



Reserved
AFR

Criminal Appeal No.1853 of 1983

Deo Raj and another Appellants
 Versus
 State of U.P. Respondent.

Connected with

Criminal Appeal No.1854 of 1983

Girdhar and another Appellants.
 Versus
 State of U.P. Respondent.

Hon'ble Vinod Prasad, J.
Hon'ble Surendra Kumar, J.

(Delivered by Hon'ble Vinod Prasad J.)

A family consisting of husband Girdhar (A-3), wife Ram Dayee (A-4), son Deo Raj (A-1) and son-in-law Ram Lal (A-2) have preferred the above two connected appeals against the judgment and order dated 8.8.1983 passed by IInd Additional Sessions Judge, Fatehpur in two connected Sessions Trial S.T. No. 488 of 1981, State Vs. Girdhar and another and S.T. No.589 of 1981, State Vs. Deo Raj and another. By the impugned judgement and order, all the appellants were held guilty under Section 302/149 I.P.C. and therefore, were convicted for that crime and sentenced to imprisonment for life. Appellants (A-1), (A-2) and (A-3) were also convicted under Section 323/149 I.P.C. and sentenced to four months R.I. Appellants (A-3) and (A-4) were convicted under Section 147 I.P.C. and with sentence of 9 months R.I., appellants (A-1) and (A-2) were convicted under Section 148 I.P.C. with impose sentence of one year R.I. and appellant (A-4) was convicted under Section 324/149

I.P.C. and was sentenced to one year R.I. It is aforesaid convictions and sentences, which are now in question in the instant appeals.

Ab initio, it is mentioned that (A-3) and (A-4), Girdhar and his wife Ram Dayee have expired, pendente lite their Criminal Appeal 1854 of 1983 in this court and therefore that appeal already stood abated vide order dated 21.5.2012 passed by our predecessor Bench. This has now left us to consider appeals of rest of the two surviving appellants (A-1) and (A-2) in Criminal Appeal No.1853 of 1983.

Shorn of unnecessarily details and stated laconically, prosecution allegations, as was scribed in the written F.I.R., Exhibit Ka-1, coupled with Chik F.I.R., Exhibit Ka-4, divulged during the investigation and later on testified by the fact witnesses, Rajendra P.W.1 and Chinka P.W.2, during the Sessions Trial, were that the informant Rajendra P.W.1 and three of the accused (A-1), (A-3) and (A-4) were co-villagers being residents of the same village Rampur Kurmi, Police Station Chandpur, district Fatehpur and son-in-law (A-2) is the resident of another village Chuhulpur. Kamal Kishore @ Sudama (deceased) and Jagdish (injured) are the elder brothers of the informant Rajendra P.W.1, whereas Chinka (injured P.W.2) is his younger brother. A mango tree was standing in the plot of (A-3), but seven or eight months prior to the date of the present incident, the same was cut by the informant, deceased and injured regarding which a FIR was lodged by (A-3) against them, in which after due investigation charge sheet was submitted by the police against Kamal Kishore @ Sudama (deceased), Jagdish and Chinka (both injured), Ram Sajivan and the informant, PW1. All these persons had to get themselves bailed out. On the date of the present incident 29.6.1981, Criminal trial in respect of that tree cutting was pending in the competent court.

On the incident date, 29.6.1981 at 10 a.m., Girdhar (A-3) was transporting the woods of the aforesaid mango tree from a bullock-cart. (A-1), (A-2) and (A-4), along with two other persons, were following the said cart from behind. At that time informant and the deceased were at the door of deceased house. Sudama's son Jitendra Mohan informed them about the transporting of the cut woods by the appellants. On this, deceased followed by the informant rushed towards the appellants to forbid them from transporting the woods and when they reached north to the house of the Panni Lal, nearby agriculture field of Bihari, that they spotted accused bullock cart transporting the cut woods, which was driven by (A-3) with others following it from behind on foot. Deceased exacerbated accused from carrying the woods on which (A-3) instigated his associates to annihilate the deceased. (A-2), thereafter assaulted the deceased with an axe but the deceased escaped the assault and did not sustain any injury by it. Deceased, then made an escape endeavour but meanwhile (A-3) jumped out of the bullock-cart and thereafter (A-1), (A-2) & (A-4) along with two unknown persons rounded up the deceased in the agricultural field of Bihari, where he was belaboured by (A-3) and two unknown persons with *lathis*, (A-1) and (A-2) with axe and (A-4) by scythe (*Hasiya*). Sustaining injuries, deceased fell down on the ground. Informant raised hue and cry, which attracted his brothers Jagdish and Chinka (P.W.2), both the injured, but they were also caused injuries. Hue and cry raised by the informant and the witnesses brought Daya Shanker, Rajan, Shivadhar and many other at incident scene. Accused thereafter retreated from the incident scene along with the bullock-cart towards their village. Informant came to his brothers and found Kamal Kishore @ Sudama dead and rest of his two brothers

injured. Blood had trickled down on the murder spot. Informant then got deceased corpse placed in the shadow of a margosa (*neem*) tree on a cot.

