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Court : Supreme Court of India

Decided On : Jan-09-1996

Reported in : 1996IAD(SC)469; AIR1996SC2905; 1996(1)ALD(Cri)84; 1996(1)BLJR596; 1996CriLJ1653; 1996(1)Crimes11(SC); (1996)3GLR726; JT1996(1)SC93; 1996(4)KarLJ238; 1996(1)SCALE162; (1996)

Judge : G.N. Ray and; G.T. Nanavati, JJ.

Acts : Code of Criminal Procedure (CrPC) , 1974 - Sections 161(3) and 172; [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 147, 149, 302, 303 and 323; [Arms Act, 1959](#) - Sections 27

Appeal No. : Criminal Appeal No. 1 of 1989.

Appellant : Behari Prasad Etc. Etc.

Respondent : State of Bihar

Advocate for Def. : S.N. Jha and ; Anil Kumar Jha, Advs.

Advocate for Pet/Ap. : Sushil Kumar,; U.R. Lalit,; Pramod Swarup,;

Prior history : From the Judgment and Order dated 31.3.87 of the Patna High Court in Crl. A. No. 390 of 1983.

Judgement :

ORDER

1. All these appeals arise out of a common judgment dated March 31, 1967 passed by the Patna High Court in Criminal Appeal No. 390 of 1983 (Uday Prasad and two others v. State of Bihar) and Criminal Appeal No. 382 of 1983 (Sheoji Prasad v. State of Bihar) arising out of the judgment dated July 18, 1983 passed by the learned 4th Additional Sessions Judge. Arrah in Sessions Trial No. 314 of 1981. By the impugned judgment, the High Court has dismissed both the appeals and convictions and consequential sentence passed by the learned Additional Sessions Judge against the convicted appellants were affirmed by the High Court.

2. The four accused namely Sheoji Prasad (A/1), Udai Prasad (A/2), Parameswar Prasad (A/3) and Behari Prasad (A/4) stood charged Under Section 302 read with Section 149 and 34 I.P.C. for being members of an unlawful assembly with the common object and common intention to commit murder of one Lai Babu on April 5, 1980 at about 1.00 P.M. at Arrah town. The accused No. 2 Udai Prasad was further charged Under Section 302 148 I.P.C. and Section 27 Arms Act. The accused Nos. 3 and 4 namely Parameswar Prasad and Behari Prasad were also charged Under Section 143 and 302/ 149 I.P.C. Accused No. 1 Sheoji Prasad was also charged Under Section 323 and 147 I.P.C. for causing voluntary hurt to Nandji (P.W.I) with a hockey stick and for committing the offence of rioting. There was another accused Rameswar Prasad, the father of the accused No. 2 Udai Prasad and accused No. 3 Behari Prasad but he had died before the trial was completed. Excepting the accused Sheoji Prasad, the other three accused are close relations. The accused Nos. 2 and 4 are real brothers and accused No. 3. Prameswar Prasad is the uncle (fathers brother) of the accused Nos. 2 and 4. The deceased Lai Babu was nephew (brother's sons) of Rameswar (deceased) and accused No. 3 Prameswar

Prasad. The common ancestor of the deceased and the accused Nos. 2 to 4, namely, Baijnath Prasad had self acquired properties. In the ancestral house at mohalla Mahadeva at Arrah town, all the sons of Baijnath Prasad excepting the deceased accused Rameswar Prasad used to reside. The said Rameswar used to stay with the member of his family including his two sons namely accused No. 2 Udai Prasad and accused No. 4 Behari Prasad in a separate house near Lalji Kothi close to Shismahal chowk in the town of Arrah which is within the market area. The members of the family of Rameswar used to stay on the upper floor of the said house and in the ground floor there were two shops. The incident of murder had happened close to the said shops. The northern shop of the said house was given by Baijanath to the father of the deceased Lai Babu since deceased. The remaining portion was given by Baijanath to his other two sons Gajadhar Prasad (P. W. 4) and Beni Prasad, the deceased father of P.W. 1 Nandji Prasad, such disposition of his properties by Baijanath was not liked by his two other sons namely Rameswar(deceased accused) and Parameswar (A/3), it appears that a probate proceeding was pending between the five sons of Baijnath and their successors-in-interest. The interest of deceased Beni Prasad and deceased Badri Prasad were represented by their sons-Nandji Prasad (P.W. 1) and the deceased Lai babu.

