

The State of Bihar Vs. Ram Kumar Choudhary and anr.

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Court : Patna

Decided On : Jul-17-2009

Reported in : 2009(57)BLJR3056

Judge : Navin Sinha and; Dharnidhar Jha, JJ.

Acts : Explosive Substances Act - Sections 3, 4 and 5; ;Indian Penal Code (IPC) - Sections 34 and 302; ;Code of Criminal Procedure (CrPC) - Sections 144, 145 and 161

Appeal No. : Death Reference Case No. 4 of 2008 and Cr. Appeal No. 63 of 2008 (D.B.)

Appellant : The State of Bihar;ram Kumar Choudhary and Dhodho Choudhary @ Pritam Chodhary

Respondent : Ram Kumar Choudhary and anr.;The State of Bihar

Advocate for Def. : Lala Kailash Bihari, Sr. Adv.

Advocate for Pet/Ap. : Rana Pratap Singh, Sr. Adv.,; Sumant Singh and; Aaruni S

Disposition : Conviction set aside Appellants acquitted

Judgement :

Navin Sinha, J.

1. The present two Appeals arise out of the judgment and order of conviction dated 10.1.2008 of the Additional Sessions Judge, (Fast Track Court No. 5), Banka in Sessions Trial No. 024/2000. The appellants in Cr. Appeal No. 63/08 were found guilty and have been sentenced to capital punishment under Section 302/34 of I.P.C. giving rise to Death reference case No. 4/08. The appellants in Cr. Appeal No. 166/08, likewise, have been sentenced to undergo life imprisonment under Section 302/34 of I.P.C. Appellant No. 1 in the latter appeal is stated to have been deceased during pendency of the appeal on 15.6.2009, as stated on oath by his son. The appeal, therefore, abates against the deceased appellant only.

2. The prosecution case was initiated on the Fardbayan of P.W.3, Ramanand Choudhary, son of the deceased Nakul Prasad Choudhary recorded at village Dera, by the Sub-inspector, Banka police station on 28.8.1999 at about 10.15 p.m. He stated that he was returning to his village-Dera (Choudhary Mohalla) from the Cotigandha Jaggery Mill, along with his father. When they reached near his 'Gohal' (cowshed) at about 8.30 p.m., the accused who lay in wait for them, surrounded the two. The two appellants in Cr. Appeal No. 63/08 were alleged to be armed with a 'Fasiani' (sickle). Accused Surendra Choudhary ordered to catch the two and teach them a lesson for fighting litigations. The accused persons threw his father, Nakul Prasad Choudhary, on to the ground. Accused Birendra Choudhary and Surendra Choudhary caught the hands of his father while accused Bulchul Choudhary and Manoj Choudhary held his feet. Bikram Choudhary and Umesh Choudhary pressed down his knees. Ram Kumar Choudhary and Dhodho Choudhary, who were both armed with sickle, made repeated attacks on the neck of his father resulting in cutting of the neck and death on the spot. The accused tried to catch him also, when he ran away shouting. The accused then went away towards the Odni river. The villagers came on hearing the commotion. The cause of occurrence was the existing land-dispute between the parties. Twice earlier, the accused had attempted murderous assault on his father for which police cases had been lodged.

3. The F.I.R. was registered the same day i.e. 28.8.1999, at 11.45 p.m. The inquest report was prepared on 28.8.1999 itself at 10.15. p.m. for recovery of the body from village-Dera, Mohalla Choudhary at the eastern end of the village the same day. Blood stains were noticed on the clothes worn by the deceased and he appeared to have been assaulted by a sharp cutting weapon on his neck. The body was received for post mortem at the Sub-divisional Hospital, Banka at 9.00 a.m. on 29.8.1999 which noticed the following ante mortem injuries:

(i) An incised wound of size 6'x4'x4' in front of the neck, as well as on the left side of the neck cutting important structures like Trachea, arteries, veins etc. It was caused by sharp cutting weapon;

(ii) An incised wound of size 1'x1/2'x1' on the left side of the cheek. It was caused by sharp penetrating weapon. The cause of death was ascribed to shock and haemorrhage due to the above mentioned injuries with the time elapsed since death approximately 20 hrs.

