

Bhola Kumar and ors. Vs. State of Bihar

Bhola Kumar and ors. Vs. State of Bihar

SooperKanoon Citation : sooperkanoon.com/122858

Court : Patna

Decided On : Jun-29-1998

Judge : B.P. Singh and R.A. Sharma, JJ.

Appeal No. : Criminal Appeal Nos. 33, 38 and 41 of 1996 (R)

Appellant : Bhola Kumar and ors.

Respondent : State of Bihar

Disposition : Appeal Allowed

Prior history : B.P. Singh, J. 1.These three appeals have been preferred against the judgment and order of 1st Additional Sessions Judge, Hazaribagh dated 8/10th January, 1996 in Sessions Trial No. 91 of 1994. There are altogether six appellants, who have been convicted by the learned 1st Additional Sessions Judge. Bhola Kumar, Uday Sankar Verma, Yugal Mistri and Nawal Kishore Singh are the four appellants in Cr. Appeal No. 33 of 1996(R). Of them Uday Sankar Verma has been sentenced to undergo rigorous impri

Judgement :

B.P. Singh, J.

1.These three appeals have been preferred against the judgment and order of 1st Additional Sessions Judge,

Hazaribagh dated 8/10th January, 1996 in Sessions Trial No. 91 of 1994. There are altogether six appellants, who have been convicted by the learned 1st Additional Sessions Judge. Bhola Kumar, Uday Sankar Verma, Yugal Mistri and Nawal Kishore Singh are the four appellants in Cr. Appeal No. 33 of 1996(R). Of them Uday Sankar Verma has been sentenced to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code, as also to undergo rigorous imprisonment for one year under Section 27 of the Arms Act. The remaining three appellants have been sentenced to rigorous imprisonment for life under Section 302/34 of the Indian Penal Code.

The sole appellant in Cr. Appeal No. 38 of 1996 (R), Omprakash has been convicted under Section 302 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life. He has also been convicted under Section 27 of the Arms Act and sentenced to undergo rigorous imprisonment for one year.

Similarly, the sole appellant in Cr. Appeal No. 41 of 1996(R), Sheo Shankar Prasad, has been convicted and sentenced to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code, and to one year's rigorous imprisonment under Section 27 of the Arms Act.

2. Two persons are said to have been killed in the occurrence giving rise to the instant appeals. While appellant Omprakash and Uday Sankar Verma have been held to have murdered Nagendra Singh by use of fire-arms, appellant Sheo Shankar Prasad is alleged to have committed the murder of Kali Pado Chakraborty by firing at him while he was attempting to escape. Other three appellants are said to be the accomplice who shared the common intention to commit the murder of the aforesaid two persons. The sentences have been directed to run concurrently,

3. The occurrence is said to have taken place on the night intervening 3rd and 4th August, 1993. It is the prosecution case that the occurrence which took place at about 2 a.m. on 4.8.1993 was preceded by heated exchange of words between the accused on the one hand and one Jitendra Parmar, owner of Parmar Petrol Pump on the other. There was a dispute between them in connection with the purchase of a truck. The actual occurrence is said to have taken place at a

distance of 500 yards from the Petrol Pump of Jitendra Parmar where there was heated exchange of words between the parties. According to the Investigating Officer the Petrol Pump of Jitendra Parmar is located on National Highway No. 31, and the actual occurrence took place at a point 500 yards to the north of the Petrol Pump on the western flank of the said Highway. Deceased Nagendra Singh, according to the prosecution, was the driver of the truck in question and was an employee of Jitendra Parmar, while Kali Pado Chakraborty was the Manager of Jitendra Parmar. The Khalashi of the truck in question, namely, Birendra Kumar (PW 1), who, said to be an eyewitness, was examined at the trial as PW 1, but he was declared hostile, as he did not claim to have any personal knowledge about the occurrence and denied having made any statement before the police in connection with the occurrence in question. Similarly, PW 3 (Bachulal) and PW 4 (Hari Narayan Sharma), examined on behalf of the prosecution, were declared hostile as they did not support the prosecution case. According to the prosecution these witnesses has arrived at the place of occurrence soon after the occurrence.

4. The prosecution case rests on the testimony of two eye-witnesses, namely, PW 2 Arbind Singh and PW 5 Surendra Pd. Singh, the informant, who claimed to be a nephew of deceased Nagendra Singh and residing with him at village Gomo, the village of occurrence. Apart from these two eye-witnesses, two other witnesses who have been examined in support of the prosecution case are Dr. Suresh Chandra Srivastava (PW 6), who performed the postmortem on the dead bodies of the deceased, and Arun Kumar Tiwary (PW 7), the Sub-Inspector of Police who investigated the case.

5. The prosecution relying upon the aforesaid witnesses contended that the appellants were responsible for the murder of Nagendra Singh and Kali Pado Chakraborty, while the appellants contended that the whole case is a concocted case and only after the dead bodies were found, a false first information report was recorded on the basis of the statement of PW 5 which was also ante-timed. The serious contradictions in the prosecution evidence and the circumstances brought on record clearly established that the occurrence did not take place in the manner as alleged by the prosecution witnesses. The earliest version of the prosecution case is to be found g in the fardbeyan of Surendra Pd. Singh, which is

said to have been recorded at 3 a.m. on 4.8.1993 at the place of occurrence itself. The same has been recorded by Sri A.K. Tiwary, Sub-Inspector of Police, who was on patrolling duty along with the police party and by chance reached the place of occurrence which was by the side of National Highway No. 31 in village Gomo, which is virtually a part of village Tilaiya. In his fardbeyan PW 5 Surendra Pd. Singh stated that his uncle (deceased) was the driver of Truck No. BR-13-H- 4492 belonging to Jitendra Singh Parmar (not examined). At about 10 p.m. in the night (3.8.1993) he proceeded to search for his uncle Nagendra Singh, deceased, since he had not returned home. He proceeded towards the Petrol Pump of Parmar. On the way he met Arbind Singh (PW 2) and both proceeded to the Petrol Pump of Parmar where they reached at about 10.30 p.m. There they found Jitendra Parmar sitting on a chair and these appellants and two other unknown persons sitting on cots near him. The informant has named all the accused persons giving their parentage and address. His uncle Nagendra Singh and Manager Kali Pado were sitting on a Bench behind Parmar. There was a heated discussion going on between Parmar and the accused persons, and it appeared to him that the appellants along with two unknown persons were trying to pressurise Sri Parmar. The informant requested his uncle to come home in, but his uncle Nagendra Singh, deceased, stated that under such a situation he should not leave his master alone. In these circumstances, the informant as also his companion Arbind Singh (PW 2) stayed at the Petrol Pump. After about an hour Omprakash, his brother Uday Sankar Verma and Sheo Shankar Prasad suddenly got up and went away. They returned at 1.30 p.m. and it appeared to the informant that they might assault Parmar. Jitendra Parmar asked Nagendra Singh and Kali Pado Chakraborty to take the truck to the house of appellant Omprakash and Park it there. Thereafter all the eight persons including these appellants left the Petrol Station and proceeded towards the house of Omprakash. On the orders of Parmar, Nagendra Singh (deceased), Kali Pado Chakraborty (deceased) and Khalasi Birendra Kumar (PW 1) boarded the truck. The informant along with PW 2 followed the appellants. At about 2 p.m. his uncle Nagendra Singh (deceased) drove the truck and brought it in front of the house of Omprakash. While he was switching off the engine of the truck, appellant Omprakash exhorted his brother appellant Uday Sankar Verma to enter the cabin of the truck and to shoot. He took out a small country-made pistol

from the pocket of his pajama and entered the cabin of the truck from the gate from which Kali Pado Chakraborty had got down. Thereafter Omprakash fired at his uncle Nagendra Singh. Similarly, Uday Sankar Verma also entered the cabin and fired. Since the cabin light was on, the informant could see him firing through the front windscreen. On hearing the sound of firing, Kali Pado Chakraborty (deceased) started running towards the west. He was chased by Sheo Shankar Prasad who took out a country-made pistol from the right pocket of his Kurta, and saying that he was also a man of Parmar ran behind Kali Pado Chakraborty and shot him, as a result of which he fell down there. Thereafter all the eight persons said in loud voice that their problem had been solved for ever, whereafter all the eight persons entered the gate of the house of Omprakash. On hearing the sound of firing the informant as well as PW 1, Birendra Kumar and PW 2, Arbind Singh, started raising alarm which attracted several persons to the place of occurrence to whom they narrated the occurrence. Thereafter the witnesses, as also those persons who had assembled, surrounded the house of Omprakash and sent intimation to the police station. The two persons, who were injured, were found to be dead.

