

IN THE HIGH COURT OF JUDICATURE AT PATNA

CRIMINAL APPEAL (DB) No. 673 of 2016

Arising Out of PS. Case No.-37 Year-2005 Thana- TAJPUR District- Samastipur

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1. Nand Kishore Rai

2. Subodh Rai

3. Ranjeet Rai

All sons of Late Ram Uchit Rai, resident of village- Keshonarainpur, P.S. Tajpur  
(Halai), District Samastipur

... .. Appellants

Versus

The State of Bihar

... .. Respondent

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*Acts/Sections/Rules:*

- *Sections 34, 148, 302, Section 304 Part II and 379 of the Indian Penal Code*
- *Section 32 of the Indian Evidence Act, 1872*

*Cases referred:*

- *Kans Raj vs. the State of Punjab & Ors., reported in (2000) 5 SCC 207*
- *Manjunath & Others vs. State of Karnataka, reported in 2023 SCC OnLine 1421*
- *Paramjit Singh vs. State of Punjab, reported in (1997) 4 SCC 156*
- *Saurav Sharma & Anr. vs. the State of Bihar (Patna High Court Criminal Appeal (DB) No.1271 of 2017)*
- *Uttam vs. State of Maharashtra, reported in (2022) 8 SCC 576*
- *Khushal Rao vs. State of Bombay, reported in AIR 1958 SC 22*
- *Govind Narain vs. State of Rajasthan, reported in 1993 Supp (3) SCC 343*
- *Sudhakar vs. State of Maharashtra, reported in (2000) 6 SCC 671*
- *Deny Bora vs. State of Assam, reported in (2014) 14 SCC 42*
- *Ishwar Singh vs. State of UP, reported in, (1976) 4 SCC 355*
- *Mohan Lal vs. State of Rajasthan, reported in (1999) 9 SCC 209*
- *State of Madhya Pradesh vs. Ramjan Khan & Ors., reported in 2024 SCC OnLine SC 3070*
- *Sri Bhagwan vs. State of U.P., reported in (2013) 12 SCC 137*
- *Ramji Singh vs. State of Bihar, reported in (2001) 9 SCC 528*

- *Balbir Singh vs. State of Punjab*, reported in (2006) 12 SCC 283
- *Jai Karan vs. State of Delhi (NCT)*, reported in (1999) 8 SCC 161
- *Gian Chand & Ors. vs. the State of Haryana*, reported in (2013) 14 SCC 420
- *Laxmibai vs. Bhagwantbuva*, reported in (2013) 4 SCC 97
- *Panneerselvam vs. State of T.N.*, reported in (2008) 17 SCC 190
- *Atbir vs. Govt. (NCT of Delhi)*, reported in (2010) 9 SCC 1
- *Rajendra vs. State of Maharashtra*, reported in 2024 SCC OnLine SC 941
- *Appabhai & Anr. vs. State of Gujarat*, reported in 1988 Supp SCC 241
- *Camilo Vaz vs. State of Goa*, reported in (2000) 9 SCC 1
- *Rampal Singh vs. State of U.P.*, reported in (2012) 8 SCC 289
- *Ankush Shivaji Gaikwad vs. State of Maharashtra*, reported in (2013) 6 SCC 770
- *Chenda vs. State of Chhattisgarh*, reported in (2013) 12 SCC 110
- *Surain Singh vs. State of Punjab*, reported in (2017) 5 SCC 796
- *Anbazhagan vs. State*, reported in 2023 SCC OnLine SC 857
- *Velthepu Srinivas vs. State of Telangana*, reported in 2024 SCC OnLine SC 107

*Appeal - filed against the judgment whereby appellants have been convicted for commission of the offences under Sections 302 and 379 of the Indian Penal Code.*

*Held - Mere non-joining of an independent witness, where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the appellants. - Evidence of prosecution witnesses are cogent, convincing, creditworthy and reliable. Examination of other independent witnesses in quantity would not have made any difference. (Para 31)*

*All the injuries except one are on non-vital parts of the body of the deceased and moreover, neither grievous/piercing injury has been inflicted by lathi nor gunshot has been fired by appellant though he was armed with pistol. - It cannot be concluded that the intention of the appellants was to cause death or to cause such injury which was sufficient in the ordinary course of nature to cause death, nonetheless the fact remains that the appellants and two others had badly assaulted the deceased - Therefore, the appellants and two others had though engaged in overt act with the knowledge that the same is likely to cause death but*

*they did not have any intention to cause death. Moreover, death must result as a proximate and not a remote consequence of the act of violence. Present case would fall under Part II of Section 304 of the IPC. (Para 32)*

*Commission of offence under Section 379 IPC does not stand proved against the appellants, considering the evidence available on record, hence the finding of conviction recorded by the Trial Judge under Section 379 of the IPC is set aside. (Para 33)*

*Appeal is partially allowed. (Para 35)*

IN THE HIGH COURT OF JUDICATURE AT PATNA  
CRIMINAL APPEAL (DB) No.673 of 2016

Arising Out of PS. Case No.-37 Year-2005 Thana- TAJPUR District- Samastipur

- 1. Nand Kishore Rai
- 2. Subodh Rai
- 3. Ranjeet Rai

All sons of Late Ram Uchit Rai, resident of village-Keshonarainpur, P.S.  
Tajpur (Halai), District Samastipur

... .. Appellants

Versus

The State of Bihar

... .. Respondent

Appearance:

For the Appellant/s : Mr. Ajay Kumar Thakur, Advocate  
Ms. Vaishnavi Singh, Advocate  
Mr. Ritwik Thakur, Advocate  
For the State : Mr. Ajay Mishra, APP  
For the Informant : Mr. Suraj Narayan Yadav, Advocate  
Mr. Bijay Bhushan, Advocate  
Mr. Ashok Kumar, Advocate  
Mr. Mansoon Alam, Advocate

CORAM: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH  
and  
HONOURABLE MR. JUSTICE SHAILENDRA SINGH

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE MOHIT KUMAR SHAH)

Date: 12.02.2025

The present appeal under Section 374(2) read with  
Section 389 (1) of the Code of Criminal Procedure, 1973  
(hereinafter referred to as “CrPC”) has been preferred against  
the judgment of conviction and order of sentence dated  
06.06.2016 and 08.06.2016, respectively, passed in Sessions  
Trial No. 66 of 2008 (arising out of Tajpur (Halai O.P.) P.S. Case



No. 37 of 2005), by the learned Additional District and Sessions Judge-2<sup>nd</sup>, Samastipur (hereinafter referred to as “learned Trial Judge”). By the said judgment, the learned Trial Judge has convicted the appellants for commission of the offences under Sections 302 and 379 of the Indian Penal Code (hereinafter referred to as “IPC”) and has sentenced them to undergo rigorous imprisonment for life under Section 302 of the IPC with fine of Rs.50,000/- and in default they have been directed to undergo rigorous imprisonment for a further period of six months separately. All the appellants have been further sentenced under Section 379 of the IPC to undergo rigorous imprisonment for a period of three years. Both the sentences have been ordered to run concurrently.

