IN THE HIGH COURT OF JUDICATURE AT PATNA
DEATH REFERENCE No.2 of 2021

Arising Out of PS. Case No.-348 Year-2013 Thana- NARPATGANJ District- Araria

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The State of Bihar

... ... Petitioner

Versus

1. Md. Irshad, Son of Late Abdul Aziz, Resident of Village - Bairiya, Police Station - Narpatganj, District - Araria.
2. Md. Tabrej Son of Late Abdul Aziz Resident of Village - Bairiya, Police Station - Narpatganj, District - Araria.
3. Md. Dilsad Son of Late Abdul Aziz Resident of Village - Bairiya, Police Station - Narpatganj, District - Araria.

... ... Respondents

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with

CRIMINAL APPEAL (DB) No. 1500 of 2019

Arising Out of PS. Case No.-348 Year-2013 Thana- NARPATGANJ District- Araria

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1. Md. Kari, Son of Late Tasruddin, Resident of Bairiya, ward no.8, P.S.-Narpatganj, District-Araria.
2. Md. Jahir, Son of Late Ishak, Resident of Bairiya, ward no.8, P.S.-Narpatganj, District-Araria.
3. Sahe Kamal @ Sahe Kalam, Son of Md. Irshad, Resident of Bairiya, ward no.8, P.S.-Narpatganj, District-Araria.
4. Shamshenoor @ Md. Shamshenoor, Son of Late Abdul Aziz, Resident of Bairiya, ward no.8, P.S.-Narpatganj, District-Araria.
5. Md. Hashib, Son of Late Tarif, Resident of Bairiya, ward no.8, P.S.-Narpatganj, District-Araria.

... ... Appellants

Versus

The State of Bihar

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 1504 of 2019

Arising Out of PS. Case No.-348 Year-2013 Thana- NARPATGANJ District- Araria

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1. Md. Tajuddin, Son of Late Jhappu, Resident of Village - Bairiya, Ward No 8, P.S.- Narpatganj, District- Araria.
2. Md. Farukh @ Faruk, Son of Late Neerjul, Resident of Village - Bairiya, Ward No 8, P.S.- Narpatganj, District- Araria.

... ... Appellants

Versus

The State of Bihar

... ... Respondent

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with

CRIMINAL APPEAL (DB) No. 1517 of 2019

Arising Out of PS. Case No.-348 Year-2013 Thana- NARPATGANJ District- Araria

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1. Md. Irshad, S/o Late Abdul Aziz, R/o Bairiya, Ward No.8, P.S.- Narpatganj, District- Araria.
2. Md. Tabrej, S/o Late Abdul Aziz, R/o Bairiya, Ward No.8, P.S.- Narpatganj, District- Araria.
3. Md. Dilshad, S/o Late Abdul Aziz, R/o Bairiya, Ward No.8, P.S.- Narpatganj, District- Araria.

... ... Appellants

Versus

The State of Bihar

... ... Respondent

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Appearance :

(In DEATH REFERENCE No. 2 of 2021)

For the Petitioner : Mr.

For the Respondents : Mr. Santosh Kumar, *Amicus Curiae*

(In CRIMINAL APPEAL (DB) No. 1500 of 2019)

For the Appellants : Mr. Rajesh Kumar Singh, Senior Advocate
Mr. Manish Kumar Singh, Advocate
Mr. Dharmendra Kumar Singh, Advocate

For the Respondent : Mr. Dilip Kumar Sinha, APP

For the Informant : Mr. Sushil Kumar Singh, Advocate

(In CRIMINAL APPEAL (DB) No. 1504 of 2019)

For the Appellants	:	Mr. Rajesh Kumar Singh, Senior Advocate
		Mr. Manish Kumar Singh, Advocate
		Mr. Dharmendra Kumar Singh, Advocate
For the Respondent	:	Mr. Abhimanyu Sharma, APP
For the Informant	:	Mr. Sushil Kumar Singh, Advocate

(In CRIMINAL APPEAL (DB) No. 1517 of 2019)

For the Appellants	:	Mr. Rajesh Kumar Singh, Senior Advocate
		Mr. Manish Kumar Singh, Advocate
		Mr. Dharmendra Kumar Singh, Advocate
For the Respondent	:	Dr. Mayanand Jha, APP
For the Informant	:	Mr. Sushil Kumar Singh, Advocate

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CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

and

HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date: 07-04-2022

These three appeals arise out of a common judgment of conviction dated 06.11.2019 and the order of sentence dated 16.11.2019 passed by the learned 2nd Additional Sessions Judge, Araria (hereinafter referred to as the 'Trial Court') in Sessions Trial No.371 of 2014/Tr. No.19 of 2019 arising out of Narpatganj P.S. Case No.348 of 2013.

2. By the impugned judgment of conviction dated 06.11.2019, the Trial Court has convicted the appellants of these three appeals under Sections 302 read with 149 and 148 of the Indian Penal Code (for short 'IPC') as well as Section 27 of the Arms Act.

3. By the impugned order of sentence dated 16.11.2019, convicts, namely, Md. Irshad, Md. Tabrej and Md. Dilshad (appellants in Cr. Appeal (DB) No.1517 of 2019) have been awarded death sentence under Section 302 read with 149 of the IPC and three years and a fine of Rs.5,000/- for each of the offences under Section 148 IPC and Section 27 of the Arms Act and in default of payment of fine to undergo further imprisonment for three months for each of the offences. Further, the convicts, namely, Md. Kari, Md. Zahir, Sahe Kamal @ Sahe Kamal @ Sahe Kalam, Shamshenoor @ Md. Shamshenoor and Md. Hasib (appellants in Cr. Appeal (DB) No.1500 of 2019), Md. Tajuddin and Md. Farukh @ Faruk (appellants in Cr. Appeal (DB) No.1504 of 2019) have been sentenced to undergo rigorous imprisonment for life under Section 302 read with 149 of the IPC and to pay a fine of Rs.50,000/- and in default of payment of fine to undergo further imprisonment for three months for each of the offences.

4. The death sentence awarded by the Trial Court is subject to confirmation by the High Court. The reference made by the Trial Court under Section 366 of the Code of Criminal Procedure (for short ‘CrPC’) has been registered as Death Reference No.2 of 2021.

5. Since the appeals and the reference arise out of a common judgment of conviction and order of sentence, they have been heard together and are being disposed of by a common judgment.

6. The prosecution case as alleged by Md. Shamshad (P.W.4) in his oral statement at his doorsteps at 2:00 pm on 09.12.2013, which was reduced into writing by Krishna Kumar Jha, SHO of Narpatganj Police Station, District-Araria is that on 08.12.2013 at about 4:30 pm, Md. Irshad began to abuse his father for no reason. He and his brother Waheed tried to mollify Irshad upon which, Irshad raised *hulla* and called other accused persons, namely, Md. Shamshenoor, Md. Tabrej, Md. Moshim, Md. Dilshad, Md. Sikandar, Md. Sajjid, Md. Sahe Kamal, Md. Hashib, Md. Zahir, Md. Kari, Md. Tajuddin, Md. Sarfaraz, Md. Farukh, Md. Matin, Md. Kamrul and Md. Akil. All of them being variously armed with guns and pistols immediately reached at the place of occurrence. Out of them, Md. Tabrej, Md. Hasib, Md. Kamrul and Md. Sarfaraz started firing indiscriminately. Md. Moshim fired shot with his gun aiming at Waheed which hit in his stomach and he fell down on the road. He was taken by him and his family members for treatment; firstly, to Forbesganj, then to Purnea and, thereafter, to Siliguri.

On way to Siliguri, Waheed died. He further stated that earlier also, the accused persons had killed his cousin sister Husruaba for which Narpatganj P.S. Case No.126 of 2012 dated 30.05.2012 was registered under Sections 147, 148, 149, 341, 342, 323, 324, 325, 307 and 302 of the IPC and Section 27 of the Arms Act. In the said case, altogether seventeen accused were charge-sheeted. Out of whom, nine are accused in the present case. He stated that his younger brother Md. Waheed was killed by Md. Moshim and his oral statement was being recorded after the postmortem examination on the body of the deceased Md. Waheed was conducted at the Sadar Hospital.

