

The State of Bihar and Others Vs. Pappu Bihari @ Pappu Sah and Others

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Court : Patna

Decided On : Apr-30-2014

Judge : V.N. SINHA & ANJANA PRAKASH

Appeal No. : Criminal Appeal (DB) Nos. 437, 518, 769 & 19 of 2013

Appellant : The State of Bihar and Others

Respondent : Pappu Bihari @ Pappu Sah and Others

Judgement :

Anjana Prakash, J.

1. The Appellants of Cr. Appeal 437 of 2013 and 518 of 2013 have been convicted u/s 302 IPC and sentenced to death and also under Section 394 IPC and 27 of the Arms Act and sentenced to ten years and two years respectively with a fine of Rs.5,000/- . Death Reference is in regard to the same Appellants. Criminal Appeal No. 379 of 2013 and Government Appeal 19 of 2013 have been preferred by the Informant against the acquittal of initial accused Kamlesh Jha. The said Judgment was delivered by the 1st Additional Sessions Judge, Darbhanga, in Sessions Trial 441 of 2011 on 9th April, 2013.

2. The Fard-byan of Ram Pukar Rai, P.W-3 recorded at 8.20 P.M. at the place of occurrence, i.e. Soni Fuel Petrol Pump at Nehra, P.S. Manigachhi, Distt. Darbhanga, on 27.7.2011, is that on the date of occurrence, around 6.30 to 6.45 P.M. when he was checking the Diesel on the Tanker the nephew of the owner Jai Ram Choudhary i.e. Ashwani Kr. Chaudhary (deceased) and Daya Shankar Roy (deceased) were working at the reconciliation of accounts and the Nozle man Kailash Sada (Deceased) was standing near the Nozle. Just then on two black motorcycles, four accused persons arrived and started to get their motorcycles re-fueled. In the meanwhile, he went inside the counter having checked the Diesel and he saw the Tanker Driver (Ram Ayodhya Mahto, PW7) talking to deceased Ashwani Kumar Choudhary. He informed Choudhary that the Tanker was emptied and that the Driver should be paid his dues. Kailash Sada (deceased) also came to the counter and told the exact details of the Petrol which had been taken by the four accused persons. He then saw the three of the four miscreants with Pistols catching hold of Kailash Sada (deceased) and taking him into the room while one of the miscreants stood outside.

3. He gives out the details of the physical description of the miscreants who were aged about 25-35 years and that one of them appeared to be of 30-32 years. One of the miscreants assaulted him on the neck and his face and felled him on the floor. On seeing this, the Tanker Driver (Ram Ayodhya Mahto, PW-7) attempted to escape but he was also assaulted with the butt of the Pistol on account of which he fell down. When Kailash Sada (deceased) tried to escape, he was shot at on the chest on account of which he was injured. The miscreants then asked for the money at which Ashwani Kumar Choudhary pointed where the money was. The miscreants then started to take the money from the drawer which probably deceased Daya Shankar Roy resisted at which he was shot at. The accused persons took away the money lying in the drawer and asked Choudhary as to where rest of the money was. Choudhary replied that there was no more money but the

miscreants continued to search the same. They then shot at Choudhary who fell down injured.

4. The miscreants thereafter went towards their Motorcycles and on finding a Bolero Car parked on the petrol pump, took away its papers, keys and Mobile from the Bolero Driver Sitaram Manjhi (PW-10) and fled away towards the main road. The Informant stated that none of the Motorcycles contained any number. He further narrated that Kailash Sada and Daya Shankar Ray died at the spot whereas Ashwini Kumar Choudhary and the Tanker Driver (Ram Ayodhya Mahto, PW-7) were removed to the Hospital. Later injured Ashwini Kr. Chaudhary also died. He claimed to identify the miscreants if shown again.

5. The complicity of the Accused appeared during investigation and hence a charge sheet was submitted on 27.9.2011 against six accused i.e. (i) Pappu Bihari (ii) Nityanand Jha (absconding) (iii) Rahul Kumar Yadav (iv) Kamlesh Jha (v) Raghav Kr. Jha (Juvenile) and (vi) Sonu Singh (dead). The Appellants and the acquitted accused Kamlesh Jha were thereafter put on trial.

6. Before proceeding any further, this Court at this juncture would think it important to discuss a relevant point since it has an important bearing on this case.

7. The order-sheet of the Chief Judicial Magistrate dated 13.10.2011 notes the fact that four copies of Police papers were attached with the case record but the three co-accused persons i.e. Kamlesh Jha, Pappu Sah @ Papu Bihari and Rahul Kumar Yadav and their learned counsels refused to receive them. The case was then notified for commitment without compliance of Section 207 Cr. P.C.

8. When the matter was posted before the Sessions Judge, Darbhanga, a petition under Section 7(a) JJ Act was filed on behalf of Rahul Kumar Yadav. On 28.11.2011, the matter was finally disposed off considering the documents and the fact that earlier the Chief Judicial Magistrate, Darbhanga, had refused such an application. On the same day the Trial Court sought to give the Police papers to Kamlesh Jha, Pappu Bihari and Rahul Yadav but they and their respective counsels once again refused to receive the same.

9. On 30.11.2011, an application under Section 227 Cr. P.C. was filed on behalf of Kamlesh Jha and the Prosecution counsels were partially heard on the point of charge.

10. On 7.12.2011, two petitions were filed on behalf of the Appellant Rahul Yadav, copies of which were served upon the Additional Public Prosecutor. One of the petitions was to the effect that the Investigating Officer had annexed the relevant documents as required under Section 173(5) Cr. P.C. but material exhibits, the statements of witnesses separately were essential in the light of Sections 170(2) and 172(1)a Cr. P.C. which was not made available in the Court. The grievance was that the case had been committed to the Court of Session without compliance of Section 207 Cr. P.C. and, therefore, further proceeding was illegal.

This was opposed by the Additional Public Prosecutor who pointed out that the Chief Judicial Magistrate had attempted to serve the Police papers but the Accused had refused to accept the same.

It was then noted by the Trial Court that all essential documents were available with the records and hence the prayer of Rahul Yadav was rejected. Finally, on 24.1.2012, the three accused were charged and the Prosecution witnesses were summoned.

11. On 2.2.2012, PW-1 Kamlesh Rai, appeared in Court but the accused Kamlesh Jha, Rahul Yadav and Pappu Bihari who were present in Dock, refused to affix their signature in the margin of order sheet. They also refused to cross-examine the said witness on the ground of awaiting orders of the High Court. On the same day, an application for transfer of the case was filed before the Trial Court which was forwarded to the District and Sessions Judge.

12. On 3.2.2012, an application was filed by the Appellant Rahul Kumar Yadav that certain irregularities had been committed before charges were framed but the Court rejected the petition on the ground that it had no power to review its own order. He also observed that if at all if it was felt at a later stage that charges required

amendment it would be done at the relevant time.

13. On 6.2.2012, the Trial Court received a direction from the Sessions Judge on the transfer petition to proceed in the matter in accordance with law.

14. On 10.2.2012, the counsel for the Defence stated that he intended to file a revision against the order dated 3.2.2012 and, hence, would not cross-examine PW-1. The Trial Court was of the view that the accused persons were purposely trying to delay the Trial and discharged PW-1.

15. On 14.2.2012, an application under Section 465(2), was filed on behalf of Kamlesh Jha to keep the Trial in abeyance till mandatory requirements under law are followed and no prosecution witness be examined on the grounds mentioned in the petition. On the said date, all the three accused persons had appeared but they refused to sign on the margin of the order sheet. PW-2 Sanjeev Kumar Chaudhary appeared on the said date and was examined and cross-examined in part by the counsel appearing on behalf of Pappu Bihari and the matter was adjourned for a further date.

16. On 22.2.2012, a petition was filed on behalf of the Appellant Pappu Bihari to allow him to withdraw his prayer on the grounds mentioned in the petition and as prayed for on behalf of the learned counsel of Pappu Bihari, PW-2, was not further cross-examined and consequently discharged.

17. On 14.2.2012, a petition under Section 465(2) Cr. P.C. was filed that the accused persons had not been given Police Papers and the Provision of Section 207(3) Cr. P.C. had not been complied with hence, charge was erroneous. Once again, the Court rejected such a petition on the ground that earlier such a prayer had been considered and rejected by orders dated 7.1.2012 and 16.1.2012. It also observed that despite efforts by the Prosecution to serve the Police Papers the provision could not be complied with because the accused/their Lawyers had refused to accept the same. It also held that charges had been framed on the materials available in the case record.

18. On the same day a petition was filed on behalf of the accused Kamlesh Jha and Appellant Rahul Yadav, praying therein to stay the examination of Prosecution Witness No. 3 Ram Pukar Rai, but the Trial Court went ahead with his examination. Once again, the accused persons and the learned Lawyer declined to cross-examine the witness on the ground that Trial was defective. The witness was then discharged without cross examination.

19. On 3.3.2013, a fresh petition was filed on behalf of Kamlesh Jha to keep the Trial in abeyance till receipt of the decision of Supreme Court and High Court. The Trial Court once again rejected it on the ground that earlier such a prayer had been rejected. On the same date PW-4, Hari Krishna Singh, was examined in Chief but the Defence counsel and the accused persons refused to cross-examine him where after the witnesses were discharged. The order-sheet also reveals that the accused persons refused to sign on the margin of order-sheet.

20. It appears that on 17.3.2012, PW-5, Amit Kumar Mandal and PW-6, Shyam Mandal, appeared and both of them were examined in chief, but, once again the Defence declined to cross-examine them. Thereafter, PW-7, PW-8 and PW-9 were cross-examined only by the counsel appearing on behalf of Pappu Bihari.

21. The aforesaid facts have been noted because one of the circumstances appearing against the two appellants i.e. their identification by Prosecution Witnesses No. 2 and 4 in Court during trial remained unchallenged for reasons mentioned above. At the relevant stage, the value of the same shall be considered.

22. During Trial, Prosecution has examined 29 witnesses but this court does not think it essential to elaborately discuss their narrative on the manner of occurrence which would unnecessarily burden the judgment since the factum of occurrence is not denied by the Defence nor does it require scrutiny.

23. PW-1 Kamlesh Rai, cousin of the deceased Daya Shankar Sada is a hear-say witness on the factum of the

occurrence as also a witness of the Inquest Report Ext. 1/1, 1/2 and 1/3 and, hence, formal in nature.

24. PW-2 Sanjeev Kumar Choudhary is the cousin of deceased Ashwini Kr. Choudhary who claims to have been present near the place of occurrence along with PW-4 Hari Krishna Singh, a staff of the Petrol Pump and ran to the Petrol Pump on hearing shouts of firing. He is an eye witness on the factum of the accused persons fleeing away from the place of occurrence as also a witness on the inquest report Ext. 1/4 of deceased Ashwini Kumar Chaudhary at DMCH. He identifies Appellants Pappu Bihari and Rahul Yadav in Court.

25. PW-3 Ram Pukar Rai is the Informant who is an eye witness to the occurrence. While narrating the manner of occurrence, he states that Appellant Rahul Yadav had shot at PW-7 Ayodhya Prasad and deceased Kailash Sada. He further states that Appellant Pappu Bihari snatched the money from Daya Shankar and shot him as well as Ashwini Kumar Choudhary dead. He supports the fact that he had given his fardbeyan and proves his signature on the same Ext. 1/5 and that he had identified Appellants Pappu Bihari and Rahul Yadav in the Test Identification Parade held in the Jail premises whom he identified in Court. He states that he had seen Kamlesh Jha (acquitted), loitering on the road in front of the Petrol Pump one hour before the occurrence. He has been formally cross-examined that the Test identification parade was faulty.

26. PW-4 Hari Krishna Singh claims to be a Nozleman of the Petrol Pump and states that he was standing 200 yards away from the Petrol Pump at the time of the occurrence and rushed there on hearing shots of firing to see the four miscreants fleeing away towards Rajwara from there. He identifies Appellants Pappu Bihari and Rahul Yadav as also Kamlesh Jha in Court. He further stated that Rahul Yadav was driving the red Motorcycle upon which Pappu Bihari was seated and the persons boarded on the other Motorcycle were not present in Court. As per him, Kamlesh Jha was seen on the road one hour before the occurrence. He gives out the description of the two Motorcycles.

27. PW-5 Amit Kumar Mandal is a seizure witness. According to him, on 28.7.2011, three fired cartridges of 9 MM Pistol, front portion of two cartridges and four small pellets were seized and proves Ext. 1/6. Some blood spot and such other materials were also seized in his presence from the place of occurrence. The next seizure list was prepared on 1.8.2011 at 11.30 A.M. at the same place wherein some finger prints had been collected and he proves his signature on the same as Ext. 1/7. To a Court question, he clarifies that the articles seized in his presence, even though wrapped up in different packets, had not been sealed.

28. PW-6 Shyam Mandal is also a witness on the point of seizure of the articles from the place of occurrence as mentioned by PW-5 Amit Kumar Mandal. Both the witnesses are formal in nature since apart from proving the factum of occurrence, they do not in any way connect the present Appellants with the crime.

29. PW-7, Ram Ayodhya Mahto, is the Tanker Driver who was named in the First Information Report as an eye witness to the occurrence. He describes the same to some extent and that he was also injured for which he was treated at DMCH. He mentions the description of the two Motorcycles. He denies having identified any of the accused persons and states that he was seeing the accused present in the Dock the first time and he had not seen them at the place of occurrence. He further specifically states that he had told the Police that the accused persons had muffled their faces.

30. PW-8, Deochand Paswan, is a signatory on the Inquest Reports of deceased Kailash Sada and Daya Shankar proves the same as Exts. 1/2 and 1/3. Even though, he says that he went to the Petrol Pump on firing, he is not an eye witness to any part and is formal in nature.

31. PW-9, Umesh Kumar Pandey, is the Judicial Magistrate who had conducted the Test Identification Parade of Pappu Bihari and Rahul Kumar Yadav in the Jail premises on 2.8.2011. He proves his signature on the Test Identification Parade Chart Ext. 2 and Ext. 2/1. He further states that PW-3 had identified the two accused persons firing and that he had taken all the precautions in regard to the Test Identification Parade.

32. PW-10, Sita Ram Mali, was the Bolero Driver whose presence is mentioned in the First Information Report.

He supports the factum of occurrence and that his Car keys, Mobile Phone and Driving License were snatched away by the miscreants but denies having identified any of the accused persons. He denies the suggestion that he had refused to identify the accused on account of fear. To a Court query, he states that he did not identify the accused persons in the Dock and that they were not present in the occurrence. In cross-examination, he states that he was seeing the accused persons first time and that perpetrators of the occurrence had muffled their faces.

33. PW-11, Dr. Dhrub Kumar Dhiraj, had held the Post Mortem examination of the three deceased on 28.7.2011, all of whom had sustained one fire arm injury, each on a vital portion, which had caused their death and proves the Post Mortem Examination Report Exts. 3/4/5. He further stated that he had recovered a metallic bullet from the person of the deceased, Ashwini Kumar Choudhary, which was duly handed over to the Home-Guard under seal.

