

**(2022) 07 PAT CK 0071**

**Patna High Court**

**Case No:** Criminal Appeal (DB) No. 405, 443 Of 2014

Nepali Yadav

APPELLANT

Vs

State Of Bihar

RESPONDENT

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**Date of Decision:** July 25, 2022

**Acts Referred:**

- Indian Penal Code, 1860 - Section 34, 302
- Code Of Criminal Procedure, 1973 - Section 161
- Arms Act, 1959 - Section 27
- Evidence Act, 1872 - Section 134, 145

**Hon'ble Judges:** A. M. Badar, J; Rajesh Kumar Verma, J

**Bench:** Division Bench

**Advocate:** Bindhyachal Singh, Arvind Kumar, Suruchi Anand, Prince Kumar Mishra, Praveen Kumar

**Final Decision:** Dismissed

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### **Judgement**

1. Criminal Appeal (DB) No.405 of 2014 is filed by appellant/ convicted accused Nepali Yadav whereas Criminal Appeal (DB) No.443 of 2014 is

filed by appellant/convicted accused Nilesch Yadav. By these appeals, they are challenging the Judgment and Order dated 15.04.2014 and 19.04.2014

respectively passed by the learned Adhoc Additional Sessions Judge-IV, Bhagalpur, in Sessions Trial No.170 of 2012, thereby convicting them of the

offences punishable under Section 302 read with 34 of the Indian Penal Code as well as under Section 27 of the Arms Act. Appellant/convicted

accused Nepali Yadav is sentenced to suffer imprisonment for life apart from a direction to pay fine of Rs.25000/- and in default, to undergo rigorous

imprisonment for five years for the offence punishable under Section 302 read with 34 of the Indian Penal Code. For the offence punishable under

Section 27 of the Arms Act, he is sentenced to suffer rigorous imprisonment for two years apart from a direction to pay fine of Rs.2000/- and in

default, to undergo rigorous imprisonment for six months. Appellant/ convicted accused Nilesh Yadav is sentenced to suffer life imprisonment apart

from a direction to pay fine of Rs.5000/-and in default, to undergo rigorous imprisonment for one year for the offence punishable under Section 302

read with 34 of the Indian Penal Code. For the offence punishable under Section 27 of the Arms Act, he is sentenced to suffer rigorous imprisonment

for two years apart from imposition of fine of Rs.1000/- and in default, to undergo further rigorous imprisonment for three months. Substantive

sentences are directed to run concurrently. As both these appeals are arising out of the same Judgment and Order of conviction and resultant

sentence imposed on the accused therein, those are being decided by this common Judgment. For the sake of convenience, the appellants shall be

referred to in their original capacity as "the accused".

2. Facts in brief leading to the prosecution of the accused persons can be summarized thus:

(a). According to the prosecution case, both accused persons in furtherance of their common intention along with co-accused Vibhishan Yadav had

committed murder of Rohit Kumar on 12.03.2010 by firing bullets at him at the bank of river Ganga at New Sidhighat falling within the jurisdiction of

Police Station-Sultanganj in Bhagalpur District of Bihar.

(b). The incident allegedly took place at about 12.30 P.M. of 12.03.2010 at the bank of river Ganga at New Sidhighat area. At that time, P.W.3

Manilal Yadav-maternal uncle of deceased Rohit Kumar, P.W.5 Kundan Kumar-cousin of deceased Rohit Kumar and P.W.6 Chhotu alias Rockey-

another cousin of deceased Rohit Kumar were taking bath at river Ganga, along with other people. Rohit Kumar (since deceased) was also present at

the New Sidhighat at the bank of river Ganga. The devotees whose wishes were fulfilled, were offering goats to river Ganga and Rohit Kumar was

catching and capturing those goats from the Ganga river at that time. It is case of the prosecution that at that time, accused persons viz. Nepali

Yadav, Nilesh Yadav so also Vibhishan Yadav came there. They quarreled with Rohit Kumar. Thereafter, accused Nepali Yadav fired a bullet which

hit at the left side of nose of Rohit Kumar. Accused Vibhishan Yadav fired a bullet which hit at the back of Rohit Kumar. Accused Nilesh Yadav

opened fire in the air to terrorize the people present at the New Sidhighat.

(c). Because of this incident of firing, chaos erupted on the spot and people ran halter skelter. The shop keepers left their shops. Hit by bullets, Rohit

Kumar fell down. His cousin P.W.5 Kundan Kumar went running to the house of Rohit Kumar to disclose the incident to the inmates of his house.

That is how, P.W.1 Vimla Devi (mother of Rohit Kumar) and P.W.7 Rahul Kumar (brother of the deceased) came to know about the incident. They

as well as P.W.2 Munna Kumar (cousin of the deceased) rushed to New Sidhighat. There, they saw dead body of Rohit Kumar with bullet injuries.