4. The investigation by the police commenced and charge-sheet came to be submitted under Sections 302/34 of I.P.C.

5. The prosecution examined 6 witnesses. P.W.1 Arjun Choudhary is the brother of the deceased Nakul Prasad Choudhary. P.W.2 Bhudeo Thakur is a villager. P.W.3 Ramanand Choudhary is the informant and son of the deceased. P.W.4 Amod Prasad Choudhary is the son of P.W.1, and nephew of the deceased. P.W.5 is the doctor who conducted the post mortem examination while P.W.6 was a formal witness who proved the fardbeyan and the first information report.

6. P.W. 1 stated that he was an eye-witness to the occurrence when the appellants surrounded the deceased and P.W.3. Appellant Surendra Choudhary ordered to kill Nakul Choudhary as he was fighting too much litigation. The appellants caught hold of and pinned down the deceased who died on the spot by reason of the assault on his neck by the two appellants in Cr. Appeal No. 63/08. P.W.2 stated that he saw the appellants running away from the place of occurrence and on reaching saw that Nakul Choudhary had died because of the cut on his neck. P.W.3 is stated to be an eye-witness to the assault accompanying

the deceased Nakul Prasad Choudhary. He reiterated his statement in the fardbeyan of the manner in which the appellants pinned down the deceased when the two appellants in Cr. Appeal No. 63/08 assaulted on the neck 3-4 times causing his death. He further stated that appellant Santosh Choudhary stood near the witness during the assault and warned him not to make noise upon threat of being killed. He identified all the appellants in the dock and stated that he recognized all of them who were his agnates and cousins. P.W.4 stated that he saw the appellants running away from the place of occurrence and identified them in the torch-light and moon-light. All the witnesses have stated of long standing enmity between the parties with regard to lands and series of litigations. P.W.5, the doctor who conducted the post mortem examination, stated that the injuries were sufficient in the ordinary course of nature to cause death and that the time elapsed since death at the time of post mortem examination was approximately 24 hrs.

7. The defence examined 7 witnesses. D.W.1, Bhuneshwar Yadav stated that he was a resident of village- Leelabharan and recognized P.W.1 Arjun Choudhary who also stays at village- Leelabharan for the last several years and that their houses were in proximity and they were on visiting terms. D.W.2 Nrit Narain Manjhi stated that at about 9 to 10 p.m. on the date of occurrence, the son of the deceased Nakul Choudhary along with 2 to 4 others called him when they together went to village- Leelabharan to bring P.W. 1 Arjun Choudhary and informed the latter there, of the assault upon his brother. He also stated of long standing enmity between the parties with regard to lands and litigations. D.W.3 Jagal Yadav stated that he resided at village-Leelabharan where P.W.1 also resided. Their houses were in proximity and they were on visiting terms. On the date of occurrence at about 9 to 10 p.m. he was at the house of Arjun Choudhary, P.W.1. On being informed of the death of his brother in the presence of the witness, Arjun Choudhary, P.W.1 then proceed to village- Dera. D.W.4 Bhagirath Manjhi stated that on commotion he came out of his house when he learnt that Nakul Choudhary had been killed. On enquiry P.W.3 Ramanand Choudhary stated that he did not know who had killed. D.W.5 Jai Prakash Singh stated that he heard commotion in the village when he learnt later that Nakul Choudhary had been killed. D.W.6 Bideshi Yadav stated that he had heard that the deceased had been killed. D.W.7

Rajendra Prasad Sah stated that he is not aware how Nakul Choudhary died and no one told him the name of the assailants.

