

**Anwar Vs. State**

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**Court :** Allahabad

**Decided On :** May-13-2011

**Judge :** The Honourable Chief Justice Mr. Ferdino Inacio Rebello & Imtiyaz Murtaza

**Appeal No. :** Criminal Appeal No. 5625 of 2007

**Appellant :** Anwar

**Respondent :** State

**Judgement :**

FERDINO I. REBELLO, C.J.

1. The appellant was charged for an offence under Section 302 IPC for murdering Chhotey Lal Yadav, son of Hari Charan Yadav on 24.10.2000 at about 3.30 p.m. between villages Marpa and Chargarha near the field of Ram Dulary Kharwar. The appellant was further charged for an offence under Section 506 IPC for having threatened to murder Rajendra Yadav, Behari Yadav, Bedeshi Yadav and Deena Nath, when they made an attempt to catch him after committing the murder of Chhotey Lal Yadav, by saying that if anybody made an attempt to apprehend him, he would murder him or sustain injuries. Charge was framed on 20.09.2001.

2. The prosecution case is that, a First Information Report of the incident was lodged on 24.10.2000 at about 8.30 p.m. at Police Station Manchi by Rajendra Yadav son of Hari Charan Yadav, alleging that on 24.10.2000 at about 3.30 p.m., his brother Chhotey Lal, his wife and his younger brother Rajgiri left home to prepare periphery (mend) for the irrigation of paddy crop. Anwar, resident of village Marpa and Chargarha, who was sitting in the field of Arhar crop near the field of Ram Dulary Kharwar between villages Marpa and Chargarha, fired one round of shot at his brother Chhotey Lal from his licensed single barrel gun of 12 bore. The prosecution sought to prove their case through Smt. Fulwa Devi, widow of deceased Chhotey Lal Yadav, P.W.2, his brother Rajgiri Yadav, P.W.3 and two other witnesses, namely, Rajendra Yadav, P.W.1 and Bihari Yadav, P.W.4., who reached the spot soon thereafter. Dr. R.C. Yadav was examined as P.W.5, as he had prepared the postmortem report. The Investigating Officer (I.O.) Raj Kumar was examined as P.W.6. The reports of Serologist and Ballistic Expert were taken on record. The accused was examined under Section 313 Cr.P.C. In his statement under Section 313 Cr.P.C., he had stated that he would lead evidence by examining the witnesses, yet he chose not to do so.

3. The learned Sessions Judge, after considering the evidence, arrived at a conclusion that the death was homicidal and caused by gun shot injuries. The statement on behalf of the accused that it was not he, but some Naxalites who had caused the death of the deceased, was not accepted by the learned Sessions Judge. The report of the Ballistic expert was relied upon. The learned Sessions Judge held that though no definite opinion has been given by the ballistic report, but the expert had expressed possibility that the three pellets recovered from the body of the deceased might have been fired by the licensed gun which was recovered. Considering the evidence, the learned Sessions Judge by judgment and order dated 23.11.2002 was pleased to convict the appellant of the offences under Section 302 IPC and after hearing the appellant on the point of sentence, awarded the sentence of life imprisonment. Apart from that, the learned Sessions Judge imposed a fine of Rs. 5,000/- and on failure to pay the fine, to further undergo imprisonment of six months.

4. At the hearing of this appeal, on behalf of the appellant, learned counsel submitted that the eye-witnesses were relatives of the deceased. The evidence of such relatives has to be taken with precaution. It was, therefore, submitted that apart from their evidence, there is no other independent evidence and, as such, the accused ought to have been given the benefit of doubt. It is next submitted that the provisions of Section 233 of Cr.P.C. are mandatory, and on failure to comply with the said requirement, the entire order stands vitiated. For that purpose, reliance was placed on a Division Bench judgment of the Gauhati High Court in the case of N. Pishak Singh Vs. State of Manipur, 2006 (2) Crimes 630. In the alternative, it is submitted that considering the evidence led by the prosecution itself, this is a case of enmity between the deceased and his family and the appellant and, consequently, placing reliance on the judgment of the Supreme Court in the case of Gali Venkataiah Vs. State of Andhra Pradesh, (2009) 3 SCC (Cri) 200, it is submitted that if at all, the appellant had to be convicted, he ought to have been convicted under Section 304 Part I IPC. It is submitted that it is not a fit case warranting conviction under Section 302 IPC.

