witness to the contents. A seizure list was prepared with regard to empty pellets seized from the spot signed by the independent witnesses.

The named accused, a powerful political personality, sought to interfere with the trial at Chapra. To ensure a fair trial, the case was transferred to Hazaribagh. On re-organization of the State of Bihar, the trial was transferred to Bhagalpur.

At Bhagalpur witnesses were intimidated in the courtroom, and unruly created. Witnesses were kidnapped to prevent from deposing. The Presiding Officer remained a mute witness and did not submit any report to this Court. The Inspecting Judge on basis of a newspaper report made a surprise visit and submitted a report. Cr.WJC No.717 of 2006 (2007(2) PLJR 244) was filed by Harendra Rai, aprosecution witness and brother of the deceased for the abduction of their mother to prevent from deposing. The Division Bench noticed how the process of law was being subverted and the trial interfered including the report of the Inspecting Judge. The trial was ordered to be transferred to Patna to ensure a fair trial.

The Division Bench quoted extensively from the judgment of the Supreme Court in (2004) 4 SCC 158 (Zahira Habibullah Sheikh Vs. State of Gujarat). It cautioned the Presiding Officer to be wary and ensure that justice was done in all respects. Liberty was given for recall of prosecution witnesses under Section 311 CrPC.

The Presiding Officer in the order sheet dated 08.09.2008 specifically states that he has gone through the order of the Division Bench and then quotes the directions with regard to recall of witnesses but makes no reference to the observation from the case of Zahira Sheikh. He also refers to Cr. Misc. No.44589 of 2006 preferred by Kishori Rai, a seizure list witness for his examination under Section 311 CrPC.

The FIR in the form of a dying declaration was not marked as an exhibit. The Presiding Officer himself states that it is the nature of a dying declaration. The application filed by Kishori Rai, seizure list witness, to examine him along with Narendra Singh and Sanjeev Kumar Singh (attesting witness to the FIR) as witnesses, was rejected

by stating that no such application was filed by the Public Prosecutor for their examination. No statement of the latter two was their under Section 161 CrPC and neither were they charge sheeted witness. The application of Kishori Rai was rejected by saying that the original seizure list was not on record. Kishori Rai was not a charge sheet witness or the informant but a stranger and no application by him on behalf of the informant, who was dead, would be entertained.

The P.P. remained silent. The Presiding Officer preferred to ignore the directions of the Division Bench from the observations in the case of Zahira Habibullah Sheikh.

After the order of the Division Bench, the Public Prosecutor filed an application for recall of certain witnesses including FIR witnesses (not the attesting witnesses). The Public Prosecutor then himself filed their affidavits that they did not wish to depose beyond what was deposed by them at Bhagalpur. The Public Prosecutor then requested for evidence to be closed. The Court took no further steps to verify the voluntary nature and genuineness of the affidavits.

The conduct of the Presiding Officer ignoring these duties prescribed in the case of Zahira Habibullah Sheikh in taking no steps for having the F.I.R. exhibited is shocking. After acknowledging that it was in the form of a dying declaration, he rejects it as it had not been proved. No coercive steps whatsoever were taken to secure the attendance of the Investigating Officer. It was simply stated that despite efforts and notice to D.G.P., he has not appeared. If the I.O. was evading appearance, the search for truth made his appearance a compelling necessity for the Presiding Officer. The original seizure list went missing. The Presiding Officer took no steps for reconstruction or holding an enquiry why and how the seizure list has gone missing from the records. Affidavits filed by the Public Prosecutor were accepted by the Presiding Officer as a gospel truth. The directions of the Division Bench of the duties of the Presiding Officer were completely ignored in the grab of a direction for expeditious disposal of the trial. The Presiding Officer did not notice the dichotomy that the Public Prosecutor himself filed the application for recall of witnesses in the changed circumstances and then filed affidavits on their behalf himself. The application of seizure

list witness, Kishori Rai, for his examination and that of the two F.l.R. witnesses was rejected on absolutely frivolous grounds even after noticing that the Public Prosecutor was not supporting the application. Cr. Misc. No.44589 of 2006, by Kishori Rai, a seizure list witness, was disposed with the observation that the Public Prosecutor has already been directed in Cr. W.J.C. No.717 of 2006 to move appropriately under Section 311 CrPC.

The duty of the Presiding Officer was to search for the truth in the criminal trial. He completely abdicated his duties and consciously chose to ignore the order of caution by the Division Bench reminding him of his duties.

The manner in which the trial has been conducted by the Presiding Officer leads to only two possible conclusions. The judgment is either based on extraneous considerations or the Officer completely lacks judicial acumen. I had called for random seven Sessions Trial judgments of the Officer. It cannot be said that he does not know the law.

The public image of the judiciary is tested in such cases. The Officer has failed the institution.

The desirability of appropriate action against the Officer merits serious consideration."

52. The said report was placed before the Standing Committee of the High Court and considered in the meeting dated 07.07.2009 wherein it was resolved to accept the recommendation. Later on when the said minutes came up for confirmation in the meeting dated 14.07.2009 it was resolved vide agenda item No.1(ii) that the recommendation made by the Inspecting Judge not only be accepted but be enlarged with further direction that the judgment in question dated 24.10.2008 be listed on judicial side before appropriate Bench for considering suo motu exercise of revisional power under CrPC. The said resolution of the Standing Committee is reproduced hereunder:

"Resolution

It is resolved to confirm the proceedings of the meeting of the Standing Committee held on 7th July 2009 with the following modifications.

i. Under the Agenda- Any other matter- it is resolved to place on record the appreciation of valuable contribution made by Hon'ble Mr. justice V.N. Sinha as a Member of Committee during his tenure, which has just expired (V.N. Sinha, J. Abstaining.)

ii. In respect of Agenda Item No.5 of Vol.I the resolution will stand enlarged with a further direction that **the judgment in question dated 24.10.2008 be listed on judicial side before appropriate Bench for considering suo motu exercise of revisional power under Code of Criminal Procedure.**

iii. In respect of Additional Agenda Item No.2 the resolution is modified to the extent that shri Krishna Kant Tripathi shall also not be posted as Principal Judge in Family Court at Aurangabad but as District and Sessions Judge Nawadah and Shri Akhilesh Kumar Jain Shall be posted as District and Sessions Judge at Jehanabad instead of Nawadah."

53. It is on the decision of the Standing Committee that Criminal Revision No. 1345 of 2009 was registered with cause title as "The State of Bihar Versus Prabhunath Singh & Ors". The Learned Single Judge dismissed the said criminal revision, vide impugned judgement dated 02.12.2011, giving rise tothe present appeal.