8. The prosecution relied on Ext.1, the signature of P.W.3 on the fardbeyan, the post mortem report at Ext.2, a certified copy of the judgment of complaint case No. C-102/1995 at Ext.3, the formal F.I.R. at Ext.4 and the fardbeyan of the informant/P.W.3 at Ext.5. The defence relied upon Ext.A, certified copy of the deposition of Amod Prasad Choudhary, P.W.4 in Complaint Case No. C-102/1995, Ext.A/1, certified copy of the deposition of Bhudeo Thakur, P.W.2, in Complaint Case No. C-102/1995, Ext.A/2, certified copy of the deposition of Bhudeo Thakur in Complaint Case No. C-102/1995 dated 15.2.1996. Ext.A/3, certified copy of the deposition of Amod Choudhary, P.W.4 in Complaint Case No. C-102/1995. Certified copy of the charge-sheet in Banka P.S. Case No. 64/1997. Certified copy of charge-sheet and order of cognizance in Banka P.S. Case No. 30/1999, apart from certain other documents including of proceedings under Sections 144 and 145 Cr.P.C. in the land-dispute between the parties.

9. Learned Senior Counsel Shri Rana Pratap Singh appearing on behalf of the appellants submitted that no case for imposition of capital punishment on the two appellants in Cr. Appeal No. 63/2008 is made out. In fact, no case for the conviction of any of the appellants under Section 302/34 of I.P.C. is made out. It was submitted that P.W. 1 Arjun Choudhary being the brother of the deceased was an interested witness. His evidence was to be considered with great caution considering the existing enmity and litigations between the parties. He was, in fact, not an eye-witness to the occurrence and at the relevant time was at village-Leelabharan, 3 kilometres away where he resided with his son Amod Prasad Choudhary, P.W.4. In support of the submission strong reliance was placed upon the deposition of P.W. 4 in Complaint Case No. C-102/1995 between the parties both before and after charge made on 2.4.1997 and 17.8.2000 respectively, indicative of continuity that his father resided with him at village-Leelabharan. P.W.1 himself, in his statement under Section 161 Cr.P.C., at paragraph-50 of the case diary, had stated that he was at village-Leelabharan and came to village-Dera after hearing of the occurrence. He was now falsely claiming himself to be an eye-witness. Confronted with his statement made under Section 161 Cr.P.C., he

denied having given any such statement to the investigating officer. In that background, the failure of the prosecution to produce the investigating officer for examination has caused serious prejudice to the defence. Bhagirath Choudhary, D.W.4, whose house is near the place of occurrence and was a charge-sheet witness whose statement was also recorded under Section 161 Cr.P.C., was not examined but deposed as D.W.4 that P.W.3 had told a different story to him. Again the non-examination of the investigating officer has caused serious prejudice to the appellants. Sahdeo Choudhary, whose house was also near the place of occurrence, has also not been examined. While P.W.1 denied that any explosives case was lodged against the deceased and P.W.3, the fact of the matter was they were charge-sheeted and cognizance taken against them under Sections 3, 4 and 5 of the Explosive Substances Act in Banka P.S. Case No. 30/1999. The aforesaid police case was evidence of the criminality in conduct of the deceased and his son, P.W.3. The witness admits land-litigation-enmity between the parties. It was, therefore, urged that he was not an independent witness whose testimony could be relied upon as he was stating falsehood, being an interested witness, as brother of the deceased.

10. P.W.2, Bhudeo Thakur himself stated that he was not an eye-witness to the assault, but allegedly saw the appellants running away from the place of occurrence when the deceased was writhing at the door of Sahdeo Choudhary because of the injuries on his neck. Yet he states that his statement was recorded by the investigating officer two days later without any explanation for the delay. He did not state that the two appellants in Cr. Appeal No. 63/08 were armed in any manner. In fact, in his statement under Section 161 Cr.P.C. at para-53 of the case diary he had described himself as a hear-say witness. From Ext.A/1, A/2 and C/2 it was submitted that he was a stock witness on behalf of the deceased Nakul Choudhary in the inter se litigations between the prosecution and the accused. There is no statement by him to the police of the source of light for identification of the appellants at 8.30 p.m. Both, for reason of non-examination of the investigating officer and being an inimical witness, no reliance could be placed upon his deposition.