The evidence of this witness on the handing over of the recovered bullet under sealed cover is an important link in the present case where Appellant Rahul Yadav is concerned.

34. PW-12 Mithilesh Kumar Choudhary is an inquest witness on the death report of deceased Ashwini Kumar Choudhary and proves his signature Ext. 1/8 and formal in nature.

35. PW-13 Sudhir Kumar was a Home-Guard posted at the office of the Sr. Superintendent of Police, Darbhanga, in his presence PW-18 Paras Kumar had produced before PW-29 the Investigating Officer the CAF of the holder of looted Macromax Mobile SIM No. 7870570517 and the call details between 1.7.2011 to 28.7.2011 as also the CAF of another SIM bearing No. 8757491031 used in the looted Mobile set IMIE No. 910048508186970 and call details between 15.7.2011 to 28.7.2011 which had been prepared by an electronic method. He signed on the production list Ext. 6.

36. On 31.7.2011 at 12.30 in his presence, PW-18 Paras Kumar produced the CAF of suspect Nos. 9709536536, 9709652208, 9779286871, 9771310537 and 8051528217 before the Investigating Officer Ext. 6/1.

37. On 9.8.2011, at 10.45 A.M. PW-18 in his presence handed over the call details and tower location of the suspect numbers which had been procured electronically to the Investigating Officer Ext. 6/2.

38. On 29.7.2011 at 6.30 P.M. PW-18 also produced the sketch of the suspect before him, Ext. 6/3. He denies personal knowledge of the contents of the production list.

39. PW-14 Prem Nath was a Constable at the office of Senior Superintendent of Police, Darbnhanga, and he has produced the relevant documents with regard to the call details prepared by Paras Kumar PW-18 before the Investigating Officer, PW-29 and signed on the Production list Ext. 6/4 - 6/7. He also denied personal knowledge of contents of the production list.

40. PW-15 Raj Kumar Das produced the material exhibits, Material Ext. I " I/A i.e. Mobile sets and money which had been recovered from the possession of Pappu Bihari before the Court. The mobile had 2 SIM Cards. He states that the same had been sealed and kept in the malkhana vide entry no. 11/11 dated 31.7.2011

41. PW-16 Md. Naseem Quraishi is formal having proved Exhibits 7 which was a seizure list prepared in the present case but denies personal knowledge of the same. Similar is the evidence of PW-17 Bhola Prasad Gupta who proves his signature Ext. 7/A on the same seizure list. Both these witnesses are formal who do not connect the present Appellants to this incident.

42. PW-18 Paras Kumar was a Computer Operator in the office of the Senior Superintendent of Police, Darbhanga. He states that he had produced the consumer application form of the looted macromax Mobile of Madhubani P.S. Case No. 117 of 2011 bearing Sim No. 7870570517 and its call details between 1.7.2011 to 28.7.2011 and the CAF of other suspects Numbers such as 8757491031, 8051574342 and call details between 15.7.2011 to 28.7.2011 as also CAF of 7250363542 and handed it over to the Investigating Officer vide Exts. 8

to 8/4 upon which PW 13 and Pw 14 had previously proved as Exts. 6 to 6/4 his own signature is marked Ext 6/8. He also obtained the CAF and call details of suspect numbers between 20.7.2011 to 30.7.2011 such as 9709536536, (Pappu Behari) 970965208, (Raghav) (Juvenile), 9771286871, (Nityanand) 9771310537(Kamlesh) and 8051658271 from the Computer and produced the same before PW 29 vide Exts. 8/5 to 8/10 previously marked by the aforesaid two witnesses as 6/1 to 6/5. He proves his signature as 6/9.

43. On 9.7.2011, he also produced the tower location chart obtained from the Computer of the numbers; 9771310537, 8057574342, 9771286871, 9709652208, 9709536536 between 28.7.2011 to 30.7.2011 and the call details between 27.7.2011 to 30.7.2011. (Exts. 8/11 to 8/22). He proves his signature as Ext. 6/10.

44. He also produced the sketch book of the artist who had prepared sketch of one of the suspects on the instructions of PW-3, the Informant and proves his signature on the production list as Ext 6/11.

45. He however states that he had no personal knowledge of the contents of the production list. To a question in the cross-examination, he answers that all the call details had been entered by the service provider in the Computer but it did not bear the signature of any Official. He stated that he had taken training in mobile tracking.

46. PW-19 Sunil Kumar Mandal is the Photographer who had taken the photographs of the finger prints at the place of occurrence on 27.7.2011 and proves the prints Material Exts. 11 " 11/7 (with objection) and once again on 28.7.2011 and proves the prints Exts. 11/8 " 11/15 which he on 1.8.2011 by a Production-cum-Seizure list handed it over to the Investigating Officer. He proves his signature on it marked as Ext 1/8.

47. PW-20 Aditya Paswan was an Officer of the Forensic Science Laboratory who on 10.8.2011 had received 2 mm. country made pistol, 8 cartridges of 9 mm, 1 country made pistol of .315 .1 pistol of 12 bore, 1 wad of 12 bore, 2 bullets of 9mm, 3 live bullets of 9mm, 4 wads of 12 bore, 2 bullets of 9mm, 3 fired shells of 9mm and 1 fired bullet 9mm, recovered from deceased Ashwini Kumar Chaudhary in a sealed condition.

He was one of the team members who had examined the samples. According to him, the fired bullet of 9 MM caliber cartridge marked G in item 11 had been fired from a country made pistol and was compared to the text-fired bullet marked BJ 2 (I) and BJ 4(I/1) under microscopic comparison and it was found that striations present in BJ 4(1/1) bullet marked G were similar. On the basis of such finding it was concluded that the bullet G noted in Column 11 had been fired from pistol marked 1 in item 1. The FSL report is marked Ext. 9.

For convenience it is noted here that the aforesaid pistol had been recovered from the house of Lalita Devi on the pointing out of Rahul Yadav. Incidentally, Appellant Rahul Yadav refused to cross-examine this witness.

48. PW-21 Aftab Alam is on the point that Pappu Bihari had misused his identity papers and obtained SIM card in his name which was in the use of Pappu Bihari ending with numbers 542.

49. PW-22 Sanjay Kumar Singh was the Officer-in charge of DarbhangaTown police Station on 30.7.2011.He alongwith a number of other police officers including the Investigating Officer of the present case had searched the house of Raju Sah. Allegedly 5 mobile phones including the looted macromax mobile of the earlier were recovered of which a seizure list Ext 11 was prepared. PW 23 and other police officials had signed on the same. On his self statement Town PS case no 173/11 was instituted which he proves as Ext 12. According to him all the mobiles were separately packed and sealed which were opened in the Court room marked Material Exts. III " III/4. He has been cross examined to discredit the authenticity of the mode of safekeeping in the malkhana. However he answered that the articles had been wrapped in his presence.

This witness is important since he attempts to connect Appellant Pappu Behari to the present incident circumstantially through the earlier crime committed in a similar fashion.

50. PW-23 Navin Sinha is also on the point of recovery of five Mobiles from the relative of Pappu Bihari, one of which was hidden between bricks in the Courtyard on 30.7.2011. He has been cross-examined as to how he

had learnt that he was a relative of Pappu Bihari and he replied that his mother and sister-in-law had told him about the relationship.

51. PW-24 Ajaz Ahmad was the Officer-in-Charge of Banta O.P. who on 27.7.2011 at 21.30 had prepared the Ext 13 i.e. the Inquest report of deceased Ashwani Chaudhary at Darbhanga Medical College and Hospital, Darbhanga. He is also formal in nature.

52. PW-25 Shiv Kumar Yadav @ Sukumar Yadav is on the point that accused Nityanand Jha (not apprehended) had used his papers for obtaining a SIM card which was under his use.

53. PW-26 Satyendra Kumar Bhaskar had examined PW-7 Ram Ayodhya Mahto on 27.7.2011 at DMCH at 10 P.M. and found a simple fire arm injury on his head and proved Ext. 4.

54. PW-27 Dhanraj Choudhary was an artist who had prepared sketch of an accused on the description given by PW-3 Ram Pukar Rai on 28.7.2011, Exbt. 15. He says it resembled Appellant Pappu Bihari. He has been cross-examined by Counsel for Pappu Bihari on the accuracy of the description.

This piece of evidence is irrelevant since PW 3 has not stated a word about having given a description to this witness.

55. PW-28 Rajbhan was a Police Officer posted at Manigachhi Police Station and has assisted in investigation of the present case. He proves the Inquest Report of deceased Kailash Sada (Ext. 1/11) and Daya Shankar Roy (Ext. 16/1). He also brought before the Court, a sealed box received from FSL, Patna, the contents of which were mentioned therein. On direction of the A.P.P., the box was opened from which three packets were taken out. The first packet contained the contents of Manigachhi P.S. Case No. 129 of 2011 dated 30.7.2011 instituted under the Arms Act. From the same, two Pistols of 9 MM and six bullets were contained in the said packet. They were marked material exhibits. The next packet which was also sealed, contains of Baikanthpur P.S. Case No. 73 of 2011 which also contained 1.2 Bore of Pistol of Manigachhi P.S. Case No. 177 of 2011 which was marked by the FSL as H-1 and marked as material Ext. 6. The next Pistol which was also of Manigachhi P.S. Case No. 127 of 2011 was marked H by FSL and marked as material Ext. 7. Four sealed packets were further found in the same packet which contained 312 bore Cartridges which were marked as material Ext. On another packet marked by the FSL, two emptied 12 bores were found marked as material Exts. Another sealed packet was there in which was one empty Cartridge of 315 bore and one other Pistol. All of them were marked material exhibits. The 3rd packet contained exhibits of Manigachhi P.S. Case No. 127 of 2011 in which were six sealed packets and four small packets. They were all marked separately by the FSL. They contained the front portion of bullets, finger prints and blood stained, all of which were marked material exhibits. Importantly all of them had been marked by the FSL

56. Now I will proceed to discuss the evidence of PW-29 Hari Shankar Mishra the Investigating Officer posted at Manigachhi Police Station with some detail since he is the main witness who has substantially proved the link between the accused persons to the occurrence.

57. According to him, at 7.20 P.M. he received information on his Mobile that four persons had committed loot at the Petrol Pump of Jairam Choudhary and fled away towards Simri. He then informed the A.S.I. R.N. Singh and directed him to reach the place of occurrence. He also informed the higher Official and other Officers of the neighbouring Police Station. He himself reached the place of occurrence at 8.05 P.M. where he was told about the status of the injured. He then recorded the statement of the Informant Ram Pukar Rai, PW-3, Ext. 18 upon which the present First Information Report Ext. 19 was instituted. Other Police Officers including high Police officials reached the place of occurrence. He then prepared the inquest reports and sent the dead-body for post mortem examination report. He insisted on keeping the place of occurrence examined by the C.I.D. so kept the area protected.

58. It was learnt that a similar incident had taken place at Pandaul, Madhubani, upon which Pandaul P.S. Case

No. 117 of 2011 had been instituted. The First Information Report and the Seizure list of the said case were made available to him according to which a Macromax Mobile Set with dual SIM facilities bearing SIM No. 8521004125 and IMEI Nos. 910048508186970 and ending 980 had been looted away. He then informed the senior officials about this and called for the call details from the Computer Branch at Darbhanga of this Mobile and himself reached Khankhor Chowk, Madhubani where he was told by the by-standers that two Motorcycle borne miscreants had fled towards Wajitpur.

59. On 28.7.2011, the D.I.G. constituted a Special Team after which the finger print expert team collected finger prints from the place of occurrence. He got the same developed by Sunil Kumar Mandal PW-19. He received the photographs and kept them as exhibits. He thereafter received the Seizure List of the blood samples and four wads as also other materials prepared by the mobile Ballistic Special Team. The seizure list is marked Ext. 21. He proved his signature on the Production-cum-Seizure List signed by PW-5 and PW-6 as Ext. 22/1. The seizure list along with the relevant entries was forwarded to the Court and the samples were sent to the FSL on orders of the Court.

60. On 28.7.2011, at 2.25p.m. he took the further statement of the Informant who claimed to identify the accused and examined PW-10 Sita Ram Manjhi who did not state before him that the miscreants had muffled their faces. He thereafter describes the place of occurrence and that he had prepared a sketch. He reportedly kept the bullet, wad, blood samples with the consent of the FSL. On 28.7.2011 he directed PW-3 to get prepared sketch of the suspect and dispatched him to the ASP Office Darbhanga. He also requested Sunil Kr. Mandal a local Photographer to develop the photos of finger prints. On return of Police Station at 8.45 P.M. he had kept all the seized articles in the Malkhana.

61. On 29.7.2011, he examined PW-8 Devanand Paswan Sanjeev Choudhary who supported the occurrence and signed on the inquest reports of deceased Kailash Sada and Dayashankar prepared by Raj Mohan Singh PW 28. Kamlesh Ram, PW-4 also signed on the said inquests. Both of them claimed to identify the accused.

62. On the same day at 8.15 A.M. he received information from the Deputy Superintendent of Police, Biraul, that the sketch of an accused had been prepared as also call details of SIM used in the looted Mobile i.e. 7870570517 were available and that it could be collected from the A.S.P. office Darbhanga. On the same date at 11.45 A.M. he left for Darbhanga where he examined Ram Ayodhya Mahto PW-7 who appeared very scared and obtained the call details and CAF numbers from the Crime Branch Office of A.S.P. on the basis of the Production-cum-Seizure List, Ext. 24.

63. On an analysis of the call details, he found that the SIM 7870570517 had been used in the looted Mobile and it allegedly belonged to one Shyamdeo Mahto. It had been in contact with suspect number 7250336542 till date. The location of the number had been found between the place of occurrence to Jhanjharpur via village Wajitpur. The next suspect number was 8051574342 which belonged to one Ravindra Yadav and the locations of both the numbers were together. It was also learnt that suspect number 9250336542 was in the name of one Aftab Alam. He seized the sketch of the suspect produced by PW-18 Paras Kumar. Ext. 25 is the Production-cum-Seizure List and Sketch is Ext. 15.

64. On the same day, at 8.15 P.M., the Officer-in-Charge of Town Police Station Sanjay Kumar PW-22 informed him that the suspect No. 7870570517 which belonged to Shyamdeo Mahto was a close relation of Geeta Devi, wife of Raju and it was she, who as a family member, was using the Mobile. This number had contacted suspect No. 7250336542 which was being used by her Son-in-law i.e. Appellant Pappu Sah @ Pappu Bihari. From the location of alleged number, it was found that the holder was within the vicinity of Ganga Rest House upon which the person was arrested. On search, one Mobile and two SIMs were recovered bearing numbers 7250336542 and 9909536536 and some money was recovered of which seizure list (Ext 26) was prepared. On enquiry, it was learnt that his name was Pappu Sah @ Pappu Bihari.