54. Learned Single Judge of the High Court, while dismissing the revision, recorded the following findings:

a) Revisional Power is akin to the appellate power in view of Section 401 CrPC.

b) Fard Bayan, turned into lodging of FIR, has not been proved by any witness. The officer or authority, who recorded the said statement, has not been produced as a witness. Moreover, it does not contain a certification of the mental/physical health of the injured (later deceased). Besides, the non-production of any such witness, who was present and heard the statement being made, has not been produced as a witness. Hence, Fard Bayan is not liable to be read as evidence.

c) PW-10, the doctor, who attended to the injured persons and had prepared the injury report, had stated that the three injured were unconscious. Hence, the deceased Rajendra Rai (the injured) was not in a position to make his statement (Fard Bayan/Bayan Tahriri). He also stated that Daroga Rai was very serious and accordingly, after having given first aid, all the injured were referred to Sadar Hospital, Chapra.

d) Dr B.D. Prasad had conducted the post-mortem of Rajendra Rai, but he was not produced in Court as a prosecution witness and the contention that his report could be admitted under Section 294 of CrPC, is unacceptable as the post-mortem report is not covered by the said provision.

e) CW-1 Lalmuni Devi is not a hearsay witness, as held by the Trial Court, but is a tutored witness in view of her last two lines in cross-examination. (The High Court went one step further from the Trial Court in treating the CW-1 as a tutored witness.)

f) Any other prosecution witness of fact does not corroborate the testimony of CW-1. Instead, their testimonies are against CW-1 as no other prosecution witness has stated about her presence.

g) It was observed that although CW-1 was not named in the chargesheet but Pirbahor Police Station probably recorded her statement while she was attending to her injured son in the Primary Medical Health Centre (PMHC), which is sufficient to indicate that her statement was recorded during the investigation.

h) Zahira Sheikh's judgement is not applicable as it relates to mayhem on account of communal hatred and disharmony, resulting in some mass massacres. The present case may have some political tinge, but that could not be of the same or deeper hue as was in Zahira's case.

55. We have heard learned counsel for the parties and also perused the original record.

56. The arguments advanced on behalf of the appellant are briefly summarized as follows:

a) None of the issues flagged in the report dated 04.05.2009 of the Inspecting Judge regarding the manner and illegality of trial of the case were considered much less in accordance with law.

b) Trial of the case was not conducted as per directions vide order dated 13.07.2007 in Cr.WJC No. 717/2006 passed by the Division Bench of the High Court in the Habeas Corpus Petition.

c) A case is made out for de-novo trial to cure the travesty of justice committed in a case wherein in a broad day light, two persons were done to death, apart from causing injury to another.

d) Witnesses were not allowed to be properly examined and the trial of the case was not conducted by the Special Public Prosecutor as per directions of the High Court.

e) The Special Public Prosecutor of the case was not competent person since he was not having practice as an advocate for ten years in terms of Section 24(8), CrPC.

f) The findings in the impugned order are perverse and erroneous and the evidences, available on record are not appreciated properly.

g) The evidence of CW-1 has not been appreciated in accordance with law either by the Trial Court or the High Court. On the sole evidence of CW-1 the conviction of accused deserves to be recorded.

h) Not a single Police Officer, including the Investigating Officer, was examined in the case showing clear malice.

57. On the other hand, learned senior counsel appearing for the Respondent Nos. 2 to 8 submitted as follows:

a) That the judgment of the High Court and the Trial Court are just, valid and proper, based upon the evidence adduced during trial.

b) It was a case of no evidence as all the witnesses turned hostile.

c) Lalmuni Devi's (CW-1) evidence was tutored and could not be relied upon.

d) The FIR itself was not proved.

e) The Doctor, who had examined the injured, had stated that they were in an unconscious state and as such also Rajendra Rai could not have been in a condition of narrating the incident.

f) Neither the Investigating Officer nor any of the police officials, though may be formal in nature were produced.

g) Scope of revision before the High Court was limited and so would be the status before this Court.

h) No perversity or material irregularity have been found or argued by the learned counsel for the appellants.

i) The present appeal, with its limited scope, deserves to be dismissed.

58. Learned counsel appearing for the State of Bihar has supported the appellant.

59. Before dealing and discussing the evidence led in the Trial Court, relevant facts relating to the manner in which the trial has been conducted, deliberate lapses on the part of the Public Prosecutor in leading the prosecution witness, lapses on the part of the Trial Court in not exercising the powers vested in it to ensure a fair and just trial, the facts mentioned in the reports of the Inspecting Judge and also the findings recorded by the High Court in the Division Bench, need to be mentioned.

Lapses on the part of the prosecution conducting the trial and that on the part of the Investigating Agency:

60. Briefly the lapses are summarized as under:

a) No explanation was given for not producing the scribe of the FIR. In case the scribe was not available for some reason then someone else from the police station could have been produced to prove the hand writing and signature of the scribe.

b) The Investigating Officer not produced by the prosecution, is again a clear and deliberate lapse.

c) Non-production of other prosecution witnesses of preparing the recovery/seizure list, inquest report, carrying the dead-body to the hospital, and absence of any effort to prove other formal aspects of the investigation clearly indicate malice and deliberate lapse on the part of the prosecution.

d) The conduct of the Public Prosecutor in filing affidavits in evidence of the witnesses of fact despite directions of the High Court and further examining witnesses under 311 CrPC to strengthen the case of defence reflects the tainted role of the Public Prosecutor.

61. The legal issues which arise for consideration in the present case may be summarized as under:

A) Whether the Supreme Court, in appeal against acquittal, can consider the High Court's judgement dated 13.03.2007 passed in the Habeas Corpus Writ Petition, which was not part of the evidence produced (although it was part of the Trial Court record) and was not relied upon by the prosecution before the Trial Court, as a piece of incriminating evidence in the nature of a Public Document and, if yes, up to what extent?

B) Whether the previous or subsequent conduct of the accused, established on record, can be treated as a circumstance against the accused in view of Section 8 of the Evidence Act?

C) Whether the FIR or Bayan Tahriri can be said to be proved as a piece of reliable prosecution evidence and if so, what would be the position of law on the issue of treating the FIR or Bayan Tahriri as the Dying Declaration?

D) Whether the testimony of a Prosecution Witness (an old feeble, rustic, illiterate lady and mother of the deceased and an eye-witness of the incident), who stated in the end of her cross-examination that "her son (another alive son) had asked her to take the name of accused before the Court," can be treated to be a reliable evidence against such accused, especially in view of the checkered and abnormal history of the case?

Issue (A): - Relevance and admissibility of the FIR:

62. According to the general procedure, facts need to be proved by adducing evidence in the Court of law, and the evidence must be produced in accordance with the procedure mentioned in the Indian Evidence Act, 1872. The doctrine of judicial notice, as provided under Section 56, is an exception to this rule.

63. Section 56 of the Evidence Act says that "No fact of which the Court will take judicial notice need to be proved." Section 57 of the Evidence Act goes one step further by providing that the Court has no other option but to take judicial notice of the facts mentioned in the list given in the Section as it uses the word "shall" and not "may". Section 58 of the Evidence Act says that if the parties or their agents have agreed to admit a fact during the court proceeding or in writing before the hearing, then such fact need not be proved unless the Court believes that it needs to be proved. The aforementioned three Sections i.e. 56 to 58 of the Evidence Act are reproduced hereunder:

"**56.Fact judicially noticeable need not be proved.—**No fact of which the Court will take judicial notice need be proved.

57. Facts of which Court must take judicial notice.—The Court shall take judicial notice of the following facts: —

[(1) All laws in force in the territory of India;]

(2) All public Acts passed or hereafter to be passed by Parliament 1 [of the United Kingdom], and all local and personal Acts directed by Parliament 1 [of the United Kingdom] to be judicially noticed;

(3) Articles of War for [the Indian] Army [Navy or Air Force]

(4) The course of proceeding of Parliament of the United Kingdom, of the Constituent Assembly of India, of Parliament and of the legislatures established under any laws for the time being in force in a Province or in the States;]

(5) The accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland;

(6) All seals of which English Courts take judicial notice: the seals of all the [Courts in [India] and of all Courts out of [India]

established by the authority of [the Central Government or the Crown Representative]; the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorised to use by [the Constitution or an Act of Parliament of the United Kingdom or an] Act or Regulation having the force of law in [India];

(7) The accession to office, names, titles, functions, and signatures of the persons filling for the time being any public office in any State, if the fact of their appointment to such office is notified in [any Official Gazette];

(8) The existence, title and national flag of every State or Sovereign recognised by 10[the Government of India];

(9) The divisions of time, the geographical divisions of the world, and public festivals, fasts and holidays notified in the Official Gazette;

(10) The territories under the dominion of 10[the Government of India];

(11) The commencement, continuance and termination of hostilities between [the Government of India] and any other State or body of persons;

(12) The names of the members and officers of the Court, and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorised by law to appear or act before it;

(13) The rule of the road [on land or at sea].