11. P.W.3, the informant, was urged not to be an eye-witness also. In any event, being the son of the deceased, he was an interested witness stating falsehood and was unreliable. He acknowledged that a Complaint Case No. 64/1997 had been filed by his father under the Indian Penal Code and the Explosive Substances Act against some of the appellants. He falsely stated that final report was submitted in Banka P.S. Case No. 30/1999 when, in fact, charge-sheet was submitted and cognizance taken against the witness and the deceased. His evidence on the manner of assault on the deceased is not consistent with the post mortem report. While he alleges 3 to 4 assaults on the neck, there was only one injury on the neck and one on the cheek. Likewise, he states that there was no penetrating injury by sharp weapon. The post mortem report is of a sharp penetrating wound on the cheek. If the deceased had been pinned down, as is alleged, he would have surely wriggled to save and set himself free, a natural human instinct. This would have caused further injuries on his person by reason of such struggle, but there is none. Contrary to his statement in court that at the time of assault accused Santosh Choudhary threatened to kill him if he made noise, in his fardbeyan he made no such statement. The witness, however, insisted that he had written so in his fardbeyan. In absence of the examination of the investigating officer, the appellants have been prejudiced on that score. It was not a natural conduct of the witness not to have made any noise at the time of assault, but only subsequently. No explanation has been given why Anant Choudhary at whose place the deceased lay when the police came was not examined and neither was Sahdeo Choudhary, whose house was near the cowshed. There has been no seizure of the weapon of assault, the blood stained clothes or the blood soaked earth. There is no material on record of any efforts made for the purpose by the prosecution. Again the lack of opportunity to cross-examine the investigating officer by the failure of the prosecution to produce him has caused serious prejudice. It was evident that the assault did not take place near the cowshed as the body was found at the door of Anant Choudhary. If the deceased had been dragged/ carried, surely, there should have been trace of blood. The witness stated that it was raining at the time of occurrence. Hence, identification by moon-light was not possible. The submission, therefore, was that though P.W.3 claims himself to be an eye-witness, he was the son of the deceased admitting previous enmity

between the parties and, therefore, an interested witness. In view of the falsity in his depositions he was an unreliable witness. He did not disclose any source of light for identification of the appellants in the night at 8.30 p.m.

12. P.W.4 Amod Prasad Choudhary was not an eye-witness to the assault but stated that he saw the appellants running away in the moon-light and torch-light. This statement was made only after the prosecution realized its error in the earlier three witnesses not stating anything about the source of light for identification of the accused. He has himself stated in his deposition at Ext.A/3 in Complaint Case No. C-102/1995, both prior to the charge in 1997 and after charge in the year-2000, indicative of continuity that he resides at village-Leelabharan. He was now trying to make out a new case of being an eye-witness, residing at village-Dera at the time of occurrence. While he states that he is not aware that the daughter of the appellant Umesh Choudhary namely Reeta Devi had filed a case against him and his father, P.W.1, the latter in his evidence had specifically admitted the institution of G.R. No. 1102/88 against them. In his deposition he states that it had stopped raining at 9.45-10.00 p.m. The question of identification in the moon-light during the rains, therefore, does not arise. He did not remember if he had told the investigating officer in his statement under Section 161 of Cr.P.C. that he had identified the appellants in the torch-light. He refers to the house of other villagers in the vicinity, but does not give any explanation why they have not been examined. The submission, therefore, was that he was stating falsehood, was not an eye-witness and came to village-Dera only after being informed of the occurrence. Being a relative and interested witness he could not be relied upon.