65. He allegedly confessed before him and disclosed the complicity of accused Nityanand Jha who remained absconding, Kamlesh Jha acquitted (acquitted), Raghav Jha (a Juvenile), Appellant Rahul Kumar Yadav and co-

accused Sonu Singh who died while investigation was on. Confession is marked Ext 27. On the basis of the confessional statement of Pappu Bihari, the houses of Kamlesh Jha, Nityanand Jha, Rahul Kumar Yadav and Pappu Bihari were raided and accused Kamlesh Jha was arrested.

66. Upon arrest of Kamlesh Jha, he accepted his guilt and pointed out the Pistol and Bullet used in the occurrence. From his house, on 30.6.2011 at 3.15, one 315 Bore country made Pistol, 12 Bore country made Pistol, three live cartridges of 315 Bore, four live cartridges of 12 Bore and one empty cartridge of 12 Bore as also a Macromax Mobile bearing SIM No. 9771310537 were recovered seizure list Ext 29. The seized articles were sealed and sent to the Police Station and were produced in the Court as material exhibits. However none of the seizures are connected to the present incident. His confession is marked Ext 28.

67. When the house of Nityanand Jha was raided on 30.7.2011, he was found absconding. However, from his house, one country made Rifle, one live cartridge of 303 Bore, two Mobile Sets and one Motorcycle were recovered which were seized and a separate case was instituted.

68. On the same day, on the pointing out of the Appellant Pappu Bihari and the disclosure of Kamlesh Jha, the house of Appellant Rahul Yadav located at Bahuarwa was raided at about 5.00 A.M. From his house, a red black Hero Honda Passion Pro Motorcycle, another Motorcycle and two Mobile Sets bearing SIM No. 8051574542 and 8051523926 were recovered and seizure list Ext 30 prepared.

69. Thereafter he proceeded along with Pappu Behari, Kamlesh Jha and Rahul Yadav proceeded to Baithhaniya, Jhanjharpur Distt. Madhubani on 30.7.2011 and from his trouser, one 9MM Cartridge was recovered in the presence of witnesses of which seizure list was prepared. The police officer of Madhubani took it along with him to institute a case. Thereafter on the discovery statement of Pappu Behari the house of the father-in-law of Pappu Bihari namely, Raju Sah within Darbhanga Town Police Station was raided in the presence of witnesses. Altogether Five Mobiles were recovered from out of which importantly was the Macromax Mobile sets bearing IMEI No. 941004850818697 and 91004850818698 in a broken condition concealed in the courtyard. The seizure list was prepared by PW22 Sanjay Kumar and marked Ext 11 and material exhibits 3 to 3/5. The officer in charge town police station instituted a separate case on his statement. The accused were then taken to Bahadurpur Police station by the team.

70. The accused Pappu Behari and Kamlesh Jha had disclosed that the arms had been given by Nityanand to the accused Rahul Yadav. The accused Rahul gave a confessional statement recorded and exhibited as Ext. 31.

71. On the basis of the confessional statement of Rahul Yadav, the house of Lalita Devi, wife of Pintu Kumar @ Pintu Poddar located at village Shardami Police Station Sakatpur was raided from where one 9 MM Pistol semi automatic, five rounds 9 MM live cartridges, one 9 MM Pistol with three rounds of live cartridges were recovered. The seizure list (Ext. 32) was prepared by the Officer of Police Station Sakatpur, Brij Lal Prasad Sinha and handed over to the accused on which he also appended his signature. A separate case was instituted in regard to the present recovery by the officer in Charge Sakatpur Police Station. They were marked as Material Exts. 5 and 5/1 and 4 to 4/5.

72. On 31.7.2011, the accused were produced before the Chief Judicial Magistrate, Darbhanga, along with seized articles, confessional statements and the mobiles.

73. He received the Inquest reports, Postmortem reports and the bullet in recovered from the person of deceased Ashwini Chaudhry in a sealed condition from Officer in charge R.M.Singh.

74. The call details of the Mobile Phones Nos. 9709652208, 9709536536, 9771286871, 9771310537, 8051528217 and 7250336542 received from the A.S.P. Office, Darbhanga between the dates 20.7.2011 to 29.7.2011 seized vide Ext 33. were scrutinized. It was found that the tower location of the aforesaid SIM numbers, Mobile bearing SIM No. 8051574342 belonging to the father-in-law of Rahul Yadav had been in contact with the Mobile No. 9709536536 of Pappu Bihari and others, on 27.7.2011 at 9.18, 12.42 and 12.30

P.M. Mobile bearing SIM No. 9709652208 belonged to the father of Raghav Jha namely, Manoj Jha and from the said number on 27.7.2011 at 12.54 there had been a talk with Mobile No. 8051574342. The call details of Mobile Numbers 7280336542 revealed that several conversations had taken place between 9709652208 and 8051574342 and the looted Mobile bearing SIM No. 7870570517 before the occurrence. From the Mobile No. 9771310537 which was recovered from Kamlesh Jha, several calls had been made at 18.52, 19.06, 19.07, 17 seconds and 19.47 and 22 seconds to the Mobile bearing SIM No. 7250336542 of Pappu Bihari.

75. On 2.8.2011, the Test Identification Parade of Appellants Pappu Bihari and Rahul Yadav was conducted in the presence of the Chief Judicial Magistrate, Darbhanga in the District Jail, Darbhanga, where PW-3 Ram Pukar Rai identified the two with certain roles.

76. He obtained the order of the Chief Judicial Magistrate, Darbhanga, for sending the seized firearms to the Forensic Science Laboratory, Patna, for its examination.

77. On 9.8.2011 Paras Kumar, PW-18 attached with the Crime Branch, Darbhanga, produced the call details and the computerized tower location of Mobiles Nos. 9771031537 (Kamlesh Jha), 8051574342 (Rahul Yadav), 9771286871 (Nityanand Jha) absconder, 9709652208 (Raghav Kumar Jha) and 9709536536 (Pappu Bihari). From the call details of 9709652208 belonging to Raghav Kumar Jha, Juvenile, it appeared that on 27.7.2011 at 7.55 A.M., the holder was at Jhanjharpur, at 8.33 A.M. at village Nissaul, Manigachhi, 9.48 Wajitpur Bhandariso, next two Wajitpur, 11.06 at Jhanjharpur, 1.26 at village Hatib, Madhubani, 15.05 at village Ujjan Masjid Tola, 16.23 Sita Ram Yadav village Bahuarwa, P.S. Manigachhi, 17.11 village Nisaul Raduar, P.S. Manigachhi, 17.42 village Basaur 1 KMs from Bhandariso, 22.56 again at Jhanjharpur.

78. The tower location of Mobile SIM bearing No. 7250336542 revealed that on 22.7.2011 at 7.01 A.M. holder was at Jhanjharpur, 7.59 Puranpokhar Soni Talkies, 14.56 village Sohal Ujjan, Sesra village, 15.05 Masjid Tola Ujjan, 16.21 Sitaram Yadav village Bahuarwa, 16.38 village Visaul Tapu Kumar, P.S. Manigachhi, 18.52 village Narayanpur three KMs from the place of occurrence, 19.06 near the place of occurrence, 19.47 at village Bhandariso Tower Ramchandra Jha, 20.06 Soni Talkies Jhanjharpur.

79. The Mobile Phone bearing SIM No. 8051574342 allegedly belonging to Rahul Kumar Yadav, revealed the holder of the Mobile on 27.7.2011 at 6.40 in Sita Ram Yadav, Bahuarwa, 13.27 at village Narpur, Bhairav Asthan, 14.40 Jhanjharpur, 15.47 Sita Ram Yadav Bahuarwa, 17.50 Ashok Purv, village Wajitpur near Bhandariso, 20.35 again at Jhanjharpur, 21.51, in village Bahuarwa, Sita Ram Yadav.

80. Further, the Mobile phone bearing SIM No. 9709536536 allegedly being used by Pappu Bihari showed the tower location of 27.7.2011, 19.18 at Jhanjharpur, 16.15 near Ujjan at Sohna, 17.48 at village Wajitpur Ashok Purv, 22.28 again at Jhanjharpur. The Mobile Phone bearing SIM No. 9771286871 allegedly belonging to absconding accused Nityanand Jha revealed this tower location on 27.7.2011 at 7.11 A.M. at Ramchnadra Jha Bhandariso, 12.01 at Ovai Manjhaur, 12.08 at village Ujjan Masjid Tola, 14.41 at Jhanjharpur.

81. The Mobile Phone of Rajesh Jha showed its location at 15.38 at Ujjan Masjid Tola, 15.42 at village Dharampur Sohna, 16.17 at Sita Ram Yadav village Bahuarwa, 16.29 at village Bahuar, P.S. Manigachhi. 16.12 village Bahat, 17.40 village Wajitpur near Bhandariso.

82. The location of accused Kamlesh Jha, through his Mobile No. 9771310537 showed his location on 27.7.2011 at 6.49 at village Bhandariso, 8.36 at village Samri Chowk Tower. He stated that all these information has been received from the Service Provider. He later testifies that the distance is measured from 3 towers and there could be a difference of 1 km not more.

83. He thereafter obtained the order of the Court and sent the arms etc to the FSL in a sealed condition. The forwarding report is Ext 36. On 13.8.2011 ASI informed him that the samples had been deposited at the FSL. The report was received on 23.9.2011.

84. On 17.8.2011 one Aftab Alam told him that Pappu Behari had misused his papers for obtaining a mobile

SIM.

85. In cross examination he stated that he had obtained the finger prints of the two Appellants in presence of Magistrate Kavita Verma (DW) but had no information as to whether it was examined by the FSL. He denied knowledge of the report and the suggestion that fresh prints were sent because the earlier ones did not match. He later stated that he had no information that the FSL had reported that the finger prints could not be compared.

86. He admitted that PW 7 Ram Ayodhya injured had stated that the accused had muffled their faces and not mentioned the presence PW-3 the present Informant.

87. He stated that the seized arms were kept in the malkhana when charge-sheet was submitted but it was not mentioned as to when they were kept.

88. In cross examination, he further stated that all the seized articles were produced before the Court and that on 30.7.2011, two copies of seizure list were prepared out of which one was forwarded to the Court and the other handed over to the co-accused. The list of articles recovered from the house of Lalita Devi, village Shardami, P.S. Sakatpur was reduced in four copies but it was not mentioned in the case diary as to how many copies were made. On the seizure list, there is no signature of Lalita Devi. He was unable to inform as to whether the seized articles had been sealed. It was only officer Brijlal Prasad Sinha, who could clarify this. It was not noted in the case diary that the arms recovered had been sealed at the place of occurrence. In cross-examination, he further stated that no finger prints had been taken from the Mobile or arms. It has been suggested to him that the articles recovered from Kamlesh Jha was not in accordance with practice. It has also been suggested to him that the confession of the accused had been extorted by coercion and, therefore, the Video recording or polygraphy and Narcho analysis test had not been conducted. He did not further send any of the SIM, Mobile or voice recorded C.D. to the FSL. He stated that on 05.8.2011, he sealed all the material exhibits and its samples, on the orders of the Court. He denied knowledge that PW-9 had filed an application for holding Test Identification Parade of accused Pappu Bihari and Rahul Kumar. He explains that the witnesses had not disclosed the names of any accused persons and accused Kamlesh Jha was known, therefore, he was not put on Test Identification Parade.

89. He further explains the distance of the place of occurrence between the various locations where the Mobile Phones were allegedly found. He also denied knowledge that the Police papers had been given to the accused firstly on 28.3.2012.

90. He stated that on 31.7.2011 at 7.00 A.M. he had proceeded along with arrested Pappu Bihari, Rahul Yadav and Kamlesh Jha towards the Court and had reached at 9.30 A.M. and thereafter at 10.30, they were forwarded along with memo of evidence. In between at 10.02 A.M. a Press Conference was held by the Senior S.P. which continued for another 20 minutes. In cross-examination, he stated that he did not remember that the three accused were interviewed by the Media on the said date. He also did not remember that the S.P. had given any further details with regard to the arms or Mobile and that photographs had been clicked of the same. He did not remember that the accused was standing along with Senior S.P. and that it was on purpose, it was not noted in the case diary.

91. On behalf of the defence as many as 11 witnesses were examined. Dw-1 is the wife of Accused Kamlesh Jha on the point that he was a political person. DW-2, 3 and 6, Suresh Jha, Babu Prasad Jha and Kalikant Jha respectively denied being witnesses to seizure of articles from the house of Kamlesh Jha. Similarly DW-4 Shivajee Chaudhary and DW-5 Sone Lal Rai denied any seizure from the house of Lalita Devi in their presence. DW-7, 8 and 9 i.e. Ramlakan, Randhir Kumar and Sone Lal denied being witnesses to recoveries allegedly effected from the houses of Rahul Kumar and Pappu Bihari. DW-10, Kavita Verma, had taken finger prints of Pappu Behari and Rahul Kumar in jail on 7.9.2011 on orders of the Court on the same day and they had not opposed the same. DW-11 proves Ext B which was a fardbeyan of Ram Ayodhya Ram in the handwriting of ASI Sheoji Ram.

92. The submission of the Counsel for Pappu Bihari is that the evidence of PW-3 on the point of identification of the Appellant is not fit to be relied upon for the reason that even though, the Appellant was arrested on 29.7.2011, he was remanded to Jail custody only on 31.7.2011. In the period between 29.7.2011 to 31.7.2011 there is every possibility that the Appellants identity was revealed to the witnesses. In absence of any explanation by Investigating Officer as to where the Appellants had been kept in this period, the Test Identification Parade held on 2.8.2011 is fit to be rejected.

93. Moreover, though the Investigating Officer PW-29 stated in court that PW-7 had not categorically stated before him that the accused had muffled their faces, there was no reason not to summon him to the test identification parade. PW-10, who was evidently an eye witness to the occurrence, was also not called to attend the same which indicates the collusive intent of the Investigating Officer. Further, the fact that they did not identify the accused even in Court validates their innocence and contradicts the evidence of PW-3 the sole eye witness.

94. Further in view of the evidence of PW-29 in paragraph-76 that the Superintendent of Police was holding an Interview with local/National and International Electronic Media in regard to the arrest of the accused, the possibility of their presence before the media is not completely ruled out.

95. The next argument is that since the pistol was not recovered on the disclosure of Appellant Pappu Bihari, even if it is accepted that it had been used in the occurrence, it does not connect him to the same. Also, there is a disparity of description in the Arms recovered and that which was tested inasmuch as the Investigating Officer states that the Pistols were made in Italy/USA whereas the ones tested were country made. The further submission is that, no details have been mentioned while forwarding the Arms to the FSL, therefore, the report has no sanctity.

96. It is also pointed out that the order sheet reveals that the articles allegedly recovered from the possession of the Appellants were not forwarded along with the accused which casts a serious doubt on its recovery and seizure. In this background the failure of the prosecution to examine the seizure witnesses is important. Furthermore when they were examined as defence witnesses they did not support the fact of seizure.

