

**IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.820 of 2015**

Arising Out of PS. Case No.-33 Year-2006 Thana- KARPI District- Jehanabad

Abinash Sharma Son of late Nawal Kishore Sharma Resident of Village
Senari P.s Karpi (Bansi O.P) District Arwal.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant : Mr. Vikramdeo Singh, Advocate

Mr. Paras Nath, Advocate

For the Respondent-State: Mr. Satya Narayan Prasad, APP

CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)

Date : 05-04-2021

The appellant Abinash Sharma was tried by the court of Additional Sessions Judge 1st, Jehanabad in Sessions Trial No.165/2008/72/2014 arising out of Karpi P.S. Case No.33 of 2006 for the charges under Sections 147, 148, 379 and 302/149 of the Indian Penal Code and 27 of the Arms Act.

2. The trial court vide its judgment dated 25.08.2015 acquitted the appellant of the charges under Sections 379 of the Indian Penal Code and 27 of the Arms Act and held him guilty of the charges under Sections 147, 148, 302/149 of the Indian Penal Code.

3. After hearing the parties on the point of



sentence, the trial court vide its order dated 26.08.2015 sentenced the appellant to undergo rigorous imprisonment for life and a fine of Rs.10,000/- and in default of payment of fine to undergo imprisonment for a further period of one year for the charges under Section 302/149 of the Indian Penal Code; rigorous imprisonment for a period of two years for the charge under Section 147 of the Indian Penal Code and rigorous imprisonment for a period of three years for the charge punishable under Section 148 of the Indian Penal Code. However, all the sentences were directed to run concurrently.

4. Being aggrieved by the aforesaid judgment of conviction and consequent order of sentence, the appellant has preferred the instant appeal before this Court.

5. The first information report (FIR) of Karpi P. S. Case No.33 of 2006 was registered on the basis of oral statement of Shradha Devi, wife of Sri Niwas Sharma, resident of village- Oar Bigha, P.S.- Karpi, District- Arwal, which was recorded by the SI of Police of Karpi Police Station, namely, U. K. Singh on 11.04.2006 at 7 a.m. at the *dalan* (a varanda with a roof outside the wall of a house) of Baliram Sharma in village- Oar Bigha, P.S.-Karpi, District- Arwal.

6. In her oral statement, Shradha Devi (P.W.1)



disclosed that during the last night at about 9 p.m., her younger brother Putun Sharma came together with his friends Anil Sharma and a resident of Goh whose name is not known to her. They talked with her for sometime. Thereafter, they went on the rooftop of the *dalan* of Baliram Sharma to sleep. At about 12 midnight, she heard the sound of gunshot and immediately rushed towards the *dalan* of Baliram Sharma and saw Butan Sharma, resident of Puran, Abinash Sharma, resident of Senari and Sadhu Sharma, resident of Oar Bigha together with 6-7 unknown persons being variously armed with gun and rifle were descending on a bamboo ladder from the rooftop of the *dalan*. They went towards northern side opening fire. Thereafter, she climbed up on the same bamboo ladder to reach the rooftop of the *dalan* and saw that her brother and his two friends were shot dead and all their belongings were taken away. She alleged that Butan Sharma, Abinash Sharma, Sadhu Sharma and their 6-7 unknown accomplices had formed an unlawful assembly and killed her brother and his two friends due to previous enmity and took away their belongings.

7. The oral statement, reduced into writing by U. K. Singh, SI of Police of Karpi Police Station was read over and explained to Shradha Devi, who put her thumb impression



over it after finding the contents to be true. Her co-villager Padum Narayan Sharma also put his signature as a witness to the *fardebayan*.