6. The fardbeyan was recorded by PW 7 at the place of occurrence which was by the side of National Highway No. 31, and the report mentions the presence of Arbind Singh (PW 2) and Birendra Kumar (PW 1). On the basis of the said fardbeyan a formal first information report appears to have been recorded at the Kodarma Police Station by the Inspector of Police-cum-Officer-in-charge of the Police Station. It appears from the formal first information report that the Tilaiya Police Station was a town out-post, under the Kodarma Police Station. We can take judicial notice of the fact that Kodarma and Tilaiya are two adjacent townships at a distance of about 8 to 10 kms. connected by the National Highway No. 31, and it takes about 20 to 25 minutes to cover the distance by car from Kodarma to Tilaiya. Though the formal first information report appears to have been drawn up at Kodarma Police Station, there is nothing on record to show as to when the fardbeyan was sent to the Kodarma Police Station and when the special report was despatched from Kodarma Police Station to the Court of Additional Chief Judicial Magistrate at Kodarma. From the first information report as also from the fardbeyan marked Ext. 3, it appears that the same was seen by the A.C.J.M. on

5.8.1993. I shall deal later with the submission urged on behalf of the defence that the delay in despatch of the special report has not been explained by the prosecution since the Court of A.C.J.M. at Kodarma is very near to Kodarma Police Station.

7. According to the Investigating Officer (PW 7), he prepared the inquest report relating to deceased Nagendra Singh at 4 a.m. and the inquest report relating to Kali Pado Chakraborty at 4.10 a.m. These reports have been marked as Exits. 4 and 4/1. The dead bodies were sent to Kodarma for postmortem examination. The Investigating Officer has also deposed that he arrested appellant Bhola Kumar, son of appellant Uday Sankar Verma from the house of Omprakash soon after the occurrence, while appellant Sheo Shankar Prasad was arrested at 8.40 a.m. on 4.8.1983, the date of occurrence, from his house. Similarly, appellant Yugal Mistri was arrested from his house at 9.05 a.m. on the date of occurrence. Nothing incriminating was found from the houses of the appellants arrested by the Investigating Officer. The other appellants were not found despite search. After investigation of the case he submitted charge-sheet against the appellants. The post-mortem examination on the dead bodies of the deceased was done by Dr. S.C. Srivastava (PW 6). He stated that at 8.45 a.m. on 4.8.1993 he held the post-mortem on the dead body of Kali Pado Chakraborty whose age he assessed to be about 65 years. He found the following ante-mortem injuries on his person:

(i) Gun shot wound (lacerated) left chest interiorly above left nipple 1/2' rounded in shape, edges inverted X thoracic cavity. Evidence of burning soot present wound of entry, fracture 3 and 4th ribs-left side, dark ring present.

(ii) Lacerated wound left chest posterior, 1-1/2' circular margins inverted, free from searching and tattooing X thoracic cavity. Wound of entry on dissection, left lung lacerated, right lung pale and collapsed, thoracic cavity contained blood heart-both chambers empty, brain-pale, liver-pale, spleen-pale, kidneys-pale, stomach-undigested food, bladder-empty.

According to the doctor, death was caused due to shock and hemorrhage as a result of above injuries caused by fire arm. Death must have taken place within 24 hours of the post-mortem examination. It may here be noticed that the second

injury mentioned by the doctor as wound of entry, is a mistake because it appears from the post-mortem report (Ext. 2) that the said wound has been described as wound of exit. This was also not disputed by Counsel appearing for the appellants and the State before us.

8. On the same day at 8.05 a.m. the doctor had held the post-mortem examination on the dead body of Nageshwar Singh (deceased), who appeared to him to be aged about 45 years. He found the following ante-mortem injuries on his person:

(a) Gun shot wound, lacerated, right shoulder posteriority 1/2' rounded in shape edges inverted X thoracic cavity. Evidence of burning and soot present, dark ring present, fracture third rib right side wound of entry.

(b) Lacerated 2' below, nipple on left chest, 1-3/4' round, edges irregular, inverted x thoracic cavity-wound of exit. Fracture 7th rib-left chest. On dissection, both lungs lacerated, heart-lacerated, thoracic cavity-full of blood, liver-pale, spleen-pale, kidneys pale, stomach undigested food, bladder-empty, brain-pale.'

In the opinion of the doctor the death was caused due to shock and haemorrhage as a result of the above injuries caused by fire-arm and death had been caused within 24 hours of the post-mortem examination.

PW 7 deposed that he had inquest reports with him at the time of holding post-mortem examination, but by mistake in the post-mortem report he mentioned the name of the deceased as Nageshwar Singh instead of Nagendra Singh. PW 7 found in both the cases presence of undigested food in the stomach and he deposed that the deceased may have taken food three hours before his death. In the case of Nagendra Singh the doctor found his bladder to be empty and stated that possibly the deceased might have urinated two to four minutes before his death.

8-A. One fact which may be noticed at the threshold is that Jitendra Parmar, with whom the appellants had a dispute, was not examined as a prosecution witness. It also appears from the deposition of Investigating Officer (PW 7) that he did not record his statement in course of investigation, though he made attempts to

contact Jitendra Parmar. He was always told by his mother that he was not available. The Investigating Officer has stated in clear terms that he was at the place of occurrence till about 7.45 a.m. on the date of occurrence, but Jitendra Parmar had not come there during this period. PW 5, the informant however has stated that at about 5 or 6 a.m. Jitendra Parmar had come to the place of occurrence, but by that time the Investigating Officer had left. The¹ defence has severally criticized the Investigating Officer for not examining an important witness like Jitendra Parmar with whom the appellants had heated exchanges just before the occurrence and who was the person with whom the appellants had a dispute, if any.

9. I shall now proceed to analyse the testimony of the prosecution witnesses examined at the trial.

PW 1, Birendra Kumar, according to the prosecution, was Khalasi of the truck in question, and had boarded the truck when the same was brought from the Petrol Station of Parmar to the place of occurrence near the house of appellant Omprakash. According to the prosecution, he also escaped and hid himself in the bushes nearby and came out only after the occurrence. This witness, however, denied that at the time of occurrence he was a Khalasi of the truck in question, though he admitted that earlier he had worked as a Khalasi of the said truck of Jitendra Parmar. He stated that he did not know how Nagendra Singh was killed and he also denied that he was questioned by the police in this connection. This witness was declared hostile and was cross-examined by the prosecution. Similarly, PW 3, Bachulal and PW 4, Hari Narayan Sharma, have also been declared hostile, as they did not support the prosecution case. PW 3 stated that he was called to the place of occurrence much after the occurrence but he did not know anything about the occurrence. He even denied that he was examined by the police in course of investigation. Similar is the testimony of PW 4. The testimony of these three witnesses did not support the prosecution case. Neither the appellants nor the State has placed any reliance on their testimony. I also find that there is nothing in their testimony to support the case of the prosecution. It is, therefore, not necessary to refer to their deposition in detail.

10. PW 2, Arbind Singh, claims to be an eye-witness. According to him, on 3.8.1993 at about 10 a.m. he was standing outside his house where he met Surendra Pd. Singh (PW 5), informant. He accompanied him to the Petrol Pump of Parmar, where he found that Parmar was sitting on a chair and these appellants as also two unknown persons were sitting on two cots. Nagendra Singh and Kali Pado Chakraborty alias Khokha Babu were standing nearby. A heated discussion was going on between Parmar on the one side and Omprakash and others on the other. The discussion was in relation to a vehicle. PW 5 asked his uncle, Nagendra Singh to leave that place, but Nagendra Singh refused to leave his master alone and asked them also to stay there. At about 1.30 a.m. Sheo Sankar Prasad and Uday Sankar Verma went to the house of Omprakash and soon returned and sat down there. Thereafter, Nagendra Singh (deceased) along With the Manager Kali Pado Chakraborty and Khalasi Birendra Kumar (PW 1) drove the vehicle for parking it near the house of Omprakash. The persons sitting at the Petrol Pump also followed, and this witness along with PW 5 followed them. Nagendra Singh (deceased) parked the truck in front of Om Trading. In the meantime, appellant Omprakash, etc. reached there. Omprakash exhorted and ordered assault, whereafter he himself got up from the right gate and fired at Nagendra Singh. Kali Pado Chakraborty opened the left gate and tried to escape towards the west. Appellant Uday Sankar Verma, brother of Omprakash entered the truck from the right gate and fired at Nagendra Singh. Kali Pado Chakraborty had run about 50 steps when he was chased by appellant Sheo Sankar Singh and was shot at by him. On alarm being raised, all the accused entered the house of Omprakash. Some persons from the Mohallah had gathered, may be about 2-4 or 10 in number and asked them to report the matter at the police station, but in the meantime the police party reached there. When search was made for the Khalasi (PW 1) it was found that he was hiding in the bushes nearby. The police recorded his statement as also the statements of PW 5 and PW 1. The police party searched the house of Omprakash and arrested his nephew, Bhola from the house. This witness has admitted that Surendra Singh PW 5 is his cousin, being the nephew of his maternal uncle. Deceased Nagendra Singh was also his maternal uncle. As earlier noticed, the informant Surendra Singh was also a nephew of deceased Nagendra Singh. In cross-examination, this witness admitted