97. As for the location of the accused at the place of occurrence allegedly tracked through their Mobile phones, it is a very weak circumstance and, therefore, not fit to be relied upon.

98. The counsel appearing for Rahul Yadav accepts the arguments passed on behalf of Pappu Bihari and in addition states that as per the Police Manual Volume-I, Rules 236, the accused persons should have been produced before the Court immediately but instead, they were taken to different places which is against the mandate of law. There is no positive evidence that any effort had been taken to conceal the faces of the accused and therefore, no presumption can be drawn that such a precaution had been taken by the Investigating Officer. The fact that the Investigating Officer did not categorically deny that the accused were present when the Superintendent of Police was holding a Press Conference is noteworthy. The positive evidence of PW-7 and PW-10 that the accused had muffled their faces directly contradicts the sole identification of PW-3 and hence the Appellants deserve to be rejected.

99. The further argument advanced on behalf of Rahul Yadav is that Prosecution has failed to examine the witnesses on the point of recovery of Arms on the disclosure statement of Rahul therefore it be kept out of consideration especially when examined as DW-4 and DW-5 they have stated that their signatures had been taken on a blank paper.

100. The counsel for the Informant and State submit that the Prosecution has been successful in proving the time, place and manner of occurrence as also the identification of the accused which has remained unchallenged and hence the Prosecution case does not suffer from any infirmity.

101. The further submission is that the Investigating Officer PW-29 had acted with all promptitude in

proceeding to the place of occurrence, recording the statement of the Informant and thereafter, in arresting the accused, seizing the articles on their discovery statements which were subsequently produced before the Court. The chain of circumstances being complete the appeal deserves to be dismissed.

102. Further, even conceding the criticism that the articles were not forwarded along with the Accused, a practical view may be taken of the same in as much as even if the procedure is not followed meticulously it does not materially affect the credibility of the basic recovery and seizure.

103. It was next submitted that the argument that the Arms seized were Foreign whereas those tested by the FSL were country made and hence an adverse inference be drawn, is fit to be rejected in view of the unequivocal evidence of the expert on this point.

104. It was concluded that identification by PW-2 and PW-4 in Court the first time should not be rejected outright. In the event when the accused persons have not challenged the same the identification even if weak in nature, offers a valuable link to the circumstances of the case.

105. The Counsel arguing against the acquittal of Kamlesh submits that in the light of the evidence of PW-3 and PW-4 who have stated that he had been seen near the place of occurrence just before the same and the fact that Arms were recovered on his disclosure statement, even if not linked with the present case, is indicative of his complicity. Also the circumstance that he was in constant contact with the rest of the accused persons reveals he was a conspirator.

106. Having heard the counsels and gone through the records of the case I find from the evidence of PW-29, the Investigating Officer, the initial investigation was carried out on the following lines:

- i) Through the call details of the looted Mobile of Pandaul P.S. Case No. 117 of 2011 which was committed in a similar fashion as the present case.
- ii) Through sketch of the accused on the description mentioned by PW-3 which has no relevance now since PW 3 did not testify on this aspect.
- iii) Collection of finger prints upon which the Investigating Officer does not provide any further lead during trial.
- iv) The location of the accused persons through their Mobiles.
- v) The recoveries of incriminating articles on their disclosure statements.
- vi) Test Identification Parade.
- vii) Report of the FSL.

107. However after close of trial the following circumstances appear against the Appellants.

- i) The identification of the Appellants Pappu Bihari and Rahul Kumar Yadav in the Test Identification Parade by PW3 the Informant.
- ii) Identification by PW-2 Sanjeev Kumar Choudhary and PW-4 Hare Krishna Singh of the aforesaid Appellants during trial.
- iii) Recovery of Pistol on the disclosure statement of the Appellant Rahul Yadav from the house of Lalita Devi.
- iv) FSL report that it matched with the bullet recovered from the body of deceased Ashwani Kumar.
- v) Recovery of the mobile of the earlier occurrence from the house of Raju Sah allegedly a relative of Appellant Pappu Bihari.

vi) Location of Appellants at the place of occurrence around the time of loot and murder on the basis of call details.

108. Now to test the circumstances.

I. Test identification Parade.

The evidence of PW-3, PW-9 and PW-29 that the Appellants Pappu Bihari and Rahul Yadav had been identified on 2.8.2011 as the perpetrators of the present crime is relevant on this point.

PW-3, Ram Pukar Rai the Informant testified that he had identified the Appellants Pappu Bihari and Rahul Yadav in the Test Identification Parade and proved the Identification Parade chart (Exhibit 1/5). This fact was supported respectively by Umesh Pandey (PW-9) the Judicial Magistrate who stated he had observed all the rules in its regard and Harishankar Mishra (PW-29), the Investigating Officer.

The reason for assailing the same is based on the ground that there is delay in production of accused before the Magistrate and consequently there was ample opportunity for the witnesses to have seen the accused persons in the interim period.

There is no doubt that law mandates that an accused on arrest be produced within 24 hours of his arrest before the Magistrate but this Court will have to consider whether failure to do so would automatically lead one to presume that the witnesses had access to them in the interim period thus affecting the credibility of the Test Identification Parade.

Before proceeding, I would like to quote from a judgment reported in the case of Devender Pal Singh v. State of NCT of Delhi reported in (2002)5 SCC 234 where the Honble Supreme Court discussed the relevance of Section 14 Evidence Act in the scheme of Official duties which would be relevant for this case when it has been pointed out that the Investigating Officer has not followed the norms. Paragraph 37 quoted below;

37.. A mere statement that requisite procedures and safeguards were not observed or that statement was recorded under duress or coercion, is really of no consequence. Such a stand can be taken in every case by the accused after having given the confessional statement. It could not be shown as to why the officials would falsely implicate the accused. There is a statutory presumption under Section 114 of the Evidence Act that judicial and official acts have been regularly performed. The accepted meaning of Section 114(e) is that when an official act is proved to have been done, it will be presumed to have been regularly done. The presumption that a person acts honestly applies as much in favour of a police officer as of other persons, and it is not a judicial approach to distrust and suspect him without good grounds therefor. Such an attitude can do neither credit to the magistracy nor good to the public. It can only run down the prestige of police administration?.

From the evidence of PW-29 discussed in great detail, one will find that on 29.7.2011 at 9.00 PM, Pappu Bihari was arrested near Ganga Rest House near Darbhanga Tower, Police Station Darbhanga after which the Seizure list was prepared and certified by PW-16 and 17. It was, thereafter, that the Investigating Officer proceeded to village Bhandariso, Police Station Manigachhi, Distt. Darbhanga, to the house of Kamlesh Jha where on 30.7.2011 at 3.15 A.M., a seizure list was prepared vide Ext. 29. Thereafter, the team proceeded to Bhauarwa, Police Station Manigachhi, Distt. Darbhanga, where the house of Rahul Yadav was located and a seizure list was prepared on 30.7.2011 at 5.45 A.M. (Ext.30). According to PW-29, thereafter, the team proceeded to village Kaithenia Police Station, Madhopur, Distt. Madhubani where some articles were recovered on 30.7.2011 at 7.30 A.M. upon the seizure of which a substantive case was instituted by S.I Jang Bahadur Singh. It was then that the team proceeded to Town Police Station, Darbhanga, where they reached at 9.30 A.M. and searched the house of Raju Sah, alleged father-in-law of the Appellant Pappu Bihari, upon which Ext. 11 proved by PW-22 was prepared in the presence of Officer-in-Charge Town Police Station. On the same day, the team proceeded to Bahadurpur Police Station. It is, thereafter, on the statement of Rahul Yadav, the house of Lalita Devi at village Shardami, P.S. Sakatpur was searched and Seizure list Ext. 32

prepared on 30.7.2011 at 3.30 P.M. which was prepared by Brijlal Prasad Sinha, Officer-in-Charge of Sakatpur Police Station.

It thus, appears that right from the time Pappu Bihari was arrested, the Investigating Agency was busy in collecting evidence. Successive raids were conducted at different locations on the basis of disclosure statements of the accused persons, articles recovered, seizure lists prepared for which evidently presence of the accused was essential. Had they, instead of trying to unearth further material followed the provision of law of producing the accused thus paying mindless lip service to procedure, most certainly investigation would have been hampered and stalled. This would thus have frustrated the course of justice. Under these circumstances, non production of the accused within 24 hours of their arrest is well explained and has to be necessarily condoned. Importantly, anxiety of the Agency was and should have been to unearth the crime which could not have been abandoned mid way.

In this period, had the accused persons been shown to the witnesses, such a plea would have been raised when they were produced before the Magistrate on 31.7.2011 or even later but no such complaint was voiced even though as noted above the Accused were very active in filing petitions after petitions for various reasons. Even at the stage of 313 Cr. P.C. there is no complaint or explanation in its regard.

The next criticism is that Prosecution acted collusively in not summoning PW 7 and 10 to participate in the Test Identification Parade nor has it furnished any explanation for the same.

There is no doubt that the Investigating Officer should have summoned PW-7 and PW-10 to participate in the Test Identification Parade or at least should have furnished some reason for not having done so but just because he did not do so, this Court would not be inclined to reject the positive evidence of PW-3 on the point of identification of the accused for the reason that being an eyewitness and the Informant undoubtedly he was the most competent witness. When his evidence is well supported by PW9 the Judicial Magistrate an independent witness holding a position of credence the failure of the Investigating Officer to summon the other witnesses would have no negative impact on his credibility. It would be unfair and unjust to discredit his competence for the fault of another.

The Defence to assail the evidence of PW3 relies heavily on the evidence of PW-7 and PW-10 who have stated that the Appellants present in Court were not the miscreants and on the touchstone of their evidence that of the solitary witness PW 3 should be discarded. However I am of the opinion that their evidence is definitely collusive since on the one hand they have stated that the miscreants had muffled their faces and yet they exonerate the Appellants by saying that they had not participated in the occurrence. Had the accused muffled their faces, how could these witnesses say with such certainty, that the Appellants were not the miscreants?

II: Identification of Appellants Rahul Yadav and Pappu Behari by PW 2 and PW4 in Court.

Before I proceed, I would like to discuss the law on the point of identification of an accused at the stage of Trial for the first time.

The Honble Supreme Court in the case of Simon Vrs. State of Karnataka reported in 2004(2) Supreme Court, Page 694 held as follows. Parts of Para 8 and 14 are quoted below;

œ8 Whether the identification of an accused for the first time in court in absence of any test identification parade can be made the basis of the conviction depends upon the facts and circumstances of the case. No. hard-and-fast rule can be laid down.

œ14..... The legal position on the aspect of identification is well settled. Under Section 9 of the Indian Evidence Act, 1872, the identity of the accused persons is a relevant fact. We have no difficulty in accepting the contention that evidence of mere identification of an accused person at the trial for the first time is from its very nature inherently of a weak character. The purpose of prior test identification is to test and strengthen the trustworthiness of that evidence. Courts generally look for corroboration of the sole testimony of the

witnesses in court so as to fix the identity of the accused who are strangers to them in the form of earlier identification proceedings. This rule of prudence, however, is subject to exceptions, when, for example, the court is impressed by a particular witness on whose testimony it can safely rely, without such or other corroboration. It has also to be borne in mind that the aspect of identification parade belongs to the stage of investigation, and there is no provision in the Code of Criminal Procedure which obliges the investigating agency to hold, or confers a right upon the accused to claim, a test identification parade. Mere failure to hold a test identification parade would not make inadmissible the evidence of identification in court. What weight is to be attached to such identification is a matter for the courts of fact to examine. In appropriate cases, it may accept the evidence of identification even without insisting on corroboration?.

In the case of Malkhan Singh and others Vrs. State of Madhya Pradesh, reported in 2003(4) PLJR, Page 63(SC), the question before the Apex Court was as to whether the conviction of the Appellant could be sustained on the basis of identification of the Appellant by the Prosecutrix in Court without a prior Test Identification Parade. To arrive at a suitable reply, it considered the previous decisions and concluded as noted below:

œ16. It is well settled that the substantive evidence is the evidence of identification in court and the test identification parade provides corroboration to the identification of the witness in court, if required. However, what weight must be attached to the evidence of identification in court, which is not preceded by a test identification parade, is a matter for the courts of fact to examine?.

Thus, it appears law is clear on the point that such identification is not to be rejected outright and the value of such identification would depend on the facts of each case.

In the instant case I find PW2 and PW4 in their deposition in Court stated that they were standing near the Petrol Pump and on hearing shots of fire they rushed to the place of occurrence and witnessed the Accused fleeing away. PW2 was a relative of the deceased Ashwini Kumar Chaudhary and accompanied him to the Hospital and later signed on the Inquest Report. Similarly PW4 happens to be an employee of the Petrol Pump who ran to the site and had the opportunity of seeing the miscreants. He also accompanied injured Ashwani to the Hospital where he was declared where after Inquest Report was prepared in his presence. Thus undoubtedly their presence at the place of occurrence is fixed and they would come within the category of competent witnesses.

However, it is rightly pointed out by the Defence that the Investigating Agency should have called them to attend the Test Identification Parade for purposes of guidance during investigation but lapses in investigation would not cloud the credibility of the witnesses. It would not make the substantive evidence of the witnesses on this point nugatory.

Law being settled on this issue, this Court would certainly not form the evidence of PW 2 and 4 the sole basis of conviction of the Appellants but it would certainly consider it a circumstance against them more so because it remained unchallenged during trial. It would be of no use to assail the same belatedly at the stage of Appeal.

Here I would also point out that when the Appellants were given an opportunity to explain this circumstance at the stage of 313 Cr. P.C., they offered no explanation.

III. Discovery statement of Appellant Rahul Yadav.

As discussed above Appellant Pappu Behari after his arrest disclosed the whereabouts of Appellant Rahul upon which he was arrested and on his statement a pistol was recovered. This is a relevant link because the pistol marked I matched with the bullet marked G recovered from the person of deceased Ashwani Kumar Chaudhary.

It appears that the arms recovered from the house of Lalita Devi was witnessed by two persons namely, Sonelal and Sheoji Rai who had been examined as DW-5 and 4 respectively and did not support the

prosecution case on the point of recovery or seizure. However, from the seizure list Ext. 30, Material exhibits 5, 5/1. I find that the Appellants Pappu Bihari and Rahul Yadav had also signed on the same. The Prosecution has failed to examine Brijlal Prasad Sinha, the Officer In-charge, Sakatpur Police Station who had prepared the seizure list. However, when PW29 the Investigating Officer by certifying his signature on the seizure list proves recovery there is no reason to discredit the same, since witnesses may not support a version for various reasons. The benefit of the same would not go to the accused in the circumstances of the case.