In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so.

58. Facts admitted need not be proved.—No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings:

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admissions."

64. We are concerned with Section 56 of the Evidence Act, which deals with the authority of a Court to accept certain facts, which are either of common knowledge or from sources which guarantee the accuracy or are a matter of authoritative official record or court record, without the need to establish such fact. The judicial notice of any fact is taken when the facts cannot reasonably be doubted.

65. This Court, in its various pronouncements, has taken support of Section 56 of the Evidence Act to do substantial justice in respective matters. Some of them are being reproduced hereinafter to get a better picture of how judicial notice is taken:

a) In the case of **State of Kerala v. Unni**[3], in **paragraph 27** it has been held as follows:

> **"27. Judicial notice can be taken of the fact that each village would not have a chemical laboratory where the process of analysis of ethyl alcohol can be carried out."** For example, if a sample is taken in a village, by the time sample is sent for and is analysed, the volume of ethyl alcohol may increase. Although we are informed that some chemical is mixed when a sample is taken, no material has been placed in that behalf. (Emphasis added)

b) In the case of **Prabhakara v. Basavaraj K.**[4], it was observed in **paragraph no. 21** as follows:

> **"21.** A relief can only be on the basis of the pleadings alone.
>
> Evidence is also to be based on such pleadings. The only exception would be when the parties know each

3 (2007) 2 SCC 365
4 (2022) 1 SCC 115

other's case very well and such a pleading is implicit in an issue. **Additionally, a Court can take judicial note of a fact when it is so apparent on the face of the record.** (Emphasis added)

c) In the case of **Ved Mitter Gill v. UT, Chandigarh**[5], **in paragraph 26**, it was held as follows:

> **"26**.……... The links of the escaped undertrial prisoners with the Babbar Khalsa International, a known and dreaded terrorist organisation was also clearly expressed in the impugned order, as one of the reasons, for it being impracticable, to hold an inquiry against the appellant/petitioners. It is a matter of common knowledge, and **it would be proper to take judicial notice of the fact, that a large number of terrorists came to be acquitted during the period in question, on account of the fact that witnesses did not appear to depose against them on account of fear, or alternatively, the witnesses who appeared before the courts concerned for recording their deposition, turned hostile, for the same reason."**
>
> (Emphasis added)

d) In the case of **Joseph M Puthussery vs T.S. Jhon and others**[6], this Court was dealing with an appeal filed under Section 116 A of the Representation of People Act, 1951, against the order of a single bench of the High Court declaring the election of the appellant as Member of Kerala Legislative Assembly from No. 106, Kallooppara Constituency as void on the ground that he was guilty of the corrupt practice within the meaning of sub-Section 4 of Section 123of the Act. While evaluating the findings recorded by the High Court, this Court considered the scope of Section 56 of the Evidence Act in paragraph 65 and observed as follows:

> "65. The High Court has summarily described "Crime" Magazine to be a yellow journal. **Whether "Crime"**

5 (2015) 8 SCC 86
6 (2011) 1 SCC 503

> **magazine is a yellow journal is a matter of opinion and not of fact. It is impossible to conclude that an opinion of this sort is a judicially noticeable fact for the purposes of Section 56 or Section 57 of the Evidence Act, 1872.** There is nothing in the impugned judgment which indicates that any evidence was led, much less considered as to whether "Crime" magazine is a yellow journal and hence magazine could not have been relied upon by the appellant in forming a belief that the contents of the magazine were not untrue." (Emphasis added)

66. The law, in respect of taking judicial notice of any fact, may be summarised in the following manner:

(i). The doctrine of judicial notice, as provided under Section 56, is an exception to general rules of evidence applicable for proving any fact by adducing evidence in the Court of law.

(ii). According to Section 56 of the Evidence Act, judicial notice of any such fact can be taken by the Court, which is well-known to everyone, which is in the common knowledge of everyone, which is authoritatively attested, which is so apparent on the face of the record, etc.

(iii). Except in the rarest of rare cases, judicial notice of any fact is generally not taken in criminal matters in the normal course of proceeding, and the case is decided on the basis of oral, material and documentary evidence adduced by the parties to find out the guilt or innocence.

67. As discussed above, the judicial notice of any fact is generally not taken in criminal matters, but the present matter stands on an altogether different footing in view of what has been noted hereinbefore. It falls in the category of rarest of rare cases and hence, it requires a different approach. This Court, in its considered opinion, finds that the judgement in the Habeas Corpus Petition was passed on the basis of notes of the Inspecting Judge of the High Court, the report of Additional Director General of Police, statement of CW-1 Smt. Lalmuni Devi recorded in Court before the Magistrate under the directions of High Court, her affidavit filed before the High Court, her

statement/disclosure in Bhojpuri before one of Judges hearing the Habeas Corpus petition and several other authoritative materials after giving the opportunity of hearing to the parties, including the accused of the crime in question. In the said judgement, certain inferences, observations and findings arrived at by the Division Bench have a crucial impact on the merit of the present case, as it gives a complete picture as to how the prosecution version in the present case was being demolished brick by brick by using political authority and muscle power with the aid of not only the police administration but also with the aid of Public Prosecutor and unfortunately, the Presiding Officer of the Trial Court also conducted himself in a manner unbecoming of a Judicial Officer, despite directions and continuous vigil by the High Court.

68. The judgement dated 13.03.2007, which is a public document, is well discussed and is based upon authoritative materials and was passed in consonance with the doctrine of *audi alteram partem*. Moreover, it has a torchbearer effect over the facts of the case. Thus, it qualifies the requirement of law for the purpose of taking judicial notice thereof, and this Court takes judicial notice of the inferences, observations and findings arrived at by the Division Bench and the directions issued in its judgement dated 13.03.2007 to the extent of the subsequent conduct of the accused, deplorable functioning of the Public Prosecutor, Police Administration and the Presiding Officer of the Trial Court to extend undesirable favour to the accused.

69. Another Latin Maxim, which means that a judicial decision must be accepted as correct, may be usefully extracted here, **"res judicata pro veritate accipitur".**

Issue (B): - Conduct of the accused-Section 8:

70. In the case in hand, the conduct of the accused is not only relevant under Section 8 of the Evidence Act but is also one of the major circumstances to arrive at a conclusion about his guilt. Section 8 of the Evidence Act is being reproduced hereinafter:

> **"8. Motive, preparation and previous or subsequent conduct. —** Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the

subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto."

The illustration (e) of Section 8 throws some light on the casein hand and is significant in the present matter, which is being reproduced hereinafter:

"Illustration (e) -A is accused of a crime.

The facts that, either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance favourable to himself, or that he destroyed or concealed evidence, or prevented the presence or procured the absence of persons who might have been witnesses, or suborned persons to give false evidence respecting it, are relevant."