that he was residing with his parents and his house was at a distance of 200 yards from the house of his maternal uncle Nagendra Singh (deceased). The informant was residing with deceased Nagendra Singh. Shekhar was the son of Nagendra Singh (deceased) aged about 22 to 24 years and he also resided with Nagendra Singh. This witness denied that he was a known bad character of the locality. Though he admitted that a case was pending against him regarding possession of explosives, and two other criminal cases were also pending against him, but he denied the suggestion that he was under the surveillance of the police. Tjlaiya police station was at a distance of about 400 yards from his house. The Petrol Pump of Parmar was about 2 kms. from his house, while the house of appellant Omprakash was about one and half kilometres from his house. According to this witness he returned at about 12 noon on 5.8.1993 after the post-mortem examination on the dead bodies of the deceased. He did not know whether the family members of the informant had been informed. He talked to them only after he returned on 5.8.1993. The other deceased Kali Pado Chakraborty as also a resident of his Mohallah, and his house was at a distance of about 500 yards from his house. This witness stated that he did not suspect that untoward incident may take place. He admitted that Jitendra Parmar is alive. He further stated that he saw the firing from a distance of about 40 yards. When Kali Pado Chakraborty was shot at he was at a distance of about five hands (7-1/2' feet) from his assailant. The shot was fired from a small pistol, but he could not say whether that was a revolver or a country-made weapon. Soon after the firing all the accused entered the premises of Om Trading. The police Jeep arrived at the place of occurrence within about half an hour or 45 minutes of the occurrence. He and others told the police that the accused had entered the premises of M/s. Om Trading. The police party went inside the premises of Om Trading, but they could arrest only one person. Thereafter the police made enquiries from them. The first person whose statement was recorded was the informant Surendra Prasad Singh (PW 5). Thereafter the statement of Birendra Kumar (PW 1) was recorded. It was only thereafter that the statement of this witness was recorded. Till the police party arrived they were looking after the dead body of Nagendra Singh. The two bodies were at a distance of 50 yards from each other. Within 25-30 minutes several persons assembled on alarm being raised and stayed there till the police party

arrived. Both the dead bodies were despatched from the place of occurrence at about 7 or 8 a.m., but he did not know whether Parmar was informed about the occurrence. He also did not know whether any information was sent to the house of his maternal uncle Nagendra Singh (deceased). In paragraph No. 23 of his deposition the attention of this witness was drawn to the statement made by this witness before the police* regarding the manner in which he came to the place of occurrence, and the manner in which the occurrence took place. This witness asserted that he had made those statements before the police in course of investigation.

This witness in paragraph No. 26 of his deposition admitted that appellant Yugal Mistri was a resident of district Nawadah, and this witness had no connection with him whatsoever. He also admitted that he did not know him from before. In his examination-in-chief, this witness did not state that the house of Omprakash was surrounded by the witnesses and the persons of the locality who had assembled on alarm being raised. In his cross-examination, he categorically stated that they had not surrounded the house in the premises of M/s. Om Trading and that the said house was not kept surrounded. In his examination-in-chief, this witness had stated that at about 1.30 D.M. Sheo Sankar Prasad and Uday Sankar Verma had gone to the house of Omprakash and had come back immediately. In cross-examination, he stated that the heated discussions went on till 1.30 a.m. In between he used to go away to urinate, etc. Therefore, he could not say whether after one hour appellants Omprakash, Uday Sankar Verma and Sheo Shankar Prasad had gone and they had come back only at 1.30 a.m. This fact has relevance because according to the informant these persons had left the Petrol Pump of Parmar at 11.30 p.m. and he returned only at about 1.30 p.m. It was, therefore, sought to be urged that this witness was not really present or else he would not have given a different version.

11. Surendra Prasad Singh (PW 5) is the informant. He was also the nephew of deceased Nagendra Singh. According to him on 4.8.1993 at about 10 p.m. he was going to Parmar Petrol Station to search for his uncle Nagendra Singh who had not returned. On the way he was accompanied by Arbind Kr. Singh (PW 2). After reaching the Petrol Station at 10.30 p.m. he noticed that these appellants, as also

two persons unknown to him, were sitting on two cots while Jitendra Singh Parmar was sitting on a chair. On a Bench behind him his Manager Kali Pado Chakraborty (deceased). Nagendra Singh (deceased) and Birendra Kumar (PW 1), the Khalasi were sitting. He found that a heated discussion was going on between appellant Omprakash and Jitendra Parmar in connection with a truck. Such discussions went on till about 11.30 p.m., whereafter appellant Omprakash, Uday Sankar Verma, Bhola Kumar and Sheo Sankar Prasad got up and left. On reaching the petrol station this witness had requested his uncle Nagendra Singh to come home, but he refused saying that there was some dispute and he did not want to leave his master alone. This witness and PW 2 also stayed on. At about 1.30 p.m. Omprakash, etc. who had gone away, returned and started getting angry with Parmar. Thereupon Parmar asked his uncle (Nagendra Singh) and Manager Kali Pado Chakraborty to take the truck to the house of Omprakash and parked it there. Omprakash, etc. left that place followed by the witnesses and Arbind Singh (PW 2). His uncle Nagendra Singh, Manager Kali Pado Chakraborty and Khalasi Birendra Kumar (PW 1) started the truck and took it to the door of Omprakash and parked it there. This witness had also reached that place and saw that appellant Omprakash came out of his house. Kali Pado Chakraborty told him that accounts should be taken, whereafter he may keep the truck. Upon this appellant Omprakash started abusing him and exhorted his brother Uday Sankar Verma to assault him. Thereafter appellant Omprakash took out a revolver from his right pocket and entered the cabin of the truck and shot at his uncle Nagendra Singh. Appellant Uday Shankar Verma entered the truck from the left side and fired a second shot at his uncle Nagendra Singh. When Kali Pado Chakraborty started running away appellant Sheo Shankar Prasad chased him and taking out of the pocket of his pajama a revolver, shot at Kali Pado Chakraborty, who was hit and fell down. He witnesses this occurrence in the light provided by the cabin light., road light and the vapour lamp fixed outside the house of Omprakash. That night also was a moonlit night. After the occurrence all the accused persons saying that their work had been done went inside the house of Omprakash. The witness raised alarm and five or seven persons assembled there to whom he narrated the incident. Just at that time the police patrolling party arrived. The police party and the persons present there searched for the accused all around the house but they

could not be found. He made a statement before the police which was recorded and he signed that statement. The witness identified his signature on the fardbeyan which was marked Ext. 1/1. The police also recorded the statement of Arbind Singh (PW 2) and Birendra Kumar (PW 1). After inspecting the dead bodies, the officer-in-charge Arun Kumar Tiwari (PW 7) prepared necessary papers and signed on the same. The said papers were also signed by this witness and Arbind Singh (PW 2). In cross-examination, this witness stated that his house was at a distance of about 1-1/2 kms. from Parmar Petrol Pump. The house of PW 2 Arbind Singh was at a distance of 200 yards from his house and the place where the occurrence took place was at a distance of about 1 km. According to this witness the distance between Parmar Petrol Pump and Om Trading was about half km. and there were large number of houses on three sides of the premises of Om Trading. This witness also admitted that he did not know appellant Nawal Kishore Singh, who belonged to Gobindpur P.S. in the district of Nawadah. He neither knew him from before nor could he identify him by face. In paragraph No. 20 of his deposition, this witness has reiterated the statement made in the first information report that he along with PWs 2 and 5 or 7 other persons who had arrived there on alarm being raised, surrounded the premises of Om Trading and kept it surrounded till the police came. The police party also surrounded the house. The Investigating Officer enquired of them and on their telling him that the assailants had gone inside the house of Omprakash, the Investigating Officer went inside the house and arrested Bhola Kumar and brought him out. The Investigating Officer had entered the house along with other police men. Other assailants had run away. Thereafter the Investigating Officer went inside the cabin of the truck and after seeing the dead bodies prepared the necessary papers. The necessary papers were made in respect of both the dead bodies at about 3 a.m., whereafter the Investigating Officer went in search of other accused person. After making a search, he returned and then recorded the fardbeyan of this witness. This witness stated that deceased Nagendra Singh had three sons, of whom the eldest Shekhar was aged 20 to 22 years and was present in the house when he had left the house to search for Nagendra Singh. When his fardbeyan was recorded by the Investigating Officer, no member of his uncle's family (Nagendra Singh's family) or the family of Arbind Singh (PW 2) had come to the place of occurrence, Jitendra