7. On the basis of the aforesaid statement of the informant, Narpatganj P.S. Case No.348 of the 2013 dated 09.12.2013 was registered under Sections 147, 148, 149, 302, 504 and 506 of the IPC and Section 27 of the Arms Act at 4:00 pm.

8. After investigation, the Investigating Officer submitted charge-sheet on 18.01.2014 under Section 147, 148, 149, 302 and 506 of the IPC and Section 27 of the Arms Act in the court of jurisdictional Magistrate against the appellants Md. Irshad, Md. Shamshenoor, Md. Tabrej, Md. Dilshad, Md. Zahir, Md. Hashib, Sahe Kamal, Md. Farukh, Md. Tajuddin and Md. Kari and kept the investigation open against the other FIR named

accused persons.

9. The learned Jurisdictional Magistrate took cognizance of the offences under which the charge-sheet was submitted vide order dated 01.02.2014 and committed the case to the court of sessions for trial in exercise of powers conferred under Section 209 of the CrPC vide order dated 13.03.2014.

10. After commitment of the case, the appellants were charged for the offences punishable under Sections 147, 148, 302/149 and 506/149 of the IPC and Section 27 of the Arms Act on 03.05.2015. Since they did not plead guilty to the charges, the trial commenced.

11. In support of its case, the prosecution examined altogether eight witnesses. It also proved seven documents in order to prove the charges.

12. After closure of the prosecution evidence, the appellants were examined under Section 313 of the CrPC on 03.01.2017. The incriminating evidence and circumstances appearing in the evidence were brought to their notice. They denied to have committed the offence. They stated that they are innocent. After the statements of the accused persons were recorded, two witnesses were examined on behalf of the defence. The defence also produced four documents in order to prove the innocence of

the appellants.

13. After closure of the prosecution and the defence case and after hearing the parties, the Trial Court vide impugned judgment dated 06.11.2019 convicted the appellants and vide impugned order dated 16.11.2019 sentenced them in the manner noted above.

14. Being aggrieved by the aforesaid conviction and sentence passed against them, the appellants have preferred these three appeals.

15. We have heard Mr. Rajesh Kumar Singh, learned senior counsel being assisted by Mr. Rana Pratap Singh, learned counsel for the appellants, Mr. Santosh Kumar, learned *amicus curiae*, Mr. Dilip Kumar Sinha, Mr. Abhimanyu Sharma and Dr. Mayanand Jha, learned Additional Public Prosecutors for the State and carefully perused the evidence on record.

16. **Md. Shamshad (P.W.4)**, the informant, reiterated the prosecution case as narrated by him in the First Information Report (for short "FIR") in his examination-in-chief. Except that, in the FIR he has stated that on the exhortation of Md. Irshad, it was four accused persons, namely, Tabrej, Hasib, Kamrul and Sarfraz, who resorted to indiscriminate firing and Md. Moshim fired causing injuries in the abdomen of the

deceased Waheed but, in his examination-in-chief, he stated that on the exhortion of Irshad, all the sixteen accused persons named in the FIR resorted to indiscriminate firing and Moshim fired with his gun causing injury in the abdomen of Waheed.

17. In cross-examination, he admitted that he is facing 3-4 cases instituted by the accused persons. One of the them is related to kidnapping of Samsher. He admitted that Narpatganj P.S. Case No.354 of 2013 was instituted against him by Shamshenoor. Md. Izaz had also instituted Narpatganj P.S. Case No.284 of 2012 against him. He denied the defence suggestion that Akil Ahmad had instituted Narpatganj P.S. Case No.198 of 2004 against him. He admitted that Irshad had filed a case against him. However, he denied that Md. Amrool of village-Chakardha had filed Narpatganj P.S. Case No.89 of 2013 against him. He stated that the accused persons indiscriminately fired for 5-7 minutes. At that time, his father was on the road and Waheed was 10-15 cubits away from him. Irshad, Farukh, Maitin, Kari, Zahir and and Shamshenoor were standing on the road adjacent to his doorsteps. At the doorsteps, Moshim, Tabrej, Dilshad, Sikandar, Sarfaraz, Hasib and Kamrul were standing. He stated that all the accused persons were standing at a little distance from each other and at a distance of 6-8 cubits,

Waheed was standing. When he reached, he first saw Irshad. At that time, Irshad was not holding any weapon. He stated that Waheed was wearing a red-striped shirt and a blue check *lungi*. At the relevant time, he fell facing his mouth after sustaining bullet injury in the center of the stomach. He stated that the bullet came out from the back. He admitted that the appellants had recorded his statement on the next day of the incident at 2 O' clock. He stated that he had not stated before the police that the main cause of dispute was the paternal property. According to him, the wife of the accused Tabrej was contesting panchayat samiti election in the year 2011. After she lost election, the accused persons always threatened to face the consequences and started quarreling on small issues. He admitted that no information in this regard was ever given to the police. He stated that blood had fallen at the place of occurrence but he did not remember whether Daroga had seized the bloodstained earth or not. He admitted that the house of Akil and Kamrul are at Chakardaha, which is at a distance of one and a half to two kilometer from his house. He admitted that Akil is brother-in-law of Tabrej and Tabrej is his cousin brother. He stated that no dispute had ever taken place between Akil and Kamrul. He denied that they are anti-social element. However, he admitted

that they had been in jail custody in several cases. He admitted that he is not aware whether any of the accused persons had ever been convicted earlier. He further admitted that he had given statement to the police that the accused persons were firing shots after aiming from a distance of 8-10 cubits. He stated that he cannot say how many rounds were fired by whom, as the accused persons were indiscriminately firing. He stated that he is a *sunni* muslim. He cannot say to which sect Irshad belongs. He denied the defence suggestion that Irshad was being pressurized to convert from Deobandi to Barelbi sect. He further denied that Irshad was going on the road and he opened fire which hit Waheed, who was stopping him and came in between. He denied the defence suggestion that he fatally shot at Waheed. He stated that at the time of incident Irshad had a house which gradually collapsed. He denied that he along with others looted his house and demolished it. He further denied that the accused persons are innocent and he has given a false statement.

18. **Md. Tabrej (P.W.1)** stated in his testimony that the incident took place on 08.12.2013 at 4:00 pm. At that time, he was at his in-laws' house in village-Bairiya. About 16-17 men namely, Irshad, Moshim, Tabrej, Tahir, Kamal, Tajuddin, Sarfaraj, Farukh, Matin, Hasib, Kari, Sikandar, Sajid, Kamrul

and Akil came in front of Jameel's house on road being armed with guns and pistols. After Irshad exhorted, everyone started indiscriminate firing. In the meanwhile, Moshim shot Waheed, who got injured and fell down. The people of the village started shouting that murder has been committed. He further stated that he along with others took Waheed to Forbesganj Referral Hospital. The doctor at Forbesganj Referral Hospital referred him to Purnea. At Purnea, Waheed was provided with some treatment. Thereafter, the doctor referred him to Siliguri. While on the way to Siliguri, Waheed died. From there, they returned to Araria. The postmortem examination of the body of the deceased was done there. After that, the dead body was brought to the village and was buried there. He further stated that the police had come and he had given his statement. All the facts were stated to the police. He identified the accused Md. Irshad, Tajuddin and Md. Kari in the dock and claimed to identify the other accused persons, who were not present.

