

The State of Bihar Vs. Shaukat Mian

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Court : Patna

Decided On : Jul-29-2009

Reported in : 2009(57)BLJR3019

Judge : Navin Sinha and; Dharnidhar Jha, JJ.

Acts : Explosive Substances Act - Sections 3 and 4; ;[Evidence Act, 1872](#) - Section 145 and 157; ;Indian Penal Code (IPC) - Sections 34, 147, 148, 149, 302, 307, 323 and 325; ;Code of Criminal Procedure (CrPC) - Sections 157, 161, 162 and 313

Appeal No. : Death Reference Case No. 8 of 2008 and Cr. Appeal No. 665 of 2008

Appellant : The State of Bihar;shaukat Mian

Respondent : Shaukat Mian;The State of Bihar

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

Advocate for Pet/Ap. : Akhileshwar Prasad Singh and; Ajay, Adv.

Disposition : Appeal dismissed

Judgement :

Navin Sinha, J.

1. These three criminal appeals arise out of the judgment of conviction and sentence dated 26.4.2008 by the Additional Sessions Judge, F.T.C.-IV, Banka, in Sessions Trial No. 897 of 2002.

2. Death Reference No. 8 of 2008 arises out of Criminal Appeal No. 665 of 2008 alone. Seventeen persons were put on trial. Nine have been acquitted, and eight convicted.

3. Shaukat Mian has been convicted under Section 302, 148 of I.P.C., Section 3(b) of the Explosive Substances Act, and sentenced to death, in addition to rigorous imprisonment for three years under Section 148 of the Indian Penal Code and to rigorous imprisonment for life under Section 4 of the Explosive Substances Act. Rahim Mian has been convicted under Sections 307, 302/148/149 and 3/4 of Explosive Substances Act, and sentenced to seven years rigorous imprisonment under Section 3/4 (each) of Explosive Substances Act, three years rigorous imprisonment under Section 148 of I.P.C., ten years rigorous imprisonment with fine under Section 307 of I.P.C. and rigorous imprisonment for life under Section 302, 149 of I.P.C. Hasib Mian and Latif Mian have been convicted under Sections 323, 325, 307, 302/147, 149 of I.P.C. and sentenced to one year rigorous imprisonment under Section 323 of I.P.C., five years R.I. under Section 325 of I.P.C., two years R.I. under Section 147 of I.P.C., ten years R.I. with fine of Rs. 20,000/- under Section 307 of I.P.C. and R.I. for life under Section 302, 149 of I.P.C. The rest have been convicted under Section 302/147/149 of I.P.C. Buddhu Mian has further been convicted under Section 307/34 of I.P.C. They have been sentenced to R.I. for two years under Section 147 of I.P.C. and R.I. for life under Section 302/149 of I.P.C. and Buddhu Mian has further been sentenced to R.I. for ten years under Section 307/34 of I.P.C. and fine imposed.

4. Md. Himmat Ali, P.W.3, in his fardbayan recorded, at the Referral hospital, Bousi, on 8.7.2002 at 6.45 a.m., marked as Ext. 1, stated that on the previous night he and his family members were asleep at their 'Basa'. About 4.00 a.m. in the morning his co-villagers, Buddhu Mian, his sons, Hasib Mian and Latif Mian came to his 'Basa'. Buddhu Mian ordered when Hasib Mian and Latif Mian assaulted his son Md. Shamshad Ansari, P.W.4, the informant's wife Bibi Mazida

Khatoon, P.W.2, on the head with a 'Khanti', causing injuries to them. Abul Basher and Israel came on hearing the commotion. The informant along with his wife and sons proceeded to the Bousi hospital for their treatment. When they reached near the Imambara at about 6.00 a.m., Hasib Mian, Latif Mian with a 'Khanti', Rahim Mian with bomb, Shaukat Ali with bomb, Nawab Mian with bomb, Pasib Mian with 'Lathi', Tudu Mian with 'Lathi', Kamrul Mian, Buddhu Mian, Kabir Mian, Jannu Mian, Firdous Mian, Minhaz Mian, Nazrul Mian, Khurshid Mian, Islam Mian and Siddique Mian with 'Lathis' in their hand lay in wait and surrounded the informant and his family members. Shaukat Mian threw a bomb which hit the informant's son, Fida Hussain, on his left shoulder 'Pakhura' and he was seriously injured. Nawab Mian threw another bomb at his son Md. Hasnain, P.W. 1, Rahim Mian threw a bomb from his terrace which hit Abul Basher causing injuries. The accused ran away when they saw the villagers coming.