8. Thereafter, U. K. Singh, SI of Police forwarded the *fardebayan* to the Officer-in-charge of Karpi Police Station for instituting a case. Accordingly, Karpi P.S. Case No.33 of 2006 dated 11.04.2006 was registered at 10 a.m. under Sections 147, 148, 149, 379 and 302 of the Indian Penal Code and Section 27 of the Arms Act against Butan Sharma, Abinash Sharma, Sadhu Sharma and 6-7 unknown miscreants by the Officer-in-charge of Karpi Police Station and investigation was handed over to one Rameshwar Ram, SI of Police.

9. Immediately after institution of the FIR on 11.04.2006 itself, the investigating officer sent the bodies of the three deceased to the Sadar Hospital, Jehanabad for autopsy.

10. P.W. 11, Dr. Akhauri Vijay Kumar conducted the autopsy on the bodies of the deceased. He has proved the post mortem reports of Anil Sharma, Putun Sharma and an unknown person which were marked as Ext. 3, 3/1 and 3/2 respectively during trial.

11. The police submitted charge sheet against the accused-appellant on 16.04.2007 after completing



investigation against him. However, the investigation was kept open against the remaining two named accused persons and 6-7 unknown miscreants.

12. On receipt of the police report submitted under Section 173(2) of the Code of Criminal Procedure, the Jurisdictional Magistrate took cognizance of the offences punishable under Sections 147, 148, 149, 302 and 379 of the Indian Penal Code and Section 27 of the Arms Act and summoned the accused-appellant.

13. After complying with the statutory requirements prescribed under Section 207 of the Code of Criminal Procedure, the case was committed to the court of sessions for trial.

14. On 22.05.2008, the trial court explained the charges to the appellant under Sections 379, 147, 148, 302/149 of the Indian Penal Code and 27 of the Arms Act. The appellant denied the charges and claimed to be tried. Accordingly, the trial commenced.

15. The prosecution examined, in all, 11 witnesses in support of its case. Out of the 11 witnesses examined during trial, P.W. 3 Suresh Sharma, P.W. 4 Krishna Murari Sharma, P.W. 7 Brijdeo Sharma, P.W. 8 Nawal Kishore



Singh and P.W. 9 Birendra Kumar Sharma were declared hostile by the trial court at the request of the prosecution.

16. P.Ws. 3, 4, 7, 8 and 9 have stated in their depositions that they knew nothing about the incident. They have stated that their statements were never recorded by the police. They further contended that they are not witness to the occurrence of the offence. They were cross-examined by the prosecution. However, their cross-examination is of no help to the prosecution case.

17. P.W. 2, Chandra Bhushan Sharma and P.W. 10, Akhilesh Kumar are formal witnesses. P.W. 2, Chandra Bhushan Sharma was an advocate clerk. He has proved the *fardbeyan* of the informant recorded by U. K. Singh, which was marked as Ext.1. In cross-examination, he admitted that the *fardbeyan* was not recorded in his presence. He also admitted that he has no personal knowledge about the *fardbeyan*. He further admitted that he does not know either the present place of posting of U. K. Singh or his present position in the police department.

18. P.W. 10, Akhilesh Kumar, another advocate clerk has identified the formal FIR drawn in the writing of Sri Janardan Dubey, the then Officer-in-charge of Karpi Police



Station, which was marked as Ext. 2 during trial. In cross-examination, he too admits that the *fardbeyan* was not recorded in his presence.

19. It is reiterated that P.W. 11 Dr. Akhauri Vijay Kumar had conducted the post mortem examination on the bodies of deceased Anil Sharma, Shadhu Sharma and an unknown person on 11.04.2006 between 01.30 and 02.00 p.m. In his deposition, he has stated that on 11.04.2006, he was posted at Sadar Hospital, Jehanabad. On that day, he conducted the post mortem examination on the bodies of the three deceased, which were brought by constable Parmanand Yadav and Chaukidar Naresh Yadav. He found the following ante mortem injuries on the person of Anil Sharma :-

(1) Lacerated wound $\frac{1}{2}$ " x $\frac{1}{2}$ " x abdominal cavity deep with blackening on left side of abdominal margin inverted- entry wound.