19. In cross-examination, he stated that Jameel is his father-in-law. One day before the occurrence, he went to the in-laws' house. He stated that since his family was there, he had gone to his in-laws' house. He stated that at the time of occurrence, Jameel was standing at his doorsteps. Both Jameel and Irshad

were abusing each other. At that time, he was present in the west at a distance of 5-6 feet. Shamshad was adjacent to Jameel. They were at the distance of 2-3 cubits. The accused persons who were 16-17 in number came armed with guns and pistols from the house of Irshad and spread within a distance of 15 cubits and resorted to firing for 5-7 minutes targeting Jameel. He stated that he did not sustain any injury as he had moved a little away. Shamshad and Jameel also did not sustain any injury. Waheed was shot from the front in the center of his abdomen. He was dressed in a *kurta* and *lungi*. He admitted that he did not see mark of bullet on the back and waist of Waheed. He admitted that blood had fallen on the surface. He stated that he met the Daroga after two days. He had shown the place to Daroga where blood had fallen. The Daroga had seized the bloodstained earth. He stated that the formality on paper was not done before him. He stated that he cannot say before whom documents were prepared. He stated that the Daroga had inquired from him for about ten minutes and from Shamshad for about 10-20 minutes at the doorsteps of their house. The Daroga had also inquired about the incident from Nisar. He admitted that when Waheed was taken to Forbesganj, doctor had administered saline and medicine to him. The doctor uncovered

the wound and put a bandage and referred him to Purnea. At Purnea, the doctor treated him. He administered him blood and saline. However, he did not touch the wound. He referred Waheed to Siliguri. On way to Siliguri, Waheed died. He stated that from there, a call was made to the police. The police called them at Araria where they reached at 5-5:30 am. The Daroga arrived at the police station at 7-7:30 am. The police enquired from Shamshad and, thereafter, the postmortem examination was done. He admitted that the Daroga did not record the statement of Shamshad. He stated that Waheed was dressed in *lungi* and *Ganji* at the time his body was being sent for postmortem examination. His shirt was taken out. There was a bullet hole in the *ganji* and the shirt. The shirt was shown to the Daroga at home but, he did not seize the shirt. He denied the defence suggestion that after the murder of Hasuruba, Waseem's house was demolished and destroyed after looting the properties. He stated that he does not know that there are sects in Islam. He further stated that he does not know that his in-laws' are of Barelbi and the accused persons are of Deobandi sect. He denied the defence suggestion that his in-laws' and others who are Barelbi and they oppress the accused persons who are Deobandi. He denied the defence suggestion that there

are 7-8 cases pending between the parties. He also denied the defence suggestion that when Jameel and Irshad were engaged in exchange of hot words and Jameel's son was trying to mollify them Wasim shot at Waheed which hit Waheed as a result of which, he became injured and later on died. He further denied the defence suggestion that he is giving false evidence because he happens to be the brother-in-law of the Wasim.

20. **Md. Nizhhar (P.W.2)** stated in his testimony that the occurrence took place on 08.12.2013 at 4-4:30 pm. At that time, he was at his *nanihal* in village-Bairiya. He saw Irshad, Samshenoor, Tabrej, Moshim, Dilsad, Sahe Kamal, Sikandar, Sajid, Zahir, Farukh, Matin, Tajuddin, Sarfaraj Kamrul, Akil, Mokari and Habib were abusing Jameel. In the meantime, Waheed came and asked why they were abusing his father. Upon this, Irshad exhorted to assault him. The accused persons, who all were armed with guns and pistols started firing indiscriminately for 5-7 minutes. Waheed was shot in stomach by Moshim as a result of which, he fell down. He was picked up and was taken to the Referral Hospital, Forbesganj from where, he was referred to the Sadar Hospital, Purnea. Again, from Purnea, he was referred to Siliguri but, on way, he succumbed to the injury. His postmortem examination was done and,

thereafter, his body was buried in the village-Bairiya. He identified Irshad and Dilshad and claimed to identify the other accused persons. He stated that his statement was recorded by the Daroga.

21. In cross-examination, he stated that his house is not situated at Bairiya. He had gone to his *nanihal*. The name of his maternal grand uncle is Sajjo. He had arrived at his *nanihal* at 2:30 pm and heard the *hulla* at about 4:00 pm. He went to the place of occurrence and saw Irshad, Waheed, Shamshad and Jameel. He admitted that Jamil is his maternal grandfather. He stated that after his arrival, Samshenoor, Tabrej, Moshim, Dilshad, Sahe Kamal, Sikander, Sajid, Jahir, Tajuddin, Sarfraz, Farukh, Matin, Kari, Hasib, Kamrul and Akil came there. He stated that Sahe Kamal, Samshenoor, Farukh, Matin, Kari and Jahir had small pistol in their hands. He stated that all persons, namely Moshim, Tabrej, Dilshad, Sikandar, Sajid, Hasib, Sarfraz, Kamrul and Akil had big guns in their hands. They were standing at a distance of 4-5 cubits from Waheed. Tajuddin, Farukh and Samshenoor were on the road. The remaining persons were standing adjacent to the road on the door of Wasim. Everyone was at the distance of 4-5 cubits. Irshad and Moshim were standing ahead and rest persons were behind.

There was no one on the road there. Some people were standing at a distance of about 4-5 cubits. He did not identify any of them. Those people did not come to the place of occurrence. At that time, Mumamtari and Kaishar were watching. He did not see when they came there. Waheed was standing adjacent to the road in the north side. After Waheed, Jameel was standing and thereafter Shamshad was standing there. He stated that all the accused persons resorted to firing for about 5-7 minutes. It was Moshim, who had fired first shot, which hit Waheed, who was picked up by Shamshad. He stated that his blood had fallen at the place of occurrence. According to him blood mark was also found on the clothes worn by Waheed, who was hit in his abdomen. He admitted that he had not gone together with Waheed for his treatment. He stated that the body of the deceased Waheed was brought on 09.12.2013. He stated that the wound in the stomach was covered with bandage. He stated that he had not given statement to the Investigating Officer that it was a dispute of road. He denied the defence suggestion that the members of the prosecution party had demolished the house of the accused. He admitted that there are two sects in Islam, namely, Deobandi and Barelbi. He admitted that his maternal uncle and his family members are Barelbi whereas Irshad and

his family members are Deobandi. He stated that it is not a fact that Irshad's family is Deobandi and other persons are pressurizing him to become Barelbi. He admitted that long before the occurrence, the case between the parties was compromised. However, he did not know as to who had filed the case. He denied the defence suggestion that when Irshad was going through the road, Shamshad tried to kill him and when Waheed intervened, he was hit in his stomach by Shamshad's shot as a result of which, he died. He further denied the defence suggestion that Shamshad had falsely implicated Irshad, his brothers and others in the instant case. He further denied to have given false evidence before the court.

22. **Bibi Mamamtri Khatoon (P.W.3)** stated in her testimony that the incident took place about two years back at 4-4:30 pm. On hearing *hulla*, she came out of her courtyard. She saw Irshad was abusing Jameel. Waheed came there and asked why are you abusing. Irshad called the other accused persons, namely, Md. Moshim, Dilsad, Sahe Kamal, Sikandar, Sajid, Sarfraz, Tajuddin, Farukh, Matin and Samshenoor, who arrived there. Irshad exhorted to kill Waheed on which Moshim fired from his gun causing injury in the stomach of Waheed. Thereafter, other persons also fired, Waheed fell on the ground.

Tabrej and Shamshad took him to Forbesganj hospital. From Forbesganj, he was referred to Purnea where he was provided with some treatment. From there, he was taken to Siliguri but, before the doctor could reach, Waheed expired. Thereafter, his dead body was taken to Araria for postmortem examination. After the postmortem examination, the dead body was brought to home and was buried there. She identified Irshad, Tajuddin, Sahe Kamal, Farukh, Dilshad and Zahir in the dock and claimed to identify the rest.

23. In cross-examination, she stated that she has been married in village-Chakardha. She had come to village-Bairiya ten days before the incident took place. She stated that first of all she saw Irshad, Tabrej and Khursheed. Irshad was armed with pistol, Tabrej, Moshim, Dilshad, Sikandar, Sajid, Sarfaraz, Hasim, Kamrul, Akil, Tajuddin, Farukh, Matin, Shamshenoor, Kari, Jahir and Sahe Kamal were armed with gun. They started firing from their respective guns and pistols. The firing continued for 5-7 minutes. She stated that Shamshad was at a distance of 5 cubits from Waheed whereas the other persons were at a distance of 7-8 cubits. At that time, Wahid was wearing *kurta* and *lungi.* She stated that blood had fallen on the ground after Waheed had sustained gunshot injury. She denied the defence

suggestion that after the death of Waheed, house of Irshad was demolished by her brothers. She stated that all muslims follow one religion. She denied to have any knowledge about the two sects in Islam, namely, Deobandi and Barelbi. She stated that it is not a fact that she is hiding anything. She further stated that it is not a fact that members of the prosecution party were impressing upon him to convert into Barelbi sects. She stated that when she went to the place of occurrence, Jameel was standing and she was at a distance of 10-12 cubits from the place where the incident took place. She denied the defence suggestion that she had falsely deposed before the court because she is sister of Waheed. She further denied the defence suggestion that she had not seen the incident.