3. The residential portion of the house where accused Rameswar used to live with his family members fell in the share of Lai Babu and suit for eviction of Rameswar was filed by Ram Babu. The shop room in the ground floor or the said house which was given to the father of Ram Babu by Baijnath was tenanted and accused No. 1 Sheoji Prasad was the tenant of the said shop room. A suit for eviction of Sheoji was filed and such suit was fought upto this Court. The tenant Sheoji Prasad compromised with the deceased Lai Babu by giving an undertaking that by a particular date, he would deliver vacant possession of the same to the deceased Ram Babu. Since vacant possession was not delivered, an execution case was instituted in the court of the learned Munsif at Arrah. The executing court passed an order directing delivery of possession by the officer of the Court.

4. On the date of the incident of murder, Rajib Ranjan the Naib Nazir of the Court (DW. 1) was deputed to deliver possession of the shop room tenanted to Sheoji Prasad to Ram Babu deceased. The said Naib Nazir in the company of four court peons and a lawyer reached the said shop at about 1.00 P.M. on April 6, 1980. It appears from the deposition of Rajib (DW 1) and his report Ext. B that since one Dariachhan Sao claimed tenancy right in respect of the said shop room on the ground of being inducted as a tenant by the deceased accused Rameswar, the said Naib Nazir did not deliver possession of the said shop room to the deceased Ram Babu and left the place.

5. The prosecution case in short is that on a false plea of tenancy raised by Dariachhan, the Naib Nazir being prevailed upon by the deceased Rameswar, accepted the case of tenancy and did not deliver possession to Ram Babu without ascertaining real state of affair. As soon as the said Naib Nazir, the court peons and the lawyer left the place, at the exhortation of accused No. 1 Sheoji Prasad, to the accused persons present at the spot, the deceased accused Rameswar Prasad and accused No. 1 Sheoji Prasad assaulted the informant Nandji Prasad (P.W. 1) and P.W. 2 Badri Prasad respectively with an iron rod for measuring cloth and a hockey stick. Accused No. 3 Prameswar Prasad and accused No. 4 Behari Prasad then caught hold of both the arms of the deceased Ram Babu and on being exhorted by accused No. 3 Parameswar, accused No. 2 Udai Prasad fired on the deceased Lai Babu with a country made pistol. The deceased accused Rameswar gave a blow on the head of the deceased Ram Babu with the said iron rod.'Ram Babu and the two other injured namely Nandij Prasad (P.W. 1) and P.W. 2 Badri Prasad were taken to the hospital at Arrah. Ram Babu, however, succumbed to the injuries shortly after the incident. At about 14.05 hours i.e. within half an hour of the incident, the fardbayan of Nandji Prasad (P.W.I) was recorded and within a few minutes formal F.I.R. was drawn up. Investigation of the case was immediately taken up and at about 14.15. hours, inquest of the dead body of Ram Babu was made. The investigating Officer visited the place of occurrence and blood stained earth was seized and a seizure list (Ex. 6) was prepared. Both the injured P.W.I Nandji and P.W. 2 Badri Prasad were examined by the doctor at Arrah hospital at about 14.10 hours. The Investigating Officer Astaque Hussain, however, did not appear in court to depose. His investigation report was identified by P.W. 8 the

clerk of the public prosecutor and was marked as Ext. 4.

6. The prosecution case has been sought to be proved by examining several eye witnesses. P.W. 1 Nandji and P.W. 2 Badri are injured eye witnesses. P.W. 1 Nandji is the informant of the said incident of murder and rioting. P. W. 2 Badri Prasad is the father-in-law of the deceased. PW 3 Kumkum is the daughter of the deceased. She is a school going girl aged about 14 years. According to her evidence, she had gone to the place of incident for witnessing delivery of possession of the shop through Court. P.W. 4 is Gajadher Prasad who is an uncle of the deceased. P.W. 5 has not deposed for the prosecution but he was tendered for cross examination.