2. Short facts of the case are that on 09.02.2005, at about 14:30 hours, the *fardbeyan* of the deceased-informant was recorded at Sadar Hospital, Samastipur by the Sub-Inspector of Police, Town Police Station, wherein he has stated that on 09.02.2005 at about 9:00 a.m., while he was going from his house to Samastipur Court he had asked his son, namely Sanjay to come along with him, however he said that he would come after sometime hence, he had left his house after 15-20 minutes on his new green cycle along with the documents of title suit and a sum



of Rs. 1500/-, and when he had travelled for about one kilometer and reached near the pond, the accused persons namely, Arjun Rai, Subodh Rai (Appellant No.2), Nand Kishore Rai (Appellant No.1), Sanjeet Roy and Ranjeet Rai (Appellant No.3), who were present there from before, armed with *lathi* and *khanti* had surrounded the deceased-informant whereupon Arjun Rai had exhorted the other accused persons to beat the deceased-informant and kill him, whereafter Arjun Rai had assaulted the deceased-informant with *khanti* with an intention to kill him, however, he had obstructed with his right hand, resulting his hand being fractured. Thereafter, Arjun Rai had assaulted the deceased-informant with *khanti* on his stomach and tried to insert it inside the stomach, however, the deceased-informant had obstructed it with his right hand resulting in his elbow being fractured. The deceased-informant had then fallen down, whereafter Subodh Rai (appellant No.2), who was armed with *khanti* had assaulted the deceased-informant on his right leg knee, leading to blood oozing out from there. Then Ranjeet Rai (appellant No.3) and Sanjeet Rai, with an intention to kill the deceased-informant had repeatedly assaulted him by *lathi*, leading to the portion below the right leg being fractured. Then Nand Kishore Rai (appellant No.1) had sat on the chest of the deceased-informant and with the butt of pistol



he had assaulted on the chest of the deceased-informant as also had pressed his neck. The deceased-informant had then raised an alarm, resulting in his son namely, Sanjay Kumar Sharma (P.W.4) and co-villagers, namely Pandav Singh and Ram Singh having arrived there, whereafter Arjun Rai had taken out the case file from the bicycle of the deceased-informant and Nand Kishore Rai (Appellant No.1) had taken out a sum of Rs.1500/- from the pocket of the deceased-informant and then all the accused persons had fled away. The deceased-informant has further stated that he was then taken to Sadar Hospital in an injured condition and on the way he had become unconscious however, subsequently he regained consciousness at the hospital where he has given his statement. The statement was read over to the deceased-informant and after finding the same to be correct, the deceased-informant had put his left thumb impression on the *fardbeyan* since he had received injury on his hand and was unable to put his signature.

3. After recording of the *fardbeyan*, a formal FIR bearing Tajpur (Halai O.P.) P.S. Case No. 37 of 2005 was registered for offences under Sections 148/307/379 of the IPC on 11.02.2005 at about 13:00 hours against the aforesaid appellants and two others, namely Arjun Rai and Sanjeet Rai. Subsequently, on account of the death of the informant, Section 302 of the IPC



was added vide order dated 12.02.2005 by the learned Trial Court. After investigation and finding the case to be true qua the appellants and two others, the police had submitted charge sheet on 31.12.2005 against the appellants herein under Sections 148/302/379/34 of the IPC. The learned Trial Court had taken cognizance of the offences under Sections 147/148/302 and 379/34 of the IPC vide order dated 20.05.2005. Thereafter, the case was committed to the Court of Sessions and was numbered as Sessions Trial No.66 of 2008. After taking into consideration the charge sheet and the materials collected during investigation, the learned Trial Judge framed charges under Sections 302/34, 379 and 148 of the IPC against the appellants to which they pleaded not guilty and claimed to be tried.

4. During the course of trial, six prosecution witnesses were examined i.e. P.W.1 Himanshu Shekhar (nephew of the deceased-informant), P.W.2 Prabhat Ranjan (son of the deceased-informant), P.W.3 Ram Kumar Singh, P.W.4 Sanjay Kumar Sharma (son of the deceased-informant), P.W.5, Subodh Kumar Singh (Investigating Officer) and P.W.6 Dr. Purushottam Kumar (Doctor who had conducted autopsy of the deceased).

5. Shri Ajay Kumar Thakur, the learned counsel for the appellants has submitted that the person, who has scribed the





*fardbeyan* has not been examined and the *fardbeyan* has also not been proved, hence it is submitted that no *fardbeyan* of the deceased-informant was ever recorded. Reference in this connection has been made to a judgment rendered by the Hon'ble Apex Court in the case of ***Kans Raj vs. the State of Punjab & Ors.***, reported in (2000) 5 SCC 207, to submit that in order to make the statement of the deceased a substantive evidence the person or the agency relying upon it is under a legal obligation to prove the making of such statement as a fact, thus if it is in writing, the scribe must be produced in the Court and if it is verbal, it should be proved by examining the person who had heard the deceased making the statement. In the present case, the scribe who has recorded the statement of the deceased in his writing has not been examined, hence the statement of the deceased-informant cannot be stated to be a substantive piece of evidence, thus, cannot be relied upon. It is also submitted that treating doctors have not been examined, causing gross prejudice to the appellants. It is next submitted that the prosecution witnesses have consistently deposed that the deceased-informant was becoming conscious and unconscious intermittently, hence under such circumstances the deceased-informant, who was critical, could not have given a detailed statement as has been



recorded by way of the aforesaid *fardbeyan* on 09.02.2005 and moreover, there is no evidence on record to show that the deceased-informant was in a fit state of mind to give statement.

6. The learned counsel for the appellants has further submitted that all the independent witnesses have been withheld by the prosecution, whose statements were recorded by the police under Section 161 of the CrPC. It is also contended that the present case will not fall within the ambit of Section 302 of the IPC, inasmuch as though the accused persons were armed with firearm and *khanti*, however, neither firearm injury nor injury caused by *khanti* has been found on the body of the deceased and almost all the injuries except one are on non-vital parts of the body as also most of the injuries are laceration, bruises and abrasion, thus the appellants did not have any intention to kill the deceased nor they had knowledge that by assaulting the deceased-informant in the manner they have done, it would have resulted in death of the deceased. It is next contended that though the accused were only five in number, however it is apparent from the evidence led in the present case that there were 20-30 persons who had arrived at the place of occurrence, nonetheless no attempt was made to capture the appellants. In fact, no incriminating articles/materials have been found from the place of occurrence and the evidence of the



witnesses is full of contradictions, hence not fit to be relied upon. It is also submitted that the FIR attesting witness, namely Ram Kumar Singh has stated in his evidence that he never went to the hospital, thus it is surprising as to how he had put his signature on the *fardbeyan*, thus the earliest version has been withheld by the police, moreso, since the son of the deceased, namely, Sanjay Kumar Sharma has said that he had given his statement at Halai, but does not remember whether he had named the accused persons or not. It is stated that the present case would also not fall within the ambit of Section 304 Part II of the IPC.

7. The learned counsel for the appellants has referred to various judgments on the issue of admissibility of a dying declaration, which are being enumerated herein below:-

(i) Judgment rendered by the Hon'ble Apex Court in the case of *Manjunath & Others vs. State of Karnataka*, reported in 2023 SCC OnLine 1421. It has been held in the said judgment that examination of the person who reduced into writing the dying declaration is essential and in case the scribe, for reasons beyond control such as incapacitation or death is unavailable, it would be open for the prosecution to take necessary aid of secondary evidence but otherwise unexplained non-examination of



the scribe would render the case to be doubtful and would land a fatal blow to the prosecution case.

(ii) Judgment rendered by the Hon'ble Apex Court in the case of ***Paramjit Singh vs. State of Punjab***, reported in (1997) 4 SCC 156. In the said case, the Hon'ble Apex Court has held that it would be totally unsafe to accept the testimony of a witness who had sustained serious injuries and had become semi-unconscious after recording of the dying declaration and in case the dying declaration contains even the minutest details and does not inspire confidence, the same should be left out of consideration.