5. Fida Hussain died at the hospital. The motive for the occurrence was the ongoing land-dispute between the informant and Nawab Mian, Buddhu Mian.

6. The police investigated the matter and submitted charge-sheet against all the accused under Section 302/149 and under Section 307/34 of I.P.C. against Buddhu Mian. Both the prosecution and accused are descendents of a common ancestor. P.W.3, Himmat Ali were three brothers, Samtulli and Mahboob Ali. Samtulli had four sons- Kabir, Nawab, Junno and Noor Nabi (deceased). The surviving three brothers are accused along with Khurshid, son of Kabir and Minhaz, Mirbous and Nazrul, sons of late Noor Nabi. Kabir, Nawab, Junno, Firdous sold certain lands to Buddhu Mian giving rise to the land-dispute for the family properties.

7. The prosecution examined six witnesses and four court witnesses. P.W.1, P.W.4 and C.W.4, Md. Hasnain, Md. Shamshad Ansari and Gulam are the sons of the informant. P.W.2 is the wife of P.W.3. P.W.5 is the doctor who did the post mortem of the deceased and P.W.6 is a formal witness. C.W.2 is the doctor who examined the injured and C.W.3 is the Investigating Officer.

8. The post mortem report of the deceased, Fida Hussain, marked as Ext.2, found the following ante mortem injuries:

I). Lacerated wound 9'x8' to the scapula with charred margin, lacerated and charred muscle over left scapular region with fracture of left scapula.

II). Several minute burn-injuries on the left leg.

III). Lacerated wound 1/2' x 1/6' skin deep over the left foot.

IV). Lacerated wound 1/2 x 1/6' skin deep on right toe.

V). Abrasion 1'x1' brown colour, forehead on right side.

VI). Abrasion over right shoulder 2' x 1' brown in colour.

9. All the injuries were caused by explosives. Cause of death- shock and haemorrhage. Time of death- within 24 hrs.

10. The injury report of P.W.2 stated:

i) One lacerated wound on Lt. side of head 1-1/2'x1/4'. Nature of injury-simple caused by hard blunt substance.

11. The injury report of P.W.4 stated

1. Lacerated wound frontal area of Lt. side of head 2-1/2'x1/4'x1/4'

2. Defused swelling on Rt. Elbow about 3'x2'.

3. Compound fracture of Rt. Leg, bone visible.

4. Defused swelling 3'x2' on left leg.

12. Injuries 1 and 4 were simple and 2 and 3 were stated to be caused by hard blunt substance.

13. The injury report of Abu Basher stated one lacerated wound on Rt. Leg on middle and outer post 1'x1/4'x1/4', simple caused by hard blunt substance. The injury report of P.W.1 Md. Hasnain Ansari stated:

1. Abrasion on forehead 1/4'x1/4'.

2. Abrasion left and right forearm 4'x1/4'.

3. One lacerated wound on Rt. Leg 2'x1/4'x1/4', injuries being simple in nature caused by hard blunt substance within six hours.

14. The injury reports were marked as Exts. 4, 4/1, 4/2 and 4/3.

15. D.W.1 Ram Balak Roy, the erstwhile Sub-inspector of police, Barari P.S., Bhagalpur was the sole defense witness who proved Ext. A, the fardbayan of P.W. 4 Md. Shamshad Ansari stated to have been recorded by him at the Bhagalpur Hospital on 30.7.2002.

16. Learned Counsel for the appellants, Shri Akhileshwar Prasad Singh, submitted that Mahboob Ali, Israel and Abul Basher named by the prosecution-witnesses to have been present, have not been examined. Abul Basher is also alleged to have suffered bomb-injuries near the Imambara. Gulam is also stated to have suffered bomb-injury near the Imambara, but there is no injury report on record. In his deposition he has said nothing with regard to any bomb-injury to him. P.W.1 was vacillating on the issue- whether his statement was recorded at 7.00 a.m. at the Bousi Hospital on 8.7.2002 or not. Contrary to his statement in his examination-in-chief that Hasib and Latif were the assailants of P.W.4, he has also named Tudu in his cross-examination. Aware of the land-dispute between them, he denied the existence of 5-6 litigations between the parties or that the cause for occurrence was the sale of 14 Katthas of land to Buddhu Mian. He was not an eye-witness to the occurrence near the Imambara. The witness had made contradictory statements before the police under Section 161 Cr.P.C. and in the court. Having been confronted with the same, he stood discredited. Being an interested witness, related to the injured and the deceased he was not stating the truth.