7. The learned Additional Sessions Judge after consideration of the evidences adduced in the case and the materials on record inter alia came to the finding that the accused were bent upon not giving possession of the shop room and was also bent upon harassing the decree holder deceased and being annoyed with the deceased for taking steps to get delivery of the possession of the said shop room through court, the accused took extreme step in eliminating the decree holder by killing him and also assaulting the uncle and the father-in-law of the deceased who were present at the spot in order to help the deceased in taking possession. The learned Additional Sessions Judge held that all the four accused along with deceased accused Rameswar had formed an unlawful assembly for the purpose of killing Ram Babu and assaulting his helpers on April 5, 1980 at about 1.00 P.M. on the road in front of Lallanji Kothi and in furtherance of common object and common intention of the accused, accused No. 2 Udai Prasad committed murder of Ram Babu by country made gun and other two accused namely accused No. 3 Parameswar and accused No. 4 Behari Prasad in furtherance of the said common object and common intention held both the arms of deceased Ram Babu and Parameswar also exhorted Udai to kill Ram Babu. The learned Additional Sessions Judge also held that deceased Rameswar and accused No. 1 Sheoji Prasad assaulted P.W. 1 and P.W. 2 and Rameswar also assaulted the deceased.

8. The learned Additional Sessions Judge, therefore, held accused No. 2 Udai Prasad guilty for the offence Under Section 302 and 148 I.P.C. and also Under Section 27 of the Arms Act for possessing unauthorised arm and also found him guilty Under Section 302 read with 149 and 302/ 34 I.P.C. The said accused No. 2 Udai Prasad was sentenced to imprisonment for life for offence Under Section 302 but no separate sentence was passed for the offence Under Section 148 302/ 149 303/ 34 I.P.C. and Section 27 of the Arms Act. Accused No. 3 Parameswar and accused No. 4 Behari Prasad were sentenced to imprisonment for life for offence Under Section 302/ 149. They were also found guilty for offence Under Section 302/ 34 302/ 109 but no separate sentence was passed for such offence. Accused No. 1 Sheoji Prasad was sentenced to imprisonment for life for the offence Under Section 302/ 149 I.P.C. but no separate sentence was passed for the offence Under Section 302/ 34 and 147 I.P.C. although he was found guilty for such offence.

9. Against the said conviction and sentence of the learned Additional Sessions judge. Udai Prasad, Behari Prasad and Parmeswar Prasad preferred Criminal Appeal No 390 of 1983 before the Patna High Court. Sheoji Prasad preferred Criminal Appeal No. 382 of 1983 before the Patna High Court against his conviction and sentence. Both the appeals were heard analogously by the Division Bench of the High Court and by a common judgment dated March 31, 1987, the High Court dismissed both the appeals by affirming the conviction and sentence passed by the learned Additional Sessions Judge.

10. Mr. Sushil Kumar, the learned Senior Counsel appearing for the appellant Behari Prasad in Criminal Appeal No. 1 of 1989 has submitted that in this case it is an admitted position that the deceased and the alleged eye witnesses for prosecution belong to one camp. The close relations of the deceased namely P.W. 1, 2, 3 and 4 are highly interested witnesses and they were actuated by a strong desire to ensure that deceased accused Rameswar and their two sons namely Udai Prasad (A/2) and Behari Prasad (A. 4) and their uncle Parameswar Prasad (A/3) were roped in for the offence of murder of Ram Babu. Admittedly, the incident had taken place in broad day light in the market area of Arrah Town where number of independent persons were present. But the prosecution chose to examine only the close relations of the deceased to prove the case and no independent and reliable witness has been examined.