13. It was next submitted that in the facts and circumstances of the case the non-examination of the investigation officer had caused serious prejudice to the appellants. In the absence of the investigating officer the court could have relied upon the statements of prosecution-witness under Section 161 Cr.P.C. especially when they had been confronted with their statements in absence of the investigating officer forthcoming. Reliance was placed on 2008 AIR S.C.W 6050 (Bachchan Singh v. State of Bihar). It was further submitted that the F.I.R. though stated to have been registered on 28.8.1999 at 11.45 p.m. and sent to the Magistrate on 29.8.1999, was, in fact, so received on 30.8.1999. This delay, when

the police station and the court were in close proximity, vitiates the prosecution, giving enough time for embellishments. The inquest report dated 28.8.1999 does not bear the F.I.R. number and no F.I.R. was registered till 29.8.1999 as the post mortem report states that no F.I.R. number was mentioned. The submission, therefore, was of false implication by unreliable and interested witnesses only in the background of previous enmity and litigations between the parties and, therefore, it could not be said that the allegations had been proved beyond all reasonable doubt. The death had taken place in another manner by others for which the appellants were falsely being made answerable.

14. Learned Senior Counsel Shri Lala Kailash Bihari Prasad, appearing on behalf of the State, submitted that in a charge under Section 302/34 of I.P.C. individual acts of assault were hardly relevant. Relying upon 1998 (6) S.C.C. (CrI.) 50 (State of Uttar Pradesh v. Harban Sahai and Ors.) it was submitted that the promptitude with which the fardbeyan was made gives strength to the case making the allegations true. Relying upon 1999(1) P.L.J.R. 325 (Gulab Sain and Ors. v. The State of Bihar and Ors.) it was submitted that the delay, if any, in sending the F.I.R. to the Magistrate was not fatal. The lapses on the part of the investigating officer in not mentioning the details of the F.I.R. in the inquest report sent for purposes of post mortem was not fatal to the case of the prosecution, but was at best a procedural irregularity only which cannot be said to have caused any prejudice to the defence. It was submitted that even if this Court were to hold that the testimony of P.Ws.1, 2 and 4 was not trustworthy, the fact that P.W.3 may be an interested witness was hardly relevant if his deposition was otherwise convincing, cogent and truthful. P.W.4 has stated of the existence of moon-light. P.W.3 was an eye-witness. Reliance was placed on 2006(3) S.C.C.(CrI.) 503 (S. Sudarshan Reddy and Ors. v. State of Andhra Pradesh) on the ocular capacities for identification of the appellants at night when the deceased was an own Gotiya (agnate) in the background of land-dispute and existing litigations between them. Reliance was further placed on 2001(4) P.L.J.R. 123 (S.C.) (Ram Ghulam and Ors. v. State of Bihar) on the difference in powers of ocular vision at night between a town dweller and a villager. Appellant Santosh Choudhary had spoken at the time of occurrence and his voice was itself a source of identification. Any partial deficiency in the evidence of P.W.3 would not vitiate that part of his evidence on

the assault which was otherwise credible. Relying upon 1998 (6) S.C.C. (Cr.) 240 (State of Bihar v. Ram Padarath Singh) and : 1997(3) Cri.L.J. 2983 (Mithilesh Upadhyay v. The State of Bihar), it was submitted that the so called variation, if any, between the medical evidence and the oral evidence by P.W.3 was hardly relevant so long as injuries on the person of the deceased on the portion of the body alleged was found. The failure to examine those residing in the vicinity is not relevant when P.W.3 has given cogent and convincing evidence. For the same reason, the non-examination of the investigating officer was not fatal and had caused no prejudice to the accused. From the cross-examination of D.W.4 it was evident that he was not speaking the truth when he stated that prior to his deposition in the court he had not given any statement to the police. It is the case of the appellants themselves that in pursuance of his statement to the police he was made a charge-sheet witness. The witness does not disclose even the name of any villagers. The witness was, therefore, wholly unreliable and had been set up. The conviction of the appellants under Section 302/34 of the Indian Penal Code was, therefore, in consonance with law and requires no interference to that extent.

15. The Court has considered the materials on record, the depositions of the witnesses and the submissions of the parties.