5. On the other hand, on behalf of the State, the learned Additional Government Advocate, submits that no fault can be found with the order of the learned Sessions Judge. It is further submitted that the provisions of Section 233 Cr.P.C. will have to be read with Section 465. A person accused of an offence contending that the trial is vitiated, must show prejudice caused to him. In the instant case, it is submitted, that the appellant in his statement under Section 313 Cr.P.C. made a statement that he would examine the witnesses, however, he chose not to examine them. It is submitted that the provision of Section 233 of Cr.P.C., being directory in nature, it is the appellant who must show serious prejudice occasioned on failure to comply with the said provisions. For all the aforesaid reasons, it is submitted that the appeal should be dismissed.

6. Dr. R.C. Yadav, P.W.5 had conducted the postmortem. In the report submitted, it has been set out that the following ante mortem injuries were found on the body of the deceased:-

"1. Gun shot of wound of entry 1 cm X 1 cm X 28 cm on Iliac Crest 6 Cm. Lat to mid line going anteriority with left upward margin - inverted.

Blackening and tattooing present burning singing and charring not present.

2. Gun shot of wound of exit 1 cm. x .8 Cm. On front of Abdomen 3 Cm left lat and below to .... in continuation of injury No. (1) Puncturing liver, Intestine stomach and skin margins are averted no burning tattooing singing of charring present.

3. Gun shot wound of entry Cm. X Cm. X 3.2 Cm. 3 below and lat to injury No.1 going entirety left upward puncturing Rt. Kidney intestine spleen margins inverted, Pellet is recovered 32 Cm. From wound of entry Cm. below the skin 8 cm. Lateral to injury No. (2) only blackening tattooing present.

4. G.S.W. of Entry .4 X .4 Cm. X 29 cm. 2 Cm. above the injury No. (3) going Anteriority left and upward and with continuation of Injury No. (2) margins are inverted only blackening and tattooing present.

5. G.S.W. of Entry cm X cm. X 28 cm., 2 cm. anterior to Injury No. (4) going Anteriority left and upward with continuation of Injury No. (2) Margins are inverted only blackening and tattooing present.

6. G.S.W. of entry 1 cm X 3.4 Cm. 1 Cm. below 2 Cm. Lat to Injury No. (3) going Anteriority upward and lateral present over Rt. stomach and Pellet is recovered 34 cm. away from wound of entry 1 cm. below the skin 3 cm. lateral to injury No.2 margins are inverted only blackening and tattooing present.

7. G.S.W. of Entry .4 cm. X .4 cm. going upward Anterior to left puncturing intestine and pellet is recovered 8 cm. away from wound of entry .5 below the skin 5 cm below the injury No.2 Margins are inverted only blackening and tattooing present and wound is situated on Rt. Buttock 9 cm. Lat to mid Line 5 cm. below the Rt. Iliac crest.

Eyes - Open

Mouth partially open.

(Walls) (Ribs) (Cartilages) NAD (Pleura) NAD.

(Larynx) (Trachea) (Bronchi) NAD.

(Pericardium) Both Chambers are empty.

(Vessels') NAD.

(Abdomen), (Peritoneum) Punctured.

(Cavity) Full of blood.

(Buccal Cavity) (Pharynx) NAD.

(Oesophagus)

(Gall Bladder) 1400 gm. Punctured with injuries No. (1) (4) and (5) G.B. is partially filled.

(Pancreas) NAD.

(Spleen) 300 gm. Punctured with injury No. (3)

(Kidneys) Rt. region punctured with injury No. (8) and (Urinary bladder) NAD.