11. Mr. Sushil Kumar has submitted that according to the prosecution case the Naib Nazir had already been influenced by the accused and the Judgment debtor Sheoji Prasad and the said Naib Nazir on the protest by on Dariachhan claiming tenancy right in the disputed shop room, did not deliver possession of the said shop and had left the place. Therefore, there was no occasion to indulge in criminal activities including commission of a grave offence of murder in the broad day light in a market place of a town. The prosecution story on the face of it is highly improbable. Mr. Sushil Kumar has submitted that alleged eye witnesses have deposed that the tenant of the shop Sheoji Prasad (A/1) had only a hockey stick in his hand. The others were empty handed. The deceased accused Rameswar had also no weapon in his hand but he picked up a small iron rod (for measuring cloth) in the shop itself. The deceased was admittedly accompanied by his relations. If there was any common object or common intention to kill the deceased Ram Babu, it was reasonably expected that the accused would have come variously armed so that despite expected resistance from the deceased and his relations and companions, they could over power the deceased and his companions with the help of weapons to be carried by them. The very fact that the accused were practically unarmed, amply indicates that there was no common object or common intention to commit murder of Ram Babu. Admittedly, Sheoji is a tenant of the shop in question. Deceased Rameswar and his two sons Udai and Behari admittedly stayed in the upper floor of the same building. Parameswar was very close relation of the said three accused being brother of Rameswar and uncle of Udai and Behari. Hence, the presence of the said accused in the shop or near the shop, even if accepted, will not constitute formation of unlawful assembly. According to the prosecution case, after the Naib Nazir of the court had left the shop, Sheoji Prasad (A/1) exhorted to the other accused to assault the deceased. On such exhortation. Nandji Prasad (P.W. 1) and Badri Prasad (P.W. 2) were assaulted by Rameswar and Sheoji Prasad respectively with iron rod (for measuring cloth) and hockey stick. The prosecution witnesses have not alleged that other accused on such exhortation assaulted the said witnesses or even Ram Babu. The only allegation is that Parameswar (A/3) and Badri (A/4) had caught both the arms of the deceased. According to prosecution case, it was only at this stage that Parameswar exhorted Udai to kill Ram Babu whereupon Udai (A/2) whipped out a country made pistol and fired at Ram Babu. Mr. Sushil Kumar has submitted that there is enough doubt as to which weapon was used by Udai. The weapon was described both as a gun and as a pistol, Such value description of the weapon by the eye witnesses who claimed to have seen the occurrences from a close range, also suggests that they had not seen any weapon in the hand of Udai and noticing that an injury by a fire arm was caused to the deceased a false allegation of using a pistol or a gun by Udai was made.

12. Mr. Sushil Kumar has submitted that the prosecution story cannot be accepted because the manner in which the deceased was injured by a gunshot is highly improbable, Mr. Sushil Kumar has submitted that if accused No. 3 and accused No. 4 had held both the arms of the deceased and accused No. 2 Udai had shot the deceased from a close range by using pellets, both accused No. 3 and accused No. 4 would have sustained injuries at least by few pellets because such pellets would have diverged after coming out of the barrel of the gun. But no such injury was caused to the said witnesses. Appreciating the improbability of the prosecution case, the eye witness tried to embellish at the time of deposition. Although it was not stated in the fardbayan constituting F.I.R. that the said two accused had released the hands at the time of firing, such case was later on sought to be introduced in the deposition. Such material contradiction in the case made out in deposition and as alleged in F.I.R. coming from a close relation and interested witness should not be accepted particularly in the absence of any corroboration from reliable, independent and disinterested witnesses. Mr. Sushil Kumar has submitted that no reliance should be made on the deposition of the daughter of the deceased (Kumkum). She was admittedly a school girl and normally she would have been in the school at the time of commission of offence. But she has deposed that she did not go to school but came to the market place to witness the delivery of possession of the shop room. Such case is highly unusual and improbable and no credence should be given to be deposition of such chance witness who was normally not expected to be present.

13. Mr. Sushil Kumar has submitted that in this case Investigating Officer has not been examined. But the entire case diary was allowed to be exhibited. The prosecution and the Judge have relied on the notings in the

case diary although the maker of the case diary did not prove the correctness of such notings and the correctness of the recordings in the diary had not been tested by cross examining the Investigating Officer. Mr. Sushil Kumar has submitted that by looking to the case diary and relying on the same in support of prosecution case serious prejudice to the accused has been caused and such action has occasioned a grave miscarriage of justice.