There is no doubt that the arms should have been forwarded with the accused before the Magistrate but in my opinion even if is viewed with some displeasure one will have to ultimately test the implications. As discussed in great detail above, one finds that the Investigating Officer, PW-29 was not alone in his investigation. A number of other Police Officers had been roped in who conducted part investigation. In such circumstances, there may have been a problem in coordinating collection of articles. Undoubtedly, the arms were forwarded to FSL on 5.8.2011. It would be too speculative to assume that in this period the Pistol was misused so as to match it with the Bullet which had been recovered from the person of the deceased Ashwani Kumar Choudhary. Importantly the bullet recovered was handed over by the Doctor in a sealed condition. Hence, I am inclined to accept this important piece of evidence.

IV- FSL report matching the pistol at the instance of Rahul Yadav with the bullet recovered from the person of the deceased Ashwani Kumar.

This link has been proved by PW-20 Aditya Paswan who stated that mock bullets were fired from the pistols and separately marked and examined. He himself was one of the members of expert team which concluded that on comparison, the bullet marked G recovered from the person of deceased Ashwani Kumar Chaudhary matched with the 9 MM caliber Pistol marked-I recovered on the disclosure statement of Rahul Yadav. There is no reason to discredit his evidence.

The objection that the Investigating Officer had noted in Seizure List that the arms recovered were of Foreign make but the

FSL described the tested pistol country made, therefore, the arms which had been recovered were not the ones which had been tested, is fit to be rejected in as much as the Investigating Officer was not expected to give an expert conclusive opinion on the nature of arms.

V. Recovery of looted mobile of earlier occurrence and its call details.

This circumstance is to connect Appellant Pappu Behari with the present occurrence. To examine the seizure of the broken Macromax Mobile recovered from the house of Raju Sah, alleged father-in-law of Appellant Pappu Bihari on his disclosure statement one would refer to the evidence of PW-29 that the same was seized in presence of PW-22, who prepared the seizure list Ext-11 Material Exts. III to III/4 in presence of many Police Officials. He himself signed on the same along with PW-23 and two others who have not been examined. PW-22 also states that on the basis of the same, Town P.S. Case No. 173 of 2011 dated 30.7.2011 was instituted and the articles were sealed which were opened only in the Court. In cross-examination he stated that all the articles had been separately wrapped and, thereafter bound in a cloth not by him but in his presence. From the evidence of the aforesaid witnesses, there is no manner of doubt that the Macromax mobile was on the pointing out of Appellant Pappu Bihari. This is an important circumstance to link Appellant Pappu Bihari with the present occurrence as well having been similarly carried out.

However, whether its call details would have any bearing on the present case is doubtful because all that it seeks to prove is that it was being used to allegedly contact Pappu Bihari.

VI. Location of the Appellants near the place of occurrence on the concerned date on the basis of call details.

Sections 65-A and B have been recently introduced in the Evidence Act with regard to the mode of admitting electronic evidence. Even though 65-B(4) reproduced below prescribes for a certificate I shall refer to a recent

judgment as to the practical aspect of the requirement.

œ65-B. Admissibility of electronic records.

(1)....

(2)

(3)

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, -

(a) identifying the electronic record containing the statement and describing the manner in which it was produced;

(b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer;

(c) dealing with any of the matters to which the conditions mentioned in sub-section (2) relate,

and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this sub-section it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.

(5).....

109. In SCC 2005(11) State (NCT of Delhi) Vrs. Navjot Sandhu, the Apex Court deals with it in the following manner in paragraphs 150 and 151.

œ150. According to Section 63, secondary evidence means and includes, among other things, œcopies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies?. Section 65 enables secondary evidence of the contents of a document to be adduced if the original is of such a nature as not to be easily movable. It is not in dispute that the information contained in the call records is stored in huge servers which cannot be easily moved and produced in the court. That is what the High Court has also observed at para 276. Hence, printouts taken from the compluters/servers by mechanical process and certified by a responsible official of the service-providing company can be led in evidence through a witness who can identify the signatures of the certifying officer or otherwise speak of the facts based on his personal knowledge. Irrespective of the compliance with the requirements of Section 65-B, which is a provision dealing with admissibility of electronic records, there is no bar to adducing secondary evidence under the other provisions of the Evidence Act, namely, Sections 63 and 65. It may be that the certificate containing the details in sub-section (4) of Section 65-B is not filed in the instant case, but that does not mean that secondary evidence cannot be given even if the law permits such evidence to be given in the circumstances mentioned in the relevant provisions, namely, Sections 63 and 65?

œ151. The learned Senior Counsel Mr. Shanti Bhushan then contended that the witnesses examined were not technical persons acquainted with the functioning of the computers, nor do they have personal knowledge of the details stored in the servers of the computers. We do not find substance in this argument. Both the witnesses were responsible officials of the companies concerned who deposed to the fact that they were the printouts obtained from the computer records. In fact the evidence of PW 35 shows that he is fairly familiar with the computer system and its output. If there was some questioning vis--vis specific details or specific suggestion of fabrication of printouts, it would have been obligatory on the part of the prosecution to call a technical expert directly in the know of things. The following observations of the House of Lords in the case of R.V. Shephard are quite apposite: (All ER p. 231b-c)

œThe nature of the evidence to discharge the burden of showing that there has been no improper use of the computer and that it was operating properly will inevitably vary from case to case. The evidence must be tailored to suit the needs of the case. I suspect that it will very rarely be necessary to call an expert and that in the vast majority of cases it will be possible to discharge the burden by calling a witness who is familiar with the operation of the computer in the sense of knowing what the computer is required to do and who can say that it is doing it properly?.

Such a view was expressed even in the face of a more stringent provision in Section 69 of the Police and Criminal Act, 1984 in the UK casting a positive obligation on the part of the prosecution to lead evidence in respect of proof of the computer record. We agree with the submission of Mr Gopal Subramaniam that the burden of prosecution under the Indian law cannot be said to be higher than what was laid down in R.v. Shephard.?

In the present case, I find that PW-13 stated that the call details of the mobiles which had been electronically prepared had been handed over in his presence by PW 18 Paras Kumar, Computer Operator posted at the Crime office to the Investigating Officer PW-29. PW 18 confirmed this fact and accepted that the service provider had fed the data in the Computer and that the call details had not been certified by any authority. In cross examination even though he states that he had taken training in mobile tracking but the next few answers do not inspire confidence on his competence. In view of such this Court will have no option but to reject the same.

VII- Conduct of the Accused

Under Section 8 Evidence Act Conduct of an accused is admissible in law. For a better understanding relevant portion of it is being reproduced below;

œ8. Motive, preparation and previous or subsequent conduct. - Any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact.

The conduct of any party, or of any agent to any party, to any suit or proceeding, in reference to such suit or proceeding, or in reference to any fact in issue therein or relevant thereto, and the conduct of any person an offence against whom is the subject of any proceeding, is relevant, if such conduct influences or is influenced by any fact in issue or relevant fact, and whether it was previous or subsequent thereto.

Illustrations.

(e) A is accused of a crime

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

The aspect of conduct which according to me is incriminating is that from the evidence of DW-10 Kavita Verma, Executive Magistrate I find that on 7.9.2011 at 3.00 P.M. she had gone to the Jail premises and taken finger prints of Appellant Rahul Yadav and Pappu Bihari to which they had not protested.

However subsequently as revealed by the order sheet dated 6.8.2012 the Prosecution had filed an application on 27.6.2012 with a prayer that a fresh photograph of the entire hands/finger prints be sent to the FSL as requested by the Director FSL so that it could be matched with the seized articles.

On 10.7.2012, a petition was filed protesting at the move of the Prosecution and that it was against the Constitutional rights of the Appellants. However, the Trial Court was of the view that since the Prosecution had submitted that it was due to technical reasons, the FSL had been unable to test the finger prints, fresh

samples be sent to reach a correct decision,. The Court then directed that an expert Photographer be appointed by the Chief Judicial Magistrate, Darbhanga, to take photographs of the full palm and send the required report to the Court. However, it appears that the Chief Judicial Magistrate, Darbhanga, by a communication dated 8.11.2012 reported that on two occasions, the Judicial Magistrate, 1st Class, Darbhanga, alongwith a finger prints expert had visited Darbhanga jail for taking finger prints but both the accused refused to give the same on account of which the Judicial Magistrate had returned the records with the above report.

In the fact situation when finger prints were collected from the place of occurrence the conduct of the Appellants in refusing to give their finger prints would also be a circumstance against them.

110. Lastly importantly this Court will have to consider as to whether an opportunity was afforded to the Appellants for explaining the circumstances at the stage of 313 Cr Pc since the instant case is one based on circumstantial evidence.

On reading of the statements recorded under Section 313 Cr. P.C. of Appellant Pappu Bihari I find that he was asked to explain the following circumstances:

i) That according to the evidence of PW-4 and PW-9, he was identified as a person who had resorted to firing and identified in the Test Identification Parade by PW-3 in presence of PW-9. He merely denied this circumstance.

ii) That the stolen Macromax Mobile had been recovered from Raju Sah, his relative. To this also there is mere denial.

Since a relationship is within the special knowledge of a person, the Appellant could have discharged his burden as required under Section 107 Evidence Act but he did not do so despite an opportunity having been given to him.

iii) The fact that he had refused to give his finger prints to which also is simple denial.

As for Appellant Rahul Kumar Yadav, I find that the following circumstances were put to him under Section 313 Cr. P.C:

i) That as per evidence of PW-2, 3, 4 and 9 he had been identified as the person who had fired and had been identified in the Test Identification Parade by PW-3 in presence of PW-9 but he has only denied the circumstance.

ii) The fact that a Pistol had been recovered from the house of Lalita Devi, at his instance was also met with mere denial.

iii) The circumstance that Pistol recovered at his instance matched with the Bullet found on the person of the deceased Ashwini Kumar Choudhary was also plainly denied.

iv) The incriminating circumstance that he had refused to give finger prints was also met with a plain denial.

111. Now to test the evidence against Kamlesh Jha:

It appears that apart from him, (i) having him seen near the place of occurrence an hour before the occurrence. This circumstance is too weak in nature to reverse or acquitted. (ii) Further there is a vague and confusing statement of PW-29 that raid was conducted on the basis of his statement in the house of Rahul Yadav in which some articles were recovered. However, none of them have any relevance in the present case. The next circumstance i.e. he was in continuous contact with the co accused as recorded from the Call details will have to be discarded since no reliance has been placed in the manner the data was proved in Court.

Thus, in my opinion, there is no infirmity in the judgment of acquittal of Kamlesh Jha and hence, Cr. Appeal (D.B) 769 of 2013 and Govt. Appeal (DB) 19 of 2013 are therefore dismissed.

112. As for Cr Appeals (DB) No. 437 of 2013 and 518 of 2013, on an objective evaluation of the circumstances enumerated above, I would be of the opinion that when read together they form a complete chain leaving no room of doubt as to the guilt of Appellants Pappu Behari and Rahul Yadav and hence, I would be inclined to uphold their conviction and dismiss the appeals.

However, in the facts of the case, I would commute the death sentence since it does not fall within the parameters of rarest of rare as laid down by the Apex Court in the case of Bachan Singh and others Vrs. State of Punjab, 1980 (2) S.C., Page, 684 and explained in Machhi Singh and others v State of Punjab (1983)3 SCC 470 at paragraph 38 - 40.

œ38 In this background the guidelines indicated in Bachan Singh case will have to be culled out and applied to the facts of each individual case where the question of imposing of death sentence arises. The following propositions emerge from Bachan Singh case :

- (i) The extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
- (ii) Before opting for the death penalty the circumstances of the offender also require to be taken into consideration along with the circumstances of the crime.
- (iii) Life imprisonment is the rule and death sentence is an exception. In other words death sentence must be imposed only when life imprisonment appears to be an altogether inadequate punishment having regard to the relevant circumstances of the crime, and provided, and only provided, the option to impose sentence of imprisonment for life cannot be conscientiously exercised having regard to the nature and circumstances of the crime and all the relevant circumstances.
- (iv) A balance-sheet of aggravating and mitigating circumstances has to be drawn up and in doing so the mitigating circumstances have to be accorded full weightage and a just balance has to be struck between the aggravating and the mitigating circumstances before the option is exercised.

œ39 In order to apply these guidelines inter alia the following questions may be asked and answered:

- (a) Is there something uncommon about the crime which renders sentence of imprisonment for life inadequate and calls for a death reference?
- (b) Are the circumstances of the crime such that there is no alternative but to impose death sentence even after according maximum weightage to the mitigating circumstances which speak in favour of the offender ?

œ40. If upon taking an overall global view of all the circumstances in the light of the aforesaid proposition and taking into account the answers to the questions posed hereinabove, the circumstances of the case are such that death sentence is warranted, the court would proceed to do so.

113. While on the desirability of maintaining death sentence in our statute books I would like to reproduce parts of an interesting article written by Albert Camus, French Nobel Prize winning author, Journalist and Photographer who after months of research on the issue, interviewing people involved in the process, wrote a fine article Reflections on the Guillotine

He begins by saying, œIt is well known that the major argument of those who support capital punishment is its value as an example. We do not chop off heads merely to punish their former owners, but to intimidate, by a terrifying example, those who might be tempted to imitate their actions. Society does not take revenge"society merely protects itself. We brandish the newly severed head so that the next prospective murderer may therein read his future and renounce his intentions. All of which would indeed be an impressive argument if one were not obliged to remark: (1) That society itself does not believe in the value of

this much advertised example. (2) That it has not been ascertained whether capital punishment ever made a single determined murderer renounce his intentions, while it is certain that its effect has been one of fascination upon thousands of criminals. (3) That the death penalty constitutes, from other points of view, a loathsome example of which the consequences are unforeseeable?.

œFirst of all, then, society does not believe its own words. If it did, we would be shown the heads.?

According to him, œWe must either kill publicly, or admit we do not feel authorized to kill. If society justifies the death penalty as a necessary example, then it must justify itself by providing the publicity necessary to make an example. Society must display the executioner's hands on each occasion, and require the most squeamish citizens to look at them, as well as those who, directly or remotely, have supported the work of those hands from the first. Otherwise society confesses that it kills without consciousness of what it does or what it says; or that it kills yet knows, too, that far from intimidating belief, these disgusting ceremonies can only awaken a sense of criminality, and thoroughly undermine public morale?.

He further poses a question and answers it. œBut does the death penalty act as a deterrent, at least, upon that "race" of criminals it claims to affect"those who live by crime? Nothing is less certain. Arthur Koestler reminds us that in the period when pickpockets were punished by hanging in England, other thieves exercised their talents in the crowds surrounding the scaffold where their fellow was being hanged.The power of intimidation operates only on those timid souls who are not dedicated to crime, and gives way before precisely those incorrigibles whom it is concerned to correc?.

Yet it cannot be denied that men fear death. œHowever what is its effect?