(Generation) NAD.”

The cause of death was given as shock and hemorrhage. Dr. R.C. Yadav, P.W. 5, has opined that the cause of death was shock and hemorrhage as a result of ante mortem injuries, and that the injuries might have been caused on 24.10.2000 at about 15.30 hours. He has further stated that all the injuries might have been caused by a single fire arm like a country made pistol or by gun, though in the cross-examination he has stated that the injuries could have been caused by more than one gun. The injuries were caused by firing a cartridge of 12 bore. He has deposed that the postmortem report was in his hand-writing and was signed by him. The injuries were caused from a very short distance and the injuries were on the backside as also on the front side at different places. The State has, therefore, proved that the death was homicidal.

7. The report of the Serologist shows that clothes at Item Nos. 2 to 6 had human blood. However, there is no material to indicate as to whether the blood was of the appellant or the deceased. Suffice it to say that the clothes were recovered under a Panchnama.

8. The prosecution, in all, has examined six witnesses of which P.W.2 Phulwa Devi and P.W. 3 Rajgiri Yadav are eye witnesses. P.W. 2 in her statement, has proved that on that date, she along with the deceased Chhotey Lal and her brother-in-law Rajgiri were going together at about 3.30 p.m. to village Chargarha for the irrigation of their field. When they reached near the field of Ram Dulary, where there was Arhar crops, she saw Anwar who was hiding in the said crops and had a licensed gun with him. He abused the deceased and fired at him. The deceased sustained injuries and fell down. The deceased was sought to be shifted by Tractor. She has also deposed that the gun was fired from the right side. The witness was recalled and a question was put to her that if someone hides himself in between the Arhar crops, then he will not be visible. To this, she deposed that the I.O. recorded her statement in the night of the day of incident at about 8.30 p.m. when she went to the Police Station along with the dead body. She was accompanied by Rajendra. She denied the suggestion that she did not see as to who had fired at her husband and that the accused Anwar had been implicated falsely.

9. Rajgiri Yadav, P.W.3, brother of the deceased was also another eye witness. In his deposition, he has stated that he was going along with P.W.2 and the deceased, and he was slightly ahead of them. When they reached the field of Arhar Crops, Anwar came out with his single barrel licensed gun and fired one round of shot at his brother Chhotey Lal, who fell down and became restless. P.W. 2 attempted to snatch the gun. At this, the accused threatened them by gun, saying that whosoever would come near him, would be fired upon. Hearing the sound of gun shot and the alarm raised by them, several other persons reached the spot including P.W.1. He has deposed that there was enmity regarding the field with accused Anwar before the incident. On sustaining the injuries, his brother fell down. He denied the suggestion that Chhotey Lal was murdered by some unknown persons.

10. P.W.1 Rajendra Yadav, in his statement, has stated that he had purchased the share of land of one Kheru, who was the brother of accused Anwar. Kheru had one daughter and she had sold her share of land to him and on account of this the accused Anwar was having enmity with him and his brothers. In his deposition, he has stated that he reached the spot on hearing the alarm of P.W.2 and P.W.3. He along with others tried to catch the accused but the accused threatened them by saying that if any person tries to catch him he would be shot. When he reached the spot, his brother was alive and he along with other persons sought to take the deceased along with his sister-in-law by tractor to the hospital. After barely two kilometers from the place of incident, his brother died. Then he reached Manchi on tractor. In the village, he got scribed the F.I.R. of the incident on the dictation, from Mohd. Ali, son of Hanif. Whatever was dictated by him to Mohd. Ali was written and then read over to him and thereafter he signed the same. The evidence of the witness could not be discredited in the cross examination. He denied the suggestion that it was the Naxalites who fired at his brother on account of which he died.