17. P.W.2, wife of the informant, was also an interested witness. She stated that her statement was recorded by the police at the hospital on 8.7.2002 at 7.00 a.m. and her thumb impression taken thereupon. This was the first true and correct narration of the occurrence disclosed before the police as a fardbayan and which has been concealed by the prosecution. This explains the delay in sending the F.I.R. to the Magistrate after deliberation on 10.7.2002. The fardbayan of P.W.3,

stated to have been recorded at 6.45 a.m., is an afterthought and an ante timed fardbayan. P.W.2 has stated that they first went to the police station where they were told to go to the Bousi Hospital for treatment. It is not the case of the prosecution that any fardbayan of P.W.3 was recorded at the police station. The witness acknowledged that Buddhu Mian had purchased lands from her brother-in-law. She woke up only after the assault on P.W.4 Md. Shamshad Ansari and, therefore, was not an eye-witness to the assaults on him. Contrary to her statement of bleeding after assault upon her when her clothes and the ground being soiled by blood or presence of remnants of the bomb and blood on the spot, the investigating officer, C.W.3, did not find any such thing.

18. P.W.3, the informant also stated of first having gone to the police station at 6.00 a.m. with the injured when they were told to proceed to the hospital immediately. He does not say that any statement of his was recorded at the police station. He feigned ignorance and denied any land-dispute, more particularly, with regard to 14 Katthas sold by a faction of the family to Buddhu Mian.

19. P.W.4, Md. Shamshad Ansari, was also an interested witness. He claimed to be an eye-witness to both parts of the episode, but did not make any such statement under Section 161 Cr.P.C. with regard to the occurrence at the Imambara. He denied having given any fardbayan to D.W.1 at Bhagalpur in which he had given a completely different version of the manner of first occurrence, that Nawab Mian and Firdous Mian had put a gun to his head and that there was animosity between them for pending litigation, or that he learnt of the death of his brother Fida Hussain in the hospital.

20. If the informant and other injured had gone to the police station at 6.00 a.m. and the statement of P.W.2 was first recorded at the hospital at 7.00 a.m., there was no occasion for their injury report to be prepared by the hospital at 6.30 a.m.

21. The impugned judgment at paragraph-18 opines that in a constrained area of 15/15 feet of open space near the Imambara it was not possible for 17 accused to assemble and not to have suffered any bomb injuries themselves. This made the presence of all the accused doubtful. The other accused with the exception of the present appellants have been acquitted. But, the case of Pasib, Tudu and Firdous

is the same as those acquitted. Even Nawab Mian, who is alleged to have thrown the bomb, has been acquitted. There was, thus, no justification for the conviction of Rahim Mian and the distinction sought to be drawn on basis of relationship of an accused with Buddhu Mian was wholly irrelevant. P.W. 1 had made a specific accusation of bomb-injury to him and to Gulam by Nawab Mian. Abul Basher, alleged to have been injured by Rahim Mian, having not been examined, was also entitled to acquittal. Summing up the arguments it was submitted that P.W's.1 to 4 and C.W.1 were interested witnesses whose testimony could not be relied upon, given the fact that the parties were descendents of a common ancestor and there was serious land-dispute and several litigations between them.

22. The prosecution-witnesses have been confronted with and questioned on the contradictions between their statements under Section 161 Cr.P.C. and that made in the court. They have been discredited and their evidence has to be tested by separating the truth from falsehood. If the truth and falsehood were inextricably mixed up, their entire evidence must be rejected.

23. Reliance was placed on (2002) 1 S.C.C. 487 on the issue of delay in the F.I.R. It was next submitted that failure to put questions to the investigating officer, C.W.3, with regard to the statements of P.W's.1 to 4 under Section 161 Cr.P.C. and which they had contradicted was not relevant. Putting of the questions to elicit contradictions to P.W's.1 to 4 was sufficient compliance with the provisions of Section 145 of the Evidence Act and the appellants cannot be prejudiced by non-compliance of Section 157 of the Evidence Act vis-a-vis the investigating officer, C.W.3, on these contradictions. Reliance was placed on AIR 1952 S.C. 214. It was lastly submitted that in any event of the matter, the present was not a case for imposition of death sentence. There was no charge under Section 3(b) of the Explosive Substances Act with regard to special category of explosives and no statement of accusation made there under, at the stage of 313 Cr.P.C. The submission therefore was of a doctored F.I.R., false implication due to land-dispute to urge that the appellants deserved an acquittal.