16. The prosecution and the defence are stated to be agnates with admitted long standing enmity between them in a land-dispute with more than one litigation against each other. These litigations were pursued earlier by the uncle and father of P.W.3, and for the last three years were being pursued by the witness. The relationship between the prosecution-witnesses has been adequately noticed herein above. To that extent, they are interested witnesses and the possibility of implication can well be a ground. Therefore, the evidence of the prosecution-witnesses shall have to be understood and scrutinized with caution. It is not that the evidence of an interested witness cannot be accepted and has to be rejected outright. In many cases independent witnesses may not be available and it may be only the relatives who may be available as witnesses. Moreover, it would primarily be the relatives of the deceased who would be keen to bring the real offenders to book. The contention of the appellants that in the absence of independent

witnesses who were available in the vicinity, but whose statements were not recorded and who have not been examined, discredits the interested witnesses cannot be simply brushed aside. Each case shall have to be judged on its own facts. The case of Ram Padarath Singh (supra) : (1998)6 S.C.C. 240 relied upon by the State appears to be different on facts inasmuch as there was nothing on record and there was no evidence of the presence of any other person at the time of occurrence. The Court, therefore, could not assume and proceed on the basis that independent witnesses must have been available and yet were not examined by the prosecution.

17. In the case of Sudarshan Reddy(Supra) 2006(3) S.C.C. (Cri.) 503, relied upon by the State it has been held at paragraph-12 that relationship alone cannot be a factor to affect the credibility of a witness. More often than not a relation would not conceal the actual culprit and make allegations against an innocent person. A foundation has to be laid to establish a plea of false implication. In such cases, the Court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible. It was the duty of the court to separate the grain from the chaff.

18. Examining the evidence of P.Ws.1, 2 and 4 on that standard, this Court finds from a conjoint reading of the evidence of the prosecution and defence witnesses that P.W.1 is not a truthful and reliable witness. His testimony of presence at village-Dera on the day of occurrence is contradicted by his own son, P.W.4, and by more than one defence witness. His denial with regard to Banka P.S. Case No. 30/1999 of the involvement of the deceased and P.W.3 cannot be lost sight of. This Court finds him to be an interested witness, not present at the time of occurrence but seeking to make out a case to that effect in the court. P.W.2 is not an eye-witness to the assault. This Court finds it difficult to accept his evidence of having seen the appellants running away from the place of occurrence. Quite obviously, he saw the appellants from a distance and not in close proximity and in the absence of any source of light for identification and the two appellants carrying any weapons, the witness being a stock witness for the prosecution in more than one litigation and his delayed statement to the police two days later without any explanation, all discredit him as an independent witness. P.W.4, who states to

have seen the appellants running away, no doubt, tried to create a theory of moonlight or the torch light at the belated stage. But, from his own evidence in Complaint Case No. C-102/1995 at Ext.A/3 he was not present in village-Dera but was at village-Leelabharan and came there subsequently. He denies any case by Reeta Devi against him and his father, P.W.1, but the latter acknowledges that she was his grand daughter and had filed a case. The Court is, therefore, satisfied that he is not telling the truth and cannot be relied upon as an interested witness.

19. P.W.3, the son of the deceased has claimed himself to be an eye-witness. He states of enmity and litigation between the parties. He also states that for the last three years he was looking after the litigations. Quite obviously, he was now the thorn in the flesh for the appellants. No useful purpose would have been served of the appellants by killing his father alone as in that event the witness would have still continued to pursue the litigation. This Court finds it difficult to accept that notwithstanding the same, the appellants asked P.W.3 to stand aside, assaulting his father alone. The witness states in the fardbeyan that accused Santosh Choudhary shouted to kill them all. But, in his deposition in Court, the witness states that Santosh Choudhary asked him to stand aside and not to make any noise, lest he should meet the same fate as the deceased. This appears to be highly unnatural conduct attributed to the appellants by the witness. P.W.3 states that the nine appellants surrounded the deceased and asked the witness to stand aside. If the deceased was surrounded by the accused, there was no occasion for the witness to view the assault with such great clarity as narrated by him. Quite naturally, his vision of the actual assault was hindered by the appellants having surrounded the deceased. The witness alleges 3 to 4 assaults on the deceased. The post mortem report finds 1 incised wound in the neck and 1 incised wound on the left side of the cheek only. The ocular evidence and medical evidence of the assault are therefore at variance with each other. The case of Mithilesh Upadhyay (Supra) 1997(3) Cri.L.J. 2983 relied upon by the State was a case of 2 firearm injuries in an allegation of firing in quick succession by 3 persons. The fact that firing by one may have missed was held to be irrelevant. The case is clearly distinguishable on facts.