(2) Lacerated wound 1" x $\frac{3}{4}$ " x chest cavity deep on right side of lateral chest, margin inverted- exit wound.

(3) Lacerated wound $\frac{1}{4}$ " x $\frac{1}{4}$ " x abdominal cavity deep on right side of upper



abdomen, anterior aspect, margin inverted-
entry wound.

(4) Lacerated wound $\frac{1}{4}$ " x $\frac{1}{4}$ " x
abdominal cavity deep with blackening on
anterior aspect of abdomen near umbilicus
with blackening- entry wound.

(5) Lacerated wound 2" x $1\frac{1}{4}$ " x
chest cavity deep on back of chest near
midline, margin inverted- exit wound.

20. According to him, the injury nos. 1 and 2
communicated to each other and injury nos. 3 and 4
communicated with injury no.5.

21. He found the following ante mortem injuries
on the person of Putun Sharma :-

(1) Lacerated wound $\frac{1}{4}$ " x $\frac{1}{4}$ " x deep on right
cheek with charring, margin inverted- wound of entry.

(2) Lacerated wound 4" x 5" x cranial cavity
deep on left side of skull, margin inverted- wound
of exit.

(3) Lacerated wound $\frac{1}{4}$ " x $\frac{1}{4}$ " x deep on right
shoulder, margin inverted- wound of entry.

(4) Lacerated wound 4" x $2\frac{1}{2}$ " x bone deep on



right axilla, margin inverted- wound of exit.

(5) Lacerated wound 1/2" x 1/4" x chest cavity deep on left side of mid axillary line, margin inverted- wound of entry.

(6) Lacerated wound 2" x 2 1/2" x chest cavity deep on right side of chest in axilla, margin inverted- wound of exit.

(7) Lacerated wound 1" x 1/2" x chest cavity deep on left side of lower chest, margin inverted- wound of exit.

(8) Lacerated wound 1/4" x 1/4" x chest cavity deep, 1" above right nipple, margin inverted, wound of entry.

22. According to P.W. 11, injury nos. 1 and 2, 3 and 4, 5 and 6 and 7 and 8 communicated to each other.

23. He found following ante mortem injuries on the person of an unknown male aged about 30 years :-

(1) Lacerated wound 1/4" x 1/4" x bone deep on left shoulder with charring, margin inverted- wound of entry.

(2) Lacerated wound 2" x 2 1/2" x bone deep on medial aspect of left upper arm, margin inverted-



wound of exit.

(3) Lacerated wound 1/4” x 1/4” x chest cavity deep on right axilla with inverted margin- wound of entry.

(4) Lacerated wound 2” x 3” x chest cavity deep on left axilla with inverted margin- wound of exit.

24. According to P.W. 11, the injury nos. 1 and 2 and 3 and 4 on the person of the unknown male communicated with each other.

25. He stated that the cause of death of all the three deceased was haemorrhage and shock due to above injuries caused by firearm. According to him, in all three cases time elapsed since death was within 24 hours.

26. In cross-examination, he stated that he cannot say whether the dead bodies were handed over to their relatives. He admitted that it was the constable and the chaukidar who had brought the dead bodies.

27. P.W. 6 Bala Nand Sharma is a hearsay witness. He stated in his deposition that the incident took place about 6-7 years ago at 11.30 p.m. He had heard that three persons were killed on the rooftop of the *dalan* of Baliram Sharma. He has further stated that he does not know the



whereabouts of the persons killed and the name of the perpetrators of the crime. His evidence is of no help to the prosecution.