71. In a very interesting case of **Anant Chintaman Lagu v State of Bombay**[7], this Court, while holding the accused of that case guilty of murder, has touched on the aspects of relevancy of conduct of the accused subsequent to the incident in question, and its inference by the Court to decide the guilt and innocence of the accused. Relevant extracts from the aforesaid judgement are quoted herein below:

"…A criminal trial, of course, is not an enquiry into the conduct of an accused for any purpose other than to determine whether he is guilty of the offence charged. In this connection, that piece of conduct can be held to be incriminatory which has no reasonable explanation except on the hypothesis that he is guilty. Conduct which destroys the presumption of innocence can alone be considered as material…

***

What inference can be drawn from his conduct after the death of Laxmibai is a matter to be considered by us. And in this connection, we can only say at this stage that if some prior conduct is connected intrinsically, with conduct after death, then motive of the appellant would be very clear indeed...

***

7 AIR 1960 SC 500

> These arguments, however, are of no avail, in view of the appellant's entire conduct now laid bare, which conduct has been proved to our satisfaction to have begun not after the death of Laxmibai but much, earlier. This conduct is so knit together as to make a network of circumstances pointing only to his guilt…"

72. In the case with which we are dealing, there is no iota of doubt that the accused-Respondent No.2 was instrumental in making all possible efforts to wipe out the evidence against him and the Prosecution machinery as also the Presiding Officer of the Trial Court, if we may say so, was used as a tool of his high-handedness.

73. The obvious question pops up in the mind of any prudent person, as to why he was instrumental, when he was not guilty of the offence to which he was being tried. The obvious answer to this would reasonably come to mind of any prudent person that his guilty mind was fearful about the result. All these aspects leave no room for doubt that the subsequent conduct of Respondent No.2 is one of the major circumstances pointing towards his guilt for the incident that occurred at 9AM on 25.3.1995.

74. We may quote a Latin Maxim which aptly means that a person who receives advantage must also bear the burden, **"qui sentit commodom, sentire debit et onus"**

Issue (C): -Status of the Bayan Tahriri/Written Statement of the deceased

75. Before discussing the status of the record of the case, it is noted, at the cost of repetition, that this Court, with the strength of Section 56 of the Evidence Act, has already taken judicial notice of certain findings and observations recorded by the Division Bench of the High Court in the Habeas Corpus Petition.

76. According to the case record, the incident had occurred at 09:00 AM on 25.03.1995. A written statement (Bayan Tahriri) of the injured Rajendra Rai was recorded in CMHC, Panapur, on the morning of 25.03.1995 at 10:30 hours. An FIR was lodged on 25.03.1995 at ……. Hours, which was based on the written statement (Bayan Tahriri) of the injured Rajendra Rai, who subsequently succumbed to the injuries he received in the incident. The FIR was forwarded to the Judicial Magistrate on 26.03.1995, and on 27.03.1995, the FIR was seen by the Judicial Magistrate.

77. Because of the indescribably regrettable subversion of the Trial proceedings, the formal witness, i.e., the Constable Clerk and Investigating Officer, were not produced to prove the lodging of FIR and written complaint. Eventually, the written statement/Bayan Tahriri, as well as the FIR, were not marked as Exhibits. All the witnesses of fact, except CW-1 Lalmuni Devi (mother of deceased Rajendra Rai), had turned hostile either under fear or being won over. Even the testimony of PW-10, Dr. Sudhir Kumar also appears to be influenced by the accused -side as he repeatedly stated (four times) before the Trial Court that "*injured were unconscious*", despite the fact that the injury report does not mention that the "*injured were unconscious*"

78. The deplorable conduct of the Presiding Officer of the Trial Court also resulted in the miscarriage of justice at various steps of the trial, but the most objectionable aspect is that one person Kishori Rai, a seizure list witness (who was not included as a witness in the chargesheet by the Investigating Officer)had filed an application before the Trial Court seeking his examination as well as examination of other two persons namely Nagendra Singh and Sanjeev Kumar Singh (who had signed said Bayan Tahriri as attesting persons but were not included as witnesses in the chargesheet by the Investigating Officer)as witnesses during the trial. However, the said application was rejected by the Trial Court, vide order dated 18.10.2008, on flimsy grounds like, the application has not been moved through Public Prosecutor, the seizure list is not on record, the person Kishori Rai is not a witness of the chargesheet. The Presiding Officer of the Trial Court adopted such a pathetic approach despite noticing the detailed order dated 13.03.2007 passed by the Division Bench of the High Court in the Habeas Corpus Petition.

79. Even the High Court, despite acknowledging in the impugned judgment that Revisional Power is akin to the appellate power in view of Section 401 CrPC, failed to set the record straight by exercising the appellate powers given under Sections 386, 389, 390 and 391CrPC, as provided under Section 401(1) of CrPC.

80. Now in this background, we would analyze whether the FIR or Bayan Tahriri can be said to be proved as a piece of reliable prosecution evidence and if so, what would be the position of law on the issue of treating the FIR or Bayan Tahriri as a Dying Declaration.

81. It is an undisputed position of law that the FIR is a public document defined under Section 74 of the Evidence Act. Various High Courts have expressed this view from time to time.

a) In the case of **Channappa Andanappa Siddareddy and others v. State[8],** the Karnataka High Court held as follows:

> "3. The F. I. R. being a record of the acts of the public officers prepared in discharge of the official duty is a public document as defined under Section 74 of the Evidence Act. Under Section 76 of the Evidence Act, every public officer having the custody of a public document, which any person has a right to inspect, is bound to give such person on demand a copy of it on payment of the legal fees therefore."

b) The Single Bench of Gujrat High Court, in the case of **Jayantibhai Lalubhai Patel vs. State of Gujrat[9],** concluded as follows:

> "10. From the aforesaid discussions, it clearly appears that whenever FIR is registered against the accused, a copy of it is forwarded to the Court under provisions of the Code. Thus it becomes a public document. Considering (1) the provisions of Article 21 of the Constitution of India,(2) First Information Report is a public document in view of Section 74 of the Evidence Act."

c) In the case of **Shyam Lal vs State of U.P. And Ors[10]**, the Division Bench of Allahabad High Court followed the same view.

d) The Division Bench of the Delhi High Court, while dealing with a public interest litigation being **Court on its Own Motion through Mr. Ajay Chaudhary vs. State[11],** discussed pronouncements of various High Courts and held that there can be no trace of doubt that FIR is a public document as defined under Section 74 of the Evidence Act.

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8 1980 Crl LJ 1022
9 1992 CRl LJ 2377
10 1998 Crl LJ 2879
11 2011 CrlLJ 1347

e) Recently, a Single Bench of Chhattisgarh High Court took similar view in the case of **Narendra Rajput vs. State of Chhattisgarh through Secretary, Department of Home Affairs (Police) and Others[12].**

82. This Court endorses the above view and holds that FIR is a public document defined under Section 74 of the Evidence Act.

83. Now, what is to be seen is that any public document does not stand proven by the mere fact of its production. It is proved in the usual manner of proof when an objection to it is taken. The Court usually accepts a fact as proved when, after considering the document and the evidence before it, concludes that what is stated in the document is believable based on what the document, on the face of it, states along with what a witness to the document states about the contents and how the document was prepared/authored.

84. According to the common practice of Trial Court and also according to the General Rules (Criminal) as applicable in the case, all the papers and documents filed and produced during any inquiry and trial of a criminal case are marked as 'Paper No.' and at the stage of evidence, when any article, weapon, material, or document is admitted as evidence, it is marked as an exhibit, be it in any manner whatsoever either by use of alphabets or by use of numbers (generally as Ex-Ka for prosecution evidence and Ex-Kha as defence evidence).