(iii) Judgment dated 13.08.2024, rendered by the learned Division Bench of the Hon'ble Patna High Court, in the case of ***Saurav Sharma & Anr. vs. the State of Bihar (Criminal Appeal (DB) No.1271 of 2017)***. In the said case, the learned Division Bench of the Hon'ble Patna High Court, considering various judgments rendered by the Hon'ble Apex Court, has summarized the broad principles regarding admissibility of a dying declaration as evidence, which are reproduced herein below:-

*“(1) Each dying declaration must be scrutinized on its own merits. The Court has to examine upon which of the statements reliance can be placed in*



*order for the case to proceed further. Medical fitness of the person making such declaration, at the relevant time, assumes importance along with other factors such as possibility of tutoring by the relatives etc.;*

*(2) If the Court is satisfied that the dying declaration is true and trustworthy, it can base conviction upon it without corroboration.;*

*(3) The Court has to scrutinize the dying declaration carefully and must ensure that the declaration is not the result of tutoring, prompting or imagination and the declarant was in a fit state to make the declaration.;*

*(4) Where the deceased was unconscious and could never make any dying declaration, the evidence with regard to it is to be rejected.;*

*(5) Where the prosecution version differs from the version as given in the dying declaration, the said declaration cannot be acted upon.;*

*(6) The Court, in order to satisfy whether deceased was in a fit mental condition to make the dying declaration, look up to the medical opinion, but where eye-witnesses state that the deceased was in a fit and conscious state to make the declaration, the medical opinion will not prevail.*

*(7) The Magistrate being a disinterested witness and a responsible officer and there being no circumstances or material to suspect that the Magistrate had any animus against the accused or was in any way interested in fabricating a dying*



*declaration, question of doubt in declaration recorded by the Magistrate does not arise.”*

(iv) Judgment rendered by the Hon’ble Apex Court in the case of ***Uttam vs. State of Maharashtra***, reported in (2022) 8 SCC 576. In this case, the Hon’ble Apex Court has held that dying declaration is the last statement that is made by a person as to the cause of his imminent death or the circumstances that had resulted in that situation at a stage when the declarant is conscious of the fact that there are virtually NIL chances of his survival. Section 32 of the Indian Evidence Act, 1872 (hereinafter referred to as “the Act, 1872”) states that when a statement is made by a person as to the cause of death, or as to any of the circumstances which resulted in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased victim to the witness is a relevant fact and is admissible in evidence. It has been further held in the said case that if a dying declaration suffers from some infirmity, it cannot be the sole basis for convicting an accused inasmuch as it is the duty of the prosecution to establish the charge against the accused beyond reasonable doubt and the benefit of doubt should always



go in favor of the accused. Thus, though dying declaration is a substantive piece of evidence, however it has to be relied upon in case it is proved that the same was voluntary, truthful and the victim was in a fit state of mind. In the said judgment, reference has been made to a judgment rendered in the case ***Khushal Rao vs. State of Bombay***, reported in AIR 1958 SC 22, wherein the principles governing circumstances where courts can accept a dying declaration without corroboration, have been dealt with extensively, which are enumerated herein below:-

*“(1) that it cannot be laid down as an absolute rule of law that a dying declaration cannot form the sole basis of conviction unless it is corroborated;*

*(2) that each case must be determined on its own facts keeping in view the circumstances in which the dying declaration was made;*

*(3) that it cannot be laid down as a general proposition that a dying declaration is a weaker kind of evidence than other pieces of evidence;*

*(4) that a dying declaration stands on the same footing as another piece of evidence and has to be judged in the light of surrounding circumstances and with reference to the principles governing the weighing of evidence;*



*(5) that a dying declaration which has been recorded by a competent Magistrate in the proper manner, that is to say, in the form of questions and answers, and, as far as practicable, in the words of the maker of the declaration, stands on a much higher footing than a dying declaration which depends upon oral testimony which may suffer from all the infirmities of human memory and human character, and*

*(6) that in order to test the reliability of a dying declaration, the court has to keep in view, the circumstances like the opportunity of the dying man for observation, for example, whether there was sufficient light if the crime was committed at night; whether the capacity of the man to remember the facts stated, had not been impaired at the time he was making the statement, by circumstances beyond his control; that the statement has been consistent throughout if he had several opportunities of making a dying declaration apart from the official record of it; and that the statement had been made at the earliest opportunity and was not the result of tutoring by interested parties.”*

(v) Judgment rendered by the Hon’ble Apex Court in the case of **Govind Narain vs. State of Rajasthan**, reported in 1993 Supp (3) SCC 343. In the said case, it has been held by the Hon’ble Apex Court that unless a





dying declaration is proved by cogent and reliable evidence it cannot be relied upon and in case the witnesses to the dying declaration are totally inconsistent and differ on material points, it is unsafe to rely on such a dying declaration. It has also been held that where for an unexplained reason, the scribe has not been produced for examination/cross-examination, reliance should not be placed on such a dying declaration.

(vi) Judgment rendered by the Hon'ble Apex Court in the case of *Sudhakar vs. State of Maharashtra*, reported in (2000) 6 SCC 671. In the said case, it has been held that due weight is required to be given to a dying declaration, however, the person or the agency relying upon it is under a legal obligation to prove the making of the statement as a fact and if it is in writing, the scribe must be produced in the court and if it is verbal, it should be proved by examining the person who heard the deceased making the statement.

8. The learned counsel for the appellants has next referred to a judgment rendered by the Hon'ble Apex Court in the case of *Deny Bora vs. State of Assam*, reported in (2014) 14 SCC 42 to submit that the Hon'ble Apex Court has held in the said



judgment that non-examination of material witnesses and them being withheld by the prosecution would oblige the Court to draw an adverse inference against the prosecution by holding that if such witness would have been examined, it would not have supported the prosecution case. In this connection, yet another judgment rendered in the case of ***Ishwar Singh vs. State of UP***, reported in, (1976) 4 SCC 355, has been relied upon. The learned counsel for the appellants has also relied upon a judgment rendered by the Hon'ble Apex Court in the case of ***Mohan Lal vs. State of Rajasthan***, reported in (1999) 9 SCC 209, to contend that it has been held therein that suppression by the prosecution of the earliest version is also a material infirmity. Lastly, the learned counsel for the appellants has relied upon a judgment rendered in the case of ***State of Madhya Pradesh vs. Ramjan Khan & Ors.***, reported in 2024 SCC OnLine SC 3070, to contend that an FIR is not an encyclopedia disclosing all facts and details relating to the entire prosecution case, which is never treated as a substantive piece of evidence and the same can only be used for corroborating or contradicting its maker when he appears in court as a witness.

9. *Per contra*, the learned counsel for the informant, Mr. Suraj Narayan Yadav, has submitted that P.W.3 Ram Kumar



Singh has stated in his evidence that he had made signature on the *fardbeyan* of the deceased-informant, hence the same stands proved and in fact, cross-examination has not been conducted by the defence on the issue of recording of the *fardbeyan*. He has also submitted that P.W.4 Sanjay Kumar Sharma has stated in his evidence that he had taken his father for treatment to the Sadar Hospital Samatipur where his statement was recorded by the police and he had put his signature on the *fardbeyan* of his father, thus it is submitted that P.W.4 has proved the *fardbeyan*, hence the same can be relied upon for the purposes of upholding the conviction of the appellants. It is next contended that P.W.5, i.e. the Investigating Officer of the present case has stated in his evidence that he had forwarded the *fardbeyan* of the deceased-informant by his forwarding note, which he has identified to be in his writing as also bears his signature and the same was marked as Ext.1/1, thus the *fardbeyan* has definitely stood proved.

10. At this juncture, the learned counsel for the informant has referred to Section 33 of the Act, 1872 to submit that the evidence given by a witness in a judicial proceeding or before any person authorised by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a



later stage of the same judicial proceeding, the truth of the facts which it states, when the witness is dead or cannot be found, hence the *fardbeyan* of the deceased-informant can very well be said to be a relevant piece of evidence. It is contended that the statement of deceased is a dying declaration by virtue of Section 32(1) of the Act, 1872. In this connection, reliance has been placed on a judgment rendered by the Hon'ble Apex Court in the case of *Sri Bhagwan vs. State of U.P.*, reported in (2013) 12 SCC 137 to contend that in the said case it has been held by the Hon'ble Apex Court that the statement of the victim/deceased made before the witnesses immediately after the incident assumes the character of dying declaration falling within the four corners of Section 32(1) of the Act, 1872. After death of the victim and then whatsoever credence that would apply to a declaration governed by Section 32(1) of the Act, 1872 should automatically be deemed to apply in all force to such a statement even though it was once recorded under Section 161 CrPC. It is further submitted that the injury report would show that fatal blow, relatable to Injury No.15 was though inflicted by the appellant no.1 Nand Kishore Rai and co-convict Arjun Rai, however the other co-convicts will be covered by virtue of Section 34 of the IPC. In this connection, reference has been



made to a judgment rendered by the Hon'ble Apex Court in the case of ***Ramji Singh vs. State of Bihar***, reported in (2001) 9 SCC 528 wherein it has been held that common intention can be gathered from the circumstances and the manner in which the assault is carried out.