20. The occurrence is stated to have taken place at 8.30 p.m. in the night. The witness himself states that it was raining at that time. P.W.4 stated that it stopped raining at 9.45-10.00 p.m. The fact that it was raining leads to the conclusion of a clouded sky without moon light or the light of the stars. The darkness of the night shall affect visibility by itself. The rains shall further affect visibility. Recognition by silhouette, even of a co-villager, cannot be accepted with certainty. There are no allegations of recognition by voice. In the absence of any statement of the source of light for identification, the case of Ram Padarath Singh (Supra) relied upon by the State of the possibility of some confusion by the witness in a case of assault by the accused surrounding the witness, and that the same shall not affect the credibility of the witness has no relevance in the facts of the present case.

21. It was only as an afterthought to fill up the lacunae in the prosecution case that P.W.4 sought to introduce the theory of moon-light and torch-light. None of the other witnesses have spoken of any source of light. The case of Ram Gulam Choudhary (Supra) 2001 (4) P.L.J.R. 123 (S.C.) and Nathuni Yadav,(AIR 1997 S.C. 1808) relied upon therein if of no avail to the prosecution as they were not cases of a dark rainy night without moon-light, stars or any other light howsoever weak for identification.

22. The identification by P.W.3 of the appellants in the dock is hardly relevant considering that they are agnates and there was an admitted enmity and litigation between them.

23. This Court further finds the conduct of P.W.3 at the time of occurrence highly unnatural. Even if the deceased had been surrounded by the appellants and felled to the ground, surely, in normal course of human conduct P.W.3 would not have stood by silently and watched the assault. It is not his case that he was confined by any of the other appellants or held at the point of arms. If the deceased had been surrounded and was being assaulted, surely, the witness would have shouted for help or in any event run away immediately either to seek help or to save himself from a followed assault after dealing with the deceased.

24. The deceased is stated to have been felled on the ground and pinned down. The normal human reaction of such a person would have been to free himself and

escape the assault. This would have led to a scuffle. If the deceased was struggling on the ground, surely, there would have been scratches or bruises on his body. His clothes may have suffered tear also. Such is not the case of the prosecution at all which raises doubts also.

25. The deceased is stated to have been assaulted at his 'Gohal' (cowshed). P.W. 3 states that the body was lying at the 'Adda' of Anant Choudhary when the police came. The inquest report states that the body was lying at the eastern end of village- Dara, Mohalla Choudhary Tola. The prosecution has given no explanation whatsoever how, why and when the dead body was moved and by whom. The witness has stated of the clothes of the deceased being soiled by blood. But, no signs of blood are stated to have been found at the place of occurrence or in between the place of assault and where the body was found. Surely, if the body was shifted, there had to be marks of dragging or at least of blood from a freshly assaulted bleeding person. No blood-soiled clothes of the deceased were given to the police as stated by P.W.3 himself. No weapon of offence has been seized. The case of Harban Sahai (Supra) is clearly distinguishable on facts as in that case blood-stained earth was seized by the police. The only lacuna was that it was not sent to the chemical examiner to test the origin of the blood.

26. Anant Choudhary at whose door the body of the deceased had been kept has also not been examined and no reason has been given by the prosecution for the same.