Parmar had come to the place of occurrence much later at about 5 or 6 a.m. but by then the Investigating Officer had left. This witness also claims to have gone along with Arbind Singh (PW 2) to Kodarma, where the post-mortem on the dead bodies of the deceased was conducted. He admitted that he did not see his uncle Nagendra Singh eating anything while he was at the Petrol Pump and till he was murdered. According to this witness, all the three shots were fired within two or three minutes. Before the firing took place, the witness did not even suspect that the accused were carrying fire-arms. This witness further admitted that he had not (Given information to the police station about the occurrence, and he did not remember whether in the fardbeyan he had stated so. The police station was at a distance of 1-1/2 kms. from Om Trading where the occurrence took place. This witness stated that if one proceeds from the Petrol Station to his house, Om Trading would fall on the way. He further stated that even when the accused persons came back at about 1.30 a.m. to the Petrol Station, he did not suspect that they were carrying fire-arms. Even when his uncle Nagendra Singh was driving the truck to the premises of Om Trading he did not apprehend any danger. When the first shot was fired PW 1, Khalasi and Kali Pado Chakraborty, deceased, were standing on the right side of the truck after alighting from the truck. He then corrected himself by stating that they were on the left side of the truck. Kali Pado Chakraborty received the gun-shot injury when he was about five to six feet away from the assailant. A lot of blood had fallen at the place where the body of Kali Pado Chakraborty was lying. This witness categorically stated that he did not inform Jitendra Parmar about the occurrence nor did he send any one to inform him. He also did not inform the son of his uncle Nagendra Singh (deceased) nor did he send either PW 1 or PW 2 to inform him about the occurrence. He also did not go to the police station to lodge a report.

12. PW 7 Arun Kumar Tiwary was the officer-in-charge of Tilaiya Police Station on the night intervening the 3rd and 4th August, 1993. He deposed that he was on patrol duty that night. At about 3 a.m. on 4.8.1993 when he was passing through village Gomo, he recorded the fardbeyan of Surendra Pd. Singh (PW 5). He identified the fardbeyan which was in his handwriting and signed by PW 5 and the same was marked Ext. 3. He claims to have again recorded the statement of the informant. Thereafter he inspected the place of occurrence. He found that the

National Highway No. 31 runs from south to north and passes through village Gomo. The road is about 24' wide. On the western flank of the road he found the truck parked facing south. The light inside the cabin of the truck was burning and on entering the cabin of the truck he found the dead body of a person who was badly smeared with blood. There was lot of blood inside the cabin. The second dead body was lying at a point 30' south of the truck. The dead body was lying on the eastern portion of the road and was also blood smeared. He was told by the informant that dead body was that of Kali Pado Chakraborty. At a distance of about 20 yards from these two points where the dead bodies were found, was the house of accused Omprakash. The house had a gate facing west. Parmar Petrol Pump was at a distance of about 500 yards from the place of occurrence towards the south. He recorded the statement of Birendra Kumar (PW 1), Arbind Singh (PW 2), Bachulal (PW 3) and Hari Narayan Sharma (PW 4). He prepared the inquest report of Nagendra Singh and Kali Pado Chakraborty at 4 a.m. and 4.10 a.m. respectively. Both the dead bodies were sent under dead body challan to Kodarma hospital. At about 10 a.m. the Superintendent of Police had visited the place of occurrence and supervised the case. After obtaining the post-mortem reports, and after conclusion of the investigation he submitted charge-sheet against the accused persons.

During the course of investigation he could not meet the brother or nephew of deceased Nagendra Singh. The notice of this witness was drawn to column No. 7 of the charge-sheet wherein it was stated that the accused persons had killed the brother of the informant and Kali Pado' Chakraborty. According to this witness, he arrested appellant Sheo Sankar Prasad at 8.40 a.m. on the date of occurrence from his house. His house was searched but no incriminating article was found. Aforesaid Sheo Sankar Prasad had no criminal record. This witness further claims that soon after recording the fardbeyan he entered the premises of Om Trading and after making a search arrested appellant Bhola Kumar. No other accused was found within the premises. This witness admitted that in the case diary it is not recorded whether some persons had or had not surrounded the house of Omprakash. Appellant Yugal Mistri was arrested by this witness at 9.05 a.m. from his house on the same day, but on search no incriminating article was recovered from his house. Aforesaid Yunal Mistri also did not have a criminal record. This

witness also admitted that there is nothing recorded in the case diary as to whether any blood was found where the dead body of Kali Pado Chakraborty was lying. The bloodstained clothes of Kali Pado Chakraborty had not been seized. He had searched for empty cartridge near about the place where the dead body was lying, but he did not find any. There is also nothing in the case diary to show that there was any street light or vapour light between Sanjay Petrol Pump and Parmar Petrol Pump. However, at the place where the dead bodies were lying he did not find any street light or vapour light. The time when the statement of the witnesses was recorded after recording of fardbeyan is not mentioned in the margins of the case diary. This witness further admits that he did not go to Parmar Petrol Pump on the date of occurrence, but in course of investigation he had been to the Petrol Pump several times but he had not make any enquiry from the employees there. He also did not investigate that part of the prosecution story which related to the discussions which took place at the Petrol Pump just before the occurrence. Jitendra Parmar never attempted to meet the witness in course of investigation. Though this witness had been to his house several times during the course of investigation of the case, he could only meet his mother who told him that Jitendra Parmar was not there. When questioned as to where her son was on the date of occurrence, the mother did not give any clear reply. The witness also admitted that he did not prepare any sketch plan nor did he record any statement of any of the shop-keepers near Parmar Petrol Pump. He did not even record the statement of Jitendra Parmar or his mother during the course of his investigation. He also did not prepare a site map of the place of occurrence.

13. This witness claims to have examined appellant Uday Sankar Verma and Omprakash in jail on 4.10.1993. Appellant Uday Sankar Verma had stated before him that on 3.8.1993 from 4 p.m. to 12 p.m. and on 4.8.1993 from 8 a.m. to 4 p.m. he was on duty at Digwadih as D.G. Set Operator. He had also told him that enquiries could be made from his neighbors Suraj Nath Choubey and Rang Lai. Digwadih was more than 100 miles away from Tilaiya. This witness admitted that he did not record the statement of either Suraj Nath Choubey or Rang Lai nor did he correspond with higher officers of appellant Uday Sankar Verma. He had not been assigned by the Jail Superintendent to make any inquiry in this regard. Similarly, on 4.10.1993 appellant Omprakash in his statement made before this

witness had stated that he was getting himself treated at the Sub-Divisional Hospital at Garwah. He had also told him that he had filed documentary evidence in Court relating to his treatment between 3.8.1993 and 10.8.1993 and between 11.8.1993 and 14.8.1993. He did not investigate the plea of alibi of appellant Omprakash. As earlier noticed, he also did not investigate the plea of alibi of appellant Uday Sankar Verma. This witness denied that any person had been arrested by the villagers and handed over to the police. The notice of this witness was drawn to Ext. B which is the forwarding report prepared by the witness himself. The witness admitted that the forwarding report was in his handwriting and was signed by him. In the said forwarding report (Ext. B) the Investigating Officer while submitting memo of evidence has stated that after the occurrence the villagers had surrounded the aforesaid accused persons, and they were arrested by the police party. This fact has also been noticed by the trial Court. This witness stated that he was at the place of occurrence till about 7.45 a.m. but during that period Jitendra Parmar did not come to the place of occurrence. The defense also sought to elicit omissions and contradictions in the statements of PWs 2 and 5 and this witness has deposed in paragraph Nos. 28 and 39 about the statements made before him by the aforesaid two witnesses in course of investigation of the case.

15. On a consideration of the evidence on record the trial Court came to the conclusion that the evidence of PWs 1, 3 and 4 who were declared hostile, was not of any help to the prosecution and, therefore, the fate of the case hinged on the evidence of two eye-witnesses, namely, PWs 2 Arbind Singh and PW 5 Surendra Pd. Singh. Placing reliance upon the testimony of PWs 2 and 5 the trial Court held that the evidence on record clearly established that the first shot was fired at Nagendra Singh by Omprakash while the second shot was fired at him by appellant Uday Sankar Verma. The medical evidence was also found reliable and supporting the prosecution case. The trial Court held that accused Kali Pado Chakraborty was chased and shot at by appellant Sheo Sankar Prasad. Though the wound of entry in such cases should have been found on the back, the possibility could not be ruled out that while being chased the deceased turned round to look back on his chaser, and may have been shot at that very time. The trial Court held that the medical evidence noticed the presence of burnt soot which showed that the firing was from close range. The trial Court, therefore, relying on

the testimony of two eye-witnesses held that the prosecution had proved its case beyond reasonable doubt and, accordingly, found the appellants guilty.