14. In this connection, Mr. Sushil Kumar has referred to the decision in *State of Kerala v. Ammina* : AIR1988Ker1 . A Division Bench of the Kerala High Court has held in the said decision that the diary mentioned in Section 172(1) and statements recorded Under Section 161(3) of the Code of Criminal procedure are covered by the sweep of inhibition contained in Section 162 of the Code. The prohibition imposed in Section 162 cannot be circumvented by resort to Section 172(2) of the Code. The two are different records, though the diary envisaged Under Section 172(1) and statements recorded Under Section 161(3) may together be incorporated in the same file which the police call for the sake of convenience case diary file. That apart, Section 172(2) of the Code embodies an inhibition that the diary envisaged in that section is not to be used as evidence in the case. Mr. Sushil Kumar has also relied on a decision of the Mysore High Court in *Hirianna Shetty v. The State of Mysore* (1972) 1 MysLJ 50. It has been held in the said decision that the examination of the Investigating Officer is necessary in order to bring on record the contradictions in the statements of witnesses and such a right is a valuable right of the accused. Non examination of the Investigating Officer is a serious infirmity in so far as it deprives the accused of an opportunity to show that witnesses were not reliable by proving contradictions in the earlier statements. Mr. Sushil Kumar has submitted that the accused in this case, particularly when the witnesses were only partisan witnesses, have suffered serious prejudice on account of being deprived of the opportunity to point out material contradictions in the earlier statements of the witnesses for not examining the Investigating Officer.

15. Mr. Sushil Kumar has submitted that in the aforesaid facts, the prosecution case must be held to have not been proved beyond reasonable doubt and all the accused should be acquitted. Mr. Sushil Kumar has also submitted that in any event accused No. 4 Behari Prasad deserves to be acquitted. Admittedly, he was staying on the upper floor of the building in which the said shop room appertained. It is quite probable that out of curiosity he had come to see the action by Naib Nazir in execution of a court case. He was admittedly empty handed. The only allegation against him was that he caught hold of one of the arms of the deceased. When suddenly Parameswar exhorted to Udai to kill the deceased. Udai whipped out a fire arm and shot at the deceased, It cannot be reasonably held that he had any common intention or common object of killing Ram Babu. It is not unlikely that although he along with others might have intended to give some thrashing to the deceased, the events suddenly changed on the exhortation of Parameswar to kill the deceased. It is also not unlikely that Behari was not aware that Udai had concealed a fire arm which he had used on sudden provocation by Parameswar. Hence, no conviction Under Section 302/ 149 or 302/ 34 1.P.C. can be given to Behari even if the prosecution case that he caught one of the arms of the deceased is accepted on its face value. The appellant Behari, therefore, should be acquitted by allowing his appeal.

16. Mr. U.R. Lalit, learned senior counsel appearing for the appellant Parmeswar in Criminal Appeal No. 437 of 1988 has also endorsed the arguments made by Mr. Sushil Kumar that the prosecution case was not believable and had not been established beyond reasonable doubt. He has also endorsed the submission that the case diary not having been proved, such case diary could not be looked into and the accused had suffered serious prejudice for not examining the Investigating Officer. He has submitted that such non examination of the Investigating Officer and consequential prejudice in not getting the opportunity to effectively cross examine the eye witnesses by indicating contradictions in the earlier statements before the police, have vitiated the trial.

17. Mr. Lalit has submitted that Parameswar is the real brother of Rameswar and uncle of Udai and Behari. His presence in or near the residential house of Rameswar was neither unusual nor per se illegal. He was admittedly without any arm. The allegation against him is that he caught hold of one of the arms of the deceased Ram Babu and exhorted Udai to kill Ram Babu and Udai thereafter shot the deceased. Such case is

highly improbable. He has also submitted that no man holding an arm of the victim will ask the assailant to fire pellet shots on the victim from a close range because in that event, the person giving exhortation was also likely to be injured. Mr. Lalit has submitted that the prosecution case was wholly unreliable and the appellant should be acquitted.