28. P.W. 1 Shradha Devi is the informant of the case. While deposing before the court, she stated that the incident took place at about 9-10 p.m. two and a half years ago. At that time, she was on the rooftop of her house. Her brother Putun Sharma had come together with Toofan Sharma and Anil Sharma. She requested them to take tea, but they declined and went on the rooftop of the *dalan* of Baliram to sleep. After few hours, she heard the sound of firing. She woke up and saw Abinash, Butan and Sadhu fired one round each at her brother Putun Sharma. She further stated that she herself and her son witnessed the entire incident. She has stated that Anil Sharma was shot dead by Kaushal and Toofan was shot dead by Kamla. She further stated that her house and Baliram's house are adjacent to each other. She contended that due to injuries caused by firearm, all the injured, namely, Putun Sharma, Anil Sharma and Toofan Sharma died on the spot. She contended that the police had arrived at 4 a.m. and she had made her statement before the police, which was reduced into writing and was explained to her and finding the contents to be true, she had put



her thumb impression over it. She contended that a similar statement was made before the police at the time of institution of the FIR. She has stated that her two sons and her daughter-in-law were present in the house at the relevant time when the incident of murder had taken place.

29. In cross-examination, she admits that she had stated before the police that the incident had taken place between 9-10 p.m. She admitted that Baliram lives at Jehanabad and no one lives in his house. She also admitted that the house and the *dalan* of Baliram remain locked. She further admitted that her house is at a distance of two bamboo lengths (approximately 24 feet) from the *dalan* of Baliram and there exists a lane between her house and the *dalan* of Baliram. She further admitted that prior to her arrival at the rooftop of the *dalan* of Baliram, six others had already reached there. Out of whom she named Birendra Sharma, Mushund Sharma and Chhotu Sharma. She admitted that out of aforesaid three persons, she does not have cordial relation with Chhotu Sharma. She stated that village Senari is about a mile away from her village. She admitted that extremists had killed 37 villagers of Senari. She also admitted that the extremists oftenly visit her village too. She stated that she cannot say in how many cases



her brother Putun Sharma was made accused and was absconding. She contended that Abinash, Butan and Sadhu fired one round each at her brother Putun Sharma.

30. Another material witness examined on behalf of the prosecution is P.W. 5, Sri Niwas Sharma, husband of the informant Shradha Devi. In his deposition, he has stated that the entire incident took place about four years ago at 12 midnight. At that time, he was at his residence. On hearing sound of gunshot, he woke up and saw a crowd. He saw Abinash Sharma, Kaushal Sharma, Sadhu Sharma, Kamal Kant Sharma and Butan Sharma causing gun shot injuries to Putun Sharma, Anil Sharma and Toofan Sharma as a result of which they died.

31. In cross examination, he stated that he gave his statement before the police on the next day of the incident at about 9-10 in the morning. He stated that Kaveri Dham is in South India. However, he denied that at the relevant time, he was not at his residence and had gone to Kaveri Dham and he came to know about the incident after he returned from Kaveri Dham. He stated that he does not know in how many cases his brother-in-law Putun Sharma had been made accused. However, he admits that on the date of occurrence itself, one Ambuj Sharma of village-Puran had been killed. He feigned his



ignorance that his brother-in-law Putun Sharma was made accused in the murder case of Ambuj Sharma. He stated that he does not know that his brother-in-law Putun Sharma was hiding himself at his residence after committing murder of Ambuj Sharma on the relevant date and the well wishers of Ambuj Sharma had killed him in retaliation. It is pertinent to note that P.W. 5 Sri Niwas Sharma has admitted in para-13 of the cross-examination that he had not visited the place of occurrence.

32. After examination of the aforesaid witnesses, the prosecution case was closed. Thereafter, for the purposes of enabling the accused personally to explain any circumstances appearing in evidence against him, the trial court examined him under Section 313 of the Code of Criminal Procedure.

33. The defence did not lead any evidence during trial. Hence, the defence case was also closed and the matter was fixed for arguments.

34. The trial court, after hearing the parties and appraising the evidences adduced by the prosecution came to the conclusion that the prosecution had been able to prove the charges framed under Sections 147, 148 and 302/149 of the Indian Penal Code against the appellant. The trial court rejected the contention urged on behalf of the appellant that the



witnesses examined during trial had failed to prove the case beyond reasonable doubt against the appellant. It also rejected the contention urged on behalf of the defence that the post mortem report was not in alignment with the ocular testimony of the witnesses. The trial court relied on the deposition of P.Ws. 1 and 5 and consequently sentenced the appellant in the manner as stated above vide impugned judgment dated 25.08.2015.