Informant Rajendra, P.W.1, scribed the F.I.R., Exhibit Ka-1 and accompanied with his two injured brothers Jagdish and Chinka, PW2, came to the police station Chandpur, in a bullock-cart, and arrived there in the afternoon and then he lodged his FIR. Injuries of his injured brothers were checked by the Head Constable. From the police station injured were sent to the hospital by the police whereas informant returned back to his house leaving both of his injured brothers at the police station.

Head constable Ram Niwas Mishra, who was posted as head moharir at the police station Chandpur registered the crime at 1.25 P.M. on the basis of Ext. Ka-1 prepared chik FIR Ext. Ka-4 and crime registration GD Ext. Ka-5 vide rapat no. 21, in which, he had also noted injuries of the injured persons. Both the injured thereafter were dispatched to the District Hospital through constable Chhitani Lal for their first aids. Special report regarding the murder was dispatched at 3.30 P.M. by this head moharir P.W. 4 through constable Shyam Narain Tiwari regarding which, he had made a entry in Rapat no. 25, the copy of which is Ext. Ka-6.

Investigation into the crime was commenced by S.O. R.K. Shukla, PW5, in whose absence, the crime was registered. Constable Ashok Kumar had brought the relevant papers to the I.O. Investigating Officer commencing the investigation, recorded the statement of the constable Ashok Kumar and thereafter came to the incident spot, searched for the accused but could not find them. I.O. thereafter conducted inquest proceedings on the cadaver of the deceased, after appointing *panch* witnesses and prepared inquest

memo Ext. Ka-7 and other relevant papers, Exts. Ka-8 to Ka-13. Corpse of the deceased was sealed and was handed over to constables Manzoor Ahmad and Ashok Kumar to be transported to the mortuary for post mortem examination. Investigating Officer thereafter recorded the statements of the informant and witnesses Daya Shanker, Shivadhar, Rajendra @ Rajan and other persons. Subsequent thereto, he inspected the spot and prepared site plan map along with the noting, which is Ext. Ka-14. Blood stained and plain earth were collected by the I.O. from the incident spot and it was seized and recovery memo, Ext. Ka-15 was sketched. Investigation, during night, was conducted in the light of petromax and torches.

PW5, as investigatory step, had also jotted down injuries of both the injured and post mortem examination report of the deceased. On 10.7.1981, I.O. received the intimation that two of the accused (A-1) and (A-2) had surrendered in the Court of C.J.M., Fatehpur on the previous day 9.7.1981. After obtaining the court's permission, both the accused were interrogated by the I.O. inside the jail on 13.7.1981. Concluding investigation against Deo Raj (A-1) and Ram Lal (A-2), P.W.5 had laid charge sheet against them vide Ext. Ka-16 on 14.7.1981. Two days after, on 16.7.1981, I.O. again came to know that rest of the two accused Girdhar (A-3) and Ram Dayee (A-4) had also surrendered in the Court of C.J.M., Fatehpur and, therefore, I.O. interrogated them inside the jail and concluding investigation against them, charge sheeted them as well on 28.7.1981 vide Ext Ka-17.

Both the injured were medically examined by Dr. B.K. Mishra P.W. 6 on the incident date itself. Injured Jagdish was examined at 8 P.M. whereas injured Chinka, PW2, was examined at 8.30 P.M. On

the body of injured Jagdish, doctor had found following injuries, vide his medical examination report Ext. ka-19:-

"1. Lacerated wound Y shaped over scalp middle and left side scalp deep one limb of Y 6cm x 1cm and other limb 8cm x 1cm x 13 cm above the left ear.

2. Lacerated wound 3cm x 1cm scalp deep, over left side of scalp 8cm above the left ear.

3. Lacerated wound 2cm x 1/2cm x scalp deep over left side of scalp 6cm above the left ear.

4. Traumatic swelling over dorsum of left hand upon which 3 abrasion over index middle and ring finger measuring 1cm x 1cm each.

5. Lacerated wound 2cm x 1/2cm over palmer aspect of right hand at the base of the right ring finger.

6. Incised wound 1.5cm x .25cm x skin deep over base of the right thumb palmer aspect.

7. Lacerated wound 1.5cm x .25cm present over lateral side of left leg 7cm above the lateral malleolus.

Duration half day old. All injuries simple in nature and caused by some blunt object except injury no. 6 which was caused by some sharp edged object."

On the body of the another injured Chinka, PW2, doctor had had noted following injuries vide his medical examination report Ext. Ka-19:-

"1. Lacerated wound 6cm x 1cm x scalp deep present over right side of scalp 12 cm above the right ear.

2. Lacerated wound 2cm x 1cm x scalp deep over left side of skull 12cm above the left ear.

3. Contusion 1.5cm x 1cm present in epigastrium, at middle of

abdomen.

4. Abrasion 5cm x1cm over back at middle of body 20cm below the neck.

Opinion- *All injuries are simple in nature and caused by some blunt object.*

Duration – Half day.”

In the estimation of the doctor, injuries sustained by both the injured could have been caused to them at or about the date and time of the incident. Doctor had further noted that the injuries 1 to 6 of injured Jagdish and 1 to 4 of injured Chinka, PW2 were caused by blunt objects. During his deposition he had testified that from the reversed side of the axe, these injuries could be possible. Injury no.7 of injured Jagdish could have been caused by axe or scythe.