11. P.W.4 Behari Yadav was another witness, who reached the spot on hearing the shouts. In his deposition, he has stated that Anwar was running away after firing a shot at Chhotey Lal from his licensed gun. P.W. 2 and P.W.3 were raising alarms. He along with others chased Anwar but Anwar said that whoever would come near him would be shot at and he ran away towards Bihar. Again the evidence of this witness could not be discredited. He denied the suggestion that the area is a Naxalite affected area and some unknown persons had fired at Chhotey Lal.

12. The evidence of P.W. 2 and P.W.3 to an extent has been partly corroborated by the evidence of P.W.4, an independent witness, inasmuch as the presence of the accused at the time of the incident at the scene of offence was established. The evidence of these witnesses, as to the weapon used for inflicting the injuries has been corroborated by the evidence of Dr. R.C. Yadav, P.W.5. From the evidence of P.W.2 and P.W.3 who are the eye-witnesses and the evidence of P.W.1 and P.W.4 who reached the spot immediately, it is proved that it was the accused who shot the deceased with a gun. The evidence of the eye witnesses

was sought to be discredited on the ground that they are relatives and, as such, considering the dispute which the deceased had with the Yadav family, the conviction under Section 302 IPC cannot be sustained.

13. The law on the issue of related or interested witnesses has been summarized in the case of Gali Venkataiah Vs. State of Andhra Pradesh (supra). We may reproduce the following paragraphs:-

“8. “11. We shall first deal with the contention regarding interestedness of the witnesses for furthering prosecution version. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made. In such cases, the court has to adopt a careful approach and analyse evidence to find out whether it is cogent and credible.

12. In Dalip Singh v. State of Punjab it has been laid down as under: (AIR p.366, para 26) it has been laid down as under:-

'26. A witness is normally to be considered independent unless he or she springs from sources which are likely to be tainted and that usually means unless the witness has cause, such as enmity against the accused, to wish to implicate him falsely. Ordinarily a close relation would be the last to screen the real culprit and falsely implicate an innocent person. It is true, when feelings run high and there is personal cause for enmity, that there is a tendency to drag in an innocent person against whom a witness has a grudge along with the guilty, but foundation must be laid for such a criticism and the mere fact of relationship far from being a foundation is often a sure guarantee of truth. However, we are not attempting any sweeping generalization. Each case must be judged on its own facts. Our observations are only made to combat what is so often put forward in cases before us as a general rule of prudence. There is no such general rule. Each case must be limited to and be governed by its own facts.'

The above decision has since been followed in Guli Chand and Ors. v. State of Rajasthan in which Vadivelu Thevar v. State of Madras was also relied upon.

13. We may also observe that the ground that the witness being a close relative and consequently being a partisan witness, should not be relied upon, has no substance. This theory was repelled by this Court as early as in Dalip Singh case (supra) in which surprise was expressed over the impression which prevailed in the minds of the Members of the Bar that relatives were not independent witnesses. Speaking through Vivian Bose, J. it was observed:(AIR P. 366 para 25) '25. We are unable to agree with the learned Judges of the High Court that the testimony of the two eyewitnesses requires corroboration. If the foundation for such an observation is based on the fact that the witnesses are women and that the fate of seven men hangs on their testimony, we know of no such rule. If it is grounded on the reason that they are closely related to the deceased we are unable to concur. This is a fallacy common to many criminal cases and one which another Bench of this Court endeavoured to dispel in - Rameshwar v. State of Rajasthan, AIR at p. 59). We find, however, that it unfortunately still persists, if not in the judgments of the Courts, at any rate in the arguments of counsel.'

14. Again in Masalti v. State of U.P. this Court observed : (AIR pp. 209-10, para 14):

'14. ... But it would, we think, be unreasonable to contend that evidence given by witnesses should be discarded only on the ground that it is evidence of partisan or interested witnesses. ...The mechanical rejection of such evidence on the sole ground that it is partisan would invariably lead to failure of justice. No hard and fast rule can be laid down as to how much evidence should be appreciated. Judicial approach has to be cautious in dealing with such evidence; but the plea that such evidence should be rejected because it is partisan cannot be accepted as correct.'