24. **Dr. Deo Narayan Prasad Singh (P.W.5)** had conducted the postmortem examination on the body of the deceased Waheed at 9:30 am on 09.12.2013. He found following external antemortem injuries on the body of the deceased:

> "(i) One circular wound about 1/2" x 1.4" x cavity deep over the right hypochondriac region with charring.
> (ii) One lacerated wound about 1 1/2" x 1/2" x cavity deep over the mid of the stomach."

In his opinion, the death was due to hemorrhage and

shock as a result of firearm injuries. He proved his writing and signature on the postmortem report, which was marked as Exhibit-2.

25. In cross-examination, he stated that the dead body was produced and identified by the Home Guard Tilaknand Sah. He admitted that he has not mentioned the facts regarding clothes worn by the deceased. He admitted that both the injuries were separate injuries caused by different arms. According to him there was no exit wound. He admitted that he had not mentioned in his postmortem examination report that which of the two injuries caused the death.

26. **Upendra Prasad Singh (P.W.6)** stated in his testimony that on 08.12.2013, he was posted as Sub Inspector of Narpatganj Police Station. At that time, Krishna Kumar Jha was the SHO of the police station. The *fardbeyan* of Md. Shamshad was recorded by Krishna Kumar Jha on 09.12.2013. He identified his writing and signature on the *fardbeyan*, which was marked as Exhibit-1/1. He also identified the signature of Krishna Kumar Jha on the formal FIR which was marked as Exhibit-1/2. He stated that after assuming the charge of investigation, he inspected the place of occurrence, which is *kacha rasta* in village-Bairiya. The house of Wasim is north to

the place of occurrence. In the south, there is a ditch, which is of the accused Shamsarul. In the east and west, there is a *kacha rasta*. The *kacha rasta* in the east leads to the house of Shamsarul. He recorded the subsequent statement of Md. Shamshad. He also recorded the statement of Md. Wasim, Tabrej, Md. Nasir and Mamamtri Khatoon at the place of occurrence. He apprehended the accused persons and sent them to judicial custody. He stated that the inquest report was prepared by Sheo Pujan Kumar, a Sub Inspector of Araria Police Station. He received the postmortem report. He stated that on completion of investigation, as per the order of senior officers, he submitted charge-sheet in the case. He proved his writing and signature on the charge-sheet, which was marked as Exhibit-3.

27. In cross-examination, he admitted that oral statement of the informant was recorded by the Officer-in-charge of Narpatganj police station. He assumed the charge of investigation on 09.12.2013. He admitted that he did not find any mark of bullet on the wall of the house of informant. He admitted that he did not recover the weapons used in the crime. He admitted that he had not prepared the inquest report. He further admitted that he had not seen the body of the deceased. Hence, he could not say about the injuries sustained by him. He

admitted that there was dispute between both the parties on the issue of village pathway. He stated that he has not written in the diary that which side used to create disputes. He denied the defence suggestion that his investigation was faulty.

28. **Md. Sidique (P.W.7)**, an advocate clerk, stated in his testimony that the inquest report was prepared on 09.12.2013. He identified the writing and signature of Sheo Pujan Kumar on the inquest report, which was marked as Exhibit-1.

29. In cross-examination, he admitted that the inquest report was not prepared before him. He further stated that he does not remember the case number.

30. **Sheo Pujan Kumar (P.W.8)** stated in his testimony that on 09.12.2013, he was posted at Araria Police Station. On that day, he was on duty at Araria Sadar Hospital. He prepared the inquest report of Md. Waheed. He proved his signature and writing on the inquest report, which was once again marked as Exhibit-5. He stated that the inquest report was prepared in presence of Md. Shamshad and Zibrail and both put their signature in his presence on the inquest report.

31. In cross-examination, he stated that he did not know Md. Waheed and Zibrail from before. He admitted that he had not seen the injuries on the person of the deceased, as the wound

was covered with bandage. He stated that he cannot say about the area over which the bandage was done on the body of the deceased. He stated that he did not know personally that the murder was committed by gunshot injury. However, he wrote in the postmortem examination report that the murder was committed by gunshot, as stated by the witnesses. He admitted that there were other persons present at the hospital but, they were not made witness.

32. It is reiterated that after the closure of the prosecution case, the statements of accused persons were recorded under Section 313 of the CrPC. Thereafter, the case was fixed for defence. Two witnesses were examined in support of the defence case.

33. **Md. Salam (D.W.1)** stated in his testimony that on 08.12.2013, he was returning from work. He reached near the house of Jammel, there was hot discussion going on between Irshad and Jameel. Irshad asked for withdrawal of the case upon which Jameel started abusing him. Waheed came running and pacified them who were quarreling. In the meantime, Shamshad came with a gun in his hand and opened fire causing injury to Waheed. He stated that no other person was present there. Thereafter, people came from the house of Shamshad. He stated

that there was dispute between Deobandi and Barelbi in the Masjid. Irshad was Deobandi. He stated that Waheed was taken to hospital where he died. He further stated that Irshad and his brother are innocent.

34. In cross-examination, he stated that on 08.12.2013, he was doing the work of painting at village-Bajarkatta in the house of Arvind Yadav. The work of painting was being done since three days before the date of incident. It was being done on daily basis. He started the work from 8:00 am on 08.12.2013 and finished it at 3:00 pm. Ten minutes after finishing the work, he left the house of Arvind Yadav alone on bicycle. After 30 minutes, he reached at Bairiya. He stated that his house is near the house of Irshad. He stated that Waheed was standing at a distance of 10-12 cubits from Shamshad, who was standing facing east. Jameel was also standing facing east. Irshad was standing facing east and Waheed was standing facing west. He stated that he cannot say who are accused in the case. He admitted that his statement was not recorded by the police during investigation.

35. **Md. Hafazuddin (D.W.2)** stated in his testimony that on 08.12.2013, he had gone to village-Bairiya to sale cosmetic goods at the doorsteps of Nemun. He reached at the place of

occurrence after shouting. He stated that son of Amir came and said why are you quarreling. In the meantime, Shamshad came and opened fire causing injury to Waheed. After hearing the sound of firing, he collected his goods and ran away. He stated that accused persons are innocent. He further stated that the cause of dispute between the parties is that they belong to different sects, i.e. Deobandi and Barelbi.

36. In cross-examination, he stated that he had reached at village-Bairiya at 4:00 pm. He stated that he does not remember the exact date on which the incident took place. He admitted that he does not know accused persons. He further admitted that his statement was not recorded by the police during investigation. He also admitted that he had not reported about the case to any other officer either orally or in writing. He denied the defence suggestion that he had falsely deposed before the court.

37. Mr. Rajesh Kumar Singh, learned senior counsel for the appellants submitted that the occurrence took place on 08.12.2013 at 4:30 pm on main road of village surrounded by several houses, yet the prosecution has not examined even single independent witness, who were admittedly present at the place of occurrence. He contended that as per *fardbeyan* of the

informant, the quarrel started between Md. Irshad and his father namely, Md. Jameel and, thereafter, the informant and his deceased brother Waheed are said to have arrived at the place of occurrence but, surprisingly, the father of the informant has neither been examined by the police under Section 161(3) of the CrPC during investigation nor he was examined as a witness during trial. His non-examination has caused serious prejudice to the case of the defence as he was the most competent witness in the case. He urged that the informant claims to have taken his injured brother Md. Waheed to Primary Health Center, Forbesganj from where, it is alleged that he was taken to Purnea and then, to Siligui but, there is no evidence whatsoever on record by the prosecution to show as to how, where and when was the injured taken to the various places mentioned above and which doctor attended him. There is also no explanation as to why the information of occurrence was not given to the police either by the informant or his family members or by the Medical Officers, who attended the victim at different places.