16. Counsel for the appellants has submitted before us that the two eyewitnesses examined by the prosecution were wholly unreliable and neither of them had witnessed the occurrence. In all probability no one had witnessed the occurrence and the occurrence might have taken place much earlier in the night. After the murders were detected, the truck was brought to the alleged place of occurrence and the dead body of Kali Pado Chakraborty was put at a distance from the truck with a view to corroborate the concocted case of the prosecution. It was also submitted that there is material on record to establish that the first information report was not recorded at 3 p.m., as alleged, but was recorded later. There is also intrinsic evidence to show that the fardbeyan had been prepared after consultation and due deliberations and was not the true version disclosed by the informant; otherwise the name of Nawal Kishore Singh, who was not known to either of the eye-witnesses, would not have found mention in the fardbeyan. It was submitted that the medical evidence on record also did not support the prosecution case. The conduct of the alleged eye-witnesses was must unnatural, inasmuch as they neither reported the matter to the police nor did they send any information to the relatives of the deceased. There was considerable delay in the despatch of the special report since the FIR was seen by the ACJM, Kodarma only on 5.8.1993. In any event, it was submitted that no case was made out against those appellants, who had not taken any active part in the assault. The (sic) justified in the facts and circumstances of the case.

17. Counsel for the appellants submitted that the trial Court has accepted the prosecution evidence on its face value without critically scrutinizing the evidence on record. If the evidence on record is carefully examined and analysed, many inconsistencies in the prosecution case will be revealed, and having regard to the infirmities in the prosecution case that will appear on a critical scrutiny of the evidence on record, this Court must hold that the prosecution case has not been established beyond reasonable doubt. It was submitted that one or two circumstances here and there may not affect the prosecution case, but if all the circumstances are considered together, that would render the prosecution case

unbelievable. Counsel, therefore, took us to the evidence on record and pointed out these infirmities.

18. The genesis and manner of occurrence, as alleged by the prosecution, has been seriously challenged, and in fact it has been submitted that the two alleged eye-witnesses were not present when the occurrence took place, and indeed the occurrence took place at a different place and in a different manner unknown to the witnesses. The evidence on record established that in all probability Nagendra Singh and Kali Pado Chakraborty were murdered elsewhere and when this was known, the truck was brought to the alleged place of occurrence and a false case was thereafter concocted implicating the appellants.

In this connection, it was urged that the prosecution case that a heated discussion preceded the murders was itself not established beyond reasonable doubt. PWs 2 and 5, the alleged eye-witnesses, were really speaking chance witnesses. Their presence was doubtful. They have no doubt deposed about the heated exchanges which preceded the occurrence. The real dispute was between Jitendra Parmar on the one hand and Omprakash on the other. Admittedly, the dispute was in relation to the truck in question. So far as the deceased are concerned, they were employees of Jitendra Parmar, and it is not alleged that the appellants had any enmity with them. The reason for their murder, as alleged by the prosecution is that they were the men of Parmar. It is the case of the prosecution that the Petrol Pump in question where heated exchanges took place is on the main National Highway No. 31. PWs 2 and 5 have admitted in course of their cross-examination that they now and then went to take tea, etc. Even the Investigating Officer found that there were shops near about the Petrol Station. Surprisingly the Investigating Officer made no effort to verify whether the prosecution case with regard to the heated exchanges that preceded the murder was true. He did not even make an attempt to question the shop-keepers nearby as to whether any such meeting had taken place immediately preceding the occurrence. So much so, that he did not even visit the Petrol Station of Parmar on the morning of the date of occurrence. Not only this, he did not examine Jitendra Parmar at all during the course of investigation. Counsel for the appellants has seriously criticised the conduct of the Investigating Officer and submitted that Jitendra Parmar may not have been an

eye-witness to the occurrence, but he was an important witness who could have unfolded the prosecution case. He was one witness who could have deposed as to whether there was any heated exchange of words at his Petrol Station. Apart from this, it does not stand to reason that Jitendra Parmar could not have been informed about the occurrence which took place only at a distance of about 500 yards from his petrol station and within a few minutes of his directing his driver, Nagendra Singh (deceased) and others to take the truck and park it at the house of Omprakash. If the prosecution case is true, he would have been the first person who would have been informed about the occurrence. In my view, the criticism levelled against the Investigating Officer is justified. It has been stated that neither of the witnesses claimed to have informed Jitendra Parmar about the occurrence. This by itself is surprising, but what is also significant is the fact that according to PW 5, Jitendra Parmar came to the place of occurrence at about 5 or 6 a.m. The Investigating Officer in course of his deposition has stated that he was at the place of occurrence till about 7.45 a.m. If it was so, it is difficult to believe that Jitendra Parmar had not met the Investigating Officer. Even assuming that they did not meet at that time, the conduct of the Investigating Officer in not making serious effort to question Jitendra Parmar is rather suspicious. This only strengthens the criticism levelled by the defence that Jitendra Parmar kept himself behind the scene and pulled strings without himself coming into the picture. In any event, the Investigating Officer could have made efforts to examine Jitendra Parmar in course of investigation. His explanation that he had visited his house on several occasions and on each occasion he was told by his mother that he was not available, to say the least, is not convincing. The appellants are, therefore, justified in making a submission that the non-examination of an important witness like Jitendra Parmar without any plausible explanation creates a doubt about the truthfulness of the prosecution story. As earlier observed, apart from PWs 2 and 5, the alleged eye-witnesses, no other witness was examined to support the prosecution case as regards the heated exchanges which preceded the occurrence. In fact, the Investigating Officer made no efforts to verify this part of the prosecution case during the course of investigation.

19. It is the prosecution case that after heated exchange of words between the appellants on one side and Jitendra Parmar on the other, the latter directed his

driver Nagendra Singh (deceased) to take the truck and park it in front of the house of Omprakash. From the evidence of the Investigating Officer based on his objecting findings, it cannot be doubted that the National Highway runs from south to north. Parmar's Petrol Station is located on this Highway. The Investigating Officer found that the house of Omprakash, sometimes described as Om Trading, is located at a distance of about 500 yards north of the petrol pump at a distance of 20 yards from the eastern flank of the road. It is the prosecution case that on the order of Omprakash the truck was driven by Nagendra Singh (deceased) from the petrol pump to a point in front of the house of appellant Omprakash. This means that the truck travelled from south to north. It is the evidence of PW 5 that while Nagendra Singh (deceased) was switching off the engine, Omprakash shot at him after boarding the cabin from the right side of the vehicle. If the occurrence took place in the manner alleged by PW 5, the truck should have been found parked on the western flank of the road facing north. The evidence of the Investigating Officer is that the truck was found on the western flank of the road facing south. It is no one's case that the truck was parked in this manner. On the contrary from the deposition of eye-witnesses, it appears that the truck was driven from south to north and parked opposite the house of Omprakash. In these circumstances, the truck should have been found parked by the side of National Highway facing north and not facing south, as found by the Investigating Officer. Counsel for the appellants submitted that this objective finding of the Investigating Officer belies the prosecution case that the truck came from south to north. In fact it would support the defence case that the occurrence took place elsewhere, may be at any place further north of the house of Omprakash from where it was brought and parked at the place of occurrence. That would sufficiently explain why the truck was found facing south i.e., facing towards the petrol pump of Parmar when it should have been found facing in

the opposite direction. It was, therefore, submitted that the story of exchange of heated words at the petrol station of Parmar and the movement of the vehicle thereafter from the petrol Pump to a place opposite the house of Parmar is rendered doubtful and in fact the place of occurrence shown by the prosecution is not really the place of occurrence.

It was' submitted that according to the prosecution, Kali Pado Chakraborty started running away after Nagendra Singh was shot. While he was trying to escape he was shot at by Sheo Sankar Prasad. He fell down at the spot and died. If the prosecution case as narrated was true, copious blood should have been found at the point where Kali Pado Chakraborty fell after receiving the gunshot injury. The Investigating Officer was not in a Position to state whether there was any blood found at the place where Kali Pado had fallen. In fact in the case diary there was nothing to indicate whether any blood was found at the place where Kali Pado Chakraborty had fallen. No sample of earth was taken from that place for chemical analysis. This has led the defence to argue that though Nagendra Singh and Kali Pado Chakraborty were both murdered inside the cabin of the truck, only to make out a case to support the prosecution version, it was sought to be established that Kali Pado Chakraborty was chased and killed at a different point. That explains the absence of blood at the place where Kali Pado Chakraborty fell, otherwise the Investigating Officer would have surely recorded his observation in the case diary that blood was found where the dead body of Kali Pado Chakraborty was found.