24. Learned Senior Counsel Shri Lala Kailash Bihari appearing on behalf of the State urged that the first occurrence took place at 4.00 a.m. at the 'Basa' of the

informant. They proceeded to the hospital around 5.00 a.m. It was natural that the only witnesses were family members at this early hour of the morning. Two of them are injured witnesses. Both the assaults were contiguous in point of time. Even if the injuries found on P.W.1, Gulam, and Abul Basher are stated not to have been caused by a bomb, it definitely confirms their presence during the second episode leading to injuries on them. In the facts of the case the issue of delay in the F.I.R. was not fatal, for which reliance was placed on (2002) S.C.C. (Cri.) 175. The basic charge was one under Section 302/149 of I.P.C. as members of an unlawful assembly actuated by a common object. Individual overt acts of assault were, therefore, hardly relevant and even if not proved shall be of no avail to the appellants. The acquittal of some of the co-accused on the ipse dixit of the trial court without any reasoning and sustainability in law was of no avail to the appellants. Reliance was placed upon (2003) S.C.C. (Cri.) 1543. The investigating officer, C.W.3, has deposed that having heard a rumour of the occurrence, he made a station diary entry at 5.00 a.m. and reached the Bousi Hospital at 6.45 a.m. where he recorded the statement of the informant. The inquest report and the dead body challan were then prepared at 7.00 a.m. The statements of P.W. 2 and P.W.4 were recorded at the Bousi Hospital itself before referring the latter to Bhagalpur for better treatment. There was no occasion for a fresh statement of P.W.4 at Bhagalpur, and if recorded, should have been sent to the Bousi police station for investigation, which has not been done. The investigating officer proceeded to the place of occurrence at 7.15 a.m. The absence of any blood or remnants of bomb at either of the two places referred to by the investigating officer is of no relevance. The occurrence was during the monsoon in the month of July, more so, when the bomb explosion took place on an unpaved village street with all possibility of wild vegetational growth in the monsoon. Even if the conviction under Section 3(b) of Explosive Substances Act were to fail, the lesser charge under Section 3(a) of Explosive Substances Act shall stand as no prejudice can be said to have been caused to the appellants in that event. Whether an offence under Section 307/149 of I.P.C. was made out against some of the accused or not, was to be tested on the nature of the assault and not the nature of the injury caused by the assault.

25. The law with regard to interested witnesses states that the credibility of an interested witness cannot be doubted merely because he was an interested witness. Many a times no independent witness may be available or be willing to depose. If an interested witness was to be rejected simpliciter on that ground, there would be no evidence left. It has, therefore, been held by the Courts that the evidence of an interested witness shall have to be tested with caution for its credibility and shall be accepted if it was otherwise cogent, consistent and convincing. Moreover, an interested witness, especially a relative of the victim, would be the person most keen to ensure that justice is done to the victim vis-a-vis the perpetrator of the crime.

26. It has likewise been held that weightage has to be given to the evidence of one who is injured in the same occurrence. It lends credibility to the allegations as he is an eye-witness and was injured in the same transaction.

27. The first assault is stated to have taken place at 4.00 a.m. at the 'Basa' of P.W.3. It is but natural at this very early hour of the morning that no independent witness shall be available at the house of P.W.3, except the inmates, unless the house owner had any visitors staying overnight. In an occurrence of the hot and humid month of July, it is not unusual that on the commotion created by the assault, Abul Basher and Israel may have arrived at the spot. P.W.2 and P.W.4 are stated to have been injured by assault with a 'Khanti'. Both have consistently stated that Buddhu Mian ordered, when Latif and Hasib assaulted them. P.W.1 was not an injured witness. His statement under Section 161 Cr.P.C. that Tudu Mian was also one of the assailants is hardly relevant. The injury report of P.W's.2 and 4 at Ext.4 and 4/1 states that it was caused by a hard blunt substance which includes a 'Khanti'. The injuries have been found to be simple in nature on P.W.2 while injuries- 1 and 4 on P.W.4 were found to be simple and opinion reserved on injuries-2 and 4 awaiting X-ray report which never came. To urge that P.W.2 was not an eye-witness, but woke up only after the assault first made on P.W.4 and was therefore not an eye-witness, is nothing but a quibbling on what are essentially non-issues. She was sleeping in the same 'Basa' as P.W.4. Assault was made on P.W.4 who shouted for help, when she ran to help and was also assaulted and suffered injuries. P.W.3, the informant, who was also sleeping there

has consistently stated that on the order of Buddhu, Hasib and Latif assaulted P.W.4 first and then P.W.2.