38. Mr. Singh, learned senior counsel further urged that P.W.1 has admitted in his deposition that he brought the dead body from Siliguri to Araria and gave a telephonic information to the Investigating Officer. However, no name of the assailant was

disclosed on telephone. He argued that P.W.8, namely, Sho Pujuan Kumar was posted at Araria Police Station on 09.12.2013. On that day, he was on duty at Araria Sadar Hospital. He had prepared the inquest of the deceased Md. Waheed on 09.12.2013 at 8:30 am even before the *fardbeyan* was recorded. The inquest report of the deceased Waheed would show that the informant Md. Shamshad and Md. Zibrail signed as witness. However, name of the accused persons was not disclosed by them till then. Not only this, according to P.W.5, Dr. Deo Narayan Prasad Singh, who conducted the postmortem examination, the body was received by him at 9:30 am and the postmortem examination commenced at 10:30 am on 09.12.2013. After the postmortem examination on the body of the deceased, the dead body was received by the informant, who buried it without lodging an FIR. For the first time, on 09.12.2013 at 2:00 pm in the afternoon, the police reached at the residence of the informant whereafter the *fardbeyan* was recorded. The inordinate and unexplained delay in institution of the FIR would make it crystal clear that it was an afterthought and it was reported to the police after due deliberation, as the informant and his family members were on inimical terms with the appellants and their family.

39. Mr. Singh, learned senior counsel submitted next that the allegation made in the FIR by P.W.4 is that one shot was fired at the stomach of the deceased Md. Waheed by Md. Moshim as a result of which he fell down and during treatment, he died but, the doctor, who performed the postmortem examination categorically stated in his deposition that he found two injuries caused by two different firearms. The inconsistency in the medical evidence would further prove that the prosecution is trying to suppress the material fact about the occurrence.

40. Arguing further, he submitted that the consistent case of the prosecution is that seventeen accused persons named in the FIR were firing indiscriminately from their firearms but, there is no impression on the wall as also no empty cartridge was seized from the place of occurrence. He contended that though the witnesses examined on behalf of the prosecution have stated in their deposition that blood had fallen on the ground, the Investigating Officer did not seize blood or bloodstained soil from the place of occurrence. Hence, the place of occurrence has not been established.

41. On the basis of the aforesaid submissions, Mr. Singh, learned senior counsel submitted that the prosecution has failed to prove its case beyond reasonable doubt.

42. Arguing on the question of sentence, he submitted that the admitted case of the prosecution is that it was Md. Moshim, who fired with his gun which hit Md. Waheed in his abdomen. No injury is said to have been caused to the deceased or anyone else due to the firing made by any other accused persons. Hence, by no stretch of imagination, it can be said that the case of the appellants falls in the category of rarest of rare case warranting death sentence.

43. On the other hand, Mr. Abhimanyu Sharma, learned Additional Public Prosecutor for the State submitted that in this case the prosecution has examined four eye-witnesses including the informant. They all are consistent in their deposition that on the order of Md. Irshad, Md. Moshim fired on the deceased as a result of which, he died. There is no contradiction in the deposition. He submitted that the delay in institution of the first information report was neither deliberate nor willful. It was because the informant wanted to save the life of his injured brother first and not to waste time in lodging the FIR before the police. He submitted that in a case where the injured battles for life, the first priority of the family members is to somehow provide him medical aid so that his life may be saved. According to him, if at all the delay had occurred, it was quite

natural. He contended that so far as the two injuries on the body of the deceased is concerned, from the deposition of the witnesses, it would be evident that altogether seventeen accused persons were indiscriminately firing at the place of occurrence. Md. Waheed might have sustained the second injury due to the firing made by number of persons and the witnesses might not have noticed the same because they themselves would be trying to save their own life. His further contention is that non-seizure of the empty cartridge or blood or the bloodstained earth from the place of occurrence may be due to defective investigation. However, the case of the prosecution would not fail due to the defective investigation by the police.

44. Mr. Sharma, learned Additional Public Prosecutor for the State contended that the injury said to have been caused by Md. Moshim has been fully corroborated by medical evidence, as the doctor, who conducted the postmortem examination found one lacerated wound measuring 1 ½ x ½" x cavity deep over the mid of the stomach. According to him, neither the place of occurrence is in dispute nor the manner of occurrence is in dispute and the Trial Court has rightly held the appellants guilty and sentenced them accordingly.

45. Mr. Santosh Kumar, learned *amicus curiae,* submitted

that the evidence of eye-witnesses, P.W.1 to P.W.4 inspire confidence and is worth acceptance, as they have given full version of the incident occurring on 08.12.2013. They have supported the prosecution case. There is no material inconsistency in deposition of P.W.1 to P.W.4 regarding the nature and genesis of the incident. All the four eye-witnesses have deposed: (i) the presence of the deceased on the spot; (ii) the presence of the appellants armed with weapon at the place of occurrence; and, (iii) Md. Irshad having exhorted other accused to fire as a result of which Waheed sustained serious injury in the stomach and fell down on the spot. He submitted that in case of incident taking place on road side, as in this case, the natural eye-witness are people present on the road. P.W.1 to P.W.4 was present at the relevant time on the road and they have stated that the incident was caused by the appellants and others, who were armed with firearm, like, guns, pistols and opened fire on the spot with common object to kill Waheed and resultantly, Waheed was killed. He submitted that where a crowd of assailants proceeds to commit an offence of murder in pursuance of the common object of the unlawful assembly, it is often not possible for witnesses to describe accurately the part played by each one of the assailants and the number of injuries

caused to the deceased. According to him, the testimonies of P.W.1 to P.W.4 does not suffer from infirmities.

46. Learned *Amicus Curiae*, submitted that though the eye witnesses are close relatives of the deceased, it is by now well settled that a related witness cannot be said to be an interested witness merely by virtue of being a relative of the victim. Though, P.Ws. 1 to 4 are closely related to the deceased Waheed, their evidence has been carefully scrutinized and appreciated by the Trial Court before arriving at the conclusion of guilt against the appellants. He submitted that there were disputes and litigation between the parties arising on account of crime of murder in Narpatganj P.S. Case No.162 of 2012 corresponding to Sessions Trial No.227 of 2015 and 269 of 2015 respectively in which the appellants Md. Irshad and Md. Dilshad were awarded sentence for life imprisonment and the appellant Tabrej was awarded rigorous imprisonment for ten years for attempt to murder. The other accused persons namely, Md. Zahir, Sahe Kamal, Md. Shamshenoor, Md. Hasib and Md. Kari had been sentenced to 2, 3 and 6 months imprisonment under Sections 147,148 and 504 of the IPC respectively. Out of the ten appellants, who were put on trial, eight had been sentenced earlier. It would clearly indicate that there was

premeditation on the part of the appellants and from the acts committed by the appellants, it is manifest that they had intention to kill Waheed. He contended that cause of death of the deceased was injury of circular wound over the right hypochondriac region and one lacerated wound over the mid of stomach as a result of use of firearms leading to shock and hemorrhage. The injury and its impact leave no doubt that the appellants have intended to cause death of the deceased and they shared the common intention to inflict the injury to the deceased.

47. On the basis of the aforesaid submissions, learned *amicus curiae* contended that no fault can be found with the finding of the Trial Court whereby it has held the appellants guilty of the charges.

48. However, so far as the sentence is concerned, learned *amicus curiae* submitted that on the touchstone of the guidelines laid down by the Hon'ble Supreme Court in ***Bachchan Singh vs. State of Punjab*** since reported in ***(1980) 2 SCC 284***, ***Machhi Singh vs. State of Punjab*** since reported in ***(1982) 3 SCC 470*** and ***Panchhi and Ors. vs. State of U.P.*** since reported in ***(1998) 7 SCC 177*** and balancing the aggravating and mitigating circumstances, the case cannot appropriately be

called the rarest of rare case warranting death penalty. He submitted that there is nothing to suggest that the appellant cannot be reformed. Hence, the death sentence awarded against the appellants may be substituted by life imprisonment.

49. Having heard Mr. Rajesh Kumar Singh, learned senior counsel for the appellants, Mr. Abhimanyu Sharma, learned Additional Public Prosecutor for the State and Mr. Santosh Kumar, learned *amicus curiae* and perused the testimonies of the witnesses examined during trial, we find force in the submissions advanced on behalf of the appellants.

50. The evidence of Dr. Deo Narayan Prasad Singh (P.W.5), would make it manifest that the deceased Md. Waheed died a homicidal death due to the two injuries caused on his person by firearms.

51. Now, the question for determination is as to whether the appellants were the members of an unlawful assembly who had resorted to indiscriminate firing and the accused Md. Moshim caused firearm injury to the deceased as a result of which he died.

52. An argument has been advanced on behalf of the appellants that no independent witness was examined during trial. The witnesses examined are all related and interested

witnesses.