Autopsy on the cadaver of the deceased was performed by Dr. S.K. Singh, P.W.3, on 30.6.1981 in District Hospital, Fatehpur at 4.45 P.M. The corpse was brought to him by CP 161 Manzoor Ahmad and CP 141 Ashok Kumar of P.S. Chandpur, who had identified the dead body. According to the doctor, deceased was 35 years of age and one and quarter day had lapsed since his demise. Following ante mortem injuries were dictated by the doctor on the cadaver of the deceased:-

"1. Lacerated wound on right temporal area 4" x 2" x bone deep 3" above the

2. Lacerated wound in middle of skull 2-1/2" x 1/2" scalp deep 5" above the bridge of

3. Lacerated wound right side of temporal area of skull 2-1/2" x 1/2" x scalp deep B" behind the right ear.

4. Abrasion 3" x 1/2" on right forearm at elbow joint.

5. Contusion 4" x1/2" on lateral aspect of right arm 5" below

the right shoulder.

6. Contusion 3-1/2" x 1/2" on lateral aspect of right arm 2-1/2" below the right shoulder.

7. Contusion 5" x 1" on right side of back 1-1/2" below the angle of scapula.

8. Contusion 3-1/2" x 1" on right side of back 1/2" lateral to injury no. 7.

9. Lacerated wound back of skull 2-1/2" x 1/2" x scalp deep 1-1/2" medial to right ear.

10. Lacerated wound 1-1/2" x 1/2" x scalp deep on occipital area."

Rigor mortis were present on the lower extremities, his stomach was distended. His scrotum and penis were swollen and there was a fracture of his right temporal and right parietal bones. His membranes were congested, brain was lacerated and half pound clotted blood was present in the skull cavity. His stomach and small intestines were empty and large intestine contained faecal matters. His urinary bladder was also empty. In the opinion of the doctor, deceased had died because of shock and haemorrhage, as a result of sustained injuries. Post mortem examination report of the deceased is Ext. Ka-2.

On the body of the deceased, a *banyan* and *underwear* was seized by the doctor, which were handed over to the constable, which P.W. 3 has proved as material Ext.1. Doctor had deposed that deceased could have died at the time of the incident and sustained injuries cumulatively were sufficient in the ordinary course of nature to cause his death. He had further deposed that the injuries sustained by the deceased were possible by blunt objects. He had also deposed that he had received the papers on 30.6.1981 at 2 P.M.

On the basis of charge sheet submitted against (A-1) and (A-2), Criminal Case no. 1744 of 1981, State Vs. Deo Raj and others, was registered in the Court of C.J.M., Fatehpur, who finding the charge sheeted offences triable exclusively by court of session's had committed the said case to the Session's Court vide committal order dated 3.9.1981. Similarly, against (A-3) and (A-4) Criminal Case no. 2478 of 1981 was registered before the same Committal Court and this case was also committed to the Session's Court for trial on 20.11.1981.

Both the cases were registered as S.T. No. 488 of 1981 and S.T. No. 589 of 1981. Since both the cases emanated from the same incident and hence both were clubbed together and learned Trial Judge had tried it both together and has rendered the impugned judgment in both the cases.

In the Sessions Trial, learned trial Judge had charged all the appellants under sections 302/149, 324/149 and 323/149 I.P.C. He has further charged (A-3) under section 147 I.P.C., (A-1), (A-2) and (A-4), under section 148 IPC on 1.10.1982. All the charges were read out and explained to all the accused, who all denied the same and claimed to be tried and resultantly, to establish their guilt, learned trial Judge observed Sessions Trial procedure to prosecute them.

During the aforesaid Trial, prosecution relied upon oral testimonies of informant Rajendra P.W.1 and injured eye witness Chinka P.W.2, as the two fact witnesses. Besides their testimonies, prosecution also tendered formal witnesses, which included post mortem Dr. S.K. Singh P.W. 3, head moharir Ram Niwas Mishra P.W. 4, investigating officer S.O. R.K. Shukla P.W. 5 and doctor who had examined injuries of injured Dr. B.K. Mishra P.W. 6.

Accused in their examination under section 313 Cr.P.C. abjured

all the incriminating circumstances, which were put to them by the learned trial Judge and pleaded a common defence of their false implication. They in their defence examined Vinod Kumar as D.W. 1.

Learned Trial Judge/ IInd Additional Sessions Judge, Fatehpur, vide impugned judgment and order, concluded that the prosecution has successfully anointed the guilt of the appellants and therefore, convicted all of them under section 302/149 I.P.C. It further convicted appellants (A-1) to (A-3) under section 323/149 I.P.C, appellants (A-3) and (A-4) under section 147 I.P.C., appellants (A-1) and (A-2) under section 148 I.P.C. and appellant (A-4) under section 324/149 I.P.C. and resultantly sentenced them for those offences, which has already been recorded in the opening part of this judgment and hence are being eschewed from being repeated. Challenged in this appeal is to the aforesaid conviction and sentence by all the appellants.

As has already been stated herein above, since (A-3) and (A-4) have already expired and their appeals have been abated, we concentrate on the appeals of the two accused (A-1) and (A-2) only, vide their appeal no.1853 of 1983.