11. The learned Additional Public Prosecutor for the State, Mr. Ajay Mishra, has submitted that non-examination of the scribe of the *fardbeyan* will in no case vitiate the dying declaration. It is further stated that the credibility of the evidence led by the prosecution has not been impeached by the defence and in fact, the testimony of the witnesses is sufficient to uphold the conviction of the appellants. He has referred to evidence of P.W.1 Himanshu Shekhar, to submit that the evidence has not been contradicted by the Investigating Officer (P.W.5), hence his evidence is enough to uphold the conviction of the appellants. The learned Additional Public Prosecutor for the State has next referred to the evidence of P.W.6 i.e. Dr. Purushottam Kumar to submit that he has stated in conclusion that the injuries found on the body of the deceased-informant were sufficient to cause his death. The learned Additional Public Prosecutor for the State has relied upon a judgment rendered by the Hon'ble Apex Court, in the case of ***Balbir Singh vs. State of***



**Punjab**, reported in (2006) 12 SCC 283, to contend that the Hon'ble Apex Court has held therein that non-recording of dying declaration of the deceased by the Magistrate, cannot itself be a ground to reject the whole prosecution case as also law does not provide that a dying declaration should be made in any prescribed manner or in the form of questions and answers, however, dying declaration should be voluntary and not tutored, as also its admissibility as evidence is statutorily recognized in terms of Section 32 of the Act, 1872. In this connection, reference has also been made to a judgment rendered by the Hon'ble Apex Court, in the case of **Jai Karan vs. State of Delhi (NCT)**, reported in (1999) 8 SCC 161, paragraph No.10 whereof is reproduced herein below:-

*“10. A dying declaration is admissible in evidence on the principle of necessity and can form the basis for conviction if it is found to be reliable. While it is in the nature of an exception to the general rule forbidding hearsay evidence, it is admitted on the premiss that ordinarily a dying person will not falsely implicate an innocent person in the commission of a serious crime. It is this premiss which is considered strong enough to set off the need that the maker of the statement should state so on oath and be cross-examined by the person who is sought to be implicated. In order that a dying declaration may form the sole basis for conviction without the need*



*for independent corroboration it must be shown that the person making it had the opportunity of identifying the person implicated and is thoroughly reliable and free from blemish. If, in the facts and circumstances of the case, it is found that the maker of the statement was in a fit state of mind and had voluntarily made the statement on the basis of personal knowledge without being influenced by others and the court on a strict scrutiny finds it to be reliable, there is no rule of law or even of prudence that such a reliable piece of evidence cannot be acted upon unless it is corroborated. A dying declaration is an independent piece of evidence like any other piece of evidence - neither extra strong nor weak - and can be acted upon without corroboration if it is found to be otherwise true and reliable.”*

12. The learned APP for the State has next relied upon a judgment rendered by the Hon’ble Apex Court, in the case of ***Gian Chand & Ors. vs. the State of Haryana***, reported in (2013) 14 SCC 420, to submit that the Hon’ble Apex Court has held therein that in absence of question being put to the witness in cross-examination to a particular fact/circumstance, the unchallenged part of the evidence of such a witness is to be relied upon. In this regard, reference has also been made to a judgment rendered by the Hon’ble Apex Court in the case of ***Laxmibai vs. Bhagwantbuva***, reported in (2013) 4 SCC 97, paragraph No.40 whereof is reproduced herein below:-



*“40. Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872, which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination-in-chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.”*

Thus, it is submitted that there being no contradictions in the evidence of the prosecution witnesses, who are consistent in





their testimony, no interference is required in the judgment of conviction and the order of sentence rendered by the learned Trial Judge, hence the present appeal is fit to be dismissed.

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

14. P.W.1 Himanshu Shekhar has stated in his evidence that the occurrence dates back to 09.02.2005 at about 9:00 a.m. in the morning when he was cutting *jai* crops and on hearing *hulla* (alarm) he went to the place of occurrence situated at a pitched road and saw that the deceased-informant, namely, Shiveshwar Sharma was being beaten by Arjun Rai, Subodh Rai (Appellant No. 2), Nand Bali Rai (Appellant No. 1), Ranjit Rai (Appellant No. 3) and Sanjit Rai, who were armed with *khanti* and rod. Nand Bali (Appellant No. 1) was armed with pistol and others were armed with lathi. P.W.1 has further stated that all the accused persons had assaulted the deceased-informant, whereafter, Arjun Rai has snatched the BSA cycle, a sum of Rs.1500/- in cash and land related documents from the deceased-informant and had then fled away. The injured was then taken to Samastipur Government Hospital where he was



treated and there the statement of the injured was recorded by the police. Thereafter, the injured was referred to Patna but since his condition was bad, he was taken to Dr. R.R. Jha's clinic and admitted there, however, he died during the course of treatment. P.W.1 had recognized Nand Bali Rai and Ranjeet Rai, who were standing in the dock, as also has stated that he can recognize the other accused persons. P.W.1 has stated in his cross-examination that the deceased is his uncle and their houses are situated side by side. The place of occurrence has been described by him to be situated half a kilometer east of his house and towards the southern side at a distance of 8-10 bamboo length (*lagga*), *jai* fields are situated. In between *jai* field of P.W.1 and the place of occurrence, the field of 3-4 persons are situated and at that time, along with him, the persons working in the said fields had also gone towards the place of occurrence who were Pandav Sharma, Devendra Sharma, Bhola Singh and Ram Kumar Singh. P.W.1 has stated that when they had reached the place of occurrence, 5-6 people were present and thereafter, many persons had arrived there. P.W.1 had seen his uncle falling down and becoming unconscious as also blood was oozing from his body and his clothes had been soaked with blood. Thereafter, the people who had arrived there had lifted his uncle and taken him



to Samastipur Government Hospital and he had also gone there where treatment was given and then the deceased had regained consciousness and had given statement to the police, however, his condition started becoming bad, hence they were told to take him to Patna but they took him to Dr. R.R. Jha's clinic where treatment was given for an hour and then the informant had died. P.W.1 has also stated that when he had reached at the place of occurrence, he saw that all the accused persons were beating the deceased and he had given statement before the police wherein he had stated that Subodh and Arjun Rai, who were armed with iron rod, Nand Bali armed with pistol and other accused persons, who were armed with *lathi* had beaten the deceased and Arjun Rai had looted cycle, Rs.1500/- and documents of the land. P.W.1 has next stated that deceased-informant was having dispute with the villagers.