15. To the same effect are the decisions in State of Punjab v. Jagir Singh, Lehna v. State of Haryana, and Gangadhar Behera v. State of Orissa."

The above position was highlighted in Babulal Bhagwan Khandare and Anr. v. State of Maharashtra and in Salim Saheb v. State of M.P., at SCC pp. 701-03, paras 11-15."

It has once again been reiterated in the case of Chunni Lal Vs. State of U.P., 2010 Cri.L.J. 3836, relying on a judgment in the case of Jayabalan Vs. U.T. of Pondicherry, 2010 (1) SCC 199. The Supreme Court there observed as under:-

“16. In Jayabalan v. U.T. of Pondicherry, reported in 2010 (1) SCC 199 : (2010 AIR SCW 419), this Court while dealing with the evidence of the interested witnesses held as under:-

“... We are of the considered view that in cases where the Court is called upon to deal with the evidence of the interested witnesses, the approach of the Court, while appreciating the evidence of such witnesses must not be pedantic. The Court must be cautious in appreciating and accepting the evidence given by the interested witnesses but the Court must not be suspicious of such evidence. The primary endeavour of the Court must be to look for consistency. The evidence of a witness cannot be ignored or thrown out solely because it comes from the mouth of a person who is closely related to the victim.”

14. We would now consider, whether the evidence of eye witness P.W.1 who reached the scene/place of incident of the offence immediately after the shooting incident and of P.W. 2 and P.W.3 who were eye witnesses is to be discredited on the ground that they are related. The law as settled is that merely because the witnesses or the eye witnesses are relatives by itself is no ground to reject the evidence of such witnesses. These witnesses, being related, normally would like to bring the truth before the Court. In some cases there could be improvements. In the instant case, they were examined. Their police statements were recorded immediately after the incident. There was, therefore, not much chance for them to improve in their statements. Moreover, nothing has been brought on record to discredit the evidence of these witnesses. There may be some minor inconsistencies, but that by itself is no ground to impeach their evidence. The only question before us is whether there is ring of truth in the evidence of witnesses. The evidence of P.W.2 and P.W. 3 is consistent as also the evidence of P.W.1. The evidence of P.W.4, an independent witness, that he saw the accused on the spot after he had reached there, supports the evidence of P.W.1, P.W.2 and P.W.3 to that extent. The only suggestion put to these

witnesses was that it might be the Naxalite elements. This suggestion was, however, not put to P.W.2 and P.W.3, the widow and brother of the deceased. In our opinion, therefore, the evidence of the two eye witnesses, i.e. P.W. 2 and P.W.3 who are related, cannot be discredited nor the evidence of P.W.1, who reached the spot immediately after the incident, as his evidence is corroborated by the evidence of P.W.4, who is not related.

15. The gun was seized under Panchnama. The report of the ballistic expert which was tested in evidence has revealed that the bullets could have been fired from that gun though no definite opinion could be given. The three pellets recovered might have been fired from that gun.

16. The I.O. Raj Kumar was examined as P.W.6. He has deposed the steps which he had taken including the arrest of the accused. We may, however, point out that though this witness states that the gun was recovered based on information given by an informant and the gun was recovered in the presence of witnesses Hidayat Ali and Mohd. Ali, but these witnesses have not been examined. He has identified the gun which was recovered. In the cross-examination, it was put to him that fictitious recovery memo was prepared. In our opinion, this is not recovery within the meaning of Section 27 of the Evidence Act. P.W.6 in his statement, thus, has stated that the weapon was not recovered at the instance of the accused but based on the information from an informant. In his statement under Section 313 Cr.P.C., when it was put to the accused that one S.B.B.L. Gun of .12 bore No.13278/84 was recovered by the I.O. on 28.11.2000, which was concealed below a stone at Duhi Hill in the jungle of Buda Dhari and the same was licensed gun, the accused stated that the gun was taken forcibly from the house. Thus, the gun, which has been produced as the weapon which caused the death of the deceased, is not being disputed as belonging to the accused. In our opinion, the evidence of eye-witnesses P.W.2 and P.W.3 show that they were aware that the accused had a gun. The ballistic evidence proves that the pellets recovered were fired from that gun which ultimately caused the death of the deceased.