In the background of preceding facts, We have heard Sri S.K. Yadav, learned counsel for the appellants in support of the appeal and Miss Usha Kiran, learned AGA for the respondent State.

Assailing the impugned judgment and conviction, appellants' counsel submitted that prosecution and accused were collaterals and informant and deceased wanted to grab mango tree belonging to the appellants which were given to them even in consolidation proceedings. A roving appreciation of deposition, of informant's evidence indicate that he does not know anything about this tree. Prosecution side had illegally cut the tree and thereby they had

started the mischief. It was admitted to PW1 that the tree stood in the plot of (A-3). Regarding theft committed by the informant, injured and the deceased a F.I.R. was lodged by (A-3) against them, in which after due investigation they were charge sheeted and were facing criminal trial, which was in the offing on the date of the incident. Just to take revenge that entire appellants family including son and son-in-law have been framed-in, by the informant in a concocted case. There was no reason for the deceased to pick up the quarrel, if the appellants were transporting the woods belonging to their tree and hence it was the deceased and injured who had picked up the quarrel, in which only Girdhar (A-3) with two unknown assailants participated and belaboured the deceased and the injured with lathis and rest of the family members of (A-3), including his wife (A-4), son (A-1) and son-in-law (A-2) have been falsely implicated in a fabricated case. Neither the injured nor the deceased had sustained any axe or scythe injury and hence claim by the fact witnesses that deceased and injured were assaulted by these weapons is a false story. When the prosecution witnesses realised this difficulty and repugnancy in ocular testimonies vis-à-vis medical evidence then they had expatiated their version in the trial by alleging that the axe and scythe were used by the reverse side, which embellishment is an afterthought and a conscious concoction, to make prosecution story congruent with medical evidence and consequently on such a version no reliance can be placed. In support of said submission learned counsel referred to various paragraphs of depositions of both the fact witnesses PW1 & 2, to which we shall refer at the appropriate stage in the later part of this judgement while making critical appreciation of evidences. It was next argued that if accused had used the sharp heavy cutting

weapon from reverse side, as was embellished by prosecution side during trial, then in that eventuality conviction of the appellants u/s 302 I.P.C. is unsustainable as, in that event it could not have been concluded with certainty, that accused had an intention to commit murder. It was further submitted that it is too unrealistic a submission that the three accused will use their sharp edged weapons from the reverse side although they had intended to annihilate the deceased. Such a conduct is wholly un-natural which does not inspire any confidence in an embellished version. As a supplementary contention it was argued that initially, the case of the prosecution was that the deceased was assaulted by all the six accused from their respective weapons, which included three blunt objects, two heavy sharp edged cutting weapons (axe) and one pointed sharp edged weapon (scythe), but the deceased had not sustained any sharp edged weapon injury either by the axe or by the scythe and therefore, autopsy report of the deceased was at variance with the ocular testimonies and contradicted it directly and substantially. Learned counsel further pointed out that none of the two injured also sustained any sharp edged heavy cutting weapon injury or injury by any sharp edged pointed weapon (scythe) and therefore, participation of (A-1), and (A-2) in the incident is a fib. It was only to implicate the entire family because of pending criminal trial against the informant, deceased and injured that such an embellishment was made by the two fact witnesses. No independent witnesses came forward to support the prosecution case, which is entirely based on depositions of two inimical, partisan, interested and related witnesses and this also corrodes credibility of prosecution story. Informant was not present during the incident and he is a got up witness which is evident from his conduct and it seems that

subsequent to the incident that he was sent for and a false case was cooked up to implicate the entire family who had launched a criminal case against the deceased, informant and injured, were some additional submissions raised by the appellants counsel. Informant P.W.1 never tried to save lives of his brothers although, he claims to be an eye witness. Contradictions and incongruities have cropped up in the prosecution story because of it's fabrication. Referring to the statement by the Investigating Officer P.W. 5, it was submitted that the deceased was of a bad character person and was involved in many crimes regarding which, he was being prosecuted and since informant was not present during the incident i.e. why in the site plan, the place from where informant had witnessed the incident had not been depicted. Investigation is perfunctory and has left much to be desired and hence on such an investigation no confidence can be placed. It was further contended that during investigation also I.O. had not found any injury by axe and scythe and for this contention a reference was made to questions and answers put to the I.O. in paragraph 5 of his deposition. Learned counsel has relied upon various decisions *Bejoy Singh versus State of W.B.:(1990) 2 SCC 159; Shingara Singh versus State of Haryana: (2003)12 SCC758;Jasbir versus State of Haryana: (2002) 10 SCC 324; Ram Chandra versus State of U.P. (2007) 60 AIC 499 (All); State of Bihar versus Bishwanath Rai 1997 SCC (Cr) 1148.* Primarily on the above submissions, it was contended that conviction of both the appellants (A-1) and(A-2) is unsanctified and their appeals deserves to be allowed and conviction be set aside.

Arguing conversely, Miss Usha Kiran, learned AGA, supported the impugned judgment and submitted that it is a day light incident

and because of rivalry, accused persons had chased the deceased and thereafter had assaulted him. There are eye witnesses account of the injured persons, whose presence at the spot cannot be doubted and therefore, the prosecution story is convincing without any damaging fact and consequently, conviction of the appellants cannot be scrapped. It was next submitted that it was not essential for the prosecution witnesses to have mentioned the manner in which weapons were used during the incident and therefore, there is no discrepancy or incongruity in the prosecution story and oral and medical testimonies. Learned AGA therefore argued that the appeal lacks merit and be dismissed.