85. At the stage of evidence, when any document/paper is formally produced for being treated as a piece of evidence, the Court looks at two basic aspects. Firstly, the existence of the document on the Court's record and, secondly, the proof of its execution or its contents being sufficiently deposed to by a witness having requisite knowledge thereof, where after, the document in question is marked as exhibit. At the stage of exhibiting any document as a piece of evidence, the truth of what is stated in the document is not considered. It is left open to final evaluation at the trial after cross-examination, and the entire testimony of the witness about the existence and contents of the document is weighed in conjunction with various other factors emerging during a trial. At the final evaluation stage, the Trial Court concludes whether the document speaks the truth and decides what weight

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to give it for final decision. In other words, its evidentiary value is analysed by the Courts at the time of final judgment.

86. This Court in the case of **Arbada Devi Gupta vs Birendra Kumar Jaiswal and Anr.**[13]**,** in paragraph 16 has held as follows:

> **"16.** ……..The legal position is not in dispute that mere production and marking of a document as exhibit by the Court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence that is by the 'evidence of those persons who can vouchsafe for the truth of the facts in issue'……..."

87. In this view of the matter, the marking of a piece of evidence as 'exhibit' at the stage of evidence in a Trial proceeding is only for the purpose of identification of evidence adduced in the trial and for the convenience of the Court and other stakeholders in order to get a clear picture of what is being produced as evidence in a Trial proceeding.

88. As we are dealing with this case as an "exceptionally painful episode of our Criminal Justice System", we have already taken judicial notice of the judgement passed by the High Court in the Habeas Corpus petition for drawing an adverse inference against the subsequent conduct of the accused of the trial in question, it's Public Prosecutor, Police Administration and the Presiding Officer of the Trial Court as provided under Section 8 of the Evidence Act.

89. In the present case, considering the failure of State machinery and failure of the Trial Court to ensure a fair trial from the perspective of the victim side, the aspect of non-marking of the FIR and Bayan Tahriri as an exhibit, non-production of the formal witnesses, i.e., the Constable Clerk and Investigating Officer to prove the lodging of FIR/Bayan Tahriri and the flimsy rejection of application filed by Kishori Rai seeking his examination as a witness along with the examination of Nagendra Singh and Sanjeev Kumar Singh (who had signed said written statement/Bayan Tahriri as attesting persons) as witnesses in the Trial proceeding do not vitiate the genuineness of the FIR and Bayan Tahriri, and we refuse to give any discount to the accused persons for non-exhibition thereof.

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13 (2003) 8 SCC 745

90. The above view finds support from the judgement of this Court in the case of **Ram Bihari Yadav vs State of Bihar & Ors[14],** relevant extract whereof is quoted herein below:

> "**Para 13.** Before parting with this case, we consider it appropriate to observe that though the prosecution has to prove the case against the accused in the manner stated by it and that any act or omission on the part of the prosecution giving rise to any reasonable doubt would go in favour of the accused, yet in a case like the present one where the record shows that investigating officers created a mess by bringing on record Exh. 5/4 and GD Entry 517 and have exhibited remiss and/or deliberately omitted to do what they ought to have done to bail out the appellant who was a member of the police force or for any extraneous reason, the interest of justice demands that such acts or omissions of the officers of the prosecution should not be taken in favour of the accused, for that would amount to giving premium for the wrongs of the prosecution designedly committed to favour the appellant. In such cases, the story of the prosecution will have to be examined de hors such omissions and contaminated conduct of the officials otherwise the mischief which was deliberately done would be perpetuated and justice would be denied to the complainant party and this would obviously shake the confidence of the people not merely in the law enforcing agency but also in the administration of justice."

91. Now further issue crops up about the treatment of the FIR/ Bayan Tahriri as dying declaration and in this respect various earlier pronouncements of this Court have clarified the position of law that the statement by an injured person recorded as FIR can be treated as a dying declaration and such a statement is admissible under Section 32 of the Indian Evidence Act. It was also held that the dying declaration must not cover the whole incident or narrate the case history. Corroboration is not necessary for this situation; adying declaration can be the sole basis for conviction.

92. In the case of **Munnu Raja and another v. State of M.P.[15],** the following observations are relevant:

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14 (1998) 4 SCC 517
15 (1976) 3 SCC 104

"**Para 5.** In regard to these dying declarations, the judgment of the Sessions Court suffers from a patent infirmity in that it wholly overlooks the earliest of these dying declarations, which was made by the deceased soon after the incident in the house of one Barjor Singh. The second statement which has been treated by the High Court as a dying declaration is Ex. P-14, being the FIR which was lodged by the deceased at the police station. The learned Sessions Judge probably assumed that since the statement was recorded as a FIR, it could not be treated as a dying declaration. In this assumption, he was clearly in error. After making the statement before the police, Bahadur Singh succumbed to his injuries and therefore the statement can be treated as a dying declaration and is admissible under Section 32(1) of the Evidence Act. The maker of the statement is dead and the statement relates to the cause of his death.

Para 6. The High Court has held that these statements are essentially true and do not suffer from any infirmity. It is well settled that though a dying declaration must be approached with caution for the reason that the maker of the statement cannot be subject to cross- examination, there is neither a rule of law nor a rule of prudence which has hardened into a rule of law that a dying declaration cannot be acted upon unless it is corroborated…

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Para 10. We are in full agreement with the High Court that both of these dying declarations are true. We are further of the opinion that considering the facts and circumstances of the case, these two statements can be accepted without corroboration. Bahadur Singh was assaulted in broad day light and he knew the appellants. He did not bear any grudge towards them and had therefore no reason to implicate them falsely. Those who were in the constant company of Bahadur Singh after the assault, had also no reason to implicate the appellants falsely. They bore no ill-will or malice towards the appellants. We see no infirmity attaching to the two dying declarations which would make it necessary to look out for corroboration."

93. This Court in the case of **Ram Bihari Yadav vs State of Bihar & Ors**[16]**,** has discussed the law in paragraph 6 as follows:

16 (1998) 4 SCC 517

"**Para 6.** The law relating to dying declaration - the relevancy, admissibility, and its probative value- is fairly settled. More often the expressions 'relevancy and admissibility' are used as synonyms but their legal implications are distinct and different for more often than not facts which are relevant are not admissible; so also facts which are admissible may not be relevant, for example, questions permitted to be put in cross- examination to test the veracity or impeach the credit of witnesses, though not relevant are admissible. The probative value of the evidence is the weight to be given to it which has to be judged having regard to the facts and circumstances of each case. in this case, the thrust of the submission relates not to relevancy or admissibility but to the value to be given to Exh.2. A dying declaration made by a person who is dead as to cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which cause of his death comes in question, is relevant under Section32 of the Evidence Act and is also admissible in evidence. Though dying declaration is indirect evidence being a specie of hearsay, yet it is an exception to the rule against admissibility of hearsay evidence. Indeed, it is substantive evidence and like any other substantive evidence requires no corroboration for forming basis of conviction of an accused. But then the question as to how much weight can be attached to a dying declaration is a question of fact and has to be determined on the facts of each case."