20. The prosecution case about Kali Pado Chakraborty being chased and shot has also to be tested in the light of medical evidence on record. So far as Kali Pado Chakraborty is concerned, the clear case of the prosecution is that Sheo Sankar Prasad chased him and after taking out a pistol fired at him. According to the Investigating Officer, the dead body was found at a distance of about 30 feet from the truck, but was lying on the eastern flank of the National Highway. According to PW 2, Kali Pado Chakraborty was fired at by appellant Sheo Sankar Prasad from a distance of about five hands (7-1/2 feet). According to PW 5, Kali Pado Chakraborty was fired at by Sheo Sankar Prasad from a distance of about 5 to 6 feet. Having regard to these facts and circumstances, wound of entry should have been found on the back of Kali Pado Chakraborty, but the medical evidence discloses that the wound of entry was on the left side of the chest above left nipple and there was evidence of burning soot present around the wound of entry. He also found the wound of exit which was lacerated wound on the left side posteriorly with averted margin which was free from scarring and tattooing. The trial Court has explained away these circumstances by observing that Kali Pado Chakraborty may have turned back to see where his assailant was. This to my

mind was a mere conjecture. At least there is no evidence to support this finding. Moreover, the presence of burning soot around the wound of entry is indicative of the fact that the firing was done from very close range, may be from one feet or so, if not point blank range. This does raise a serious doubt about the manner in which Kali Pado Chakraborty was killed and on the fateful day.

21. The medical evidence also discloses that there was only one wound of entry so far as the deceased Nagendra Singh is concerned. The wound of entry was lacerated wound located on right shoulder posteriorly with inverted edges. In his case also, there was presence of burning soot and a dark ring around the wound of entry. He also found the wound of exit which was located 2' below the left nipple on left chest with the irregular and averted margin. The prosecution has sought to make out a case that two persons fired at Nagendra Singh, both from very close range. Appellant Omprakash first got up from the right side of the cabin and fired at Nagendra Singh, and the second shot was fired immediately thereafter by Uday Sankar Verma, who got up from the left side of the vehicle. It is not very material as to whether they stood on the foot-board and fired at Nagendra Singh or whether they entered the cabin and fired at him. There is some inconsistency in this regard. However, the case made out by the prosecution that two shots were fired, both from very close range does not appear to be true and is clearly negated by the medical evidence on record. The question of any of the assailants missing his target must be ruled out because the firing was from very close range. The prosecution story that two shots were fired at Nagendra Singh only strengthens the suspicion that the eye-witnesses having not seen the occurrence were made to say so since there were two injuries on the dead body of Nagendra Singh. This also helped the prosecution to implicate at least one more accused in the case. The prosecution did not realise that the wound was only an exit wound and was not caused by another gun shot. .

The doctor (PW 7) has stated that he found the bladder of Nagendra Singh empty and in his opinion he might have urinated two to four minutes before his death. He was also of the opinion that the deceased would have taken food three hours before his death. The presence of undigested food in the stomach of both the deceased does support the opinion of the doctor that they must have taken some

food within three hours of their death. The oral evidence provided by PWs 2 and 5 on this point is to the contrary. These witnesses were with the deceased right from 10.30 p.m. till the time of their death i.e. about 2 a.m. Neither of them had seen either of the deceased taking any food between 10.30 p.m. and 2 a.m. No doubt, PW 5 in course of his cross-examination later stated that he had seen them taking tea at times. It was, therefore, submitted on behalf of the appellants that the occurrence had taken place soon after the deceased had taken food, and that explains the presence of undigested food in their stomach. This belies the case of the prosecution that from 10.30 p.m. onwards and till the time of their death they had not taken any food. The earlier story that they were having discussions at the petrol pump of Parmar, and had not taken any food is belied by this circumstance alone, and it gives rise to a serious suspicion about the occurrence having taken place at a different place and in different circumstances. I have considered some of the infirmities pointed out by counsel for the appellants and to my mind also it appears that the medical evidence on record does not fully corroborate the prosecution case. The presence of undigested food in the stomach of both the deceased does lead to the inference that they must have taken food within at least two to three hours of the occurrence, and that they were murdered soon after they had taken food. The presence of burning soot round the wound of entry is also indicative of the fact that they were shot at from almost point blank range. The story that Kali Pado Chakraborty was chased and shot at from a distance of 5 to 7 feet does not appear to be true and the existence of wound of entry on his chest makes the story even more doubtful.

22. The presence of two eye-witnesses, namely, PWs 2 and 5 has been strongly disputed by the appellants. It was submitted before us that these two witnesses are tutored witnesses, who came on the scene of the occurrence much later. In a parrot like fashion, they have narrated the occurrence, but their cross-examination reveals that they were not really present or else their conduct would have been different. They were both chance witnesses, as their presence at the place of occurrence was not expected in normal course. They have themselves admitted certain facts which make their testimony doubtful.

23. It is established on record that Nagendra Singh (deceased) was the maternal uncle of PW 2 and the paternal uncle of PW 5. PW 5 resided with Nagendra Singh (deceased) along with other family members including the son of Nagendra Singh, namely, Shekhar, who was about 20-22 years old. According to PW 2, his house was at a distance of about 200 yards from the house of Nagendra Singh (deceased). The police station was at a distance of about 400 yards from his house. The house of Omprakash was at a distance of about 1-1/2 'km. from his house. PW 5 has also admitted that if one goes from Parmar Petrol Station to his house, which was also the house of Nagendra Singh (deceased), the house of Omprakash will fall on the way. According to him, his house was at a distance of about 1-1/2 km. from the Petrol Pump and about 200 yards from the house of PW 2. This witness further admitted that the police station was only at a distance of about 1-1/2 km. from the house of Omprakash. As found by the Investigating Officer, the truck was found parked near the house of Omprakash at a distance of about 500 yards south of the Petrol Pump of Parmar. These facts which are admitted establish that the place of occurrence is very near the residences of the eye-witnesses and also very near the Tilaiya Police Station. It was submitted that PW 5 claims to have come to Parmar Petrol Station on finding that his uncle Nagendra Singh (deceased) had not returned home till about 10 p.m. On the way he met PW 2 who accompanied him to Parmar's Petrol Station. It was, therefore, submitted that these two witnesses are more chance witnesses and their evidence is unreliable.

24. It cannot be said as a matter of principle that chance witnesses can never be relied upon. A Court may entertain some doubt about their presence at the time of occurrence, but that doubt is dispelled if their evidence is otherwise found to be truthful and free of infirmities. Their evidence, therefore, requires a careful scrutiny before acceptance. It may be that tutored witnesses may depose in a consistent manner, but the whole purpose of cross-examination of witnesses is to bring out the infirmities in their evidence by eliciting facts regarding manner of occurrence as also other events and incidents intimately connected with the occurrence. If on a perusal of their evidence, it appears to the Court that the consistency in their evidence is only confined to the main part of the occurrence, and that their evidence in regard to other matters connected with the commission of the offence

is discrepant or contradictory, the Court may not rely upon such witnesses. I am, therefore, not persuaded to reject the testimony of these two eye-witnesses only on the ground that they are chance witnesses. It is necessary to critically scrutinise their evidence before accepting the same as truthful.

25. According to PW 5, the appellants and two others were seen at the Petrol Station at 10.30 p.m. when he arrived there with PW 2. The heated discussion continued for about an hour and thereafter at about 11.30 p.m. appellants Omprakash, Uday Sankar Verma, Bhola Kumar and Sheo Sankar Prasad left for the house of Omprakash. They again returned at 1.30 a.m. and it was thereafter that Jitendra Parmar asked his driver Nagendra Singh to take the truck and park it at the house of Omprakash. PW 2 does not support this version of PW 5. According to him, the heated discussions continued till 1.30 a.m. and only then some of the appellants went home but came back immediately. The absence of as many as four of the appellants between 11.30, p.m. and 1.30 a.m. from the Petrol Station was not noticed by PW 2. When he realised this, later in his cross-examination, he tried to explain this by saying that he sometimes used to go to urinate, etc. and, therefore, he could not say whether three of the appellants went away at 11.30 p.m. and came back at 1.30 a.m. Counsel for the appellants submitted that if really PWs 2 and 5 have together witnessed the heated exchanges that took place at the petrol station, the absence of four of the main appellants from the petrol station for almost two hours could not have been missed by PW 2. It was, therefore, submitted that this inconsistency in their deposition does indicate that they were not present at the petrol station of Parmar and they were speaking from imagination. This is only one of the circumstances pointed out by Counsel for the appellants, but there are other circumstances which have also to be noticed before one can say with any amount of confidence that these witnesses were present when the occurrence took place.

26. According to PW 2, after the occurrence took place all the appellants entered the house of Omprakash on alarm being raised by the eye-witnesses. Some people of the locality came to whom they narrated the occurrence. None of these persons of the locality has been examined by the prosecution in support of its case. What is, however, significant is the fact that PW 2 did not mention that all the

appellants raised slogan that their work was done and so shouting they entered the house of Omprakash. He also did not state that eyewitnesses with the help of other persons of the locality surrounded the house of Omprakash till the police party came. In cross-examination, he categorically stated that the house of Omprakash was not surrounded by him and other members of the locality who had assembled.