15. P.W.2 Prabhat Ranjan has stated in his evidence that the occurrence dates back to 09.02.2005 which was Wednesday and it was around 9 a.m., in the morning. P.W.2 is stated to be working at a distance of 200 yard west of the place of occurrence when an alarm was raised and then he had ran and gone to the place of occurrence where he saw that Arjun Rai, Subodh Rai (Appellant No. 2), Nand Kishore Rai (Appellant



No. 1), Sanjeet Rai and Ranjeet Rai (Appellant No. 3) were assaulting his father. The place of occurrence is situated near the *Surbhi pokhar*, towards the eastern side near the road. P.W. 2 has stated that he had seen Arjun Rai and Subodh Rai (Appellant No. 2) assaulting his father by *khanti*, whereas Nand Kishore Rai @ Nanda (Appellant No. 1) was sitting on the chest of his father and was assaulting him with the butt of the pistol. Sanjeet Rai and Ranjeet Rai (Appellant No. 3) were beating the father of P.W.2 by *lathi*, whereas Ramjee Rai was exhorting the other accused persons to kill the father of P.W.2. Arjun Rai had then taken away the BSA cycle and land related documents and fled away, while Nand Kishore Rai (Appellant No. 1) had taken out a sum of Rs.1500/- from the pocket of the deceased and fled away. P.W.2 has further stated that thereafter, his father was taken to the hospital in a car where treatment was given to him, however, when the situation became bad he was referred to PMCH, Patna and in the meantime, the police had come and recorded the *fardbeyan* of his father and since his father had received several injuries in the right hand, as such he was not able to put his signature, hence he had put his thumb impression. P.W. 2 has next stated that his father could not be taken to Patna but he was taken to Dr. R.R. Jha's clinic at



Samastipur where he died at 9:00 p.m. in the night. P.W.2 has stated that the *fardbeyan* of his father was recorded in presence of Ram Kumar Singh and Sanjay Kumar Sharma who had also put their signatures on the *fardbeyan*. P.W.2 had also recognized the appellants. In cross-examination, P.W.2 has stated that his statement was recorded by the police and he had told the police that when he reached the place of occurrence he saw Arjun Rai, Subodh Rai (Appellant No. 2), Nand Kishore Rai (Appellant No. 1), Sanjeet Rai and Ranjeet Rai (Appellant No. 3) beating his father and while Arjun Rai and Subodh Rai (Appellant No.2) were assaulting his father by *khanti*, Nand Kishore Rai (Appellant No. 1) was sitting on the chest of his father and was assaulting him by the butt of the pistol. P.W.2 has also stated that he had told the police that Ramji Rai was exhorting the accused persons and then Ranjeet Rai (Appellant No.3) and Sanjeet Rai had repeatedly assaulted the deceased by *lathi*. P.W.2 has stated that on the eastern side of his house, at about half a kilometer, the place of occurrence is situated from where road passes-by through the pond. He has also stated that when he reached at the place of occurrence, 10-15 persons were present there and all were villagers, blood had fallen at the place of occurrence where vegetable was grown and the clothes of his



father were soaked with blood. P.W.2 has stated that at that time his father was conscious but sometime he used to get unconscious. Thereafter, the father of P.W.2 was lifted and taken to Samastipur. At about 11:00 a.m., father of P.W.2 was brought to the government hospital where he was becoming conscious/unconscious and the doctor had asked to take the informant to Patna. Then the Office-in-Charge had arrived there and recorded the *fardbeyan* of the father of P.W.2, in the evening and at that time also he was becoming conscious/unconscious, however he had given his statement while he was conscious and thereafter, he had become unconscious. The informant was then taken to the clinic of Dr. R.R. Jha at about 7:00 p.m. and there also, he was becoming conscious and unconscious and then he died at about 9:00 p.m. in the night. He has also stated that the accused persons have filed a criminal case under Section 307 of the IPC, which is still going on and in fact his father was also fighting several cases relating to land dispute.

16. P.W.3 Ram Kumar Singh has stated in his evidence that on 09.02.2005 at about 9-9:30 a.m. in the morning he was going to the in-laws' place of his child situated at Nathpura, on his motorcycle alone and when he had reached at the pond situated just before the village, he saw some people had assembled there



and were beating one person by rod, *khanti* and *lathi*. They were beating Shiveshwar Sharma. Arjun Rai, Subodh Rai (Appellant No. 2), Ranjeet Rai (Appellant No. 3) and others were beating Shiveshwar Sharma resulting in him becoming unconscious and blood was oozing from his hands and legs. Thereafter, alarm was raised whereupon his son Sanjay Sharma and Prabhat Sharma had arrived there and then the injured was taken for treatment to Samastipur Sadar Hospital from where he was referred to P.M.C.H., Patna. The Police had recorded the statement of the injured at Samastipur itself, however the injured died during the course of treatment at the clinic of Dr. Rati Raman Jha. P.W.3 has also stated that he had made his signature on the *fardbeyan*. He had also recognized all the accused persons standing in the dock. In cross-examination, P.W.3 has stated that his brother's father-in-law is Ramakant Singh and he did not use to go there frequently but went there if required. He has stated that his house is situated at a distance of about a kilometer from the place of occurrence. P.W.3 has stated that when he reached at the place of occurrence, he saw Shiveshwar Sharma fallen down on the ground, the accused persons were beating him and at that time nobody belonging to the said place was present there, however he had raised an



alarm, whereafter the co-villagers and family members of the deceased had arrived there and when the said persons had chased the accused persons, they had fled away and then all the people had gone near the injured person and had seen that he was becoming conscious/unconscious at regular intervals. He has also said that apart from the family members of the deceased, 25 people of the village were present there, whereafter the people present there had lifted the injured and taken him to Sadar Hospital, Samastipur. He has stated that he had not gone along with them but had gone to the in-laws' place of his child, however, they were not present and after staying there for half an hour he had gone back to his house and narrated the incident to his family members.

17. P.W.4 Sanjay Kumar Sharma, who is the son of the deceased-informant has stated in his evidence that the informant is his father and the occurrence had taken place about seven years back on 09.02.2005 (Wednesday). He has stated that his father had got ready to go to Samastipur Civil Court at about 9:30 a.m. in the morning and he had to accompany him but he had stayed back on account of some work and had told his father that he would come from behind, hence his father had left his house before him on a cycle, whereafter he had also left his





house on a cycle. P.W.4 has also stated that when his father had reached towards eastern side of Subadhi pond, he had also reached there from behind and then he saw that Arjun Rai armed with *khanti*, Subodh Rai (appellant no.2), armed with iron *khanti* and Nand Kishore Rai (appellant no.1) armed with pistol were beating his father and pressing his neck. Ranjeet Rai (appellant no.3) and Sanjeet Rai were also assaulting the father of P.W.4 by *lathi*. It has been stated by P.W. 4 that his father was injured badly, had fallen down as also his right hand had been fractured apart from him receiving injury on the left hand and leg and he had also received injury on his chest. Thereafter, Arjun Rai had fled away with the cycle of the father of P.W.4, on which a bag was hanging containing pension and title suit related documents. The informant was then taken to Sadar Hospital, Samastipur for treatment where he was treated and during the course of treatment, the police had arrived at the hospital and recorded the statement of the father of P.W.4. As the hand of the father of P.W.4 had broken, he had put thumb impression. The condition of father of P.W.4 had deteriorated, hence the doctor had referred him to PMCH, Patna but on account of his condition becoming worse he was taken to Dr. R.R. Jha's clinic at Samastipur where the treatment had started,



however, during the course of treatment he died on the same day at about 10 O'clock, in the night. P.W.4 has stated that he had also put his signature on the *fardbeyan* of his father which he recognizes and the same has been exhibited as Ext.1. He had also recognized all the accused persons standing in the dock, namely, Subodh Rai (Appellant No. 2), Ranjeet Rai (Appellant No. 3) and Nand Kishore Rai (Appellant No. 1).

18. In cross-examination, P.W.4 has stated that his statement was also recorded by the police and he had stated before the police that Arjun Rai and Subodh Rai (Appellant No. 2) armed with *khanti* and Nand Kishor Rai (Appellant No. 1) armed with pistol were assaulting his father and pressing his neck and Ranjeet (Appellant No. 3) and Sanjeet were also assaulting his father by *lathi*. P.W.4 has further stated that when he reached at the place of occurrence about ten people of the locality were present there including Ram Kumar Singh, Kamta Prasad Singh, Ramanand Singh, Pandav Singh etc., who were standing at a distance of about 50-100 yards separately and when they had raised an alarm, the family members had reached there and then they saw that the informant had fallen down, was wriggling in pain in an injured condition, blood was oozing out from his body and his clothes had become soaked with blood. P.W.4 has



further stated that they had then called a Marshal vehicle at the place of occurrence and had gone to Samastipur via Halai Police Station where oral information about the occurrence was given, however he does not remember whether he had disclosed or not about the names of the accused persons. P.W.4 has also stated that they had reached Samastipur Hospital, at about 12:00 hours, where his father used to get conscious and unconscious intermittently from where he was referred to Patna, but the informant was taken to Dr. R.R. Jha's Clinic for taking opinion, where the informant was conscious till 7-8 O'clock in the evening and then he did not regain full consciousness, however after two hours he died. P.W.4 has stated that the accused persons have also filed a case against him and his father under Section 307 of the IPC and a title suit is going on in between both the sides. P.W.4 has denied the suggestion that his father had fallen down and got injured on account of accident and that his father had not given any statement to the police and instead his thumb impression was taken in an unconscious state.