We have considered the arguments raised by both the sides and have summated evidences on record. What is discernible from the critical appreciation of oral and documentary evidences is that both the factions are related with each other as dead accused Girdhar (A-3) was the uncle of the informant and the deceased. Father of Girdhar (A-3) and grandfather of the informant were real brothers. They are thus collaterals. Both the factions had a dispute over a mango tree, which albeit was standing in the plot of appellant (A-3) but informant and deceased claimed it to be theirs. They had got said mango tree cut seven or eight months prior to the present incident. Embarking upon critical appreciation of evidence, depicts altogether a different picture as it is very strange that none of two fact witnesses examined by the prosecution had any idea how they claimed the said mango tree to be theirs. They have not filed any documentary evidences in that respect. Consolidation proceeding in their village had already taken place and in that proceedings, tree was allotted to A-3. When informant was questioned on the said aspect he unambiguously stated, at various stages of his depositions,

that *"Consolidation had taken place in my village. How long before the incident it was done I don't know. I don't know who had got incident tree in consolidation. In consolidation proceeding two plots were carved out one of Girdhar and the other of my father Chota. Before the incident the plot which was given to Girdhar the tree stood in that plot."*(Para 10). Further he had testified in the same para that *"Since I gained consciousness after my birth, I am seeing that tree standing in the plot of Girdhar"*. In para 16 he had admitted that the criminal case in which he is an accused alongwith others was in respect of the same tree but he expressed his ignorance regarding the plot number on which this tree was standing. Thus, such type of evidence does not inspire any confidence and projects that something is being suppressed by this witness. PW1 failed to bring convincing oral as well as documentary evidences on record to determine that his allegation that the mango tree belonged to prosecution side was a true fact. It further transpires that in the wood cutting crime, the cut woods were given in custody of (A-3) by the I.O. So is the case with another eye witness PW2. Thus it seems that the tree belonged to the appellants and in such fact situation if appellants were carrying the wood of that tree, their act was a *damnum*, sanctified by law.

In respect of Mango tree evidence of PW2 does not in any way add credence to the prosecution version. In para 3 of his deposition has stated that *"seven or eight months prior to the incident we got our mango tree cut which was in the plot of Girdhar. On our tree cutting Girdhar had made a report in the police station, on which a criminal case started against us and Rajendra, Jagdish, Kamal Kishore @ Sudama and I had to get bailed out. On the date of the incident that case was pending in court. Accused were carrying the*

wood on the date of the incident. That wood was ours." His entire depositions in para 7 indicate that though he had seen the accused loading the cut wood since quite some time but he never resisted their activity nor informed the deceased, although he claimed that the woods were his. This self-contradictory statements are unreliable. Para 7 indicates that this witness had no grievance against accused while they were loading the woods and hence his claim that the woods belonged to them is a false claim. Attour, prosecution had not brought any document to indicate that they had a genuine claim over the ownership of the Mango tree.

So far as motive to start the incident is concerned, from the prosecution story itself it is well perceptible that it was the deceased who had gone to the accused and had proscribed them to refrain from carrying the woods and it was he who had pick up the quarrel. Thus the motive lied with the deceased and the informant to resist the act of the appellants. It is recollected here that the incident had occurred all of a sudden at the spur of the moment without any premeditation and hence as whose behest incident had started is of much significance. Thus prosecution could have a motive to implicate entire family, when on their own picked up quarrel they were at the receiving end.

Turning towards another contention that the informant was not present at the spot, we are of the view that the said submission is also not without force. We cannot accept evidence in a pedantic manner without judging it's veracity to unravel the truth. Informant is not an injured. He claims to have been sitting with the deceased when deceased's son had informed them about the carrying of woods by the appellants. Although deceased immediately started to resist such transportation but informant remained there, although for

a short while but for no reasons. He stated that he started after some time. Anyway, when appellants started the assault, informant PW1 never tried to save life of his brother (deceased) so much so that when on his rescue call two of his other brothers (both injured) intervened into the scuffle and jumped amidst assault to save the deceased, even then informant, PW1, kept himself at bay without making, even an insignificant, attempt to help all his brothers. No doubt different people act in different situations and there cannot be any determined human conduct of universal application, but then there are certain natural innate human impulsive reactions, which also cannot be abjured by a normal human being in a given fact situation. At least what informant could have done was to pelt stones or bricks, which also he never endeavoured. All these bizarre conduct of the informant, and his only being a Mayday caller, to us, does not inspire any confidence. Here we must hasten to add that the explanation furnished by PW1 not to save lives of his brothers, that he was terrified, is a bogus and prevaricated explanation as from the very beginning of his cross examination, vide para 8 of his testimonies, defence had been able to surface long criminal activities in which informant, deceased and their associates were involved. Thus neither PW1 was a novice nor a hapless helpless person. While scanning their evidences, it is excepted of us, by a catena of apex court decisions, that when witnesses are inimical, partisan, related and interested, who could have reasons to falsely implicate, their evidences has to be scrutinised carefully and cautiously and therefore we are under taking all this scrutiny to separate the grain from the chaff.