PW 5 gives a different version. According to him, after the two murders took place all the appellants raised Jaikar and loudly said that their work was done. They thereafter entered the house of Omprakash. In the first information report, PW 5 has stated that the eye-witnesses along with others who had assembled surrounded the house of Omprakash and sent information to the police station. In his deposition, before the Court PW 5 stated that after firing the eye-witnesses and five or seven persons who had assembled surrounded the house of Omprakash for about 5 to 7 minutes, whereafter the police party came and they also surrounded the house of Omprakash in the front. They search for the accused all around the house of Omprakash, but they were not found. Only Bhola Kumar was arrested by the Investigating Officer.

27. Apart from the fact that it is stated in the first information report itself that the house of appellant Omprakash was surrounded by the eye-witnesses and the persons who had assembled there, which is supported by PW 5 in course of his deposition, there is also the forwarding report of the Investigating Officer (Ext. B) dated 5.8.1993 under which appellants Sheo Shankar Prasad, Yugal Mistri and Bhola Kumar were forwarded together with memo of evidence. In that memo of evidence, it is mentioned by the Investigating Officer himself that after the occurrence the villagers surrounded the aforesaid accused persons and they were arrested by the police party. The Investigating Officer was shown Ext. B and he admitted that the same was in his handwriting and bore his signature. However, in course of his deposition the Investigating Officer (PW 7) gave a different version. According to him, Bhola Kumar was arrested from the house of Omprakash soon after the occurrence while Sheo Sankar Prasad was arrested at 8.40 a.m. from his house. Similarly, Yugal Mistri was arrested from his house at 9.05 a.m. Neither any incriminating article was found¹ on search of the house of the accused nor did

they have any criminal antecedent. The prosecution has failed to explain the facts stated in the forwarding report along with the memo of evidence. One fails to understand how the Investigating Officer could have stated that those three accused persons had been surrounded by the villagers and arrested by the police, when the same Investigating Officer has deposed in Court and stated that they were arrested from their respective houses at different times. Apart from the submission that appellants Sheo Shankar Prasad and Yugal Mistri would not have been found in their houses if they had really taken part in the occurrence a few hours earlier, Counsel for the appellants submitted that the first information report itself is a concocted document and till the time the arrested accused were forwarded the prosecution had not made up its mind as to the story which it was going to put forward in course of investigation. There is no other reason why contrary to the first information report, in the forwarding report the Investigating Officer should have mentioned that three of the accused persons had been surrounded by the villagers and arrested by the police, when that was not a fact. This discrepancy has not been explained by the prosecution and it does create some doubt as to the manner in which the aforesaid

accused persons were arrested. Counsel for the appellants submitted that though it may not be very material as to how those accused persons were arrested and when, this much is apparent that the Investigating Officer was not impartial in the investigation, and had succumbed to the pressure of the prosecution party to concoct a false case. The first information report is an ante-timed document and had, perhaps, not seen the light of the day till the forwarding report was prepared by the Investigating Officer. In my view, the submission urged on behalf of the appellants gains strength when one looks to other evidence on record which does give rise to a suspicion that the first information report was not recorded at 3 a.m., as alleged, but is an ante-timed document.

28. The fardbeyan is alleged to have been recorded at 3 a.m. According to the Investigating Officer it was sent to Kodarma police station for recording a case soon thereafter, and it appears that on the basis of the said fardbeyan Tilaiya (Kodarma) P.S. Case No. 218 of 1993 was instituted allegedly at 4.30 a.m. The distance between Tilaiya and Kodarma is not much and can be covered by vehicle

in about 20-25 minutes time. Kodarma is a small township and the police station is very close to the Civil Court as also to the residence of judicial officers. The distance may only be a few hundred yards. We can take judicial notice of these facts as Tilaiya and Kodarma, both fall on the way to Patna from Ranchi and they are all located by the side of National Highway, which we see whenever we go to Patna from Ranchi or vice versa. In such a situation, if the case was instituted and FIR recorded at 4.30 a.m. on 4.8.1993, the special report should have been received by the Additional Chief Judicial Magistrate on the same day. It, however, appears from Ext. 3 that the ACJM, Kodarma saw the special report on 5.8.1993 i.e., one day later. No explanation has been offered by the Investigating Officer as to why the special report was not despatched immediately to the Court of ACJM, which was only a few hundred yards away from Kodarma police station. In the absence of such explanation, a serious doubt arises as to whether the fardbeyan as also the formal first information report was really prepared at a time they are purported to have been prepared. Counsel placed considerable reliance on a decision of the Supreme Court in *Maharaj Singh v. State of Uttar Pradesh* : 1995 CriLJ457 , wherein the Hon'ble Supreme Court has observed that a first information report in a criminal case and particularly in a murder case is a vital and valuable piece of evidence for the purpose of appreciating the evidence led at the trial. The object of insisting upon prompt lodging of the first information report is to obtain the earliest information regarding the circumstances in which the crime was committed, including the names of the actual culprits and the parts played by them. Delay in lodging the first information report often results in embellishment, which is a creature of an afterthought. On account of delay, the first information report not only gets bereft of the advantage of spontaneity, danger also creeps in of the introduction of a colored version or exaggerated story. With a view to determine whether the first information report was lodged at the time it is alleged to have been recorded, the Courts generally look for certain external checks. One of the checks is the receipt of the copy of the FIR, called a special report in a murder case, by the local Magistrate.. If this report is received by the Magistrate late it can give rise to an inference that the FIR was not lodged at the time it is alleged to have been recorded, unless, of course the prosecution offers a satisfactory explanation for the delay in dispatching or receipt of the copy of the

FIR by the local Magistrate.

Relying upon the observations of the Supreme Court Counsel for the appellants submitted that this Court must hold that in the instant case the FIR came to be recorded later after due deliberations and consultations and was then ante-timed to give it a colour of promptly lodged FIR. In my view the appellants are justified in submitting that having regard to the delay in despatch and receipt of the special report by the ACJM and in the absence of any good explanation for the delay, a serious doubt arises as to whether the fardbeyan and the FIR were recorded at the time they are alleged to have been recorded. This, to my mind, is a serious infirmity in the prosecution case.

29. There is also no consistency in the prosecution evidence as to when the fardbeyan was recorded. According to the Investigating Officer, as soon as he reached the place of occurrence and the matter was reported to him, he recorded the fardbeyan of PW 5. According to PW 2, the police first arrested Bhola Kumar and only thereafter the statements of the eye-witnesses and Khalashi Birendra Kumar (PW 1) were recorded. This obviously means that the police did not promptly record the statement of PW 5 and it was only after some time that his statement was recorded after they had searched for the accused and arrested one of them. From the deposition of PW 5, it appears that after the arrival of the police the Investigating Officer made enquiries from him, whereafter he searched the house of Omprakash from where Bhola Kumar was arrested. He thereafter went to the cabin and prepared the necessary papers with regard to the dead bodies meaning thereby inquest report. After preparing those papers the Investigating Officer went to search for other accused persons. He returned after some time and only thereafter he recorded his fardbeyan. It thus appears from the evidence of PWs 2 and 5 that the fardbeyan was not immediately recorded but was recorded much later, and the version given by the Investigating Officer in this regard is not supported by the testimony of the two eye-witnesses. Counsel submitted that this is not the only reason to suspect the genuineness of the fardbeyan, there is also another strong reason to suspect that the fardbeyan was recorded much later and after due deliberations.

30. It was submitted that admittedly one of the accused Nawal Kishore Singh was not known to either of the eye-witnesses. PW 2 as well as PW 5 have stated in their deposition that they did not know Nawal Kishore Singh either by name or by face. They had seen him for the first time on the date of occurrence. It is, therefore, surprising to find the name of Nawal Kishore Singh mentioned in the fardbeyan recorded on the statement of PW 5, who did not know him. PW 2 also could not be of much help since he also did not know the aforesaid Nawal Kishore Singh. If the prosecution case is to be believed, there was no other person present at the time of recording of first information report who could supply the name of Nawal Kishore Singh. It is, therefore, surprising to find that the name of an accused not known to the informant was mentioned in the fardbeyan without there being any chance of prompting by any other person known to that accused being present at the time of recording of the fardbeyan. In the fardbeyan, the name of accused Nawal Kishore Singh is mentioned, and he has been described as the Mukhiya of Gobindpur in the district of Nawadah. Obviously, the name of Nawal Kishore Singh was got included in the first information report on the prompting of someone and that must have been done later because there was no one present at the time of recording of the fardbeyan who was known to Nawal Kishore Singh. This casts serious doubt as to whether the fardbeyan was recorded at the instance of PW 5 and whether it was recorded at the time it is alleged to have been recorded. Obviously at a later stage the fardbeyan was prepared including all names with necessary particulars. Counsel for the appellants submitted that this also discloses the unfair manner in which investigation was conducted. On the one hand the Investigating Officer made no efforts to record the statement of Jitendra Parmar, while on the other these facts indicate that Jitendra Parmar was instrumental from behind and was misleading the course of investigation. The suspicion entertained by the defence, in the facts and circumstances noticed above, is fully justified.