œIndeed if the fear of death is one kind of evidence, the fact that this same fear, no matter how great it may be, has never sufficed to discourage human passions, is still another. Bacon was right: no passion is so weak that it cannot confront and master the fear of death. Vengeance, love, honor, grief, even fear of something else"all are victorious over the fear of death in one circumstance or another. And shall cupidity, hatred, or jealousy not accomplish all that love or patriotism or the human passion for liberty are able to achieve? For centuries the death penalty, often accompanied by various barbarous refinements, has tried to restrain the incidence of crime; yet crime persists. Why? Because the instincts which confront and war against each other within man are not, as the law would have them, constant forces in a state of equilibrium. They are variable forces that die and triumph one after another, whose successive imbalances nourish the life of the mind in the same way that electrical oscillations, occurring with sufficient frequency, establish a current. Consider the series of oscillations passing from desire to satiation, from decision to renunciation, which all of us experience in a single day and then multiply these variations to infinity and we may form an idea of the extent of our psychological proliferation. These imbalances, these disequilibriums are generally too fugitive to permit any one force to gain control of the entire self. Yet it sometimes happens that a single element of the soul's resources can break free and occupy the entire field of consciousness; no instinct, even that of self-preservation, can then oppose the tyranny of this irresistible force. In order that the death penalty be really intimidating, human nature itself would have to be different from what it is, would have to be as stable and serene as the law itself. It would no longer be life, but still-life.

But life is not still-life, is not stable, not serene. Which is why, surprising as it may seem to those who have not observed or experienced in themselves the complexity of the human situation, the murderer for the most part considers himself innocent when he commits his crime. Before being judged, the criminal acquits himself. He feels he is"if not entirely within his rights"at least extenuated by circumstances. He does not reflect; he does not foresee; or if he does, it is only to foresee that he will be pardoned"altogether or in part. Why should he fear what he regards as highly unlikely? He will fear death after being judged, not before his crime.ÿ

To read on further, œAll statistics show, without exception"in the countries which have abolished it, as well as in the others"that there is no connection between the death penalty and the incidence of crime. This

incidence, in fact, neither rises nor falls?.

œYet it is administered in our country in the name of a possibility, a calculation of likelihood. And even if this possibility should be reasonable, would it not have to be certitude itself to authorize certain and absolute extinction? Yet the man we condemn to die is cut in two not so much for the crime he has committed as for the sake of all the crimes that might have happened, but which have not happened"which could occur, but somehow will not occur. Hence, the greatest possible uncertainty appears to authorize the most implacable certitude of all?.

According to him, death penalty œforbids, but it prevents nothing"when it does not in fact arouse the will to murder itself. It is as if it were not, except for the man who suffers it" in his soul for months or years, and in his body during the desperate and violent moment when he is cut in two without being altogether deprived of life. Let us call it by a name which, lacking all patents of nobility, at least provides that of truth"let us recognize it for what it ultimately is: a revenge?.

œPunishment, penalizing rather than preventing, is a form of revenge: society's semiarithmetical answer to violation of its primordial law. This answer is as old as man himself, and usually goes by the name of retaliation. He who hurts me must be hurt; who blinds me in one eye must himself lose an eye; who takes a life must die. It is a feeling, and a particularly violent one, which is involved here, not a principle. Retaliation belongs to the order of nature, of instinct, not to the order of law. The law by definition cannot abide by the same rules as nature. If murder is part of man's nature, the law is not made to imitate or reproduce such nature. We have all known the impulse to retaliate, often to our shame, and we know its power: the power of the primeval forests. Yet if we still define our justice according to the calculations of a crude arithmetic, can we at least affirm that this arithmetic is correct, and that even such elementary justice, limited as it is to a form of legal revenge, is safeguarded by the death penalty? The answer must again be: No?.

In his opinion œcapital punishment is not merely death. It is as different, in its essence, from the suppression of life as a concentration camp from a prison. It is undeniably a murder which arithmetically cancels out the murder already committed; but it also adds a regularization of death, a public premeditation of which its future victims are informed, an organization which in itself is a source of moral suffering more terrible than death. There is thus no real compensation, no equivalence. Many systems of law regard a premeditated crime as more serious than a crime of pure violence. But what is capital punishment if not the most premeditated of murders, to which no criminal act, no matter how calculated, can be compared? If there were to be a real equivalence, the death penalty would have to be pronounced upon a criminal who had forewarned his victim of the very moment he would put him to a horrible death, and who, from that time on, had kept him confined at his own discretion for a period of months. It is not in private life that one meets such monsters?.

He describes the state of a condemned prisoner as œHe hopes by day, despairs by night. And as the weeks pass his hope and despair increase proportionately, until they become equally insupportable. According to all accounts, the color of his skin changes: fear acts like an acid. "It's nothing to know you're going to die," one such man in the Fresnes prison said, "but not to know if you're going to live is the real torture." But it takes months, not minutes. The condemned man knows long in advance that he is going to be killed and that all that can save him is a reprieve which operates, so far as he is concerned, like the will of heaven itself. In any case he cannot intervene, plead for himself: he is no longer a man, but a thing waiting to be manipulated by the executioners. He is kept in a state of absolute necessity, the condition of inert matter, yet within him is the consciousness that is his principal enemy?.

He explains why death penalty is not real justice. œYet there could not be real justice in such cases unless the murderer, having made known his decision months in advance, had entered his victim's house, tied him up securely, informed him he would be put to death in the next hour, and then used this hour to set up the apparatus by which his victim would be despatched. What criminal has ever reduced his victim to a condition so desperate, so hopeless, and so powerless??

According to him in the period of waiting a prisoner has already died..... œAs a general rule, the man is destroyed by waiting for his execution long before he is actually killed. Two deaths are imposed, and the first is worse than the second, though the culprit has killed but once. Compared to this torture, the law of retaliation seems like a civilized principle. For that law, at least, has never claimed that a man must be blinded in both eyes to pay for having blinded his brother in on?.

He argues that abdication by the State of its duties in maintaining its citizens also contributes majorly to incidence of crime and yet, œThe State (thus) maintains the right to punish in the very case in which its own responsibility is profoundly involved?.

He further argues that œthe abolition of the death penalty should be demanded by the conscious members of our society on grounds of both logic and fidelity to the facts?.

œOf logic, first of all. To decide that a man must be definitively punished is to deny him any further opportunity whatsoever to make reparation for his acts. It is at this juncture, we repeat, that the arguments for and against capital punishment confront one another blindly, eventuating in a fruitless checkmate. Yet it is exactly here that none of us can afford to be positive, for we are all judges, all party to the dispute. Hence, our uncertainty about our right to kill and our impotence to convince others on either side. Unless there is absolute innocence, there can be no supreme judge. Now we have all committed some transgression in our lives, even if this transgression has not put us within the power of the law and has remained an unknown crime: there are no just men, only hearts more or less poor in justice. The mere fact of living permits us to know this, and to add to the sum of our actions a little of the good that might partially compensate for the evil we have brought into the world. This right to live that coincides with the opportunity for reparation is the natural right of every man, even the worst. The most abandoned criminal and the worthiest judge here find themselves side by side, equally miserable and jointly responsible. Without this right, the moral life is strictly impossible. None among us, in particular, is entitled to despair of a single man, unless it be after his death, which transforms his life into destiny and admits of a final judgment. But to pronounce this final judgment before death, to decree the closing of accounts when the creditor is still alive, is the privilege of no man. On these grounds, at least, he who judges absolutely condemns himself absolutely.

Capital punishment, in fact, throughout history has always been a religious punishment. When imposed in the name of the king, representative of God on earth, or by priests, or in the name of a society considered as a sacred body, it is not the human community that is destroyed but the functioning of the guilty man as a member of the divine community which alone can give him his life. Such a man is certainly deprived of his earthly life, yet his opportunity for reparation is preserved. The real judgment is not pronounced in this world, but in the next. Religious values, especially the belief in an eternal life, are thus the only ones on which the death penalty can be based, since according to their own logic they prevent that penalty from being final and irreparable: it is justified only insofar as it is not supreme?.

And further..... œDelirious in its own behalf, society plucks the wicked from its bosom as if it were virtue personified. In the same way, an honorable man might kill his son who had strayed from the path of duty, saying, "Really, I didn't know what else I could do!" Society thus usurps the right of selection, as if it were nature, and adds a terrible suffering to the eliminative process, as if it were a redeeming god?.

He questions the lofty posture of the Society in condemning a person and says, œthat a man must be absolutely cut off from society because he is absolutely wicked is the same as saying that society is absolutely good, which no sensible person will believe today. It will not be believed" in fact, it is easier to believe the contrary. Our society has become as diseased and criminal as it is only because it has set itself up as its own final justification, and has had no concern but its own preservation and success in history..... Society has grown accustomed to legalizing whatever can minister to its future, and consequently to usurping the supreme punishment in an absolute fashion: it has regarded as a crime and a sacrilege everything that contradicts its own intentions and temporal dogmas. In other words, the

executioner, formerly a priest, has become a civil servant. The results surround us. Half-way through the century, our society, which has forfeited the logical right to pronounce the death penalty, must now abolish it for reasons of realism?.

“Bloody laws, it has been said, make bloody deeds. But it is also possible for a society to suffer that state of ignominy in which public behavior, no matter how disorderly, comes nowhere near being so bloody as the laws?.

And he concluded by saying “Neither in the hearts of men nor in the manners of society will there be a lasting peace until we outlaw death?.

114. Applying the argument of Albert Camus and substituting the Society for State and that it does not believe in death penalty, I would like to refer to a recent judgment of Justice Madan B. Lokur who in the case of Shankar Kisan Rao Khade Vrs. State of Maharashtra, reported in SCC 2013(5) in Paragraphs 146, 147 and 148 has reproduced the figures of the actual executions carried out by the State. He has rightly suggested a rethink on the issue when the figures are so blatant and demonstrative. This is another factor which has influenced my decision in the nature of sentence imposed in the present case.

“146. The details mentioned above, as obtained from a study of the publications of NCRB, are compiled in the following chart:

State/UT	Convicts sentenced to death	Convicts whose sentence commuted to life imprisonment	Executed
Andhra Pradesh	8	3	0
Assam	21	97	0
Bihar	132	343	0
Chhatisgarh	18	24	0
Goa	1	0	0
Gujarat	57	3	0
Haryana	31	23	0
Himachal Pradesh	3	2	0
Jharkhand	81	300	0
Jammu and Kashmir	20	18	0
Karnataka	95	2	0
Kerala	34	23	0
Madhya Pradesh	87	62	0
Maharashtra	125	175	0
Manipur	3	1	0
Meghalaya	6	2	0
Mizoram	0	0	0
Nagaland	0	15	0
Orissa	33	68	0
Punjab	19	24	0

Rajasthan	38	33	0
Sikkim	0	0	0
Tamil Nadu	95	24	0
Tripura	2	9	0
Uttar Pradesh	370	458	0
Uttarakhand	16	46	0
West Bengal	79	98	1
Total	1374	1853	1
Chandigarh	4	3	0
Dadra and Nagar Haveli	0	0	0
Daman and Diu	4	0	0
Delhi	71	2462	0
Lakshadweep	0	2	0
Pondicherry	2	1	0
Total	81	2468	0
Grand Total	1455	4321	1

œ147. The significance of these figures is that even though the courts have awarded death penalty in appropriate cases applying the rarest of rare principle, the death sentence has been commuted in many of them. The reasons for commuting the death sentence by the executive are not in the public domain and therefore it is not possible to know what weighed with the executive in commuting the death sentence of each convict. Was the reason for commutation that the crime and the criminal did not fall in the category of rarest of rare and if so what was the basis for coming to this conclusion when the competent court has come to a different conclusion?

œ148. It seems to me that though the courts have been applying the rarest of rare principle, the executive has taken into consideration some factors not known to the courts for converting a death sentence to imprisonment for life. It is imperative, in this regard, since we are dealing with the lives of people (both the accused and the rape-murder victim) that the courts lay down a jurisprudential basis for awarding the death penalty and when the alternative is unquestionably foreclosed so that the prevailing uncertainty is avoided. Death penalty and its execution should not become a matter of uncertainty nor should converting a death sentence into imprisonment for life become a matter of chance. Perhaps the Law Commission of India can resolve the issue by examining whether death penalty is deterrent punishment or is retributive justice or serves an incapacitative goal.

115. Hence for reasons stated above, all the Appeals are dismissed with modification in sentence of Appellants Pappu Bihari and Rahul Yadav and the Death Reference No. 6 of 2013 is answered accordingly.

V.N.Sinha, J.

1. Before proceeding to consider the submission made on behalf of the parties, it is necessary to note the contents of the fardbeyan of informant Ram Pukar Rai (P.W. 3), recorded by Investigating Officer of the case Hari Shankar Mishra, S.H.O., Manigachhi Police Station (P.W. 29) on 27.07.2011 at 8:10 P.M. P.W. 3 has claimed that he is serving at the petrol pump (Soni Fuels) of Jai Ram Choudhary, resident of Nehra for about 2 years, generally as a Nozalman but sometimes on the cash counter as well. P.W. 3 further stated that on 27.07.2011 between 6:30-6:45 P.M. having climbed over a tanker was checking diesel, at the same time nephew of the petrol pump owner Ashwani Kumar Choudhary, son of Balram Choudhary alias Damru Choudhary, resident of Nehra, Cashier Daya Shankar Rai, son of Ram Bahadur Rai, resident of Behta, both within Manigachhi Police

Station (deceased) were verifying the cash. Kailash Sada, son of Mangal Sada, resident of village- Nehra within Manigachhi police station (deceased) was standing near the petrol pump as a Nozalman. Meanwhile, four persons riding two black motorcycles came to the petrol pump and asked Kailash Sada to fill the petrol tank of their motorcycle. Having checked the diesel P.W. 3 came down from the tanker and went inside the counter, at that time tanker driver Ram Ayodhya Mahto (P.W. 7) was talking to Ashwani Kumar Choudhary. P.W. 3 informed his master Ashwani Kumar Choudhary that fuel has been drained out from the tanker and the driver (P.W. 7) be given challan and food allowance. Meanwhile, Kailash Sada (deceased) entered the counter and disclosed the amount for which petrol was filled in the two motorcycles. At the same time three out of four miscreants armed with pistol dragged Kailash Sada inside the counter from the side of the stairs but one of the miscreants remained standing outside the counter. The miscreants were aged between 25-35 years and were of fair complexion, slim, wearing pant-shirt and spoke Hindi. One of the miscreants who entered the counter assaulted the informant on his neck, face with his hand in which he was holding pistol which led to his fall on the floor. P.W. 3 further claimed that the miscreant, who assaulted him, was of average height, slim, aged between 30-32 years with round face, thin moustache, clean shave, had put on white shirt (half sleeve). Kailash Sada (deceased) attempted to leave the counter by bending himself which prompted one of the miscreants to fire shot at him causing chest injury and his fall on the floor. Miscreants asked the owner Ashwani Choudhary to hand over cash, who became fearful and pointed towards the cash in the drawer. Miscreants were about to take the cash from the drawer which was perhaps objected to by Daya Shankar Rai (deceased). The miscreants shot Daya Shankar Rai and took out the entire cash from the drawer again asking the owner about more cash but owner replied that no more cash is available. Miscreants searched for more cash on the table, drawer and almirah but could not find any more cash and shot the owner, who having suffered injury, also fell on the floor. The miscreants thereafter came to the petrol pump where a Bolero vehicle was waiting for refuelling and forced the driver of Bolero vehicle Sita Ram Manjhi (P.W. 10) to hand over the papers, keys of the vehicle as also snatched his mobile. Miscreants finally made good their escape through the main road towards north on the two motorcycles brandishing their pistol. Neither of the motorcycles had registration number. P.W. 3 further claimed that during the occurrence Kailash Sada and Daya Shankar Rai died at the spot, whereas owner Ashwani Choudhary and Tanker driver Ram Ayodhya Mahto (P.W. 7) became injured. Hearing the gun-shot local people came running and took both the injured for treatment to Darbhanga. P.W. 3 further stated that he has no information about the quantum of the amount which was robbed during the occurrence. P.W. 3 further claimed in the fardbeyan that he can identify the miscreants.