Other circumstances indicating absence of informant PW1 at the time of the incident are that in the FIR he himself had mentioned

that- *"On commotion I and Ramjan son of Munnu Kurmi and Shivadhar son of Sadhu Kumhar resident of Rampur Kurmi and my brother –in-law Dayashankar son of Jagannath resident of Babai and many village people rush to intervene..."*. This clearly shows that he was not present at least since the beginning of the incident. His absence is further authenticated by the fact that in site plan map place from where he had seen the incident had not been depicted. He is an accused in the criminal case launched by the appellants and hence is an inimical, partisan, related and interested witness. We are conscious of the fact that merely because of relationship his evidence cannot be discarded, but at the same time we are also of the view that if a related, interested, inimical and partisan witness is unreliable and untrustworthy his evidence cannot be treated to be creditworthy merely because of his relationship. There is no concrete evidence to establish his presence at the incident spot and hence we are of the opinion that he is a planted and got up witness, who had not seen the incident at all and it is because of this reason that initial case of the prosecution that the axe and scythe also caused injuries to the injured and the deceased was expatiated to make it consistent with that of post mortem examination report and injury reports. Assault description deposed by informant is inconsistent with that of injury reports and autopsy report. Our view that PW1 was not an eye witness of the incident is further credited because of glaring omissions and contradictions in his FIR and 161 statements, which cannot be said to be minor and insignificant. Firstly he had nowhere, either in the FIR nor 161 Cr.P.C. statement, had stated that he was present with the deceased at his house, when son of the deceased had informed them about transporting of woods by the accused. He had also omitted to state that he had gone behind the deceased. He

had also not mentioned nor stated to the I.O. that the deceased had evaded first blow and sprinted away. He had also not mentioned and stated during investigation that all the blows by axe were hurled from the reverse side. He had also not divulged that the injured were also assaulted with axe and scythe. This last contradiction, was further found to be false as both the injured had not sustained any injury by axe nor by scythe. A single cut injury to Chinka, PW2, is at such a site and is so in-significant that it cannot be attributed to an assault by a lady with scythe. He for the first time deposed during trial that the dead body was removed and was placed in the shadow. All these unsatisfactory and unconvincing testimonies which are contained from para 11 onwards of his depositions do not inspire any confidence and makes him an unreliable and planted witness. At this moment we recollect that the what has been argued by the defence counsel is that the prosecution story of involvement of six persons in the incident is a false version, whereas only (A-3) with two of his associates were involved in the incident wherein they had wielded lathis, and in which brawl, other side was represented by the deceased and the two injured only and it was only subsequent to the loss of life that a false story was cooked up to implicate the entire family to mount pressure on them and take revenge of criminal case launched by (A-3).

Other attending unsatisfactory circumstances weighing against PW1 are that he (informant) was a young man of 25 years of age and therefore, had he been present at the spot certainly he would have retaliated, if the incident would have occurred in his presence. From the beginning of his cross examination, defence had endeavoured to bring on record that he, deceased and his associates, had criminal background and used to indulge into the

crime so much so that the deceased was convicted in one crime as well.

Turning towards the evidence of injured P.W. 2, he also does not seem to be a wholly truthful witness. According to his deposition, when he had reached at the incident scene, deceased had already been assaulted by the accused persons. He along with Jagdish were belaboured subsequent to the assault made on the deceased. As has already been mentioned herein above though he and another injured were witnessing loading of woods in the bullock cart by the appellants since long time but they never resisted or informed it to the deceased. They were mute spectators to the whole episode. The cart was loaded and left the place and even then they did not raise any objection. This clearly indicates that his claim of woods belonging to them is an afterthought story. Had his allegation be true, why he will remain silent is a big question to be answered. Further he deposed in his examination-in-chief that they were assaulted by all the accused but he had not sustained any axe or scythe injury. Faced with such repugnant situation, when cross examined, he testified in para 9 of his evidence that he could not see whose assault had hit Sudama. First assault was made on Sudama was by axe but he could not see whether it hit or not. He has seen scythe being hurled but did not see whether it hit or not. He had not seen that axe assault by Deo Raj had hit but had seen him assaulting. In para 10 he had deposed that assault by axe made by Ram Lal had not caused him injury. Axe assault by Deo Raj had also not caused him any injury. Ram Dayee scythe had also not caused him any injury. He further stated that he was rounded up and assaulted but could not state whose assault caused him injuries. Later on he (PW2) deposed that he was assaulted only by one or two assailants. One of

them was Girdhar (A-3) and the other was unknown assailant both armed with lathis. This injured witness had not sustained any heavy sharp edged weapon injury nor any injury of scythe. Above referred to testimonies do not inspire any confidence nor indicate that he is a reliable witness. His deposition that he was assaulted by all the accused therefore is a false claim. There are serious omission in his depositions as well vis-a-vis his investigatory statement.