19. P.W.5 Subodh Kumar Singh, who is the investigating officer of the present case, has stated in his evidence that on 10.02.2005, he was In-charge of Halai Outpost and on that day, the *fardbeyan* of Shiveshwar Prasad Sharma was received from



the Town Police Station, Samastipur, whereafter he had sent it to the Officer-in-charge for registration of a case. He has identified his signature on the forwarding note which has been marked as Ext.1/1. On the basis of *fardbeyan* of Shiveshwar Prasad Sharma, Tajpur P.S. Case No.37 of 2005 was registered on 11.02.2005 under Sections 148, 307 and 379 of the IPC. The informant had died in the night of 09.02.2005 during the course of treatment and the inquest report of the deceased was received on 10.02.2005. P.W.5 has identified the carbon copy of the inquest report, which has been written in the writing of the then Inspector of Town Police Station, Samastipur, namely, R. D. Singh who had also put his signature, which has been recognized by P.W.5 and marked as Ext.2. P.W.5 has further stated that after taking charge of the investigation, he had gone to the house of the deceased, situated at village-Kesav Narayanpur where he had recorded the statement of the witnesses, namely, Asharfi Sada, Ashok Kumar, Pradev Thakur, Sita Devi, Ram Muni Singh, Rajesh Kumar and Rajkumari Devi as also had inspected the place of occurrence. P.W.5 has stated that the place of occurrence is situated near the road, 100 meter east of Kesav Narayanpur. The road at the place of occurrence is 12 feet wide and on both the sides of the road, 3-4 feet wide raw



soling is present and on the northern place of occurrence wheat crop field of the accused Arjun Rai is present whereas on the southern side of the place of occurrence, crop field of Awadhesh Sharma is present. P.W.5 has stated that he had recorded the statement of witnesses, namely, Pandav Singh, Maheshvar Prasad Sharma, Sanjay Kumar Sharma (P.W.4), Prabhat Rajan (P.W.2), Himansu Shekhar (P.W.1). He had also received the postmortem report of the deceased from Sadar Hospital. P.W.5 has further stated that on the basis of statement of the witnesses, inspection of the place of occurrence and postmortem report, he had submitted the charge sheet against accused Sanjeet Rai and Arjun Rai while keeping the investigation pending qua the other accused persons, however subsequently charge sheet was submitted against the rest of the accused persons while showing others to be absconder. He has said that he had not recorded the statement of the deceased. P.W.5 has also stated that after receiving *fardbeyan* and the inquest report, he had gone to the place of occurrence where he had met the son and other family members of the deceased, whereafter he had recorded their statement. P.W.5 has stated that on 24.02.2005 he had recorded the statement of Prabhat Ranjan (P.W.2) who had not disclosed in his statement that Ramjee Rai had given order to kill the



deceased upon which accused Subodh Rai (Appellant no.2) had assaulted with butt of the pistol, whereafter Nand Kishore (Appellant No. 1) had assaulted by *khanti* and pressed the neck of the deceased. P.W.5 has denied that Prabhat Ranjan (P.W.2) had stated before him that accused Arjun Rai had taken away cycle while Nand Kishore (Appellant no.1) had snatched a sum of Rs.1500/- from the deceased. P.W.5 has stated that P.W.2 had stated before him that at the time of occurrence he was planting vegetable at his house along with his brother. P.W.5 has also stated that the witness Ashrafi Sada had not stated before him that Arjun and Subodh were assaulting by whip (*sota*) and iron rod (*chharh*). P.W.5 has stated that witness Ram Kumar Singh (P.W.3) had not stated before him that Subodh (Appellant no.2) was armed with *khanti* and Arjun with rod. P.W.5 has also stated that witness Himanshu Shekhar (P.W.1) had stated that Nand Kishore (Appellant No. 1) was assaulting the deceased by pistol, Arjun and Subodh (Appellant No. 2) by rod and Ranjeet (Appellant No. 3) by *lathi*. P.W.5 has also stated that the witness, namely Sanjay Kumar Sharma had not stated before him that Ramji was standing at the place of occurrence and had ordered to kill the deceased as also he had not stated that Nand Kishore (Appellant No. 1) was sitting on the chest and pressing



his neck and that Ranjeet (Appellant No. 3) and Sanjeet were assaulting the deceased by *khanti*. P.W.5 has also denied the suggestion that his investigation is faulty.

20. P.W.6 Dr. Purushottam Kumar, is the doctor, who had conducted postmortem on the dead body of the deceased, namely Shiveshwar Prasad Sharma, who was posted at Samastipur Sadar Hospital in the year 2005 and upon conducting the postmortem examination he had found the following ante-mortem injuries:-

- (i) Lacerated wound over dorsum of right hand, size about  $\frac{1}{2}$  "x  $\frac{1}{2}$  "x muscle deep.
- (ii) Bones of right forearm found clinically fractured.
- (iii) Three stitched wounds over back side of right lower part of arm each about 1" in length.
- (iv) Lacerated wound over dorsum of right thumb, size about 1" x  $\frac{1}{4}$  " x muscle deep.
- (v) Bruise over lower third of right forearm dorsally, size about 2"x  $\frac{1}{2}$ ".
- (vi) Lacerated wound over distal part of left index finger dorsally, size about  $\frac{1}{2}$ " x  $\frac{1}{4}$  " x muscle deep.
- (vii) Stitched wound below left knee joint on front 1" in length.



(viii) Abrasion over left heel, size 1"x ¼ ".

(ix) Stitched wound over ventral aspect of right middle toe 1" in length and stitched wound over right thigh laterally, size about 5 ½" in length.

(x) Bruise over left buttock, size 1"x 1".

(xi) Bruise over left arm 1"x ¼ " and bruise over left wrist joint dorsally, size ½ "x ¼ " and over lateral aspect of left elbow joint, size ½ "x ½ ".

(xii) Bruise over front of lower left thigh 3 in number each about ½ x ½".

(xiii) Stitched wound over space between left little toe and adjacent toe, size about ½" in length.

(xiv) Multiple bruises over front of right leg, left little toe & right knee joint & right and right lower thigh.

(xv) Multiple bruises over left side chest (front) ½ " x ½ " to ½" x ¼".

21. The findings of P.W.6 on dissection are as follows:-

**On dissection of chest:-**

(i) Left sided 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> ribs were found fractured on anterior portion.





(ii) Left side pleura and lung found lacerated.

(iii) Left pleural cavity found full of blood.

**On dissection of limbs:-**

Both bones of right forearm found fractured and hematoma present all around fracture.

**P.W.6 has opined about the weapon used as follows:-**

Wound Nos. 1, 2, 4, 5, 6, 8, 10, 11, 12, 14, 15, caused by hard blunt substance and rest wounds are stitched already so weapons could not be determined.

**P.W.6 has found time elapsed since death to be between 6 to 24 hours.**

**P.W.6 has finally opined as follows:-**

The cause of death was shock and hemorrhage produced by above mentioned injuries.

22. P.W.6 has proved the postmortem report which is in his writing and has been marked as Ext.3. In his cross-examination, P.W.6 has stated that all the injuries have been found on non-vital parts except injury no.15. He has stated that length and width of all the injuries were found to be between 1" x ¼ " except injury no.9. P.W.6 has stated that he cannot say as to whether the injuries were caused on account of hard blunt



substance or *lathi*. He has also stated that he cannot say about such injuries which have been found to be stitched at the time of postmortem examination. P.W.6 has stated by way of conclusion that the injuries found on the body of the deceased were sufficient to cause death.