35. It was argued on behalf of the appellant that the court below had fallen in error while placing reliance upon the deposition of P.W. 1, Shradha Devi and P.W. 5, Sri Niwas Sharma. It was contended that in the instant case, the investigating officer of the case was not examined. His non-examination has seriously prejudiced the case of the defence. It was also argued that several important witnesses have been withheld by the prosecution. The prosecution not only failed to examine the investigating officer but it also withheld SI U.K. Singh, who had recorded the *fardebayan* of Shradha Devi and Janardan Dubey, the Officer-in-charge of Karpi Police Station, who had drawn the formal FIR. He contended that the deposition of P.W. 1, Shradha Devi makes it abundantly clear that on the date of occurrence, P.W. 5, Sri Niwas Sharma was not in the village. He contended that the trial court grossly erred



in convicting the appellant by ignoring the admission of P.W. 5 that on the date of occurrence, he had not visited the place of occurrence. He further contended that the deposition of P.W. 1, Shradha Devi could not have been relied upon by the prosecution for arriving at a conclusion of guilt. Her deposition is full of exaggeration, embellishment, contradiction and improvement. It was also argued that the two eye witnesses are related to the deceased Putun Sharma, who admittedly had inimical relation with the accused persons. Hence, their evidence needs a more closer scrutiny.

36. On the other hand, Mr. Satya Narayan Prasad, learned Additional Public Prosecutor for the State submitted that the trial court has rightly held the appellant guilty in view of unimpeachable testimonies of P.Ws. 1 and 5, which were duly corroborated by the medical evidence. He contended that both P.Ws. 1 and 5 are truthful witnesses and they have narrated the vivid detail of the incident. He further contended that they were eye witnesses to the incident. Merely because they were related to the deceased Putun Sharma, their evidence cannot be disbelieved.

37. We have heard the learned counsel for the parties and carefully perused the record.



38. Since P.Ws. 3, 4, 7, 8 and 9 were declared hostile by the trial court at the request of the prosecution and, on a careful scrutiny of their cross-examination, we find that prosecution could not take out anything from them in its favour. Similarly, P.Ws. 2 and 10 are formal witnesses. They are advocate clerks, who have proved Ext.1 and Ext. 2 during trial. They are neither authors the documents nor their owner nor their custodian nor are they privy the contents thereof. The advocate clerks cannot be treated as competent witnesses under such circumstance. They cannot be substitute for the police officer who recorded the *fardbeyan* or the officer-in-charge of the police station who drew the formal FIR. The evidence given by them or obtained through them is not admissible.

39. We further find that the evidence of P.W. 6, a hearsay witness, is also of no help to the prosecution case, as he has deposed that he neither knew the whereabouts of the persons killed nor the name of perpetrators of the crime.

40. The doctor, who conducted the post mortem examination on the bodies of the three deceased is P.W.11.

41. Thus, the finding of guilt of the appellant recorded by the trial court is based on the testimony of two witnesses, namely, P.W. 1 Shradha Devi and P.W. 5, Sri Niwas



Sharma.

42. As a general rule, it is not the number, the quantity but quality that is material. The time honoured principle is that evidence has to be weighed and not counted. There is no legal impediment in convicting a person on the sole testimony of a single witness. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise.

43. In the light of settled principles, we proceed to examine the testimonies of P.W. 1 Shradha Devi and P.W. 5 Sri Niwas Sharma.

44. P.W. 5 is neither a witness to the FIR lodged by his wife (P.W.1) nor his wife has uttered a word about his presence in her *fardbeyan*. While deposing before the Court also, she has not uttered a word about the presence of P.W. 5 in the house or in the village on the date on which her brother Putun Sharma and two others were killed. On the contrary, she has stated in her evidence that at the time of occurrence, her two sons and their spouses were present in the house. She has stated that she herself and her son had witnessed the occurrence.