Now turning towards case of the two surviving appellants we note certain broad features to indicate that they were not present at the spot and have been falsely implicated. First of all, it is the prosecution case itself that the appellants were carrying already cut woods, which were lying there since before and hence there was no use of axe and hence carrying of axe by the two appellants does not appeal to reason. Further, neither in the FIR nor in 161 statements, any of the witnesses had disclosed that assault was made from the reverse side by both the appellants from the very beginning of the assault as was claimed by them during trial. This certainly was a conscious, deliberate and motivated move to make prosecution story consistent with the injuries and post mortem examination report of the two injured and the deceased. Such an embellishment which altogether alters the fact situation and makes happening of the incident, as alleged by the prosecution doubtful, stated for the first time in court, in our view has to be discarded from consideration. At page 19 of his depositions PW1, vide para 14 had clearly stated-“*Axe was wielded from reverse side was not asked by anybody nor I disclosed. I on my own not mentioned it in FIR nor informed it to the investigating officer.*” We further note that axe is a very heavy cutting sharp edged weapon and even if used from reverse side it will cause much severe damage to the cranium than what was been

sustained by the deceased. Even during investigation, I.O. had noted that the most damaging factor of the prosecution story is that deceased had not sustained any injury by axe or scythe. This is so clear from the question answer penned down at page 9 of his deposition. None of injured had sustained any axe injury which has been attributed to appellants (A-1) and (A-2). PW2, in no uncertain terms had deposed that he was assaulted only by lathi wielding accused vide para 10 at page 11 of his testimonies and hence he certainly was not assaulted either by (A-1) or (A-2). Another injured had also not sustained any axe injury and thus we are of the opinion that the proven facts and circumstances does not indicate that both the surviving appellants had participated in the incident. Their presence at the incident spot during the incident also seems to extremely doubtful. Only two hard core inimical and interested witnesses had entered into the witness box to depose against them without support from any independent quarter and there are medical inconsistencies in their depositions. After vetting evidences, facts and circumstances, we are of the view that prosecution has not been able to establish guilt of appellants (A-1) and (A-2) convincingly and clearly. To countenance our above view we aptly rely upon some of the apex court decisions which we refer herein below:

In **Shingara Singh versus State of Haryana and another: AIR 2004 SC 124** it has been held by the apex court as under:-

"There was no dispute that their deposition in Court was consistent, but what was observed by the trial Court was that their version as to the manner of occurrence as deposed to by them was at variance with what was stated in the First Information Report by P.W. 5, and in the statements of P.Ws. 6 and 7 recorded under S.

161, Cr. P.C. When confronted with their earlier statements, they could not give a satisfactory explanation, with the result that their credibility was sufficiently impeached. The change of version by each one of them, and to the same effect, was deliberate and not merely accidental or on account of lapse of memory. It cannot be disputed that this was a very significant change. It cannot also be disputed that the change was deliberately made by all the witnesses, so that the prosecution case became consistent with the medical evidence on record. We, therefore, do not find any error committed by the trial Court in coming to this conclusion."

In Jasbir and others versus State of Haryana: AIR 2003 SC 554 it has been held by the apex court as under:-

"10. We have been taken through the FIR and the statement made by Satpal when the inquest was held. He stated that he noticed that Randhir, Jagdish, Rohtash, Satbir, Jasbir, Rani and Banwari were armed with halberds and climbed up the roof of the house. Halberd is described to be a kind of battle axe which can be used as spear as well. In other words, it is a combination of spear and battle axe with a long handle. When the statement made by him in the FIR and at the inquest is clearly to the effect that they had the halberd, to say that they were armed with lathis would not be correct or accurate at all. In such cases when there has been long enmity between the parties, it is not unusual to lug in persons who are innocent as well. When there were no injuries caused by lathis, it cannot be explained away in the manner as has been done either by the trial Court or by the High Court, particularly when the witnesses are specific that large number of blows on the person of the injured and the deceased have been inflicted with lathis. The High Court should not have assumed that pharsa may look like lathi whereas it

was nobody's case that the pharsa was used by Randhir and Jagdish or none of the witnesses stated that Randhir and Jagdish had some weapon which looked like a lathi but was really a pharsa or a halberd. Therefore, it will not be safe to rely upon the evidence tendered by those persons as to the presence of either Randhir or Jagdish."

In Bejoy Singh and Vijay Narain Singh and others versus State of W.B.: AIR 1990 SC 814 it has been held as under:-

".....Having carefully considered the evidence and the facts and circumstances of the case and the medical evidence, we are of the view that the prosecution case suffers from a serious infirmity in respect of the allegation made against accused Nos. 2 to 4 namely that they caught hold of the deceased. If we look at the injuries and particularly on the hands and also on other parts of the body, the case that they caught hold of him falls to the ground and their conviction on the basis of this unsatisfactory evidence may result in miscarriage of justice. Therefore, interference is called for. So far as appellant No. 2 is concerned, a further allegation is that he had a knife and thrust it into the stomach after Bejoy Singh, appellant No. 1 and the two unknown persons stabbed him indiscriminately. This appears to be clearly an afterthought. In the earliest report given by PW. 3 the principal witness, it is not mentioned at all that Ujagar Singh, appellant No. 2 had a knife and stabbed the deceased in the abdomen after Bejoy Singh, appellant No. 1 and the two unknown persons inflicted so many injuries on him. As a matter of fact it is in the FIR that only Bejoy Singh, appellant No. 1 and the two unknown assailants were cutting the deceased all over the body with their weapons and the three appellants including appellant No. 2 only held

the deceased in such a way that he could not move and PW. 3 went in front of his elder brother and on seeing him all the assailants ran away leaving the deceased. We are satisfied that the overt act attributed to appellant No. 2 namely that he stabbed the deceased is clearly an after-thought. Therefore this aspect of the prosecution case also is unacceptable. So far as the first appellant is concerned, the evidence against him is consistent. In the earliest report it is mentioned that he along with two unknown assailants came and stabbed the deceased. The evidence of P.Ws. 3, 13 and 15 also is consistent against him. It was he who brought the other two unknown assailants who also inflicted injuries on the deceased. The medical evidence also corroborates."