23. After closing the prosecution evidence, the learned Trial Court recorded the statements of the appellants on 07.11.2014 under Section 313 of the CrPC for enabling them to personally explain the circumstances appearing in the evidence against them, however in their respective statements, they claimed themselves to be innocent.

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

25. A bare perusal of the evidence of the prosecution reveals that on 09.02.2005 at 9:00 a.m. in the morning, the appellants herein as also Arjun Rai and Sanjeet Rai had surrounded the deceased-informant, whereafter Arjun Rai and Subodh Rai (Appellant No.2) armed with *khanti* had assaulted the deceased-informant, leading to fracture of his right hand and right elbow



and in the meantime Nand Kishore Rai (Appellant No.1) had sat on the chest of the deceased-informant and assaulted on his chest by the butt of his pistol as also pressed his neck whereupon, Sanjeet Rai and Ranjeet Rai (Appellant No.3) had mercilessly beaten the deceased-informant with *lathi*, resulting in the deceased-informant being injured badly. Thereafter, the deceased-informant was taken to Sadar Hospital, Samastipur where his condition was found to be serious by the treating doctor, hence he had referred him for further treatment to Patna. At this juncture, it would be relevant to mention that P.W.1 Himanshu Shekhar, P.W.2 Prabhat Ranjan, P.W.3 Ram Kumar Singh and P.W.4 Sanjay Kumar Sharma are the eye witnesses to the aforesaid occurrence and they have deposed consistently with regard to the overtact engaged in by the appellants herein and two others qua the deceased-informant which has also stood the test of cross-examination. It is a well settled law that minor divergences, if any in the prosecution's evidence being insignificant in nature, cannot have any effect on the case of the prosecution in case of overwhelming incriminating evidences have been adduced at the trial to establish the guilt of the appellants.

26. The prosecution's narrative in the FIR is fully supported



by the ocular evidence adduced at the trial and the ocular evidence is corroborated by the medical evidence, inasmuch as the doctor has categorically stated in his evidence that the injuries found on the person of the deceased are sufficient to cause his death. Reference in this connection be had to a judgment rendered by the Hon'ble Apex Court in the case of ***Bhagchandra vs. State of M.P.***, reported in (2021) 18 SCC 274.

27. In fact, the appellants have also not been able to show any material contradictions in the statement of the witnesses inasmuch as though the statements made by the witnesses under Section 161 Cr.P.C. were put to P.W.5 Subodh Kumar Singh (Investigating Officer) to elicit his response, however, a bare perusal of the evidence of P.W.5 would show that as far as P.W.1 is concerned no contradiction could be extracted inasmuch as P.W.5 has stated that P.W.1 had stated that Nand (Appellant No.1) was assaulting the deceased by pistol, Arjun and Subodh (Appellant No.2) by rod, Ranjeet (Appellant No.3) by *lathi*, a statement which is absolutely consistent with the FIR and there is no contradiction. P.W.5 has further stated that as far as P.W.2 Prabhat Ranjan is concerned, he had not disclosed in his statement made before him that Ramjee Rai had given order to kill the deceased upon which Subodh Rai (Appellant No.2) had assaulted with the butt of the pistol and then



Nand Kishore (Appellant No.1) had assaulted by *khanti* and pressed the neck of the deceased, inasmuch as even the FIR does not state that Ramjee Rai had given order to kill, therefore there is no discrepancy. Similarly, the statement of P.W.5 to the effect that P.W.3 Ram Kumar Singh had not stated before him that Subodh (Appellant No.2) was armed with *khanti* and Arjun with rod is also a minor discrepancy. As far as P.W.4 Sanjay Kumar Sharma is concerned, no contradiction has been elicited inasmuch as P.W.5 has stated in his cross-examination that P.W.4 had not stated that Ramjee was standing at the place of occurrence and had ordered to kill the deceased and that Ranjeet (Appellant No.3) and Sanjeet were assaulting the deceased with *khanti*. Thus, considering the ocular evidence of the prosecution's witnesses, which have withstood the test of cross-examination, in our opinion, minor discrepancies in their evidence cannot effect the prosecution case as these witnesses do not appear to be untrustworthy.

28. Now coming to the *fardbeyan* of the deceased-informant, it has been argued at great length by the learned counsel for the appellants that in order to make the statement of the deceased a substantive piece of evidence, the person or the agency relying upon it is under a legal obligation to prove the making of such a statement as a fact, hence the scribe, who had written the



*fardbeyan* of the deceased-informant, should have been produced in the Court, however in the present case since the scribe has not been produced during the course of the Trial, the *fardbeyan* of the deceased-informant has remained unproved. It has also been argued by the learned counsel for the appellants that the evidence on record would show that the deceased-informant was becoming conscious/ unconscious from time to time, hence the deceased-informant being critical could not have given a detailed statement as has been recorded by way of the aforesaid *fardbeyan* on 09.02.2005 and moreover, there is no evidence on record to show that the deceased-informant was in a fit state of mind to give a statement. The learned counsel for the appellants has referred to several judgments on this issue, however, this Court finds that the principles laid down by the Hon'ble Apex Court, regarding admissibility of a dying declaration is not in dispute and it is a well-settled law that there is no prescribed manner or format of a dying declaration, non-recording of dying declaration of the deceased by the Magistrate cannot itself be a ground to reject the whole prosecution case, however, dying declaration should be voluntary and not tutored, consistent and credible and its admissibility as evidence is statutorily recognized in terms of Section 32 of the Act, 1872.



Therefore, dying declaration can be the sole basis for conviction if it inspires full confidence of the Court and the Court is satisfied that the declaration is true and voluntary. In this regard, reference be had to the following judgments rendered by the Hon'ble Apex Court:-

- (i) ***Jai Karan vs. State of Delhi (NCT)***, reported in (1999) 8 SCC 161;
- (ii) ***Balbir Singh vs. State of Punjab***, reported in (2006) 12 SCC 283;
- (iii) ***Panneerselvam vs. State of T.N.***, reported in (2008) 17 SCC 190;
- (iv) ***Atbir vs. Govt. (NCT of Delhi)***, reported in (2010) 9 SCC 1; and
- (v) ***Rajendra vs. State of Maharashtra***, reported in 2024 SCC OnLine SC 941.

29. Now adverting back to the present case, we find that all the witnesses have consistently stated that the deceased-informant was regaining consciousness from time to time and when he was taken to Sadar Hospital, Samastipur, he had regained consciousness after treatment and then the police had arrived there and recorded his statement which was countersigned by P.W.3 Ram Kumar Singh and P.W.4 Sanjay



Kumar Sharma and in fact P.W.4 has also identified his signature during the course of trial, which has been marked as Ext.1. As far as P.W.3 is concerned, he has also stated in his evidence that he had made signature on the *fardbeyan* but we find that the defence is trying to take advantage of the contradiction in his statement made during the course of his cross-examination but actually it is not so, since he has merely stated in his cross-examination that at the time when the villagers had lifted the deceased-informant and taken him to Samastipur Government Hospital, he had not gone along with them, however he has nowhere denied that subsequently he had gone to the hospital, hence the same would not matter much. Thus, it cannot be said that the *fardbeyan* of the deceased-informant has not stood proved. Another aspect of the matter is that no question has been put to the witnesses in cross-examination regarding untruthfulness of the *fardbeyan* and that the same is fabricated, hence the unchallenged part of the evidence of a witness is required to be relied upon. It is a well settled law that in absence of question being put to the witness in cross-examination to a particular fact/circumstance, the unchallenged part of the evidence of such a witness is to be relied upon. Reference in this connection be had to a judgment





rendered by the Hon'ble Apex Court in the case of ***Gian Chand & Ors. vs. the State of Haryana*** (supra) and in the case of ***Laxmibai vs. Bhagwantbuva*** (supra).