45. According to the *fardbeyan* of the P.W.1, on the fateful night at about 9 p.m., her younger brother Putun



Sharma came together with his two friends, namely, Anil Sharma and a resident of Goh, whose name was not known to her. They talked with her for sometime and, thereafter, they went to the rooftop of the *dalan* of Baliram Sharma. It is important to note here that her *fardbeyan* was recorded on 11.04.2006 at 7 a.m. whereas the occurrence is alleged to have taken place in the midnight. Even till the time of recording her *fardbeyan*, i.e. 07 hours after the time of incident, she was not knowing the name of one of the friends of her younger brother, who had visited her house and was killed in the incident.

46. According to the deposition of the doctor, who conducted the post mortem examination, the bodies of the three deceased were brought to Sadar Hospital, Jehanabad by the constable Parmanand Yadav and the chaukidar Naresh Yadav. The post mortem reports have been marked as Ext. 3, 3/1 and 3/2 respectively during trial. The post mortem examination on the bodies was conducted between 1.30 p.m. and 2 p.m. on 11.04.2006. The doctor has noted the name of the two deceased Putun Sharma and Anil Sharma in the designated column of their respective post mortem reports, but in the third post mortem report, in the column meant for noting the name of the deceased and his parentage, it has been noted as “unknown 30



years male”. This clearly goes to show that till that time, neither the police nor the family members nor anyone else had disclosed the name of the third deceased.

47. Having discussed the aforesaid aspect, when we closely look to the deposition of P.W. 5, Sri Niwash Sharma, we find that he claims himself to be an eye witness to the occurrence. Had P.W. 5 been present in the village and seen the occurrence and was knowing the name of the deceased, as disclosed by him in his deposition, he must have disclosed the name of the third deceased to his wife, who is the informant of the case or to the police or to the doctor who conducted the post mortem examination.

48. It does not stand to reason that if he was present in the house and had witnessed the killing of three deceased and was knowing the name of the third deceased as to why his wife stated in her *fardebayan* that she did not know the name of friend of her brother accompanying him, who was a resident of Goh, specially when her *fardebayan* was recorded after 07 hours of the incident and, in the meantime, she had enough time to inquire from her husband the name of the third deceased.

49. Further, in her *fardebayan*, the informant



disclosed the name of Butun Sharma, Abinash Sharma and Sadhu Sharam and 6-7 unknown armed miscreants to have committed the offence, but P.W. 5 claiming himself to be an eye witness deposed before the court that apart from the aforesaid three named accused Kaushal Sharma and Kamal Kant Sharma also shot Anil Sharma and Toofan Sharma dead. Had he been present in the village and seen the occurrence, he would have certainly disclosed the name of Kaushal Sharma and Kamal Kant Sharma to his wife as offenders and she would not have spared them from being added as FIR named accused persons.

50. We have noticed that P.W. 5 has admitted in his cross-examination that he had not visited the place of occurrence himself. If he had not visited the place of occurrence, one fails to understand as to how he could be an eye witness and narrate, who killed the three deceased. It is an admitted position that the deceased Putun Sharma was the brother-in-law of P.W. 5 and he and his two friends had been murdered on the fateful night on which they had visited his house. In such a situation, the normal conduct would be to immediately rush to the place of occurrence. His admission that he had not gone to the place of occurrence himself is not a normal human conduct consistent with the ordinary course of



human nature making his deposition extremely doubtful and highly unsafe.

51. There is another reason for not placing reliance on the deposition of P.W. 5 Sri Niwas Sharma. He was specifically questioned by the defence that on the relevant date of incident, he was at Kaveri Dham. Though, he has denied the said contention of the defence, the aforesaid aspect of not being present in the village, on the date of occurrence and having gone to Kaveri Dham could have been verified from the investigating officer, in case he would have been examined as a witness during trial. His non-examination by the prosecution and that too without giving any reason for the same has, thus, seriously prejudiced the case of the defence.