2. On the basis of the aforesaid fardbeyan Manigachhi P.S. Case No. 127 of 2011 was registered on 27.07.2011 at 9:30 P.M. First Information Report, however, reached the Court of Chief Judicial Magistrate, Darbhanga on 29.07.2011. Column No. 15 of the First Information Report which provides for indicating the date and time of dispatch of the F.I.R. from the police station to the concerned Court is kept blank. The two injured, namely, tanker-driver Ram Ayodhya Mahto (P.W. 7) and Ashwani Kumar Choudhary were taken to Darbhanga Medical College Hospital for treatment. P.W. 7 was examined by Dr. S.K. Bhaskar, Senior Resident, D.M.C.H. on 27.07.2011 at 10:00 P.M. His injury-report (Exhibit-14) is on record. After examination of the injuries of P.W. 7 his statement (Exhibit-B) was also recorded by A.S.I. Shivajee Rai of Denta Out Post, Darbhanga on 27.07.2011 at 10:30 P.M. in the Emergency Ward of D.M.C.H. It would be useful to notice the contents of the statement of P.W. 7 (Exhibit-B).

3. P.W. 7 claimed in his statement (Exhibit-B) that on 27.07.2011 he came to Nehra Petrol Pump, P.S. Manigachhi, District- Darbhanga on his tank lorry bearing Registration No. WB 41C 4895 with 9,000 litres of diesel and 3,000 litres of petrol. Having drained out diesel, petrol from the tank lorry in the underground tank of the petrol pump the owner of the petrol pump called P.W. 7 inside the show-room to obtain receipt, meanwhile, four young men riding two motorcycles came to the petrol pump and asked the Nozalman to refuel the tank of the motorcycle. P.W. 7 further claimed that no sooner he came to the entrance of the show-room was hit from behind on the head with the butt of a firearm, suffered giddiness and fell down. The miscreants resorted to indiscriminate firing. Inside the show-room son of the owner and Cashier were sitting

on the counter from before. P.W. 7, however, clarified that he is not aware about name of the owner and the cashier sitting at the counter from before. P.W. 7 further claimed that the four miscreants had muffled their face and he could not identify them. He also claimed that he had fallen down and suffered gun-shot causing injury in the rear portion of his head. P.W. 7 further claimed that he regained consciousness in a medicine shop in Nehra market wherefrom local people shifted him on a vehicle to the Emergency Ward of D.M.C.H. where he has been admitted and is under treatment. P.W. 7 also claimed that having arrived at D.M.C.H. he learnt that during the occurrence two staff of the petrol pump were killed at the place of occurrence itself and the injured son of the owner of the petrol pump died during treatment at D.M.C.H. He also claimed that the occurrence took place at Nehra petrol pump around 7:30 P.M. P.W. 7 further claimed in his statement that the four accused persons resorted to firing at Nehra petrol pump in which two of the staff of the petrol pump were killed at the petrol pump itself and the son of the owner of the petrol pump died during treatment at D.M.C.H. Miscreants also snatched the cash from the counter of the petrol pump. Aforesaid statement of P.W. 7 was not only signed by him but also by Ganesh Mahto in presence of the scribe of the statement A.S.I. Shivajee Rai of Benta Out Post. Shivajee Rai having recorded the statement of P.W. 7 forwarded the same to S.H.O., Manigachhi P.S. for necessary action under Station Diary Entry No. 566/10 dated 27.07.2011 as place of occurrence of the case is within his police station jurisdiction. Statement of P.W. 7 was received in Manigachhi P.S. vide D.R. No. 565/11 dated 28.07.2011 and then entered in the Station Diary of the police station vide Station Diary Entry No. 586 dated 31.07.2011.

4. Ashwani Kumar Choudhary, nephew of the owner of the petrol pump, who suffered gun-shot injury during the occurrence and was also taken to D.M.C.H. for treatment could not survive and make statement as he died before the statement of P.W. 7 was recorded on 27.07.2011 at 22.30 hours. The dead body of Ashwani Kumar Choudhary was subjected to post mortem on 28.07.2011 at 0.30 A.M. by Dr. Dhruva Kumar Dhiraj, Professor of Forensic Medicine, D.M.C.H. (P.W. 11) after the same was identified by Home Guard No. 843 Devendra Yadav. P.W. 11 recovered one metallic bullet of 14mm X 7mm dia from the dead body of Ashwani Kumar Choudhary and handed over the bullet to the Home Guard under seal. From the evidence of P.W. 11 or any other prosecution witness, it does not appear that the metallic bullet of the size of 14 mm X 7 mm dia extracted by P.W. 11 from the dead body of Ashwani Kumar Choudhary and handed over to the Home Guard under seal is the same bullet which was marked Exhibit G and sent to the Director, Forensic Science Laboratory, Patna under letter no. 940/011 dated 10.08.2011 (Exhibit-36).

5. From the fardbeyan and further statement of P.W. 3, it is evident that he claimed to have identified the four miscreants who committed the occurrence. Sanjeev Kumar Choudhary and Hare Krishna Singh (P.Ws. 2, 4) were examined by the Investigating Officer on 29.07.2011. P.W. 2 claimed in his police statement that on the date of occurrence between 6:30-6:45 P.M. he had come to Hat Chowk from his house to purchase vegetable where he met another employee of the petrol pump Hare Krishna Singh (P.W. 4) and while the two were taking tea in a tea-shop situate at a distance of 100 metres from the petrol pump, heard sound of gun-shots being fired at the petrol pump, rushed towards the petrol pump and saw four miscreants attempting to escape on two motorcycles by brandishing pistols and threatening the onlookers to run away. P.W. 2 claimed in his police statement that he has seen the miscreants and can identify them. Hare Krishna Singh (P.W. 4) also stated in his police statement that on the date and time of occurrence he was taking tea at a tea-shop, 200 yards away from the petrol pump along with P.W. 2, heard gun-shot and then rushed to the petrol pump along with P.W. 2 and saw the villagers of Rajwara trying to prevent the miscreants from making good their escape with the help of bamboo-beam etc. Four miscreants, however, managed to escape on the two motorcycles brandishing their pistol. P.W. 4 claimed in his police statement that he had seen the miscreants and can identify them. In the light of the aforesaid police statement of P.Ws. 2, 4 made on 29.07.2011 that they can identify the miscreants, the Investigating Officer (P.W. 29), who arranged Test Identification Parade for identification of the two appellants on 02.08.2011, should have called P.Ws. 2, 4 also to participate in the Test Identification Parade and thereby could have confirmed the veracity of their claim of identifying the miscreants during occurrence by enabling them to participate in the Test Identification Parade. In the aforesaid background Court identification of the appellants by P.Ws. 2, 4 though not challenged in Court, may

not lend credence beyond reasonable doubt. In this connection, I may point out that from the deposition of P.W. 2 dated 14.02.2012, P.W. 4 dated 03.03.2012 itself it appears that the appellants refused cross-examination of P.Ws. 2, 4 as they had not received police papers on the ground that the complete set of police paper, relevant for the cross-examination, was not supplied to them, which is evident from the order dated 13.10.2011, passed by the Chief Judicial Magistrate, committing the case to the Court of Sessions. After commitment of the case to the Court of Sessions also similar submission was raised by filing petition dated 03.01.2012 under Section 227 Cr.P.C. and petition dated 11.01.2012 under Section 161 (3), 465(2) Cr.P.C. that the accused persons have not been given complete police papers and the provision of sub-section (3) of Section 207 Cr.P.C. has not been complied with. Hence, framing of charge against them is erroneous. Aforesaid petitions dated 03., 11.01.2012 were rejected under order dated 16.01.2012 passed by the trial court. Raising similar plea co-accused Kamlesh Jha filed petition dated 14.02.2012 which was also rejected under order dated 14/29.02.2012. Assailing the order dated 14/29.02.2012 Cr. Misc. No. 12046 of 2012 was filed reiterating the submission that all documents have not been provided to the accused persons as required under Section 207 Cr.P.C. and without compliance of the same charges have been framed. Aforesaid submission was considered by the High Court under order dated 27.07.2012 observing as follows :-

œHowever, this Court will not go into factual aspects as to whether the documents had been supplied or not to the petitioner but if at any point of time the Court notices that the prosecution is relying on a document/material which had not been supplied to the petitioner to the prejudice of the accused, the trial Court will ignore the same at the final stage of trial.?

6. It would, thus, appear that the appellants throughout from the date of commitment, framing of charge and date of recording of deposition of P.Ws. 1 to 4 registered their protest about non-supply of the complete set of police papers and on that ground refused to cross-examine the witnesses. In the aforesaid background, if the appellants have not chosen to challenge their identification made, for the first time, in Court by P.Ws. 2, 4 such unchallenged identification made in Court should not prejudice the argument of the appellants that the prosecution without disclosing any reason chose to withhold P.Ws. 2, 4 from participating in the Test Identification Parade held on 02.08.2011. It is well settled that the weight, which is to be attached to Court identification, is a matter for Courts of fact to examine and determine. From the evidence of P.Ws. 2, 4 it is quite evident that at the time of occurrence both were taking tea in a tea-shop situate at Hat Chowk, which according to P.W. 2 is at a distance of 100 metres and according to P.W. 4 at a distance of 200 yards from the petrol pump. Both the witnesses having heard gun-shots in the tea shop rushed to the petrol pump, saw the four miscreants making good their escape on two motorcycles brandishing pistols scaring away the onlookers. From the evidence of P.Ws. 2, 4, it is quite evident that both the witnesses had only occasion to have a fleeting glance of the miscreants and thereby could not have been in a position to identify the miscreants in the evening of the occurrence as they have neither spoken about the source of light nor have indicated in their evidence that they could somehow engage the miscreants. In the case of Malkhan Singh and others Vs. State of Madhya Pradesh, 2003 (4) P.L.J.R. 63 (SC) identification made by the prosecutrix for the first time in Court was accepted by the Court as the rape was perpetrated in broad day light. The prosecutrix had sufficient opportunity to observe and register the features of the appellants who raped her one after the other. Before the rape was committed, she was threatened and intimidated by the appellants. After the rape was committed, she was again threatened and intimidated by them. All this must have taken time. In the present case, at the time of occurrence, P.Ws. 2, 4 were taking tea in a tea shop situate at Hat Chowk which according to P.W. 2 is at a distance of 100 metres and according to P.W. 4 at a distance of 200 yards from the petrol pump. The two witnesses after hearing gun-shots in the tea shop rushed to the petrol pump, by that time, the four miscreants were making good their escape on the two motorcycles brandishing their pistol, thereby P.Ws. 2, 4 hardly had any opportunity to watch their features which may have an imprint on their memory as the miscreants were wholly strangers to the two witnesses. In the case of Simon and Others Vs. State of Karnataka, (2004) 2 Supreme Court Cases 694 Supreme Court accepted the Court identification of P.W. 97 as he knew the appellants from before. Such fact would appear from paragraph 12 of the report. In paragraph 14 Supreme Court has further observed that the purpose of a prior Test Identification is to test and

strengthen the trustworthiness of the evidence. Courts generally look for corroboration of the sole testimony of the witness in Court so as to fix the identity of the accused who are strangers to them in the form of earlier identification proceedings.

7. In the facts of the present case discussed above, P.Ws. 2, 4 being wholly stranger to the accused persons, identification of the appellants by them for the first time in Court does not inspire confidence.

8. At this stage itself I would like to deal with the identification of the appellants by P.W. 3 in the Test Identification Parade as also in Court. In the fardbeyan recorded on the date of occurrence at around 8:10 P.M. P.W. 3 did claim that he can identify the miscreants, to verify the said claim Test Identification Parade was held on 02.08.2011 in which P.W. 3 identified both the appellants Pappu Bihari, Rahul Kumar Yadav as the shooter. Aforesaid claim of P.W. 3 is to be considered in the light of the claim of another injured eye-witness, the tanker driver (P.W. 7) who also recorded his statement about the occurrence in the same night at 10:30 P.M. in the Emergency Ward of D.M.C.H. vide Exhibit-B in which he specifically claimed that the miscreants had muffled their face and he could not identify anyone of them. Presence of P.W. 7 at the place of occurrence and that he suffered injury during the occurrence is not in dispute as about his presence and having suffered injury during the occurrence P.W. 3 has also admitted not only in the fardbeyan but also in his deposition, which is further confirmed from the injury-report of P.W. 7 issued by Dr. S.K. Bhaskar who examined P.W. 7 on 27.07.2011 in the Emergency Ward of D.M.C.H. at 10:00 P.M. vide injury-report (Exhibit-14). P.W. 3 has also claimed in his fardbeyan as also in the deposition in Court that he suffered assault on his neck during the occurrence by the butt of the pistol and that he fell down on the floor of the counter room but the prosecution has neither claimed that he was examined by any doctor nor has produced his injury-report. P.W. 3 has further claimed in his fardbeyan and deposition in Court that Nozalman Kailash Sada (deceased) after refueling the two motorcycles entered the counter room and disclosed the amount for which petrol was filled in the two motorcycles. At the same time three out of four miscreants armed with pistol dragged Kailash Sada inside the counter room from the side of the stairs and one of the miscreants remained standing outside. It is difficult to appreciate the version of the informant (P.W.3) that Kailash Sada was dragged inside the counter room by the three miscreants from the side of the stairs as according to informant (P.W. 3) himself he had already entered the counter room and the miscreants came following him. In any case P.W. 3 being the only witness who claimed that the miscreants had not muffled their face, it would not be safe to rely on his solitary testimony in view of the statement of P.W. 7 (Exhibit-B) recorded in the same night as also his evidence in Court that accused persons had muffled their face and it was not possible to identify them.