53. On the other hand, learned counsel for the State and learned *amicus curiae* have argued that the witnesses examined in the case are natural witnesses and their presence cannot be doubted at the scene of crime when the incident took place. They have submitted that the law does not presume the related witness as interested witness.

54. In our opinion, the law in this regard is well settled. A related witness cannot be termed as an interested witness under all circumstances. A related witness can also be a natural witness. If an offence is committed within the precincts of the deceased, the presence of the family members cannot be ruled out, as they assume the position of natural witnesses. In case, their evidence is reliable, cogent and clear, the prosecution case cannot be doubted. However, a related witness would become an interested witness when his evidence is tainted and it shows that he is desirous of implicating the accused by fabricating and concocted evidence. The Court is required that the evidence of an eye-witness who is a near relative of the victim should be closely scrutinized but, no corroboration is necessary for acceptance of his evidence.

55. The aforesaid proposition of law has been laid down by

Hon'ble Supreme Court in ***Bhaskar Rao and Others vs. State of Maharashtra*** since reported in ***(2018) 6 SCC 591*** as under:

> *"32. Coming back to the appreciation of the evidence at hand, at the outset, our attention is drawn to the fact that the witnesses were interrelated, and this Court should be cautious in accepting their statements. It would be beneficial to recapitulate the law concerning the appreciation of evidence of related witness. In Dalip Singh v. State of Punjab [Dalip Singh v. State of Punjab, 1954 SCR 145: AIR 1953 SC 364: 1953 Cri LJ 1465], Vivian Bose, J. for the Bench observed the law as under: (AIR p. 366, para 26)*
>
> > *"26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily, a close relative would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the*

guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalisation. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts."

33. In Masalti v. State of U.P. [(1964) 8 SCR 133: AIR 1965 SC 202: (1965) 1 Cri LJ 226], a five-Judge Bench of this Court has categorically observed as under: (AIR pp. 209-210, para 14)

"14. ... There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not the evidence strikes the court as genuine; whether or not the story disclosed by the evidence is probable, are all

matters which must be taken into account. But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard-and-fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct." (emphasis supplied)

34. In Darya Singh v. State of Punjab [(1964) 3 SCR 397: AIR 1965 SC 328: (1965) 1 Cri LJ 350], this Court held that evidence of an

eyewitness who is a near relative of the victim, should be closely scrutinised but no corroboration is necessary for acceptance of his evidence. In Harbans Kaur v. State of Haryana [Harbans Kaur v. State of Haryana, (2005) 9 SCC 195: 2005 SCC (Cri) 1213: 2005 Cri LJ 2199], this Court observed that: (SCC p. 227, para 6)

> *"6. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused."*

35. The last case we need to concern ourselves is Namdeo v. State of Maharashtra [(2007) 14 SCC 150: (2009) 1 SCC (Cri) 773], wherein this Court after observing previous precedents has summarised the law in the following manner: (SCC p. 164, para 38)

> *"38. ... it is clear that a close relative cannot be characterised as an "interested" witness. He is a "natural" witness. His evidence, however, must be scrutinised carefully.*

> *If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the "sole" testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one."*

36. From the study of the aforesaid precedents of this Court, we may note that whoever has been a witness before the court of law, having a strong interest in result, if allowed to be weighed in the same scales with those who do not have any interest in the result, would be to open the doors of the court for perverted truth. This sound rule which remains the bulwark of this system, and which determines the value of evidence derived from such sources, needs to be cautiously and carefully observed and enforced. There is no dispute about the fact that the interest of the witness must affect his testimony is a universal truth. Moreover, under the influence of bias, a man may not be in a position to judge correctly, even if they earnestly desire to do so. Similarly, he may not be in a position to

> *provide evidence in an impartial manner, when it involves his interest. Under such influences, man will, even though not consciously, suppress some facts, soften or modify others, and provide favourable colour. These are most controlling considerations in respect to the credibility of human testimony, and should never be overlooked in applying the rules of evidence and determining its weight in the scale of truth under the facts and circumstances of each case."*

56. Thus, in view of the ratio laid down by the Hon'ble Supreme Court in ***Bhaskar Rao vs. State of Maharashtra*** (Supra), we cannot proceed with the presumption that the related witnesses examined in the case are untruthful witnesses. However, we cannot ignore the fact that admittedly the parties were on inimical terms and there was series of litigation between them. Under such circumstance, there may not be any reason for the prosecution to shield the actual culprits but, there may be a situation where a blind murder could have taken place and due to previous enmity, the accused persons might have been implicated in the case.

57. Another argument, which has been advanced on behalf of the appellants is that the incident had taken place at 4:30 pm on 08.12.2013 on the road in the village and there were several

houses in the vicinity but, no independent person was examined.

58. In this regard, the law is well settled that a mere non-examination of witness in itself would not vitiate. The onus of proving the prosecution case rest on the prosecution and the prosecution has complete liberty to choose its witness to prove the case. However, if a material witness is withheld, the court may draw an adverse inference against the prosecution but, it is not the law that the omission to examine every witness even on minor point would create a doubt.

59. The aforesaid proposition of law has been laid down by Hon'ble Supreme Court in ***Sarwan Singh and Others vs. State of Punjab*** since reported in ***(1976) 4 SCC 369*** as under:

> *"13. Another circumstance which appears to have weighed heavily with the Additional Sessions Judge was that no independent witness of Salabatpura had been examined by the prosecution to prove the prosecution case of assault on the deceased, although the evidence shows that there were some persons living in that locality like the "pakodewalla", hotelwalla, shopkeeper and some of the passengers who had alighted at Salabatpura with the deceased. The Additional Sessions Judge has drawn an adverse inference against the prosecution for its failure to examine any of those witnesses. Mr Hardy has adopted this argument. In our opinion the*

comments of the Additional Sessions Judge are based on serious misconception of the correct legal position. The onus of proving the prosecution case rests entirely on the prosecution and it follows as a logical corollary that the prosecution has complete liberty to choose its witnesses if it is to prove its case. The court cannot compel the prosecution to examine one witness or the other as its witness. At the most, if a material witness is withheld, the court may draw an adverse inference against the prosecution. But it is not the law that the omission to examine any and every witness even on minor points would undoubtedly lead to rejection of the prosecution case or drawing of an adverse inference against the prosecution. The law is well-settled that the prosecution is bound to produce only such witnesses as are essential for unfolding of the prosecution narrative. In other words, before an adverse inference against the prosecution can be drawn it must be proved to the satisfaction of the court that the witnesses who had been withheld were eyewitnesses who had actually seen the occurrence and were therefore material to prove the case. It is not necessary for the prosecution to multiply witnesses after witnesses on the same point; it is the quality rather than the quantity of the evidence that matters. In the instant case, the evidence of the eyewitnesses does not suffer from

any infirmity or any manifest defect on its intrinsic merit. Secondly, there is nothing to show that at the time when the deceased was assaulted a large crowd had gathered and some of the members of the crowd had actually seen the occurrence and were cited as witnesses for the prosecution and then withheld. We must not forget that in our country there is a general tendency amongst the witnesses in mofussil to shun giving evidence in courts because of the cumbersome and dilatory procedure of our courts, the harassment to which they are subjected by the police and the searching cross-examination which they have to face before the courts. Therefore nobody wants to be a witness in a murder or in any serious offence if he can avoid it. Although the evidence does show that four or five persons had alighted from the bus at the time when the deceased and his companions got down from the bus, yet there is no suggestion that any of those persons stayed on to witness the occurrence. They may have proceeded to their village homes. So far as "pakodewalla" and hotelwalla etc. are concerned there is positive evidence to show that they were interrogated by the police but they expressed ignorance about the occurrence. In this connection the evidence of PW 5 Harnek Singh clearly shows that the Investigating Officer interrogated the hotelwalla and the

> *"pakodewalla" but they stated before him that they had not witnessed the occurrence. In these circumstances, therefore, there was no obligation on the prosecution to examine such witnesses who were not at all material. It is not a case where some persons were cited as eyewitnesses by the prosecution on material points and were deliberately withheld from the court. For these reasons, therefore, the learned Additional Sessions Judge was not at all justified in raising an adverse inference against the prosecution case from this fact and the High Court was right in rejecting this part of the reasoning adopted by the learned Additional Sessions Judge."*