18. Mr. Promod Swarup learned Counsel appearing for the appellant Sheoji Prasad in Criminal Appeal No. 195 of 1989 has also endorsed the submissions of Mr. Sushil Kumar and has submitted that the prosecution had not only failed to establish the prosecution case beyond reasonable doubt but such case on the face of it was highly improbable. Mr. Swarup has submitted that Sheoji Prasad is not related to the other accused or the deceased and their relations. He is admittedly a member of a different caste. Sheoji Prasad was tenant of the shop in respect of which decree for eviction was passed. Sheoji Prasad had undertaken to vacate the shop room before this Court. It is, therefore, unlikely that on his own initiative he would flout the undertaking and forcibly resist execution of the decree. Even if it is assumed that he was keen in frustrating the execution of the decree, admittedly such purpose was secured when the Naib Nazir without executing the decree left the place. After such event, there was hardly any occasion for Sheoji Prasad to wreck any vengeance on the decree holder by inciting other accused. Presence of Sheoji Prasad in his own shop is wholly legal and he cannot be held to be a member of unlawful assembly. The allegation is that after the Naib Nazir and court peons and the lawyer had left the shop, he exhorted other accused to assault the deceased and his companions. It is alleged that Sheoji had only a hockey stick with which he assaulted Badri Prasad. There is no allegation against him that he assaulted the deceased or exhorted for killing the deceased. Mr. Swarup has submitted that even if the prosecution case is accepted, Sheoji Prasad is not liable to be punished for offences Under Section 302/ 34 302/ 149 and Section 147 I.P.C. Hence, conviction of Sheoji Prasad for the aforesaid offences is wholly illegal and should be set aside.

19. The learned Counsel appearing for Udai Prasad (A/2) in Criminal Appeal No. 789 of 1989 has endorsed the submissions of the learned Counsel appearing for other appellants by contending that the prosecution case was improbable and the same had not been established beyond reasonable doubt. Hence, the said accused should also be acquitted by giving him benefit of doubt. As there was direct evidence about the commission of murder by this appellant, the learned Counsel has not advanced any submission regarding absence of common object or common intention in murdering Ram Babu.

20. The learned Counsel for the State appearing in all these appeals has, however, refuted the contentions made by the learned Counsel for the appellants. It has been contended by the learned Counsel for the State that the prosecution case has been clearly established by reliable evidences of the eye witnesses. Such eye witnesses being close relations were expected to be present at the place of occurrence. Simply because they are relations, it cannot be held that they were partisan and deposing falsely. The learned Counsel has submitted that the said witnesses were also close relations of the accused excepting Sheoji Prasad. After a long drawn battle upto the Apex Court, the deceased was going to get possession. The daughter of the deceased aged 14 years became curious to notice execution through court and came with elderly relations. There is nothing unusual in her presence at the time of occurrence. P.W. 1 and 3 were injured witnesses. Shortly after the incident, they were examined by doctors. F.I.R. was also lodged immediately after the incident and the accused were named. Hence, no interference is called for in these appeals.

21. After considering the facts and circumstances of the case and the judgments of the learned Additional Sessions Judge and of the High Court and the evidences adduced in the case through which we have been taken by the learned Counsel for the parties and considering the submissions made by the learned Counsel for the parties, it appears to us that the prosecution case has been proved by the eye witnesses in this case. Over the shop room, a long drawn battle was fought by the deceased upto this Court. Ultimately, the delivery of possession of the shop through court was fixed on the date of incident. It was, therefore, quite natural that the said eye witnesses being close relations of the deceased were present at the place and at the time of the incident. In our view, the learned Counsel for the State is also justified that in the facts of the case the presence of the daughter of the accused aged 14 years in the company of elderly relations was also not