28. P.W.1 has stated likewise. Even C.W.1 has corroborated the first assault at the 'Basa'. P.W's.1 to 4 have consistently stated of his presence also at the time of assault at their 'Basa'. Merely because there may have been some variations in their statements made under Section 161 Cr.P.C. and during deposition in court, peripheral in nature, when the contradictions have not even been proved in accordance with law shall hardly be relevant. The Court shall deal with this aspect subsequently.

29. There is no allegation of any bomb-explosion at the 'Basa'. The Investigating Officer, C.W.3, states that he did not find any remnants of a bomb at either place of occurrence. That he did not state about blood being present or not at the first place of occurrence is irrelevant, in view of the consistent evidence of witnesses, including injured witnesses, of assault with a 'Khanti' and bleeding injuries corroborated by the injury reports. The failure to mention blood spots or seizure of blood-stained clothes or earth is inconsequential.

30. The second part of the occurrence at the Imambara draws its sustenance for truthfulness from the first occurrence at the 'Basa'. P.W.1-4 have consistently stated that Abul Basher arrived at the first place of occurrence immediately after the assault on P.W.2 and P.W.4. It is the case of the prosecution that immediately after the assault all of them proceeded to the Bousi Hospital for treatment. The second assault near the Imambara took place when they were on way to the hospital. Abul Basher is also stated to have suffered bomb injury as a result of the bomb thrown by accused Rahim. The continuity of the sequence of events certainly lends credence to the allegations. Fida Hussain is stated to have been deceased as a result of the bomb thrown by accused Shaukat Mian and P.W.1 and C.W.1 are stated to have been injured by the bomb thrown by accused Nawab Mian. The inquest report and the post mortem report of Fida Hussain both refer to death being caused by explosives. The fact that the Investigating Officer, C.W.3, may have stated that he found no remnants of a bomb at the place of occurrence is not of much avail to the accused. The place of occurrence was an unpaved road

and an open area. It was the month of Monsoon, in July. The possibility of wild vegetational growth in a village environment where the remnants may have got scattered and camouflaged, cannot be ruled out. The bomb thrown on Fida Hussain landed on his shoulder directly and exploded immediately causing injury to him. The mere absence of any remnants, does not persuade this Court to hold that the entire allegations are false and fictitious when the medical evidence is to the contrary. Lacerated wounds have been found on P.W.1 and Abul Basher. Modi's book on Medical Jurisprudence and Toxicology states that lacerated wounds can also be caused by bomb explosions also. Quite obviously, the bombs used in the present occurrence in a village was a crude bomb which has its limits of causing injuries dependent on various factors of its ingredients which unfortunately is not the subject matter of the investigation.

31. This Court on consideration of the above, is satisfied that the evidence of the witnesses cannot be disbelieved simply on the ground of their being interested witnesses, but is otherwise cogent, convincing and credible.

32. In : AIR 2004 S.C. 313 (Choudhary Ramji Bhai Narsan Bhai v. State of Gujarat) it has been held as follows at paragraph-4:

4. In appeal the High Court found that the trial Court's approach was erroneous. It was of the view that if a particular fact stands established by the evidence of trustworthy and reliable witnesses, the record is not to be burdened by examining other witnesses for proving the same fact as it would amount to multiplicity only. If the witness is otherwise reliable and trustworthy, the fact which is sought to be proved by that witness need not be further proved through other witnesses. Even if a witness is related to the deceased there is no reason to discard his evidence if he is reliable and trustworthy. What is required is the cautious and careful approach in appreciating the evidence because a part of the evidence might be tainted owing to the relationship and the witnesses might be exaggerating the facts. In such an event, the Court is to appreciate the evidence in the light of other evidence on record which may be either oral or documentary. It was noticed that the presence of the informant was not challenged in the cross-examination and this was considered significant by the High Court. The incident was admitted by

the accused persons and their presence at the time and place of occurrence was also not under dispute. The presence of the deceased and the injured (PW-7) was also not disputed as is clear from the tenor of cross-examination as well as the stand taken by the accused. The informant was examined at length and the High Court noticed that nothing infirm was brought out by such cross-examination. The evidence of PW-5 i.e. his mother was also held to have corroborated the evidence of PW-4 and PW-6, the blind witness.