30. The second part of clause (1) of Section 32 of the Act, 1872 is yet another exception to the rule that in criminal law the evidence of a person who has not been subjected to or given an opportunity of being cross-examined by the accused would be valueless, for the simple reason that a person on the verge of death is not likely to make a false statement, unless there is strong evidence to show that the statement was secured either by prompting or tutoring. Reference in this connection be had to the judgment rendered by the Hon'ble Apex Court in the case of ***Kans Raj vs. State of Punjab*** (supra) as also to a judgment rendered by the Hon'ble Apex Court in the case of ***Sri Bhagwan*** (supra). Thus, we are of the view that since in the present case no conflicting circumstance has been either pointed out or demonstrated during the course of trial so as to warrant excluding the statement made by the deceased-informant, which has been recorded as a *fardbeyan* as also bears the thumb impression of the deceased-informant and has remained unchallenged apart from the same having been proved by P.W.4 Sanjay Kumar Sharma as also P.W.3 Ram Kumar Singh, who



had put their signature over the same, there is no reason to doubt the said declaration of the deceased-informant, which we find to be not only true and voluntary but the same also stands corroborated by the abundant legal evidence on record.

31. As far as the argument of the learned counsel for the appellants to the effect that independent witnesses and material witnesses have been withheld which has prejudiced the appellants, this Court finds that it is a well settled law that mere non-joining of an independent witness, where the evidence of the prosecution witnesses may be found to be cogent, convincing, creditworthy and reliable, cannot cast doubt on the version forwarded by the prosecution if there seems to be no reason on record to falsely implicate the appellants. Reference in this connection be had to a judgment rendered by the Hon'ble Apex Court in the case of **Gian Chand** (Supra) and the one rendered in the case of **Appabhai & Anr. vs. State of Gujarat**, reported in 1988 Supp SCC 241, paragraph No.11 whereof is reproduced herein below:-

*"11. In the light of these principles, we may now consider the first contention urged by the learned counsel for the appellants. The contention relates to the failure of the prosecution to examine independent witnesses. The High Court has examined this contention but did not find any infirmity in the investigation. It is no doubt true that the*



*prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused. The court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner. In Rana Pratap v. State of Haryana [(1983) 3 SCC 327] Chinnappa Reddy, J., speaking for this Court*



*succinctly set out what might be the behaviour of different persons witnessing the same incident. The learned Judge observed:*

*“Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way.”*

In the present case, we find that the evidence of prosecution witnesses are cogent, convincing, creditworthy and reliable apart from the fact that P.W.3 Ram Kumar Singh is an independent eye witness, thus examination of other independent witnesses in quantity would not have made any difference, hence the said submission advanced by the learned counsel for the appellants does not merit any consideration.

32. Now coming to the last submission made by the learned counsel for the appellants to the effect that the present case will not fall within the ambit of Section 302 IPC inasmuch as though



the accused persons were armed with firearm, *khanti* and *lathi*, however, no serious injuries have been found on the body of the deceased and all the injuries (laceration, bruises and abrasion) except one are on non-vital part of the body of the deceased, hence the accused persons did not have any intention to kill the deceased apart from the fact that they had no knowledge that by assaulting the deceased-informant in the manner they had done would have resulted in his death. As regards this aspect of the matter, we have considered the evidence led by the prosecution from which we find that all the injuries except one are on non-vital parts of the body of the deceased and moreover, neither grievous/piercing injury has been inflicted by *khanti/lathi* nor gunshot has been fired by Nand Kishore Rai (appellant No.1) though he was armed with pistol, thus we are of the view that it cannot be concluded that the intention of the appellants was to cause death or to cause such injury which was sufficient in the ordinary course of nature to cause death, nonetheless the fact remains that the appellants and two others had badly assaulted the deceased and in fact P.W.6 Dr. Purushottam Kumar has stated in his evidence that the injuries found on the body of the deceased were sufficient to cause his death. Therefore, we find that the appellants and two others had though engaged in



overtact with the knowledge that the same is likely to cause death but they did not have any intention to cause death. We also find from the records that though the deceased-informant was critical, having been assaulted badly by the appellants and other accused persons and was referred by the treating doctor at Sadar Hospital, Samastipur to PMCH, Patna but the family members of the deceased-informant, instead of taking him to PMCH, Patna for better treatment, had delayed the matter whereafter, they had finally taken the deceased-informant to the clinic of one Dr. R.R. Jha at Samastipur itself where also apparently proper treatment was not given leading to the death of the deceased-informant in the night of 09.02.2005. It is a well-settled law that the death must result as a proximate and not a remote consequence of the act of violence. Thus this circumstance has also weighed upon us to come to a finding that the present case would fall under Part II of Section 304 of the IPC. In such view of the matter, we find that the appellants are liable to be convicted under Section 304 Part II of the IPC, thus the conviction of the appellants under Section 302 of the IPC and the sentence of rigorous imprisonment for life awarded thereunder along with fine of Rs.50,000/- are set aside and instead the appellants are convicted under Section 304 Part II of



the IPC and sentenced to undergo rigorous imprisonment for ten years. In this connection, reference be had to the following judgments rendered by the Hon'ble Apex Court:-

- (i) ***Camilo Vaz vs. State of Goa***, reported in (2000) 9 SCC 1;
- (ii) ***Rampal Singh vs. State of U.P.***, reported in (2012) 8 SCC 289;
- (iii) ***Ankush Shivaji Gaikwad vs. State of Maharashtra***, reported in (2013) 6 SCC 770;
- (iv) ***Chenda vs. State of Chhattisgarh***, reported in (2013) 12 SCC 110;
- (v) ***Surain Singh vs. State of Punjab***, reported in (2017) 5 SCC 796;
- (vi) ***Anbazhagan vs. State***, reported in 2023 SCC OnLine SC 857; and
- (vii) ***Velthepu Srinivas vs. State of Telangana***, reported in 2024 SCC OnLine SC 107.

33. As regards conviction under Section 379 of the IPC, we find that appellant nos. 2 and 3 have not been alleged to have either grabbed bicycle or land related documents or snatched a sum of Rs.1500/- from the deceased-informant, however, the allegation has been made against appellant no.1 of snatching a sum of Rs.1500/- from the deceased-informant but the same has



not stood corroborated by the evidence of P.W.1 and P.W.3, nonetheless P.W.2 has though stated that appellant no.1 had snatched Rs.1500/- from his father, however the defence has been able to elicit contradiction while cross-examining P.W.5, who has stated that P.W.2 had not stated before him that the appellant no.1 had snatched a sum of Rs.1500/- from the deceased. In the facts and circumstances of the case we are of the view that commission of offence under Section 379 IPC does not stand proved against the appellants, considering the evidence available on record, hence the finding of conviction recorded by the learned Trial Judge under Section 379 of the IPC vide judgment dt. 06.6.2016 is set aside, qua the appellants.

34. The appellant no.2, namely Subodh Rai and the appellant no.3, namely Ranjeet Rai were granted bail during the pendency of the present appeals by orders dated 23.02.2023 and 22.03.2023 respectively. In view of the fact that the appellants have now stood convicted under Section 304 Part II of the IPC and sentenced to rigorous imprisonment for 10 years by the instant judgment, the bail bonds of the aforesaid two appellants are hereby cancelled and they are directed to surrender before the learned Trial Court for being sent to jail for serving the remaining sentence. As far as the appellant no.1, namely, Nand





Kishore Rai is concerned, he is already in custody, hence he is directed to serve the remaining sentence.

35. Accordingly, the present appeal, i.e. Cr. Appeal (DB) No.673 of 2016 is partly allowed to the extent indicated above.

**(Mohit Kumar Shah, J.)**

**Shailendra Singh, J.:-I agree**

**(Shailendra Singh, J.)**

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AFR/NAFR	AFR
CAV DATE	18.01.2025
Uploading Date	12.02.2025
Transmission Date	12.02.2025