unusual. The accused Nos. 2 to 4 and deceased accused Rameswar though related to the deceased had been harbouring ill feeling and grudge against the deceased. As a matter of fact, suit for eviction was also filed by the deceased against Rameswar. It was, therefore, quite likely that they took side of Sheoji Prasad in frustrating the execution of the eviction decree against Sheoji Prasad. Although, the accused managed for the time being to frustrate execution of decree through court by influencing Naib Nazir to accept the case of independent tenancy in favour of a third party on the face value of the statement of such tenant without ascertaining relevant facts and thereby sending him back without executing the decree, the accused were fully aware that the decree for eviction affirmed upto this Court was staring on their face. They were, therefore, quite agitated and it is not at all unlikely that they became revengeful against the decree holder deceased Ram Babu.

22. Immediately after the Naib Nazir, Court peons and the lawyer had left the place of occurrence, at the behest of accused No. 1 Sheoji Prasad the accused No. 1 and deceased accused Rameswar assaulted P.W. 1 and P.W. 2. The accused No. 3 and 4 with an intention to immobilise the deceased caught both of his arms. It is the positive case of the prosecution that accused No. 3 Parameswar exhorted accused No. 2 Udai to kill the deceased and accused No. 2 then whipped out a fire arm and shot at the deceased from a close range which caused his death. From the evidences of the eye witnesses it is quite evident that the accused were aware that one of them namely Udai (A/2) was carrying a fire arm for assaulting the deceased. In order to facilitate such assault on the deceased both accused No. 3 and 4 took active part by holding both the arms of the deceased to make him immobile. Accused No. 2 Udai then fired at the deceased. The fire arm was described both as pistol and gun. But the nature of the fire arm has been explained by the eye witnesses. The fire arm was a country made weapon. It was not unlikely that barrel of the fire arm not being of any standard size, there was confusion in describing the fire arm very accurately. But in view of clear evidence that the deceased was shot at by a country made fire arm by Udai Prasad (A/2), we do not find any reason to entertain any doubt that the eye witnesses had not seen Udai firing from a country made fire arm. The medical evidence has also corroborated the case of suffering pellet injuries by the deceased. In this case, P.W. 1 and P.W. 2 are injured eye witnesses. Their presence at the time of incident is, therefore, not to be doubted. They were also examined almost within an hour by this doctor. The Fardbayan forming F.I.R. was lodged within about half an hour and the names of the accused and their specific roles were also indicated in F.I.R. It has been contended by the learned Counsel that if the deceased had been shot at from a close range when the two accused had been holding the arms of the deceased, they also would have suffered pellet injuries and the fact that they had not suffered such injury only indicates that the deposition of the eye witnesses are false. Such submissions, however, should not be accepted. There is clear evidence that just before the firing the said accused left the deceased. In the facts of the case, no adverse inference against the prosecution case need be drawn for not giving the detailed account of the firing by indicating that the two accused holding arms had left the deceased just at the time of firing. It may be noted that F.I.R. was lodged almost within half an hour of the incident by the injured witness who apart from discomfort on account of injury sustained by him, was likely to be completely upset at the unfortunate incident of killing of his close relation before his eyes. In such circumstances, omission to mention of the fact of leaving the arms of the deceased by the accused Prameswar and Behari just at the time of firing is understandable.

23. It, however, appears to us that the entire case diary should not have been allowed to be exhibited by the learned Additional Sessions Judge. In the facts of the case, it appears to us that the involvement of the accused in committing the murder has been clearly established by the evidences of the eye witnesses. Such evidences are in conformity with the case made out in F.I.R. and also with the medical evidence. Hence, for non examination of investigating Officer, the prosecution case should not fail. We may also indicate here that it will not be correct to contend that if an Investigating Officer is not examined in a case, such case should fail on the ground that the accused were deprived of the opportunity to effectively cross examine the witnesses for the prosecution and to bring out contradictions in their statements before the police. A case of prejudice likely to be suffered by an accused must depend on the facts of the case and no universal straight jacket formula should be laid down that non examination of investigating Officer per se vitiates a criminal trial.

These appeals, therefore, fail and are dismissed. The appellants who have been released on bail should be taken into custody to serve out the sentence.

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