33. The contention that the fardbayan of P.W.3 recorded at 6.45 a.m. at the Bousi Hospital was fabricated, concocted after deliberation and ante timed does not appeal to the Court. The Investigating Officer, C W 3, has deposed that on hearing a rumor about the occurrence he made a station diary entry, duly proved, and proceeded to the hospital. He made a requisition to the doctor for the injury report of those injured already undergoing treatment. Clearly before the injured went to the hospital no statement of theirs or others was recorded. Otherwise, the injured would have been forwarded for treatment by the police. The fardbayan was then recorded at the hospital at 6:45 a.m. and the statements of others thereafter at 7:00 a.m. The injured who were bleeding may have gone to the police station at 6:00 a.m. The police considered medical attention to them as more important than recording their statement immediately. Surely, the police was not expected to make P.W.2 and 4 sit at the police station, bleed away to death, awaiting the recording of an F.I.R. There is no time delay in the sequence of events. Even the inquest report of the deceased and the dead body challan have been prepared at 7.00 a.m. and the body sent for post mortem. The fact that the thumb impression of P.W. 2 may have been taken on her statement under Section 161 Cr.P.C. is of no relevance and does not turn the statement during investigation into an independent fardbayan. Section 162 Cr.P.C. clearly prohibits the police from taking the signature of the person making the statement.

34. Section 162, proviso Cr.P.C. reads as follows:

Provided that when any witness is called for the prosecution in such enquiry or trial whose statement has been reduced into writing as aforesaid, any part of his statement, if duly proved, may be used by the accused, and with the permission of

the Court, by the prosecution to contradict such witness in the manner provided by Section 145 of the [Evidence Act, 1872](#) (1 of 1872); and when any part of such statement is so used, any part thereof may also be used in the pre-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination.

35. Section 145 of the Evidence Act relevant for the purpose reads as follows:

Section 145 witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting.

36. Read together, the emphasis is on statements duly proved and the contradiction of such statements after inviting his attention to that part of his statement intended to be contradicted.

37. These two provisions have been considered by the Supreme Court in : AIR 1959 S.C. 1012 (Tahsildar Singh, appellants v. State of U.P.). The Court observed that these two provisions were primarily intended to protect the accused against use of statements of witnesses made before the police during investigation presumably on the assumption that the said statements were not made under circumstances inspiring confidence. The legal position thus emerging is that a statement in writing made by a witness before a police officer in course of investigation can be used to contradict the statement of the witness in the box and not for any other purpose. Such statements not reduced into writing by the police officer cannot be used for contradicting and a particular statement not expressly recorded can be used for contradiction because it is deemed to form part of the recorded statement under specified circumstances. This would necessarily require that the two are irreconcilable and one has to give way for the other. The Supreme Court, however, cautioned that these were not exhaustive propositions but were illustrative to be considered in its application by a Judge in the facts of each case.

38. It has been noticed in : (1999) 4 S.C.C. 621 (State of Kerala v. Babu and Ors.) that such contradiction can also be used for impeaching the credit of a witness.

39. But, to this Court, it is not every or any contradiction which shall affect the case of the prosecution or impeach the credit of the witness. The contradiction must be germane to the controversy hitting at the vitals as distinct from peripheral issues. Obtaining statements from a witness of what he may have stated or may not have stated or omitted to state before the police shall not fall within the definition of 'contradiction'. The Court may be a little more cautious while considering his evidence, but, per se, the witness does not get discredited in its entirety.

40. We have gone through the cross examination of P.W's. 1 to 4 and C.W.1. The contention that P.W's. 1 to 4 claimed to have made certain statements to the police, but which are, in fact, not recorded in the investigation, cannot be termed as a contradiction. Likewise, disclosures not made during investigation, but statements to that effect during the trial do not constitute contradictions. The cross-examination does not reveal that the attention of the prosecution-witnesses was specifically drawn to a particular statement made before the police during investigation and a completely contradictory statement made before the court on the same issue thus creating a situation that the two statements could not exist and one shall have to give way for the other.