31. The conduct of two alleged eyewitnesses also leaves much to be desired, and makes their presence at the time of occurrence doubtful. As noticed earlier, the occurrence took place very near the houses of the alleged eye-witnesses. Both the eye-witnesses were related to one of the deceased, namely, Nagendra Singh. The other deceased was a resident of their locality as admitted by PW 2. The son of

Nagendra Singh was also residing with him. According to PW 2, the police arrived at the place of occurrence about half an hour to forty-five minutes after the occurrence. As noticed earlier, the police station at Tilaiya (Top) was also not far away from the place of occurrence, and was 400 yards from the house of PW 2, as stated by him. In the fardbeyan though it was stated that necessary information had been sent to the police, in course of his deposition PW 5 denied that he had sent information to the police about the occurrence. It was expected that in the circumstances in which two persons had been killed, a related eyewitness would have made an effort to inform the police about the occurrence particularly when the police station was nearby. The fact that the police patrolling party came on its own was a matter of chance. The conduct of the eyewitnesses appear to be unnatural. As stated by them, several persons had assembled at the place of occurrence soon after the occurrence. In the circumstances, it is natural to expect that eye-witnesses would have immediately informed Jitendra Parmar about the occurrence, since the deceased were his employees and the petrol station of Parmar was only at a distance of about 500 yards from the place of occurrence. This is all the more significant because only a few minutes earlier, on the orders of Parmar the vehicle had been sent to the house of Omprakash. It could not have taken much time for the truck to cover the distance of 500 yards from the petrol pump of Parmar to the place of occurrence. Admittedly, no effort was made to inform Jitendra Parmar about the occurrence. What is more surprising is that even if no effort was made to inform the police, the witnesses did not even make an effort to inform the family members of Nagendra Singh and Kali Pado Chakraborty, deceased. PW 2 was the maternal nephew of Nagendra Singh while PW 5 was his paternal nephew living with him. Admittedly, there were other members of the family living with Nagendra Singh including his grown-up son aged about 20-22 years. The natural conduct of the witnesses would have been to immediately inform the members of the family of the deceased who were residing nearby. Even that was not done and the witnesses kept waiting at the place of occurrence till such time as the dead bodies were removed for post-mortem examination which was sent at about 7 or 8 a.m., as stated by PW 2. According to PW 5 it was only on the following day that he met the members of the family of his uncle Nagendra Singh (deceased). He admitted that on the earlier day he had made no effort to

inform the family members about the occurrence. These facts do create a suspicion about the presence of the eye-witnesses at the time of occurrence.

32. Counsel for the appellants also adversely commented on the conduct of the Investigating Officer. The Investigating Officer has admitted that appellants Omprakash and Uday Sankar Verma were examined in jail on 4.10.1993. Both of them had disclosed to him their plea of alibi. Appellant Omprakash had told him that he was getting himself treated at Garwah at the time of occurrence, and that he had filed papers in Court to show that he was being treated at Garwah between 3rd August, 1993 and 14th August, 1993. Similarly appellant Uday Sankar Verma had stated before him that on 3.8.1993 from 16 hours to 24 hours and on 4.8.1993 from 8 a.m. to 4 p.m. he was on duty at Digwadih as D.G. Set Operator. Digwadih is more than 100 miles away from Tilaiya. He had told him that this fact could be verified from his neighbour Suraj Nath Choubey and Ranglal. The Investigating Officer did not at all investigate the plea of alibi set up by these two appellants, as admitted by him. This only showed that he was partisan in his attitude and was not impartial, as he was expected to be. I have considered the submission urged before us. An Investigating Officer is expected to be impartial and fair, and if a plea is set up in defence in course of the investigation, it is his duty to investigate the matter and to collect necessary facts, which must be placed before the Court, if necessary. The conduct of the Investigating Officer cannot meet our approval. In the first instance he did not examine one of the important witnesses in the case, namely, Jitendra Parmar, and the excuse given for not examining him as a witness are not satisfactory. In his forwarding report, he mentioned that three of the accused persons had been surrounded by the villagers and arrested by the police, but in course of his deposition in Court he gave a different story altogether. All the three accused were arrested by him at different times from their respective houses. There is also evidence to indicate that the first information report may have been ante-timed. No explanation is forthcoming from the prosecution as to why the special report was not received immediately by the ACJM, Kodarma when the same was recorded at 4.30 a.m. on 4.8.1993. Even the Inspector of Police who prepared the formal first information report at Kodarma police station was not examined. There is, therefore, reason for the defence to entertain a grievance that the Investigating Officer was not fair in his investigation. That by itself does not

lead to the conclusion that the prosecution case is false, but in the light of other circumstances discussed above, I have serious doubt about the truthfulness of the prosecution case.

33. In any event, so far as appellants Bhola Kumar, Yugal Mistri and Nawal Kishore Singh are concerned, it is not possible to sustain their conviction with the aid of Section 34, IPC. Admittedly none of them fired at the deceased and in fact no overt act is alleged against them. Assuming that they were present at the petrol station of Parmar and were the associates of Omprakash, that by itself would not necessarily lead to the inference that they shared any common object of committing the murder of anyone, much less the murder of Nagendra Singh and Kali Pado Chakraborty, who were not directly concerned and they were mere employees of Jitendra Parmar with whom Omprakash had dispute. From the depositions of PWs 2 and 5, it appears that even they did not suspect that untoward incident might take place. PW 2 has said so categorically and so has PW 5. In fact PW 5 has gone to the extent of saying that even on the return of the accused persons at 1.30 a.m. he did not suspect that they were carrying any weapon and did not apprehend any danger to the life of the deceased. It, therefore, appears that inspite of the heated exchanges that took place in connection with the dispute regarding the ownership of the truck between Omprakash and Jitendra Parmar, no one entertained a suspicion that any such occurrence will take place as a result thereof. It did not appear to the witnesses that any of the appellants were armed, nor is there any evidence to establish that other accused persons knew that some of them were carrying firearms. In these circumstances, even if they took part in the discussions between Omprakash and Jitendra Parmar, it cannot be said that at that stage they shared any common intention to commit the murder of anyone. Thereafter, they all left the petrol station and proceeded towards the house of Omprakash. The prosecution case is that Omprakash came out of his house and exhorted his brother Uday Sankar Verma to assault the deceased. He took out a pistol from his pocket and fired at Nagendra Singh. His brother Uday Sankar Verma did likewise. The other Shree accused did not take any part in the occurrence nor did they do anything to facilitate commission of the crime. Similarly, Kali Pado Chakraborty is alleged to have been chased by Sheo Sankar Prasad, who, according to PW 5 took out a

pistol from the pocket of his pajama and fired at Kali Pado Chakraborty. In these circumstances, it cannot be said that these appellants and three others had formed themselves into an unlawful assembly. They have been convicted with the aid of. Section 34, IPC, but to my mind even that section is not applicable in the facts and circumstances of the case. Their very presence, even if it be admitted, does not necessarily lead to the inference that they shared any common object with the other accused persons. At best, it can be said that Omprakash, Uday Sankar Verma and Sheo Sankar Prasad acted in concert and developed a common intention at the spur of moment after Omprakash exhorted his brother to assault the deceased. The remaining appellants did not take any part in the assault and were mere spectators. They did not do anything to facilitate commission of the offence nor did they do anything else from which it can be inferred that they must have shared the common intention of causing the death of Nagendra Singh and Kali Pado Chakraborty. Moreover, the common intention was sought to be established by stating that they all went back to the house of Omprakash shouting that their work was done. Even on this aspect of the matter, the prosecution evidence is not consistent. PW 2 does not say that the accused persons raised any slogans or shouted that their work was done, though PW 5 had said so in course of his deposition. I am, therefore, of the view that even if the prosecution case is accepted, appellants Bhola Kumar, Yugal Mistri and Nawal Kishore Singh cannot be convicted with the aid of Section 34, IPC.

34. Having regard to the infirmities in the prosecution case earlier discussed in this judgment, I am of the view that the prosecution has not been able to prove its case beyond reasonable doubt. There are serious infirmities in the prosecution case which make the case doubtful. The appellants are, therefore, entitled to the benefit of doubt.

35. In the result, Criminal Appeal Nos. 33, 38 and 41 of 1996(R) are allowed. The appellants are acquitted of all the charges leveled against them. The appellants in Criminal Appeal Nos. 38 and 41 of 1996 (R) as also appellant Uday Sankar Verma in Cr. Appeal No. 33 of 1996(R) are in custody. They are directed to be released forthwith unless required in connection with any other case. The remaining appellants are on bail. Their bails bonds are discharged.