52. While saying so, we are conscious of the fact that the non-examination of the investigating officer would not be fatal in every case. It depends on the facts and circumstances of each case.

53. In the instant case, since the non-examination of the investigating officer has caused prejudice to such an extent that it deprived the defence an opportunity to test the veracity of the prosecution case, we are of the opinion that the same would prove fatal to the prosecution case.



54. The facts, discussed, hereinabove, make the presence of so-called eye witness P.W. 5 in the village or in his house on the date of occurrence extremely doubtful and highly improbable. Since there are several doubtful aspects in the conduct of P.W. 5 couple with the prejudice caused to the defence due to non-examination of the investigating officer, it would be totally unsafe to accept his evidence for the purpose of arriving at a conclusion of guilt.

55. Now, we shall look at the deposition of the informant Shardha Devi.

56. If we closely appreciate her evidence, we find that in the first information report, she has stated that the incident had taken place at about 12 midnight, but in her deposition she has stated that the incident took place in the night in between 9-10 p.m. on 10.04.2006. We further notice that in the *fardbeyan*, she has stated that her brother Putun Sharma along with two friends had come to her house at about 9-10 p.m. and after talking with her for sometime, they went to the rooftop of *dalan* of Baliram Sharma to sleep and at about 12 midnight, she heard the sound of gunshot and immediately rushed from her house towards the *dalan* of Baliram Sharma. She saw Butan Sharma, Abinash Sharma, Sadhu Sharma and 6-7 unknown



persons being variously armed descending from the rooftop of the *dalan* on a bamboo ladder and they went towards the northern side opening fire, but while deposing before the court, she completely changed her version and stated that the rooftop of her house and the rooftop of the house of Baliram Sharma are adjacent to each other. She stated that she herself and her son witnessed the entire incident. She saw Abinash Sharma, Butan Sharma and Sadhu Sharma firing one round each at her brother Putun Sharma as a result of which he died. She further stated in her deposition that Anil Sharma was shot dead by Kaushal and Toofan was shot dead by Kamla. Thus, in the *fardbeyan*, she is not an eye witness to the murder of the three deceased, but in her deposition, she becomes an eye witness to the entire incident.

57. There is yet another reason to doubt her version as narrated in her deposition. In cross-examination, she admitted that the *dalan* of Baliram Sharma is at a distance of two bamboo length from her house and in between her house and the *dalan* of Baliram Sharma, there is a lane. The aforesaid admission made by Shradha Devi in cross-examination completely belies her deposition that the rooftop of her house is adjacent to the rooftop of Baliram Sharma's *dalan*.



58. We further notice that P.W. 1 has stated in her deposition that on the date of occurrence the police had arrived at the place of occurrence at 4 a.m. and had recorded her *fardebayan*. However, the *fardebayan* exhibited before the court would show that it was recorded at 7 a.m. on 11.04.2006. It is not known what happened to the *fardebayan* recorded by the police at 4 a.m. This aspect of the mater could have been clarified by SI U. K. Singh, who had reduced the *fardebayan* in writing, or by SI Rameshwar Ram, who investigated the case, or by Janardan Dubey, the Officer-in-charge of Karpi Police Station, who drew the formal FIR and handed over the investigation to the investigating officer. Their non-examination, without offering any explanation in this regard by the prosecution leaves the court guessing not only about the *fardebayan* recorded at 4 a.m. on 11.04.2006, but also about the manner of occurrence and place of occurrence.