60. The Hon'ble Supreme Court has reiterated the aforesaid principle of law in ***Gulam Sarbar vs. State of Bihar*** since reported in ***(2014) 3 SCC 401*** as under: -

> *"19. In the matter of appreciation of evidence of witnesses, it is not the number of witnesses but quality of their evidence which is important, as there is no requirement under the Law of Evidence that any particular number of witnesses is to be examined to prove/disprove a fact. It is a time-honoured principle that evidence must be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis*

on value provided by each witness, rather than the multiplicity or plurality of witnesses. It is quality and not quantity, which determines the adequacy of evidence as has been provided by Section 134 of the Evidence Act. Even in probate cases, where the law requires the examination of at least one attesting witness, it has been held that production of more witnesses does not carry any weight. Thus, conviction can even be based on the testimony of a sole eyewitness, if the same inspires confidence. (Vide Vadivelu Thevar v. State of Madras [AIR 1957 SC 614 : 1957 Cri LJ 1000] , Kunju v. State of T.N. [(2008) 2 SCC 151 : (2008) 1 SCC (Cri) 331] , Bipin Kumar Mondal v. State of W.B. [(2010) 12 SCC 91 : (2011) 2 SCC (Cri) 150 : AIR 2010 SC 3638] , Mahesh v. State of M.P. [(2011) 9 SCC 626 : (2011) 3 SCC (Cri) 783] , Prithipal Singh v. State of Punjab [(2012) 1 SCC 10 : (2012) 1 SCC (Cri) 1] and Kishan Chand v. State of Haryana [(2013) 2 SCC 502 : (2013) 2 SCC (Cri) 807 : JT (2013) 1 SC 222] .)"

61. It has been argued on behalf of the appellants that an inordinate and unexplained delay was caused in lodging the FIR, which creates serious doubt about the veracity of the prosecution case.

62. In this regard, when we closely look at the testimony of

the witnesses, we would find that the occurrence took place about 4:30 pm on 08.12.2013. The injured Md. Waheed was first taken to Primary Health Center, Forbesganj from where he was taken to Purnea and then to Siliguri. There is no evidence whatsoever by the prosecution to show as to how, where and when the injured was taken to various places mentioned above and which doctor attended him.

63. P.W.1 admitted in his cross-examination that the injured was administered saline and medicine by the doctor at Referral Hospital, Forbesganj. Thereafter, he was referred to Purnea Sadar Hospital. He further admitted that at Purnea also, the doctor treated him and administered him saline. He also received blood transfusion and his bandage was changed at Purnea. Thereafter, he was referred to Siliguri. Surprisingly, no information of occurrence was given to the police about the incident either at the Referral Hospital, Forbesganj or at the Sadar Hospital, Purnea or at Siliguri. There is no document showing the treatment provided to the deceased Waheed in Referral Hospital, Forbesganj or Sadar Hospital, Purnea. The doctors, who treated him at Forbesganj and Purnea have not been made witness in the present case.

64. There is no doubt about it that it was a medico legal case.

In a medico legal case, in emergency resuscitation and stabilization of the patient is required to be carried out and medico legal formality may be completed subsequently. However, medico legal documents are required to be prepared urgently with utmost care. In such cases, the police should be informed. The Medical Officer attending the injured is legally bound to inform the police about the arrival of a medico legal case under Section 39 of the CrPC. Any failure to report the occurrence of medico legal case may invite prosecution under Sections 176 and 202 of the IPC. Medico legal evidence are required to be preserved and, subsequently, sent or handed over to the investigating authorities for forensic examination and production of evidence in a court of law.

65. In absence of the medico legal evidence and in absence of the examination of the doctors of different hospitals, it is difficult to believe the story of the prosecution that the injured was taken to various hospitals for treatment on 08.12.2013.

66. Further, from the testimony of P.W.1, it would be evident that after Waheed died, a phone call was made to the police at Araria and he was asked to reach at Araria. He came back along with the body of the deceased at Araria at about 5-5:30 am on 09.12.2013. The Daroga reached at police station at about 7-

7:30 am on 09.12.2013. The Daroga made inquiry from the informant Md. Shamshad but, no FIR was registered. The Daroga sent the body for postmortem examination. In the Sadar Hospital, Araria, it would appear that P.W.8 Sheo Pujan Kumar, a Sub Inspector of Police, prepared the inquest report of the deceased Md. Waheed at 8:30 am on 09.012.2013. The inquest report was witnessed by the informant Md. Shamshad and one Md. Zibrail. Surprisingly, even though the informant was present at the time of preparation of the inquest report, neither name of the assailant was disclosed to the police officer nor the FIR was registered.

67. Thereafter, the doctor, who conducted the postmortem examination received the body of the deceased at 9:30 am on 09.12.2013. The body of the deceased was identified by a Home-guard Jawan Tilaknand Jha. The postmortem examination commenced at 10:30 am on 09.12.2013. After the postmortem examination was conducted, the body was handed over to the informant and his family members and they buried it in their village. Thereafter, the SHO of Narpatganj Police Station came at the house of the informant at 2:00 pm on 09.12.2013 and recorded his oral statement at his doorsteps. Pursuant to which, the FIR was instituted at 4:00 pm on 09.12.2013.

68. Apparently, no information was given to the police when the body of the deceased was taken to the Referral Hospital, Forbesganj and then to the Sadar Hospital, Purnea and, thereafter to Siliguri. After the death of the deceased also, when a telephonic call was made, name of the appellants was not disclosed to the police. When the body of the deceased was brought to the police station, no FIR was registered. On 09.12.2013, when the Daroga arrived at the police station and made inquiries from the informant and others and saw the dead body, no FIR was registered. The body of the deceased was sent to the Sadar Hospital, Purnea for postmortem examination. The inquest report was prepared by P.W.9 at Sadar Hospital at 8:30 am on 09.12.2013 and till then, the name of the assailant was not disclosed. The postmortem examination was conducted on the body of the deceased much prior to the institution of the FIR. There is absolutely no doubt about the fact that a major part of investigation has been conducted by the police even prior to the institution of the FIR.

69. It is well settled that FIR is an important document even though it is not a substantive piece of evidence. A prompt FIR prevents possibility of coloured version being put by the informant.

70. Section 154 contained in Chapter XII of the CrPC deals with the information to the police and their powers to investigate. The CrPC classifies the offences in two categories, namely, (a) cognizable offence; and (b) non-cognizable offence. Registration of an FIR is mandatory under Section 154 of the CrPC if the information discloses the commission of a cognizable offence.

71. In the instant case, since the information regarding a cognizable offence given to the police on 08.12.2013 at 7:30 am, it was incumbent upon the police officer to have instituted the FIR promptly. The institution of the FIR much after the preparation of the inquest report and the autopsy on the body of the deceased gives rise to the presumption that the same was instituted after due deliberations and consultation.

72. In ***Dilawar Singh vs. State of Delhi***, since reported in ***(2007) 12 SCC 641***, while holding that unexplained delay in lodging of the FIR is fatal, the Supreme Court held:

> *"9. In criminal trial one of the cardinal principles for the court is to look for plausible explanation for the delay in lodging the report. Delay sometimes affords opportunity to the complainant to make deliberation upon the complaint and to make embellishment or even*

make fabrications. Delay defeats the chance of the unsoiled and untarnished version of the case to be presented before the court at the earliest instance. That is why if there is delay in either coming before the police or before the court, the courts always view the allegations with suspicion and look for satisfactory explanation. If no such satisfaction is formed, the delay is treated as fatal to the prosecution case.

10. In Thulia Kali v. State of T.N. [(1972) 3 SCC 393: 1972 SCC (Cri) 543: AIR 1973 SC 501] it was held that the delay in lodging the first information report quite often results in embellishment as a result of afterthought. On account of delay, the report not only gets bereft of the advantage of spontaneity, but also danger creeps in of the introduction of coloured version, exaggerated account or concocted story as a result of deliberation and consultation.

11. In Ram Jag v. State of U.P. [(1974) 4 SCC 201 : 1974 SCC (Cri) 370 : AIR 1974 SC 606] the position was explained that whether the delay is so long as to throw a cloud of suspicion on

the seeds of the prosecution case must depend upon a variety of factors which would vary from case to case. Even a long delay can be condoned if the witnesses have no motive for implicating the accused and/or when plausible explanation is offered for the same. On the other hand, prompt filing of the report is not an unmistakable guarantee of the truthfulness or authenticity of the version of the prosecution."