27. The assault is stated to have taken place on 28.8.1999 at 8.30 p.m. The fardbeyan of P.W.3 was recorded at village-Dera at 10.15 p.m. The inquest report was prepared on 28.8.1999 at 10.15 p.m. The F.I.R. was registered the same day at 11.45 p.m. The body was sent for post mortem examination to the Sub-divisional Hospital, Banka at 9.00 a.m. on 29.8.1999. The F.I.R. was forwarded to the concerned Magistrate on 29.8.1999, stated to have been received on 30.8.1999. The argument of Shri Singh, for the appellants, that the fardbeyan was, in fact, not recorded at 8.30 p.m. on 28.8.1999 and no F.I.R. registered as in that event the inquest report would have borne the number of the F.I.R. which finds no mention in the post mortem report dated 29.8.1999 suggestive of the absence of

any fardbeyan or the F.I.R. till the stage of the body being sent for post mortem cannot be ignored. The case of Gulab Sain 1999(1) P.L.J.R. 325 relied upon by the State was different on facts inasmuch as no F.I.R. had been registered formally and in which background the Supreme Court held in the relevant extract of the judgment at paragraph-5 as follows:

5. ...As a matter of fact when the police officer takes up the investigation in a case in anticipation of registration of the case, he leaves scope for mentioning the number of police case on the papers and subsequently, it is mentioned on the papers which is necessary for the purpose of connecting the papers with the case. It does not indicate that actually such mentioning of number of police case indicate some manipulation....

28. In the present case, the F.I.R. was registered on the date of occurrence itself and the dead body sent for post mortem the next day. Quite naturally, the inquest report should have borne the number of the F.I.R. Thus, there was no occasion for the post mortem report to state that the police case number was not mentioned in the dead body challan/inquest report. The fact that while forwarding the dead body for post mortem the next day, no details of the F.I.R. registered the previous day were incorporated makes it highly probable of the F.I.R. being an afterthought in the facts and circumstances of the case. This probability is further weighted by the fact that the F.I.R. registered on 28.8.1999 has been sent to the Magistrate on 30.8.1999. This delay by itself, perhaps, may have been overlooked by the court as not being unreasonable. But, when the allegations are of antedating, false implication, admitted previous enmity between the parties and the credibility of witnesses is not to the satisfaction of the Court, there are unexplained links in the case of the prosecution, even this delay becomes relevant.

29. In : (2002) 1 S.C.C. 487 (Thanedar Singh v. State of M.P.) the occurrence was in the night of 18.5.1982/19.5.1982. The F.I.R. was received by the Magistrate on 21.5.1982. The Apex Court noticed as follows in the relevant extract of paragraph-5.2:

5.2. ...It is significant to note that the crime number/F.I.R. number is not to be found in the inquest report (P-6), site plan (P-5) or (P-8) which is a requisition sent

to the hospital for post mortem. No reference whatsoever is made in Ext.P-6 about the information, if any, furnished by P.W.8 or P.W.6. All this would support the defence version that F.I.R. (P-10) in which the names of the accused were mentioned would have probably come into existence much later...

30. In the present case also, in the inquest report no names of the appellants have been mentioned in either Colmn. 6, 8 or 9. If the appellants were the assailants identified by P.W.3, surely, the inquest report was the first stage for recording such disclosure of names of the assailants. This casts serious doubts on the case of the prosecution as alleged.

31. The Court, therefore, on a consideration of the entirety of the matter is not satisfied that the case has been proved beyond all reasonable doubt that the occurrence took place in the manner as alleged, committed by the appellants alone. The unexplained issues, in the case of the prosecution, raise serious doubts on the possibility of an occurrence having taken place in some other manner, at some other place, committed by some other persons. The possibility of false implication cannot be ruled out completely.

32. This Court, therefore, finds the conviction and sentence of the appellants wholly unsustainable. It is accordingly set aside and the appellants are acquitted.

33. The appellants Ram Kumar Choudhary and Dhodho Choudhary @ Preetam Choudhary, who are in custody, are directed to be released forthwith, if not wanted in any other case. The rest of the appellants, who are already on bail, are discharged from the liability of their bail-bonds.