(d). On getting information about the incident, Police Station Officer of Police Station-Sultanganj along with his team rushed to the spot of the incident,

i.e., New Sidhighat. The Police Station Officer recorded the F.I.R. lodged by P.W.7 Rahul Kumar at the spot of the incident itself. Seizure Memo

effecting seizure from the spot came to be prepared in presence of P.W.2 Munna Kumar. Dead body of Rohit Kumar came to be inspected in

presence of Panch witnesses including P.W.4 Pawan Kumar and inquest Panchnama came to be prepared. It was then sent for the post-mortem

examination to the Jawaharlal Nehru Medical College and Hospital, Bhagalpur, immediately. The Investigating Officer recorded statements of

witnesses on the spot of the incident as well as by visiting house of deceased Rohit Kumar. It seems that thereafter, on return to the Police Station-

Sultanganj, he registered Crime No.48 of 2010 for the offences punishable under Section 302 read with 34 of the Indian Penal Code and under Section

27 of the Arms Act against the accused persons. After routine investigation, the accused persons came to be chargesheeted.

(e). The learned trial court had framed and explained the charges to the accused persons. They pleaded not guilty and claimed trial. It appears that

during the course of the trial, accused Vibhishan Yadav went absconding and his trial came to be separated. The trial against the appellants/accused

continued.

(f). In order to bring home the guilt to the accused, the prosecution has examined in all nine witnesses. P.W.1 Vimla Devi is mother of deceased Rohit

Kumar. P.W.2 Munna Kumar is a Panch witness to the seizure and he is son of sister of P.W.1 Vimla Devi. P.W.3 Manilal Yadav is maternal uncle

of the deceased Rohit Kumar. He claims to be an eye witness to the incident. P.W.4 Pawan Kumar is a Panch witness to the inquest Panchnama.

P.W.5 Kundan Kumar is cousin of the deceased and he claims to be an eye witness to the incident. P.W.6 Chhotu alias Rockey is another cousin of

the deceased and he is also claiming to be an eye witness to the incident in question. First informant Rahul Kumar is brother of the deceased and he is

examined as P.W.7. Autopsy Surgeon Dr. Yogesh Prasad Sah is examined as P.W.8. Md. Nisar is a Clerk of an Advocate and he is examined as

P.W.9.

(g). The defence of the accused as gathered from the line of cross-examination of prosecution witnesses is that of total denial. According to the

accused persons, they are falsely implicated in the crime in question because of their enmity with the members of the prosecuting party.

(h). Upon hearing the parties, the learned trial court by the impugned Judgment and Order was pleased to convict the appellants/accused and to

sentence them as indicated in the opening paragraph of this Judgment.

3. We heard the learned counsel appearing for both the appellants at sufficient length of time. It is argued on behalf of the appellants that the

Investigating Officer is not examined by the prosecution and this fact has caused prejudice to the accused because contradictions in evidence of the

witnesses could not be put to the Investigating Officer. The members of the prosecuting party are having inimical disposition with the accused persons

and despite availability of independent witnesses, not a single independent witness is examined. It is further argued that evidence of P.W.5 Kundan

Kumar shows that he has not seen the actual occurrence. Medical evidence is not corroborating the version of alleged eye witnesses and there is

discrepancy in respect of the spot of the incident coming on record from evidence of the so-called eye witnesses examined by the prosecution.

According to the learned counsel for the appellants, some witnesses have spoken about the spot of the incident as southern bank of the river whereas

others have stated about northern bank of the river. It is further argued that there is inordinate delay in lodging the F.I.R. Though the F.I.R. of P.W.7

Rahul Kumar shows that it was recorded at 12.45 P.M. of 12.03.2010, the printed formal F.I.R. shows that it was recorded at 17 hours, i.e., 05.00

P.M., when the information was received at the Police Station. This, according to the learned counsel for the appellants, implies that there is deliberate

antitiming of the F.I.R. in order to implicate as many persons as accused in this case. Therefore, the accused persons are entitled for benefit of doubt.