41. The reliance on : AIR 1952 S.C. 214 (Bhagwan Singh v. State of Punjab) in support of the theory of 'substantial compliance' under Section 145 of the Evidence has well been considered in the case of Tahsildar Singh and therefore is of no avail to the appellants.

42. In the case of Tahsildar Singh (Supra) it has further been held that when the attention of the witness is drawn to his statement before the police and that in the witness-box, if he admits his previous statement during investigation, no further proof is necessary. If he does not admit the statement, it can be accepted subject to being proved by the police officer. On facts, in the present case, what are alleged to be contradictions in court have not been sought to be corroborated or proved by the defense putting questions in cross-examination to the investigating officer, C.W.3. The defense purposefully refrained from doing so. This Court has

no hesitation in holding that the questions sought to be elicited from prosecution-witnesses as contradictions during investigation was nothing but a ruse and an attempt by the defense to derail issues in an attempt to obtain undue advantage. The truth would have emerged in the cross-examination of the Investigating Officer. While Section 145 of the Indian Evidence Act deals with contradiction, Section 157 of the same deals with corroboration. In absence of compliance with the latter, in the facts of the case, it cannot be held that the contradictions, if they be so, sought to be relied upon have been legally proved.

43. The submission that the acquittal of certain other persons with similar accusations as Pasib, Tudu and Firdous entitles them to acquittal also and that the acquittal of Nawab Mian entitles Rahim Mian to acquittal as both are alleged to have thrown bombs has only to be stated to be rejected. The impugned judgment at paragraph-18 granting acquittal is neither reasoned nor considered, arriving at any finding of fact that they were not present at all, much less with regard to the overt acts attributed to them. The trial court has simply proceeded on a yardstick of relationship with Buddhu Mian, an accused, to grant acquittal or not, an issue wholly irrelevant. The acquittal is unfortunate in law, but there is no appeal against the same for this Court to test the acquittal. A wrong acquittal cannot be of any avail of the present appellants and for which learned Counsel for the State has rightly relied upon the case of Darshan and Ors. (Supra) wherein, at the relevant extract of paragraph-3, considering a similar plea it has been held as follows:

3. Though, we are not happy with the manner in which an order of acquittal of Ram Chand, Lila, Jagdish, Surjai and Chadni Ram was recorded by the High Court, for it gives no reasons in support of the view that they were entitled to benefit of doubt, however, since there is no appeal filed by the State against their acquittal, we need not detain ourselves to consider this aspect any further.

44. To the same effect are the observations of the Supreme Court at paragraph-7 in : AIR 2004 S.C. 313 (Choudhary Ramji Bhai Narasang Bhai v. State of Gujarat and Ors.).

45. The contention that no conviction could have been made under Section 3(b) of the Explosive Substances Act in absence of a specific charge there under and

statement of accusation with regard to the same explained under Section 313 Cr.P.C. appeals to the Court. The section deals with a special category of explosives warranting death sentence while under Section 3(a) rigorous imprisonment is warranted for use of an explosive. However, if the bigger charge were to fail, it shall not affect the lesser charge as the accused in that event cannot be stated to have been prejudiced in any manner.

46. The injury-reports of P.W's.1, 2, 4 and Abul Basher are stated to be all simple in nature. The allegation of assault on P.W's.2 and 4 is with a Khanti while on P.W. 1 and Abul Basher with a bomb. In absence of any evidence with regard to the nature and intensity of the explosive, the only material before this Court is the medical report of injury to decide the nature of offence made out. In the nature of the injuries caused, this Court finds it difficult to hold that any offence under Section 307/149 of I.P.C. is made out in the facts of the case, insofar as the assault on the injured is concerned. Section 149 of I.P.C. creates vicarious liability for acts done in pursuance of a common object. Once this Court has held on the truthfulness of the witness, individual overt acts when Fida Hussain died, of those forming an unlawful assembly is hardly relevant. If the accused proceeded armed to confront the prosecution side and lay in wait for them with weapons like a bomb, common object of causing injuries likely to cause death or to cause death can easily be inferred. The Court, therefore, finds no illegality in the conviction of the appellants under Section 302, 149 of I.P.C. The conviction under Section 3(b) of Explosive Substances Act is altered to one under Section 3(a) and 4 of Explosive Substances Act.