94. We may usefully reproduce the relevant paragraphs of the judgement of this Court in the case of **Suresh Chandra Jana vs. State of West Bengal and Ors.**, reported in **(2017) 16 SCC 466**, which reads as follows:

"32.It would not be out of place to discuss the importance of dying declaration under Section 32 of the Evidence Act. The principle underlying Section 32 of the Evidence Act is 'Nemo moriturus praesumitur mentire' i.e., man will not meet his maker with a lie in his mouth. Dying declaration is one of the exceptions to the rule of hearsay. It is well settled that there is no absolute rule of law 'that the dying declaration cannot form the sole basis of conviction unless it is corroborated'. The rule requiring corroboration is merely a rule of prudence [refer Paniben (Smt.) v. State of Gujarat, (1992) 2 SCC 474;

Munnu Raja and Anr. v. State of Madhya Pradesh, (1976) 3 SCC 104; State of U.P. v. Ram Sagar Yadav, (1985) 1 SCC 552; Ramawati Devi v. State of Bihar, (1983) 1 SCC 211]. Moreover, if the person making the dying declaration survives, then such statement would not be admissible under Section 32 of the Evidence Act, rather such Statements may be admissible under Section 157 of the Evidence Act [refer Gajula Surya Prakasrao v. State of A.P., (2010) 1 SCC 88]

33. In light of the importance the dying declaration holds in a criminal trial, the dereliction of duty in recording the dying declaration and the doctor's ignorance of medico-legal jurisprudence is apparent from the material placed before us. My attention has been drawn to various judgments, which have addressed the aspects of dereliction of duty by the doctors and importance of medico-legal aspect in medical jurisprudence [refer State of Gujarat v. Hasmukh @ Bhikha Gova Harijan, (1996) 1 Guj LR 292, Muniammal v. Supt. of Police, 2008 SCC OnLine Mad 1251 and Indrajit Khandekar v. Union of India and Ors., 2014 SCC OnLine Bom 4810]. It has to be remembered that every stakeholder in this criminal justice system is expected to act with a sense of fairness to bring out the truth so that punishment can be meted out to those who deserve. Although courts are provided with the duty to dispense justice, it cannot be denied that effective dispensation of justice by the courts in this country requires support of all the stakeholders. In light of the above, every stakeholder is expected to be aware of their responsibility and work towards achieving ends of the criminal justice system.

34. The last aspect is regarding the defective investigation and prosecution. If a negligent investigation or omissions or lapses, due to perfunctory investigation, are not effectively rectified, the faith and confidence of the people in the law enforcing agency would be shaken. Therefore the police have to demonstrate utmost diligence, seriousness and promptness. [refer Ram Bihari Yadav v. State of Bihar, (1998) 4 SCC 517].

35. The basic requirement that a trial must be fair is crucial for any civilized criminal justice system. It is essential in a society which recognizes human rights and is based on values such as freedoms, the

rule of law, democracy and openness. The whole purpose of the trial is to convict the guilty and at the same time to protect the innocent. In this process courts should always be in search of the truth and should come to the conclusion, based on the facts and circumstances of each case, without defeating the very purpose of justice."

95. In the case at hand, the deceased Rajendra Rai gave his statement in the form of Bayan Tahriri and narrated the entire incident and circumstances of the transaction which resulted in his death. Subsequently, he died on account of injuries suffered by him in the incident in question. This fact is not in dispute and hence, following the above case laws, the FIR lodged on the basis of Bayan Tahrir of injured Rajendra Rai is liable to be treated as a dying declaration, which itself is a substantive piece of evidence and is admissible under Section32(1) of the Evidence Act.

96. In the present case, the FIR, being a public document and a dying declaration of the informant, is the foundation of the entire prosecution case. However, in the present matter, we have to find out the 'evidence of those persons who can vouchsafe for the truth of the facts in issue'. As held in **Narmada Devi Gupta (supra)**, to ensure the reliability of the contents of the FIR/dying declaration, for which along with the inference drawn by us against the subsequent conduct of accused-respondent no.2 and the aspect of deplorable functioning of the Public Prosecutor, Police Administration and the Presiding Officer of the Trial Court to extend undesirable favour to the accused, the only incriminating evidence is the testimony of Smt Lalmuni Devi (CW-1), which aspect is being dealt with hereinafter.

Issue (D) : Testimony of CW-1:

97. In the present case, besides the FIR/Bayan Tahriri, which is in the form of dying declaration, the testimony of CW-1 Lalmuni Devi is another incriminating evidence against the accused persons. CW-1 Lalmuni Devi's statement was recorded during the investigation on 29.08.1995 and during Trial she was not produced as Prosecution Witness but was summoned by the Trial Court as Court's Witness (CW-1) and her first statement was recorded on 03.11.2006, which was scrapped by the Division Bench of High Court by means of one of the various directions issued in the Habeas Corpus judgment dated 13.03.2007 in view of a serious allegation of her kidnapping by the

accused side on 24.10.2006 i.e., just before her examination in the Trial Court and the High Court directed that she will be reexamined afresh before the Trial Court at Patna under Section 311 of the CrPC. Subsequently, CW-1 was examined by the Trial Court when she had deposed about the incident in question and supported the prosecution's version narrated in the FIR.

98. The High Court, in its impugned judgement, concluded that CW-1 Lalmuni Devi is not a hearsay witness, as held by the Trial Court, but is a tutored witness in view of her last two lines in cross-examination. Any other prosecution witness of fact does not corroborate the testimony of CW-1. Instead, their testimonies are against CW-1 as no other Prosecution Witness has stated about her presence. The main reason assigned by the High Court for such a conclusion is that she has stated in the end of her cross- examination that "her son (another alive son) had asked her to take the name of accused before the Court,"

99. The above conclusion drawn by the High Court is unacceptable and suffers from a serious error of law and also an error of fact. The High Court has completely failed to take up the merit of the case in its right perspective and failed to take note of the sensitivity attached to the case.

100. The High Court ought to have considered the fact that on account of the complete failure of state machinery, it was the institution of justice which had taken the task in its hand, firstly, by means of a Habeas Corpus Petition and secondly, by means of Suo Moto Revision under Section 401 of CrPC having the foundation of inspecting notes of the Inspecting Judge of the District Judgeship and the resolution of Standing Committee of High Court. The minutes of the Standing Committee and the report of the Inspecting Judge, Justice Navin Sinha dated 04.05.2009 were on record of the High Court but it chose to completely ignore the same.

101. The High Court ought to have considered the checkered history of events that occurred in the case, resulting in the judgement of the Division Bench of the High Court in the Habeas Corpus Petition containing serious observations about the conduct of all the stakeholders of the said criminal trial and also the impact of the report of the Inspecting Judge dated 04.05.2009.

102. CW-1 was an old lady and mother of the deceased Rajendra Rai and the eye-witness of the incident, whose first examination was scrapped by the High Court on the allegation of her kidnapping just a few days before that first examination dated 03.11.2006. She was under continuous threat and fear of facing dire consequence, which is apparent on the face of the record. Under these circumstances, in case she had stated in the end of her cross-examination that her son had asked her to take the name of the accused before the Trial Court, there is nothing so contradictory or surprising so as to treat the rest of the substantive ocular evidence as tutored one. In this regard, it is interesting to note that in the impugned judgment, the High Court itself observed that although CW-1 was not named in the chargesheet, but Pirbahor Police Station recorded her statement while she was attending to her injured son in PMHC, which is sufficient to indicate that her statement was recorded during the investigation.