59. We further find from the deposition of the informant Shardha Devi that in her *fardebayan* she had named three accused only, namely, Abinash Sharma, Butan Sharma and Sadhu Sharma, but in her deposition, she has made material improvement by adding the name of Kaushal and Kamala, who, according to her, had shot dead Anil Sharma and Toofan



Sharma. She did not utter a word that Kaushal and Kamala repeatedly fired, but the post mortem examination report would show that deceased Anil Sharma had at least three wounds of entry and deceased Toofan Sharma had sustained at least two wounds of entry. As per FIR, she is not a witness to the murder but, while deposing before the court, she stated that the accused Abinash, Butan and Sadhu fired one round each at her brother Putun Sharma, as a result of which he died, but the doctor, who conducted the post mortem examination found 4 wounds of entry on the person of Putun Sharma. If only 3 shots were fired at Putun Sharma, there could not have been 4 wounds of entry.

60. The oral testimony of the informant is not in alignment with the medical evidence. Major discrepancies and improvements made in her evidence while deposing before the court goes to the root of the matter and ushers in incongruities. Her deposition does not inspire confidence.

61. Moreover, the informant is the elder sister of the deceased Putun Sharma. In her *fardebayan* itself, she has disclosed that Putun Sharma had strained relations with accused named in the FIR. She was confronted with the question that her brother was a criminal having many cases pending against him. Her husband was also confronted with a similar question. He



was also confronted with the question that on the fateful day, one Ambuj Sharma of village-Puran was killed in which the deceased Putun Sharma was made an accused and he was hiding in his house when in retaliation he was killed by supporters of Ambuj Sharma. The informant and her husband have not negated such questions put to them during trial. They have simply expressed their ignorance about the criminal activities of the deceased Putun Sharma. The defence would have clarified these aspects from the investigating officer. For the reasons best known to it, the prosecution did not examine the investigating officer. On the facts and in the circumstances of the case where the conduct of the two star witnesses for the prosecution is unnatural and there are other attending circumstances, which make their presence at the place of occurrence doubtful, we are of the opinion that the non-examination of the investigating officer has seriously prejudice the case of the defence as it was only the investigating officer, who was in a position to explain the whole sequel of events. We are also of the opinion that in absence of examination of the investigating officer during trial neither the place of occurrence nor the manner of occurrence has been established.

62. We have noticed that as per the prosecution



case, the miscreants committed the offence and left the place of occurrence. It is not the case of the prosecution case that after committing the offence, the miscreants remained present at the place of occurrence even for a moment. P.Ws. 1 and 5 claim themselves to be witness of the occurrence. They were closely related to one of the deceased. They made no effort to shift the three injured to any doctor or hospital. They also made no effort to call any doctor in order to ascertain as to whether the injured were alive or not after miscreants had left the place of occurrence. It is highly unnatural that the two close relatives of one of the three deceased made no effort to save their life.

63. While appreciating the evidence of witnesses related to the deceased having strained relationship with the accused, the Court is required to carefully scrutinize it and examine their testimony with caution.

64. On this principle, when we scrutinize the evidence of the informant P.W.1 and P.W. 5, we find that there are major discrepancies, significant embellishments, material improvements and inconsistencies in their evidence while deposing before the Court which do affect the core of the prosecution case. They create serious doubt about their credibility as a witness.



65. In view of the foregoing discussions, we are not able to appreciate the reason given by the trial court for convicting the appellant for the alleged offences. On the contrary, we are of the considered view that the prosecution has failed to establish the guilt of the appellant beyond reasonable doubt by adducing cogent and trustworthy evidence.

66. Since the prosecution has failed to prove the guilt of the accused-appellant beyond reasonable doubt, we set aside the impugned judgment of conviction dated 25.08.2015 and order of sentence dated 26.08.2015 passed by the learned Additional Sessions Judge-1st, Jehanabad in Sessions Trial No.165/2008/72/2014 arising out of Karpi P.S. Case No.33 of 2006.

67. The appeal stands allowed.

68. The appellant, who is in custody, is acquitted. He is directed to be released forthwith unless required in any other case.

(Ashwani Kumar Singh, J)

(Arvind Srivastava, J)

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