73. In ***P. Rajagopal vs. State of Tamil Nadu***, since reported in ***(2019) 5 SCC 403***, the Hon'ble Supreme Court held:

"12. Normally, the Court may reject the case of the prosecution in case of inordinate delay in lodging the first information report because of the possibility of concoction of evidence by the prosecution. However, if the delay is satisfactorily explained, the Court will decide the matter on merits without giving much importance to such delay. The Court is duty-bound to determine whether the explanation afforded is plausible enough given the facts and circumstances of the case. The delay may be condoned if the complainant appears to be reliable and without any

motive for implicating the accused falsely. [See Apren Joseph v. State of Kerala [Apren Joseph v. State of Kerala, (1973) 3 SCC 114: 1973 SCC (Cri) 195] and Mukesh v. State (NCT of Delhi), (2017) 6 SCC 1: (2017) 2 SCC (Cri) 673]"

74. In ***State of Punjab vs. Ramdev Singh***, since reported in ***(2004) 1 SCC 421***, the Hon'ble Supreme Court held: *"Delay in lodging the FIR cannot be used a ritualistic formula for doubting the prosecution case and discarding the same solely on the ground of delay in lodging the first information report. Delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not. If the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment in the prosecution version on account of such delay, the same would be fatal to the prosecution. However, if the delay is explained to the satisfaction of the court, the same cannot by itself be a ground for disbelieving and discarding the entire prosecution version. ..."*

75. It is true that there is no hard and fast rule that the delay in lodging the FIR would automatically render the prosecution

case doubtful. However, the delay has the effect of putting the court on its guard to search if any explanation has been offered for the delay, and if offered, whether it is satisfactory or not.

76. In view of the ratio laid down by the Supreme Court in ***Dilawar Singh*** (Supra), ***P. Rajagopal*** (Supra) and State ***of Punjab vs. Ramdev Singh*** (Supra), since no satisfactory explanation has been given by the prosecution for the delay caused in lodging the FIR, the same gives rise to the possibility of concoction of evidence by the prosecution.

77. In the instant case, not only an inordinate delay was caused in instituting the FIR, Krishna Kumar Jha, the SHO of Narpatganj Police Station, who had recorded the oral statement of the informant and who would have thrown some light on the reason for the delay has been withheld by the prosecution.

78. It was Krishna Kumar Jha, the SHO of Narpatganj Police Station with whom P.W.1 had talked on telephone after the death of Md. Waheed from Siliguri. He had called P.W.1 and others to the police station at Araria. It was he, to whom the witnesses narrated about the occurrence in the police station at 7:30 am on 09.12.2013. He had made inquiry about the incident and had sent the dead body of the deceased Md. Waheed for postmortem examination along with a Home-guard. Thus, it was for him to

explain the circumstances under which the FIR was not registered at the earliest point of time after receiving the information about a cognizable offence. He was certainly a material witness. His withholdment by the prosecution without any reasonable explanation has certainly prejudiced the case of the defence.

79. Similarly, Md. Jameel, the father of the deceased and the informant was the person with whom Md. Irshad had allegedly quarreled first at the place of occurrence. He was present from beginning to end at the scene of the crime. He was the most competent witness, who would have disclosed about the manner of occurrence. Surprisingly, he has not even been made a charge-sheet witness in this case. His non-examination during trial without any reasonable explanation by the prosecution would certainly create an impression that the prosecution was not interested in unfurling the truth.

80. It has been argued on behalf of the appellants that the consistent case of the prosecution is that seventeen accused persons named in the FIR were firing indiscriminately from their firearms but, there is no impression on the wall as also no empty cartridge was seized from the place of occurrence. It has also been argued that the blood had fallen on the ground, but the

Investigating Officer did not seize the blood or bloodstained soil from the place of occurrence.

81. As a general principle, it can be stated that error, illegality or defect in investigation cannot have any impact unless miscarriage of justice brought about or serious prejudice is caused to the accused. If the prosecution case is established by evidence adduced, any failure or omission on the part of the Investigating Officer cannot render the case of the prosecution doubtful.

82. However, in the present case, since very beginning the investigation is suspicious. The informant or his family members did not report about the incident to the police immediately after the incident. The injured was taken to various hospitals but, no information was given to the police. When the information was given to the police on telephone, the FIR was not registered. When the informant and the witnesses reached at the police station with the body of the deceased at Araria, though enquiries were made, the FIR was not registered. The FIR was registered after the inquest report was prepared, the autopsy was done and the body of the deceased was buried.

83. In view of such suspicious investigation, the non-seizure of the empty pellets and the blood or the bloodstained soil from

the place of occurrence assumes significance, as seventeen persons are alleged to have resorted to indiscriminate firing. The non-seizure of the blood or bloodstained soil and the empty shell from the place of occurrence would certainly affect the credibility of the prosecution case in the facts and circumstance of the present case.

84. It is argued on behalf of the appellants that the ocular testimony is not consistent with the medical evidence.

85. We have seen that right from the beginning the case of the prosecution is that the deceased sustained only one gunshot injury in his abdomen. P.W.1 to P.W.4, who claim themselves to be eye-witness have not whispered a word that the deceased sustained any other injury but, Doctor, Deo Narayan Prasad Singh (P.W.5), who conducted the postmortem examination on the body of the deceased found one circular wound over the right hypochondriac region with charring and one lacerated wound over the mid of the stomach. The doctor admitted in his evidence that both the injuries were separate injuries caused by two different arms. According to him, there was no exit wound.

86. The medical evidence adduced by the prosecution has great corroborative value. It proves that the injuries could have been caused in the manner alleged and the death could have

been caused by the injuries so that the prosecution case being consistent with verifiable medical evidence.

87. It is true that in a given case where the eye-witnesses' account is found credible and trustworthy, the medical opinion pointing to alternative possibility may not be accepted as conclusive.

88. However, in the present case, since the FIR was instituted after the inquest and autopsy on the body of the deceased, the initial version given to the police at the police station have been suppressed, the SHO of Narpatganj Police Station, who had recorded the *fardbeyan,* registered the FIR and handed over the investigation of the case to Upendra Narayan Singh, has been withheld, the independent witnesses present at the scene of the occurrence have not been examined, the father of the deceased with whom the quarrel had started has been withheld, the investigation of the case has been conducted in the most perfunctory manner and the medical evidence is not consistent with the oral evidence of the witnesses, it would be highly unsafe to place reliance on the evidence of the witnesses examined during trial in order to hold the appellants guilty for the offences punishable under Sections 302 read with 149 and 148 of the IPC as well as Section 27 of the Arms Act.

89. In view of the discussions made above and after carefully analyzing and scrutinizing the evidence adduced by the prosecution, we are of the opinion that the Trial Court has completely erred in appreciating the evidence on record. The finding of facts by the Trial Court cannot be sustained.

90. These appeals are allowed.

91. The impugned judgment of conviction dated 06.11.2019 and the order of sentence dated 16.11.2019 passed by the learned 2nd Additional Sessions Judge, Araria in Sessions Trial No.371 of 2014/Tr. No.19 of 2019 arising out of Narpatganj P.S. Case No.348 of 2013 are set aside.

92. The appellants, namely, Md. Kari, Md. Jahir, Sahe Kamal @ Sahe Kalam, Shamshenoor @ Md. Shamshenoor, Md. Hashib (in Criminal Appeal (DB) No.1500 of 2019), Md. Tajuddin, Md. Farukh @ Faruk (in Criminal Appeal (DB) No.1504 of 2019), Md. Irshad, Md. Tabrej and Md. Dilshad (in Criminal Appeal (DB) No.1517 of 2019) are acquitted of the charges levelled against them. They shall be released from the jail forthwith unless required in any other case.

93. Since we have allowed the appeals and set aside the impugned judgment of conviction and the consequent order of sentence passed by the Trial Court, the reference made by the

Trial Court for confirmation of death sentence vide Death Reference No.2 of 2021 is, hereby, rejected.

94. Before parting with the Death Reference and the appeals, we record our appreciation for the able assistance rendered by Mr. Santosh Kumar, learned *amicus curiae*.

(Ashwani Kumar Singh, J.)

(Rajeev Ranjan Prasad, J.)

Sanjeet/-

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