103. There is no serious discrepancy or variation in the testimony of CW-1 with regard to the sequence of events that occurred during the incident in question. A witness, like the CW-1 of the present case, cannot be expected to possess a photographic memory and to recall the details of an incident. The variations of trivial nature in her testimony are liable to be ignored. The very sentence uttered by her at the end of her examination that *"her son had asked her to take the name of the accused before the Court"* is not so surprising in a case like the present one. When the entire family of CW-1 was facing so many storms, it is quite natural for a son to say to her mother (who was old, illiterate, rustic woman having faced immense trauma) that she should not forget to disclose the name of accused persons, in as much as the second occasion of her examination, as ordered by the Division Bench of High Court under Section 311 of CrPC, was the last opportunity for her to speak the truth before the Trial Court.

104. We do not find anything unusual in the statement of CW-1, and her ocular evidence appears to be trustworthy and corroborates the dying declaration of her son Rajendra Rai. This conclusion of ours is guided by the basic and well-settled principles of appreciation of evidence, which this Court in the case of **Balu Sudam Khalde and Another vs. State of Maharashtra**[17]**,** has summarized as principles of appreciation of ocular evidence in a criminal case, which we can usefully reproduce hereinafter:

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"APPRECIATION OF ORAL EVIDENCE

Para 25. The appreciation of ocular evidence is a hard task. There is no fixed or straight-jacket formula for appreciation of the ocular evidence. The judicially evolved principles for appreciation of ocular evidence in a criminal case can be enumerated as under:

I. "I. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole appears to have a ring of truth. Once that impression is formed, it is undoubtedly necessary for the Court to scrutinize the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence given by the witness and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief.

II. If the Court before whom the witness gives evidence had the opportunity to form the opinion about the general tenor of evidence given by the witness, the appellate court which had not this benefit will have to attach due weight to the appreciation of evidence by the Trial Court and unless there are reasons weighty and formidable it would not be proper to reject the evidence on the ground of minor variations or infirmities in the matter of trivial details.

III. When eye-witness is examined at length it is quite possible for him to make some discrepancies. But Courts should bear in mind that it is only when discrepancies in the evidence of a witness are so incompatible with the credibility of his version that the Court is justified in jettisoning his evidence.

IV. Minor discrepancies on trivial matters not touching the core of the case, hyper technical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error committed by the investigating officer not going to the root of the matter would not ordinarily permit rejection of the evidence as a whole.

V. Too serious a view to be adopted on mere variations falling in the narration of an incident (either as between the evidence of two witnesses or as between two statements of the same witness) is an unrealistic approach for judicial scrutiny.

VI. By and large a witness cannot be expected to possess a photographic memory and to recall the details of an incident. It is not as if a video tape is replayed on the mental screen.

VII. Ordinarily it so happens that a witness is overtaken by events. The witness could not have anticipated the occurrence which so often has an element of surprise. The mental faculties therefore cannot be expected to be attuned to absorb the details.

VIII. The powers of observation differ from person to person. What one may notice, another may not. An object or movement might emboss its image on one person's mind whereas it might go unnoticed on the part of another.

IX. By and large people cannot accurately recall a conversation and reproduce the very words used by them or heard by them. They can only recall the main purport of the conversation. It is unrealistic to expect a witness to be a human tape recorder.

X. In regard to exact time of an incident, or the time duration of an occurrence, usually, people make their estimates by guess work on the spur of the moment at the time of interrogation. And one cannot expect people to make very precise or reliable estimates in such matters. Again, it depends on the time-sense of individuals which varies from person to person.

XI. Ordinarily a witness cannot be expected to recall accurately the sequence of events which take place in rapid succession or in a short time span. A witness is liable to get confused, or mixed up when interrogated later on.

XII. A witness, though wholly truthful, is liable to beoverawed by the court atmosphere and the piercing cross examination by counsel and out of nervousness mix up facts, get confused

regarding sequence of events, or fill up details from imagination on the spur of the moment. The sub-conscious mind of the witness sometimes so operates on account of the fear of looking foolish or being disbelieved though the witness is giving a truthful and honest account of the occurrence witnessed by him.

XIII. A former statement though seemingly inconsistent with the evidence need not necessarily be sufficient to amount to contradiction. Unless the former statement has the potency to discredit the later statement, even if the later statement is at variance with the former to some extent it would not be helpful to contradict that witness."

[See Bharwada Bhoginbhai Hirjibhai v. State of Gujarat, 1983 Cri LJ 1096 : ((1983) 3 SCC 217 : AIR 1983 SC 753) Leela Ram v. State of Haryana, (1999) 9 SCC 525 : AIR 1999 SC 3717 and Tahsildar Singh v. State of UP (AIR 1959 SC 1012)]

105. In the totality of the Case, this Court finds that the testimony of CW-1, Lalmuni Devi (mother of deceased Rajendra Rai), corroborates the same and makes it reliable. The narration about the incident's time, place and manner, the specific role attributed to the accused persons, etc, as described by Lalmuni Devi (CW-1), conforms with the contents of the FIR/Bayan Tahriri.

106. This Court is conscious of the fact that a path different from the normal is being adopted to determine the guilt of the accused. The Court is compelled to do so in the glaringly peculiar facts of the present case which have been elaborately discussed in the preceding paragraphs.

107. We have noticed that the three main stake holders in a criminal trial, namely the Investigating Officer that is the part of the police of the State of Bihar, the Public Prosecutor, and the Judiciary, have all utterly failed to keep up their respective duties and responsibilities cast upon them. This Court time and again has commented upon the failure of the major stakeholders in the criminal delivery system.

108. In the case of **State of Haryana and Ors. vs. Ch. Bhajan Lal and Ors[18].**, this Court had commented on the conduct of the Police Officer. The following extract from the said judgment is reproduced hereunder:

> "Human dignity is a dear value of our Constitution. But if a police officer transgresses the circumscribed limits and improperly and illegally exercises his investigatory powers in breach of any statutory provision causing serious prejudice to the personal liberty and also property of a citizen, then the Court, on being approached by the person aggrieved for the redress of any grievance has to consider the nature and extent of the breach and pass appropriate orders as may be called for without leaving the citizens to the mercy of police echelons since human dignity is a dear value of our Constitution."

109. Insofar as the Public Prosecutors are concerned, a lot of comments have been made, not only by this Court but also by the Law Commission, highlighting the role and importance of a Public Prosecutor. We may quote with profit the role of the Prosecutors as stated in the **197th Law Commission of India Report on Public Prosecutors' Appointments (2006):**

> "The Prosecutor has a duty to the state, to the accused and the Court. The Prosecutor is all times a minister of justice, though seldom so described. It is not the duty of the prosecuting counsel to secure a conviction, not should any prosecutor even feel pride or satisfaction in the mere fact of success."
>
> In 154th Law Commission of India Report it was reported as follows:
>
> "Prosecutors are the ministers of Justice whose job is none other than assisting the State in the administration of Justice. They are not representatives of any party. Their job is to assist the Court by placing before the Court all relevant aspects of the case. They are also not there to see the culprits escape conviction."

110. This Court in the case of **Zahira Habibulla H. Sheikh v. State of Gujarat[19]**, had commented as follows with respect to the conduct of fair trial:

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18 AIR 1992 SC 604
19 (2004) 4 SCC 158

"Denial of a fair trial is as much injustice to the accused as is to the victim and the society. Fair trial obviously would mean a trial before an impartial judge, a fair prosecutor and atmosphere of judicial calm. Fair trial means a trial in which bias or prejudice for or against the accused, the witnesses, or the cause which is being tried is eliminated. If the witnesses get threatened or are forced to give false evidence that also would not result in a fair trial. The failure to hear material witnesses is certainly denial of fair trial."