In State of Bihar versus Bishwanath Rai and others: AIR 1997 SC 3818 it has been held as under:-

"4. In order to prove its case, the prosecution had examined 8 eye-witnesses. The trial Court found them reliable but though their evidence was consistent, on reappreciation of the entire evidence, the High Court considered it unsafe to rely upon their evidence. It held that (i) their evidence is not consistent with the medical evidence regarding the injury caused to the deceased; (ii) all eye-witnesses belong to village Patahi which is at a distance of 3 kms. from Muzaffarpur town where the incident took place and their explanation for their presence near the place of occurrence is not convincing; (iii) the fard-bayan though stated to have been recorded at 11.30 p.m. was possibly not recorded till 2.00 p.m. on the next day; and (iv) the eye-witnesses have suppressed the real manner in which the incident took place as they have failed to explain how a serious injury was received by one of the accused, Ram Nath Prasad Gupta. The learned counsel for the appellants challenged the finding

recorded by the High Court that the fard-bayan of injured witness, Ramesh Prasad Singh was not recorded till 2.00 p.m. on the next day, as incorrect. On scrutiny of the evidence of Ram Jiwan Singh (PW-13), Sub-Inspector of Police who had recorded the fard-bayan, the Deputy Superintendent of Police (PW-16) and the Superintendent of Police (DW-1) and also the Injury Certificate (Exh. 4) of Ramesh Prasad Thakur and the fard-bayan (Exh. A) of accused, Ram Nath Gupta alias Mohan Prasad Gupta, we find that the fard-bayan of injured witness, Ramesh Prasad Thakur was really recorded at about 11.30 p.m. on 24-5-1977. The fard-bayan which was recorded between 8.00 a.m. and 2.00 p.m. on 25-5-1977 was really of accused, Ram Nath. The finding recorded by the High Court is thus clearly wrong. However, we find no substance in the other contentions raised by the learned counsel for the appellants. It was submitted that the evidence of eye-witnesses being consistent, ought to have been accepted by the High Court. What the High Court has pointed out is that though the evidence of the eye-witnesses appears to be consistent inter se, is not consistent with the medical evidence and that creates a doubt regarding the real manner in which the incident had taken place. Even though the eye-witnesses have deposed that two shots were fired by accused Ram Chandra Singh and both had caused injuries to the deceased, the evidence of the doctor is that they were possibly caused by only one shot. All the eye-witnesses have stated that accused Ram Chandra Singh had fired two shots from his revolver from a distance of about 6 to 9 feet. The medical evidence shows that there was blackening around the wounds. This circumstance indicates that in all probability, the injuries were caused to the deceased with a different type of weapon. As regards the injuries of PW-4 Chandra Mohan, the eye-

witnesses have stated that they were caused by three of the accused with pharsas and lathis but the medical evidence discloses that he had not received a single injury which could have been caused by a pharsa. Realising this inconsistency, all the witnesses have made an identical improvement in their evidence by stating that he was assaulted by accused Chandresh Rai with back portion of his pharsa. Thus they have made a deliberate attempt to change their version to make it consistent with the medical evidence. Moreover, as rightly observed by the High Court, all the eye-witnesses are residents of village Patai and they belong to the rival political party. So also, as rightly submitted by the learned counsel for the respondents, if a mob of as many as 60 to 100 people had attacked the deceased and the persons with him, then others could not have escaped unhurt and the two injured would have received more injuries. The two injured had received three injuries each but they were minor injuries. None of them was caused by a weapon with a sharp edge.

5. The High Court after taking into consideration all these aspects found it unsafe to rely upon the evidence of eye-witnesses. Once it found that the eye-witnesses had not given the correct account of the manner in which the incident had taken place, the High Court was justified in discarding their evidence even though it was otherwise consistent. The learned counsel for the appellants could not point out any infirmity in the other findings recorded by the High Court."

Wrapping up our discussion we find that the residue of analysis is that the prosecution has failed to establish its case against the appellants Deo Raj(A-1) and Ram Lal(A-2) and therefore they deserves to be acquitted.

Criminal Appeal No.1853 of 1983 Deo Raj and another is

allowed. Conviction and sentence of both the appellants Deo Raj (A-1) and Ram Lal (A-2), as is recorded in the impugned judgement and order is set aside and they are acquitted of the charge. These appellants are on bail, they need not surrender, their personal and surety bonds are hereby discharged.

Let a copy of this judgement be certified to the trial court for its intimation.

Dt.14.92012
RK/Arvind/Tamang