17. The next submission of learned counsel for the appellant is that the prosecution has not furnished any proximate motive for commission of the offence. We have again been taken through the record and testimonies of the witnesses. We find that all the four witnesses have consistently deposed that both the parties were horn-locked in a landed dispute and Chhotey Lal was vigorously prosecuting the pending case. The nuanced submission advanced across the bar is that the motive alleged was not so strong as to propel the accused to commit the crime. Without delving deep into the submission, it would suffice to say that when there existed enmity pertaining to sale of land between the parties, it cannot be said that the motive was conspicuous by its absence. It is settled position in law that a clear proof of motive for the crime lends additional support to the finding of the Court but the absence of clear proof of motive does not necessarily lead to the contrary conclusion. In some cases, it may not be difficult to establish motive through direct evidence while in other cases, the motive established is a weak one but that by itself is insufficient to lead to any inference adverse to the prosecution. Moreover, it is a case of direct evidence which is to be decided on the anvil of acceptability of testimonies of witnesses.

The Apex Court in the case of Nathuni Yadav Vs. State of Bihar, (1998) 9 SCC 238 ruled as under. Para 16 being relevant is quoted below:-

“16. Motive for doing a criminal act is generally a difficult area for prosecution. One cannot normally see into the mind of another. Motive is the emotion which impels a man to do a particular act. Such impelling cause need not necessarily be proportionally grave to do grave crimes. Many a murders have been committed without any known or prominent motive. It is quite possible that the aforesaid impelling factor would remain undiscoverable. Lord Chief Justice Champbell struck a note of caution in Reg v. Palmer (Shorthand Report at page 308 (sic), CCC May 1856) thus: "But if there be any motive which can be assigned, I am bound to tell you that the adequacy of that motive is of little importance. We know, from experience of criminal courts that atrocious crimes of this sort have been committed from very slight motives; not merely from malice and revenge, but to gain a small pecuniary advantage, and to drive off for

a time pressing difficulties." Though, it is a sound proposition that every criminal act is done with a motive, it is unsound to suggest that no such criminal act can be presumed unless motive is proved. After all, motive is a psychological phenomenon. Mere fact that prosecution failed to translate that mental disposition of the accused into evidence does not mean that no such mental condition existed in the mind of the assailant. In *Atley v. State of U. P.* (AIR 1955 SC 807) it was held "that is true, and where there is clear proof of motive for the crime, that lends additional support to the finding of the Court that the accused was guilty but absence of clear proof of motive does not necessarily lead to the contrary conclusion." In some cases, it may not be difficult to establish motive through direct evidence, while in some other cases inferences from circumstances may help in discerning the mental propensity of the person concerned. There may also be cases in which it is not possible to disinter the mental transaction of the accused, which would have impelled him to act. No proof can be expected in all cases as to how the mind of the accused worked in a particular situation. Sometimes, it may appear that the motive established is a weak one. That by itself is insufficient to lead to any inference adverse to the prosecution".

18. The next argument of the learned counsel revolves round certain contradictions in the testimonies of the witnesses. We have given our anxious considerations to the contradictions focused on by the learned counsel. To begin with, our attention has been drawn to contradiction in the testimonies of the witnesses about their position at the time of assault. P.W.2 Phulwa Devi wife of deceased initially stated that she did not know from which side the shot was fired but subsequently, the shot was fired from southern side. P.W.3 Rajgiri Yadav stated that the shot was fired from western side to eastern side. There also appears to be slight variation in their respective statements as regards their positions vis a vis the deceased. It has to be borne in mind that the witnesses are village people living at the border of U.P. and Bihar and they cannot be said to be as sophisticated as a literate person who can withstand the rigours of grueling cross examination. Another aspect worthy of consideration is that the occurrence in the case took place on 24.10.2000 and the evidence commenced to be recorded in the month of December 2001, i.e. after an efflux of 13 months

of the occurrence. By this reckoning, the witnesses cannot be expected to escape from making some discrepant details. The discrepancies are trivial in nature and on the basis of such discrepancies, the testimonies of the witnesses cannot be said to be improbable or to be suffering from intrinsic infirmities. We have our attention drawn to a decision of the Apex Court in State of U.P. Vs. Krishna Master, (2010) 12 SCC 3243. Para 24 of the said decision being relevant is excerpted below:-