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"Failure to accord fair hearing either to the accused or the prosecution violates even minimum standards of due process of law. It is inherent in the concept of due process of law, that condemnation should be rendered only after the trial in which the hearing is a real one, not sham or a mere farce and pretence. Since the fair hearing requires an opportunity to preserve the process, it may be vitiated and violated by an overhasty, stage-managed, tailored and partisan trial."

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"Time has become ripe to act on account of numerous experiences faced by courts on account of frequent turning of witnesses as hostile, either due to threats, coercion, lures and monetary considerations at the instance of those in power, their henchmen and hirelings, political clout and patronage and innumerable other corrupt practices ingeniously adopted to smother and stifle truth and realities coming out to surface rendering truth and justice to become ultimate casualties. Broader public and societal interests require that the victims of the crime who are not ordinarily parties to prosecution and the interests of State represented by their prosecuting agencies do not suffer even in slow process but irreversibly and irretrievably, which if allowed would undermine and destroy public confidence in the administration of justice, which may ultimately pave way for anarchy, oppression and injustice resulting in complete breakdown and collapse of the edifice of rule of law, enshrined and jealously guarded and protected by the Constitution. There comes the need for protecting the witness."

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> "A more serious ground which disturbs us in more ways than one is the alleged absence of congenial atmosphere for a fair and impartial trial. It is becoming a frequent phenomenon in our country that court proceedings are being disturbed by rude hoodlums and unruly crowds, jostling, jeering or cheering and disrupting the judicial hearing with menaces, noises and worse."

111. The Trial Court and the High Court miserably failed to notice the sensitivity and intricacies of the case. Both the Courts completely shut their eyes to the manner of the investigation, the Prosecutor's role, and the high-handedness of the accused as also the conduct of the Presiding Officer of the Trial Court, despite observations and findings having been recorded not only by the Administrative Judge but also by the Division Bench deciding Habeas Corpus petition. They continued with their classical rut of dealing with the evidence in a manner as if it was a normal trial. They failed to notice the conduct of the Public Prosecutor in not even examining the formal witnesses and also that the Public Prosecutor was acting to the advantage of the accused rather than prosecuting the accused with due diligence and honesty. The Presiding Officer of the Trial Court acquitting the accused as also the learned Judge of the High Court dismissing the revision, were both well-aware of the facts, legal procedures, as well as the law regarding appreciation of evidence in a criminal case. Both the courts below ignored the administrative reports as also the judgment of the High Court in the Habeas Corpus petition. In fact they should have taken judicial notice of the same. They completely failed to take into consideration the conduct of the accused subsequent to the incident, which was extremely relevant and material in view of Section 8 of the Evidence Act. They failed to draw any adverse inference against the accused with respect to their guilt.

112. Section 311 CrPC confers wide powers on any court at any stage of any inquiry, trial or other proceeding under this Code to summon material witness or examine person present. Such person may not be a person summoned as a witness. Power to recall and re-examine is also vested. The concept is that it should be essential for the just decision of the case. The said section is reproduced hereunder:

"Section 311 in The Code Of Criminal Procedure, 1973

311. Power to summon material witness, or examine person present. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or. recall and re- examine any person already examined; and the Court shall summon and examine or recall and re- examine any such person if his evidence appears to it to be essential to the just decision of the case."

This power can be exercised not only by the Trial Court but also by the appellate Court or revisional Court. The logic behind this provision is that the endeavour of the Courts is to find out the truth which would be essential for the just decision of the case. Additionally, Sections 367 and 391 CrPC confers powers on the High Court dealing with death reference and appellate Courts to take additional evidence. The said sections are reproduced hereunder:

"Section 367 in The Code of Criminal Procedure, 1973

367. Power to direct further inquiry to be made or additional evidence to be taken.

(1) If, when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

(2) Unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when such inquiry is made or such evidence is taken.

(3) When the inquiry or evidence (if any) is not made or taken by the High Court, the result of such inquiry or evidence shall be certified to such Court."

"Section 391 in The Code Of Criminal Procedure, 1973

391. Appellate Court may take further evidence or direct it to be taken.

(1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons

and may either take such evidence itself, or direct it to be taken by a Magistrate, or when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) The accused or his pleader shall have the right to be present when the additional evidence is taken.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXIII, as if it were an inquiry."

Even otherwise under general principles of law and procedure appellate Courts can exercise all powers vested in the Trial Court in an attempt to arrive at a just and fair decision.

113. In the present case, unfortunately the Trial Court as well as the High Court failed to exercise their powers under the aforesaid provisions to summon the witnesses of the charge-sheet to prove the police papers. Despite applications being filed to summon persons who were not shown as witnesses to the charge-sheet, the Trial Court repeatedly rejected the said applications in 2006 and again in 2008 on the flimsy grounds that were not named in the charge-sheet or that the Public Prosecutor had not filed such application in gross violation of Section 311 CrPC.

114. In the above backdrop of facts and the legal position, the conclusions based on analysis of the evidence in the light of the legal position is as follows:

a) Fard Bayan of Rajendra Rai, which was later converted into an FIR, is admissible in evidence and is to be read as a dying declaration or his last statement.

b) The tainted investigation shows the high-handedness of the accused-Respondent no.2, who was a powerful person, being a sitting M.P. of the Ruling Party.

c) The prosecution had established, even through the hostile witnesses, that the date, time, and place of incidence as given in

the Fard Bayan of Rajendra Raiwere fully established. The only issue was with regard to the identity of the assailants.

d) The post-mortem reports, show that the death of Rajendra Rai and Daroga Rai was homicidal in nature. The medico legal reports supported the prosecution's story to the extent that the injuries were caused by a fire arm, which proved fatal for two out of the three injured.

e) Adverse inference against the accused is drawn in view of their subsequent conduct.

f) Judicial notice is taken of the judgment in the Habeas Corpus petition dated 13.07.2007 regarding the conduct of the accused, the investigating agency, the Public Prosecutor and the Presiding Officer conducting the trial.

g) The two administrative reports of the respective judges, who were constitutional functionaries, also have to be given due credence and cannot be ignored outright regarding the conduct of the accused, public prosecutor and the Presiding Officer conducting the Trial.

h) The statement of CW-1 is found to be reliable, and the Courts below wrongly discarded it on the ground that it was hearsay and tutored.

i) The dying declaration and the statement of CW-1 fully establish that it was Prabhunath Singh, who had caused the injuries from his firearm weapon, which proved to be fatal for two out of the three injured and also caused injury to the third surviving injured, namely Smt. Devi.

j) Prabhunath Singh (accused no.1) is thus liable to be convicted under Sections 302 and 307 IPC for committing culpable homicide amounting to murder and attempt to murder.

k) The rest of the accused, although named in the chargesheet after due investigation, since their names were not reflected either in the Fard Bayan of the deceased Rajendra Rai (dying declaration) or in the statement of CW-1, therefore, their acquittal is not disturbed.

115. Accused-respondent no.2 is thus convicted under Sections 302 and 307 IPC for the murders of Daroga Rai and Rajendra Rai and also for attempt to murder of injured Smt. Devi.

116. The Secretary, Department of Home, State of Bihar and the Director General of Police, Bihar are directed to ensure that Prabhunath Singh (Respondent No. 2) is taken into custody forthwith and produced before this Court to be heard on the question of sentence in view of Section 235 CrPC.

117. Let the matter be listed again on 1st September, 2023. On the said date, accused Prabhunath Singh (respondent no. 2) be produced before this Court in custody for the aforesaid purpose.

Headnotes prepared by:
Bibhuti Bhushan Bose

Acquittal of main accused reversed and matter listed for hearing on sentence.