9. From the evidence of Investigating Officer (P.W. 29) paragraphs 9, 20, 22 to 30 it appears that in the light of the call details of the snatched mobile of Pandaul P.S. Case No. 117 of 2011 dated 30.05.2011 and the suspect number appellant Pappu Bihari was arrested from Ganga Rest House on 29.07.2011 at 9:00 P.M. and from his custody one black Nokia Max 333 mobile with double SIM facility bearing SIM Nos. 7250363542, 9709536536 was recovered, as would appear from search-cum-seizure-list (Exhibit-26). He also recorded confessional-cum-disclosure statement (Exhibit-27). On the basis of the confessional-cum-disclosure statement of appellant Pappu Bihari co-accused Kamlesh Jha (since acquitted) was apprehended and recorded his confessional statement on 30.07.2011 at 2:30 A.M. and from his residence two country-made pistols of 0.315 bore, 0.12 bore with three live cartridges of .315 bore, four live cartridges of 12 bore, one empty cartridge of 0.12 bore and Micromax mobile (dual SIM) with only one SIM bearing no. 9771310537 were recovered, as would appear from search-cum-seizure-list dated 30.07.2011 at 3:15 A.M. (Exhibit-29). In the light of the confessional-cum-disclosure statement of Pappu Bihari and Kamlesh Jha, Investigating Officer and the members of the raiding party came to the house of Nityanand Jha (absconder) who was not present in his house. His house was, however, searched, from where one country-made rifle, one live cartridge of 303 bore, two mobile set and one suspected Platina motorcycle were recovered, as would appear from Paragraph 30 of the evidence of P.W. 29. Seizure-list indicating recovery from the house of Nityanand Jha has not been brought on record. From the house of Nityanand Jha Investigating Officer (P.W. 29) and the raiding party came to the house of appellant Rahul Kumar Yadav on 30.07.2011 at 5:00 A.M., arrested him and recovered from his house two

motorcycles, one red-black, another blue and two mobile set bearing SIM Nos. 8051574342, 8051573926 at 5.45 A.M., as would appear from search-cum-seizure list (Exhibit-31). From the house of appellant Rahul Kumar Yadav Investigating Officer (P.W. 29), raiding party and the apprehended accused persons, namely, Pappu Bihari, Kamlesh Jha and Rahul Kumar Yadav came to the house of Pappu Bihari on 30.07.2011 at 7.15 A.M. in village Kaithinia and with the help of Sub-Inspector Jung Bahadur Singh of Madhubani Police Station recovered from the house of Pappu Bihari one 9 MM cartridge from the pocket of the full pant of Pappu Bihari, which would appear from the evidence of the Investigating Officer (P.W. 29) paragraph 32 and search-cum-seizure-list (Exhibit-41/6). From the house of Pappu Bihari Investigating Officer (P.W. 29), raiding party and the apprehended accused came to the house of Raju Sah, father-in-law of Pappu Bihari on 30.07.2011 at 9.30 A.M. and recovered five mobile set including snatched Micromax mobile set of Pandaul P.S. Case No. 117/2011 bearing IMEI No. 941004850818697, 91004850818698 which would appear from the evidence of P.W. 29, paragraph 32 and the seizure-list drawn by Sanjay Kumar Singh, Officer-in-Charge Darbhanga (Town) Police Station, marked Exhibit-11, who also registered a case with respect to the seized articles from the house of Raju Sah on the basis of his self statement. Original of Exhibit-11 has not been brought on record, rather its photo copy has been placed on record. From the house of Raju Sah, father-in-law of Pappu Bihari the apprehended accused along with seized articles were brought by the raiding party to Bahadurpur Police Station, as would appear from the evidence of P.W. 29, paragraph 32. At Bahadurpur Police Station appellant Rahul Kumar Yadav recorded his confessional-cum-disclosure statement on 30.07.2011 at 12.30 P.M. In the light of the confessional-cum-disclosure statement of appellant Rahul Kumar Yadav raid was conducted in the house of one Lalita Devi on 30.07.2011 at 3.30 P.M. and from her house at the instance of appellant Rahul Kumar Yadav two 9 MM pistols with magazine was recovered, on the basis of which Sakatpur P.S. Case No. 73/11 dated 30.07.2011 was registered in the light of the self statement of Sri Braj Lal Prasad Sinha, Officer-in-Charge, Sakatpur P.S. and seizure-list (Exhibit-30) indicating recovery of arms from the house of Lalita Devi at the instance of appellant Rahul Kumar Yadav was prepared by Brajlal Prasad Sinha over which P.W. 29, three apprehended accused put their signature. Besides the two independent witnesses, namely, Sone Lal Rai, Shivji Choudhary, D.W. 5, 4 also put their signature. Sri Braj Lal Prasad Sinha, the then Officer-in-Charge, Sakatpur P.S., who seized the arms from the house of Lalita Devi at the instance of Rahul Yadav on 30.07.2011 on whose statement said Sakatpur P.S. Case was registered, has also not been examined in the present case to establish the fact that the arms recovered from the house of Lalita Devi at the instance of Rahul Yadav was handed over to P.W. 29 for production in Court. In this connection it may further be pointed out that the seizure of arms from the house of Lalita Devi at the instance of Rahul Yadav vide seizure-list (Exhibit-30) is itself in doubt as the two seizure-list witnesses Sonelal Rai and Shivji Choudhary were not examined by the prosecution to support the seizure of arms from the house of Lalita Devi at the instance of Rahul Yadav rather they deposed as D.Ws. 5,4, and categorically asserted in their deposition that no seizure of arms was made from the house of Lalita Devi in their presence and they were made to sign on blank piece of paper.

10. P.W. 29 has not indicated in his evidence as to why appellant Rahul Kumar Yadav recorded his confessional statement on 30.07.2011 at 12.30 P.M. and not at the time his house was raided on 30.07.2011 at 5.45 A.M. when two motorcycles, mobile of Nokia company and SIM of Vodaphone company was recovered from his house and he was apprehended. He has also not explained as to why did he not produce the recovered arms etc. at the time of the production of the accused before the Court of Chief Judicial Magistrate, Darbhanga on 31.07.2011. In this connection, following extracts from the order of Chief Judicial Magistrate, Darbhanga, before whom apprehended accused persons were produced on 31.07.2011, is quoted below for ready reference:

œFrom perusal of case record it appears the above named accused persons are not named in F.I.R. But from perusal of forwarding, memo of evidence, seizure-list as well as confessional statement of accused Pappu Bihari, Kamlesh Jha and Rahul Kumar Yadav, it appears that above non-F.I.R. accused persons are involved in the alleged occurrence. So sufficient material is available for their remand. As such, they are taken into judicial custody and remanded to jail till 12.08.2011. I.O. of this case has not produced any seized article at the time of their remand.?

11. From the subsequent order-sheet maintained by the Chief Judicial Magistrate, Darbhanga it does not appear that the seized articles (arms and ammunition recovered on 30.07.2011, the metallic bullet recovered from the dead body of Ashwani Choudhary on 27.07.2011 by doctor (P.W. 11) who conducted post mortem on the person of Ashwani Choudhary) were ever produced before the Court and forwarded to the Director, Forensic Science Laboratory, Patna for examination as claimed by the prosecution vide DR No. 940/011 dated 10.08.2011 (Exhibit-36) signed by Chief Judicial Magistrate, Darbhanga on 05.08.2011 as there is no entry in the order-sheet that the seized arms and ammunitions as also the metallic bullet recovered from the dead body of Ashwani Kumar Choudhary on 27.07.2011 and handed over to the Home Guard by the doctor (P.W. 11) was ever produced in Court and sent to Forensic Science Laboratory, Patna. In the circumstances, the finding of the Forensic Science Laboratory (Exhibit-9) that the metallic bullet recovered from the dead body of Ashwani Choudhary was fired from 9 MM pistol recovered from the house of Lalita Devi at the instance of appellant Rahul Yadav is not free from doubt.

12. From the evidence of Investigating Officer (P.W. 29) paragraphs 75 to 77 it is evident that P.W. 29 along with three apprehended accused persons including the two appellants proceeded on 31.07.2011 at 7:00 A.M. for Court in a police jeep, escort party and reached in front of the Civil Court, Darbhanga at 9:30 A.M. along with Sub-Inspector of Special Auxiliary Policy Force (SAP). Three apprehended accused persons including the two appellants under orders from Senior Superintendent of Police, Darbhanga were sent at 10:30 A.M. for production in the Court of Chief Judicial Magistrate, Darbhanga with forwarding Memo in a police van along with SAP, Chowkidar and force from Police Line. It further appears that during the period between 9:30-10:30 A.M. Senior Superintendent of Police, Darbhanga held a press conference with local, international print, electronic media which fact is also mentioned in the case diary. P.W. 29 further stated in evidence that at the time of press conference he was present in the office of Senior Superintendent of Police, Darbhanga P.W. 29, however, evaded to indicate the duration of the press conference and stated that he does not remember that the press conference continued for 20 minutes. P.W. 29 further evaded answer about the nature, complexities of the occurrence at Nehra Petrol Pump and stated that he does not remember that during the press conference the then Senior Superintendent of Police had stated that the occurrence dated 27.07.2011 concerning robbery and murder at Sony Fuels, Nehra was a blind murder case in which investigation was taken up by forming Special Task Force. P.W. 29 further evaded answer about case being solved and stated that he does not remember that Senior Superintendent of Police had stated in the press conference that the police solved the case by taking assistance of electronic surveillance and other scientific methods and that the accused persons Kamlesh Jha, President of PACS Pappu Bihari, resident of Jhanjharpur and Rahul Yadav, resident of Bahuarwa have been apprehended. P.W. 29 further stated that he does not remember whether the apprehended accused persons were made available to the media for interview. P.W. 29 also stated that he does not remember that Senior Superintendent of Police had stated that the mobile which was thrown after breaking the same has been recovered along with fire-arms, mobile set and vehicle used in the crime. From the contents of paragraphs 75 to 77 of the evidence of P.W. 29 it appears that the defence has been able to establish that the accused persons including the two appellants reached in front of Darbhanga Court on 31.07.2011 at 9:30 A.M. for their production in Court and were sent for production at 10:30 A.M. on the same day, meanwhile, Senior Superintendent of Police, Darbhanga held a press conference in his office at 10.02 A.M. P.W. 29 was also present at the time of the press conference in the office of the Senior Superintendent of Police. From the trend of the cross-examination of P.W. 29 in paragraphs 75 to 77 it further appears that the accused persons including the appellants have succeeded in probablisising their defence that during the press conference held on 31.07.2011 Senior Superintendent of Police informed the media that with the help of electronic surveillance and use of other scientific methods the case has been solved and that the accused persons were also offered to the media for being interviewed. Aforesaid inference is being drawn as P.W. 29 admitted about the holding of press conference by the Senior Superintendent of Police, Darbhanga on 31.07.2011 at 10.02 A.M. gave evasive reply to the pointed questions put to him about the nature of the case being blind and that the same was solved with the help of electronic surveillance and use of other scientific methods and the arrested accused persons were offered to the media for interview. If the suggestions given to P.W. 29 were not correct his answer to the query put by way of suggestion should have been categorical

instead of evasive answer that he does not remember.

13. The call details and the location chart of mobile numbers 07250363542, 09709536536 and 08051574342 said to have been used by the two appellants respectively and other mobiles said to have been used by other accused persons is indicative of the fact that the holder of a particular mobile spoke to whom, for what duration and from which location. The printouts though exhibited by the trial Court are not admissible for lack of certificate from a responsible officer of the service provider in the light of sub-section (4) of Section 65(B) of the Evidence Act. Placing reliance on Sections 63, 65 of the Evidence Act I also examined the printouts as a secondary evidence but am not satisfied about its admissibility as a secondary evidence also as the printouts do not disseminate complete information in a set pattern which is evident from bare perusal of the printouts particularly location chart at pages 454, 456, 457 and 459 of the paper-book about Cell ID I, II and the telephone numbers given along with Cell ID-I, II. Further mobile numbers referred to above are in the name of Aftab Alam, Rabindar Yadav and Shyam Deo Mahto, out of the three only Aftab Alam has been examined as P.W. 21 to establish that Pappu Bihari fraudulently obtained his Voter Identity Card 3-4 years earlier as he was his partner in mango business and misusing the said Voter Identity Card obtained mobile number 7250363542. In the circumstances, there is no evidence on record to establish that it was Pappu Bihari and Rahul Yadav who subscribed, used mobile numbers 9709536536, 8051574342 respectively. Even otherwise, printouts do not prove who spoke to whom nor do printouts give the contents of the conversation as has been authoritatively held by the Supreme Court in the case of John Pandian Vs. State represented by Inspector of Police, Tamil Nadu (2010) 14 SCC 129 as such it is unsafe to place reliance on the printouts, location-chart to maintain the conviction of the two appellants.

14. In view of my discussions in paragraphs 5 onwards, I agree that Death Reference Case No. 6 of 2013 has to be answered in negative. Cr. Appeal (D.B.) No. 769 of 2013, Government Appeal (D.B.) No. 19 of 2013 filed against the impugned judgment for securing conviction of Kamlesh Jha has to be dismissed. Cr. Appeal (D.B.) Nos. 437, 518, both of 2013 filed by appellant Pappu Bihari @ Pappu Sah and Rahul Kumar Yadav respectively assailing the judgment of their conviction has to be allowed in view of my finding that it would be unsafe to rely on the Court identification of both the appellants by P.Ws. 2, 4 as by the time P.Ws. 2, 4 reached the petrol pump in the evening of the occurrence on 27.07.2011 from the tea shop situate at a distance of 100 metres at Hat Chowk the miscreants were making good their escape on the two motorcycles brandishing their pistol and P.Ws. 2, 4 hardly had any opportunity to identify them and that is why they were not asked to participate in the Test Identification Parade held on 02.08.2011 though both claimed in their police statement on 29.07.2011 that they had identified the miscreants. Test Identification Parade, Court Identification by P.W. 3 has also to be disbelieved in the light of the evidence of the injured P.W. 7 recorded in the evening of the occurrence itself at 10:30 P.M. in the Emergency Ward of D.M.C.H., in which he has categorically stated that the miscreants had muffled their face and could not have been identified. Presence of P.W. 3 appears to be doubtful in view of his claim that he also suffered injury by the butt of the pistol in the same manner in which P.W. 7 suffered injury and fell on the ground but injury-report of P.W. 3 has not been produced and his presence at the place of occurrence is doubtful. Failure of the prosecution to indicate the date on which the seized arms, ammunitions as also metallic bullet extracted from the body of Ashwani Kumar Choudhary by P.W. 11 and given to the Home Guard was produced before the Chief Judicial Magistrate, Darbhanga creates doubt about the authenticity of the seizure of arms, ammunitions and the extracted metallic bullet from the body of deceased Ashwani Choudhary and that the same arms and the bullet were sent to the Forensic Science Laboratory for testing. In the facts and circumstances of the case, in my opinion Appellant Pappu Bihari, Rahul Kumar Yadav also deserve grant of benefit of doubt.

15. Let the appellants Pappu Bihari @ Pappu Sah, Rahul Kumar Yadav be released from custody forthwith, unless they are required to be detained in connection with in any other case.