“The basic principle of appreciation of evidence of a rustic witness who is not educated and comes from a poor strata of society is that the evidence of such a witness should be appreciated as a whole. The rustic witness as compared to an educated witness is not expected to remember every small detail of the incident and the manner in which the incident had happened more particularly when his evidence is recorded after a lapse of time. Further, a witness is bound to face shock of the untimely death of his near relative(s). Therefore, the court must keep in mind all these relevant factors while appreciating evidence of a rustic witness.”

We have given our anxious considerations to the testimonies of the witnesses all over again. P.W.1 Rajendra Yadav has explained his presence and stated that when Chhotey Lal fell down from sustaining injury, his wife and younger brother had raised alarm and on hearing the alarm, he along with Behari Yadav, Deena Nath Yadav and Bedeshi Yadav arrived at the place of occurrence. He also stated that he tried to overpower the accused but he managed to escape after threatening with dire consequences. P.W.2 Phulwa Devi wife of the deceased narrated the entire incident in a very truthful manner. She was subjected to grueling cross examination but the defence was unable to pick out even a single answer from her evidence which could at least throw a modicum of doubt about the correctness of her evidence. From a further delving into the evidence it would clearly transpire that testimonies of P.W.1 and P.W.2 find reinforcement and corroboration from the testimony of P.W.3 Rajgiri Yadav and P.W.4 Bihari Yadav who, we may again observe, gave the details of entire incident in a very natural and truthful manner. It is also notice-worthy that the ocular account finds corroboration from the postmortem examination report as

well. The witnesses have withstood the test of cross examination and nothing could be elicited from the grueling cross examination so as to render impeachable their testimonies or to discredit them.

19. One of the objections raised is that the conviction is vitiated as the provisions of Section 233 Cr.P.C., which are mandatory, have not been followed. The Bombay High Court, in the case of Hanif Banomiya Shikalkar Vs. The State of Maharashtra, 1981 Cr. L.J. 1622, has taken a view that the provision is not mandatory. The Court further held that a person complaining of violation of the provisions of Section 233 must show the prejudice occasioned to him because the accused person was not formally called upon to enter on his defence.

The Kerala High Court, on the other hand, in the case of Parmeswara Kurup Janardhanan Pillai Vs. State of Kerala, 1982 Cr.L.J. 899, has taken the view that the provision is mandatory and failure to comply with the provision, amounts to failure of justice and that, in the absence of full and effective compliance of the mandatory provisions of Section 233 (1), it cannot be said that the appellant has not been prejudiced in the conduct of his defence. In the circumstances it is only just and proper that the appellant should be given an opportunity to adduce defence evidence in support of his plea.

In Vanlalven and Anr. Vs. State of Manipur, 2004 (4) Crimes 274, a preliminary objection was raised before the Gauhati High Court, that the trial was vitiated on account of failure to comply with the provisions of Section 232 Cr.P.C.. The learned Bench observed that the issue had been considered by the Agartala Bench in which reliance was placed on the judgment of the Bombay High Court in ILR (1987) Bombay 962, as also of the Karnataka High Court in 1993 Cr.LJ 907, which had taken the view that the accused must show the prejudice occasioned and, accordingly, rejected the preliminary objection.