47. The attribution of delay in sending the F.I.R. registered on 8.7.2002 to the Magistrate on 10.7.2002 cannot be accepted. Section 157 Cr.P.C. mandates this to be done forthwith. In the given facts of a case, delay can be fatal. But, if the facts speak eloquently and the case is otherwise not in doubt, a reasonable delay is of no consequence. It has been noticed that the fardbayan has been recorded promptly, the inquest report of the deceased and being forwarded for post mortem examination, injury reports of the others, forwarding of one injured for specialized treatment to Bhagalpur, visit of the Investigating Officer to the place of occurrence are all co-terminus in time. The actions are with promptitude and in continuity

lending credence. Therefore, where the F.I.R. was lodged and the investigation started promptly, the mere delay in dispatch or for that matter in receipt of the same by the Magistrate does not make the F.I.R. suspect. The case of Thanedar Singh (supra) relied upon by the appellants is not relevant as it was in the facts of that case when the inquest report or requisition sent for post-mortem did not bear the F.I.R. number along with attending circumstances that the delay was held to be vital. Such is not the case presently.

48. In (2002) S.C.C. (Cri.) 175 (Munshi Prasad v. State of Bihar) it has been held at paragraph-13 as follows:

13. In support of the appeal, a further submission has been made pertaining to the First Information Report (FIR). On this score the appellants contended that delayed receipt of the FIR in the Court of the Chief Judicial Magistrate cannot but be viewed with suspicion. While it is true that Section 157 of the Code makes it obligatory on the Officer Incharge of the Police Station to send a report of the information received to a Magistrate forthwith, but that does not mean an imply to denounce and discard an otherwise positive and trustworthy evidence on record. Technicality ought not to outweigh the course of justice - if the Court is otherwise convinced and has come to a conclusion as regards the truthfulness of the prosecution case, merely delay, which can otherwise be ascribed to be reasonable, would not be itself demolish the prosecution case. The decision of this Court in Shiv Ram v. State of U.P. : 1997 AIR SCW 3996 : AIR 1998 SC 49 : 1998 Cri LJ 76 : 1997 All LJ 2266 lends support to the observation as above.

49. The fardbayan of P.W.4, stated to have been recorded at Bhagalpur on 30.7.2002 raises mere questions than it answers. The witness was sent to Bhagalpur by the Bousi police for better treatment. There had to be police records accompanying the injured. D.W.1 giving his statement after his superannuation states that he received a requisition from the Bhagalpur hospital but does not produce it. There is no explanation why the statement was recorded 22 days later. The witness denied having given any such statement. No contradiction was obtained from him. D.W.1 does not state of any F.I.R. having been registered and investigation done upon it or that it was forwarded to Bousi police for appropriate

investigation. The court is satisfied that it is a document, fictitious, created by the defense.

50. On the facts of the present case, the conduct of the accused, the nature and manner of assault, injuries caused on the deceased, the submission on behalf of the appellant Shaukat Mian in Cr. Appeal No. 665 of 2008 that the allegations against him do not fall in the category of the rarest of rare cases laid down by the Supreme Court to warrant death sentence under Section 302 of the Indian Penal Code is apt. His case does not qualify as the rarest of the rare case befitting death penalty as considered in the five categories laid down in the case of *Machhi Singh v. State of Punjab* AIR 1983 SC 957.

51. In the absence of a proper charge, statement of the accusation under Section 313 Cr. P.C. and the absence of any forensic materials with regard to the nature of the explosives the conviction and sentence of the appellant Shaukat Mian under Section 3(b) of Explosive Substances Act and the sentence of death awarded there under is also not sustainable. Shri Lala Kailash Bihari Prasad for the State found it difficult to persuade this Court to uphold the sentence of death awarded to appellant Shaukat Mian. We are, therefore, unable to uphold the sentence of death awarded to the appellant Shaukat Mian on both counts.

52. The sentence of the appellant Shaukat Mian under Section 302 of I.P.C. and Section 3 and 4 of Explosive Substances Act is, therefore, altered to life imprisonment.

53. The conviction and sentence of the appellants under Section 307 of the I.P.C. is held 'not sustainable' and is set aside.

54. The conviction of the accused appellants under Sections 302/149/148/147 and 323, 325 of I.P.C., 3 and 4 of Explosive Substances Act and the fines as imposed call for no interference by this Court.

55. With the modification of sentence of accused Shaukat Mian, the appeals are dismissed. The death reference is answered accordingly.