Another Division Bench of the Gauhati High Court in Lal Behari Das Vs. State of Tripura, 1990 Cr.L.J. 847, was pleased to hold that the failure on the part of the Judge to call upon the accused persons to enter on his defence in terms of Section 233 Cr.P.C. would not in all cases vitiate the conviction, unless there is

material to indicate that prejudice has been caused to the accused.

Another Division Bench of the Gauhati High Court in State of Mizoram Vs. Zoduhliana, 2005 Cr. L.J. 3756, has also taken the view that the trial was not vitiated unless prejudice has been occasioned.

The Gauhati High Court in N. Pishak Singh (supra), which was relied upon by the appellant, after noting the earlier judgment in Lal Behari Das (supra), was pleased to hold that failure on the part of the trial Court on the facts of that case to call upon the accused appellant to enter into his defence will vitiate the conviction only if prejudice has been caused.

It, thus, appears that the preponderance of views taken by the High Courts, is that mere non-compliance would not be fatal. The accused/appellant must show the prejudice occasioned on account of failure to comply with the provisions.

20. Having considered the judgments of the various High Courts, in our opinion, the Section as it stands, for failure to comply with the same, has no penal consequences, though the language used is 'shall'. That by itself cannot be a ground to hold that the requirement is mandatory. Section 465 Cr.P.C. will also have to be considered. Section 465 clearly sets out that an order passed by a Court of competent jurisdiction shall not be reversed or altered by a Court of Appeal on account of any error, omission or irregularity in the judgment before or during trial, unless in the opinion of the Court, a failure of justice has in fact been occasioned thereby. Therefore, a reading of Section 233 Cr.P.C. with Section 465 Cr.P.C. would clearly establish that on failure to comply with the provision of Section 233 Cr.P.C., the appellant must establish prejudice occasioned on account of failure to comply with the mandate of Section 233. In the instant case, the accused was put to notice that he is entitled to enter on his defence after the prosecution evidence was closed and he was not acquitted in terms of Section 233 Cr.P.C. Apart from that, Section 313 (1) (b) Cr.P.C. sets out that in every trial, for the purpose of enabling the accused personally to explain any circumstances appearing in the evidence against him, the Court shall, after the witnesses for the prosecution have been examined and before he is called on for his defence, question him generally in the case. Thus, if the

accused is not acquitted in terms of Section 232 Cr.P.C., then the Court, in terms of Section 313, must comply with the requirement of Section 313 (1) Cr.P.C. In the instant case, we find that while recording the statement under Section 313 Cr.P.C., the trial Court, as Question No.11, put the following question:-

“Whether you will give evidence in defence.”

The answer of the accused to the above question was 'yes'. The accused, however, did not lead any evidence, nor in terms of Section 233 (3) Cr.P.C. applied for the issue of any process for compelling the attendance of any witness or the production of any document or thing. In our opinion, on the facts of the present case, firstly there has been substantial compliance of the requirements of Section 233 Cr.P.C. and alternatively no prejudice has been shown to have been occasioned to the accused. That contention, therefore, will have to be rejected.

21. The last contention, as urged on behalf of the appellant, is that the conviction under Section 302 IPC, ought not to have been sustained and, at the highest, conviction should be under Section 304 Part I of IPC, and for that purpose reliance was placed on the judgment in Gali Venkataiah (supra). In that case, the record would show that the relationship between the appellant and the deceased was strained much before the assault was made, there was exchange of hot words between the accused and the deceased and they were quarreling with each other. In the circumstances of that case, the Supreme Court held that the proper conviction would be under Section 304 Part I IPC. In the instant case, the evidence on record would show that there were strained relationship between the parties. However, when the incident took place, there was no quarrel or any exchange of hot words on the part of the deceased or his relatives to provoke the appellant. The appellant, without any provocation, with his licensed gun shot the deceased, which resulted in his death. In our opinion, therefore, the conviction and the punishment of the appellant under Section 302 IPC cannot be faulted.

22. For all the aforesaid reasons, no case for interference with the judgment and order passed by the Sessions Judge is made out. The same is affirmed. The appeal is dismissed.

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