4. As usual, none appeared to represent the Prosecuting Agency, i.e., the State of Bihar, in these two appeals. It is considered that when a crime

takes place in a society, it is not just the victim who is affected. The entire society and in fact the State gets affected and therefore the prosecution is

taken up by the State instead of allowing the victims of the crime to prosecute the accused. The State as such is duty bound to provide the Public

Prosecutor for prosecuting the case so as to ensure that justice is being done in an impartial manner. The Public Prosecutor is an important and

significant component of the Judicial System who is supposed to safeguard rights of the victim as well as the accused person as per the facts of the

case, by assisting the Court. We are at pains to note that in many of the old cases taken up by this Court, the Public Prosecutors are not entrusted by

the State of Bihar. There seems to be something fundamentally wrong with the concerned Department of the State of Bihar. This tendency of not

appointing the Prosecutor for representing the State of Bihar even in the appeal relating to the offence under Section 302 IPC needs to be depreciated

and is depreciated by us. Left with no other alternative, we appointed Mr. Prince Kumar Mishra, the learned Advocate, to assist us as an Amicus

Curiae for deciding these appeals in order to enable us to keep the interest of the Prosecuting Agency i.e. the State of Bihar safeguarded, in absence

of the appointment of the Public Prosecutor by it in these appeals.

5. Mr. Prince Kumar Mishra, the learned appointed Advocate, vehemently argued that the prosecution has proved the charges beyond all reasonable

doubts. He argued that evidence of the witnesses is required to be read and appreciated as a whole. He pointed out that the evidence of P.W.5

Kundan Kumar is consistent with the prosecution case and presence of eye witnesses is brought on record from cross-examination of prosecution

witnesses by the defence. Hence, now, the appellants cannot argue that there is no eye witness to the incident. He further argued that the so-called

delay in registering the F.I.R. gets explained from the record itself. For this purpose, he drew our attention to the printed F.I.R. as well as

endorsement of the Station House Officer on the F.I.R. recorded on the spot of the incident. In submission of the learned Amicus Curiae, minor

discrepancies which does not affect the core of the prosecution case needs to be ignored and, therefore, whether the incident took place at the

southern bank or northern bank of the river is of no consequence. What is material is place of the incident and that is proved to be of the bank of river

Ganga. It is further argued that nothing is shown to demonstrate the prejudice caused to the accused due to non-examination of the Investigating

Officer. Therefore, in submission of the learned Amicus Curiae, both these appeals are devoid of merit and needs to be dismissed.

6. We have carefully considered the submissions so advanced. We have also examined the records and proceedings including oral as well as

documentary evidence.

7. At the outset, as the accused persons are charged for commission of murder of Rohit Kumar, let us examine whether said Rohit Kumar died

homicidal death. Death of Rohit Kumar is not disputed by the defence. Unimpeachable testimony of P.W.1 Vimla Devi-mother, P.W.2 Munna

Kumar-cousin, P.W.3 Manilal Yadav-maternal uncle, P.W.5 Kundan Kumar-cousin and P.W.6 Chhotu alias Rockey-cousin apart from that of P.W.7

Rahul Kumar-brother of deceased Rohit Kumar that Rohit Kumar died on the spot of the incident, i.e., at the New Sidhighat Mohalla of Police

Station-Sultanganj in the afternoon of 12.03.2010, proves the factum of death of Rohit Kumar.

8. Dead body of Rohit Kumar came to be dispatched to the Jawaharlal Nehru Medical College and Hospital, Bhagalpur, on 12.03.2010 itself after

conducting inquest notes. The inquest notes shows that dead body of Rohit Kumar was having bullet injuries. P.W.8 Dr. Yogesh Prasad Sah, the

Medical Officer of Jawaharlal Nehru Medical College, Bhagalpur, conducted post-mortem examination on dead body of Rohit Kumar on 12.03.2010

itself. As per version of Dr. Yogesh Prasad Sah, he noted following antimortem injuries on dead body of Rohit Kumar on 12.03.2010:

(1). One wound of entry 1/2" x 1/2" size with inverted and black margin was present on left zygomatic area 1" away from lower border of left

nostril. The projectile entered skull cavity and found lodged in muscle of occipital bone showed fractured brain tissues was lacerated. The bullet

recovered and handed over to Police under seal cover.

(2). One wound of entry 1/2" x 1/2" with inverted and black margin on left side of back at the level of tenth thoracic vertebra, 1" away from

middle of back. Projectile pierced back and chest cavity and was found lodged in muscles of left fourth chest ribs 2½" away from left nipple. Left

lower part of lungs spleen mesterty were found lacerated. The bullet recovered has been handed over to Police under seal cover.

(3). One wound of entry 1/2" x 1/2" size with inverted and black margin was present on upper border of right hip bone, 4" away from exterior

superior iliac spine. The bullet pierced hip bone and was found lodged between sacral and first lumber artifru. Bullet recovered and handed over to the

Police under seal cover.

P.W.8 Dr. Yogesh Prassad Sah deposed that the injuries noted by him on dead body of Rohit Kumar were antimortem in nature and were caused by

the firearms. Those injuries were grievous in nature and Rohit Kumar died because of hemorrhage and shock due to those injuries, within three to six

hours prior to the post-mortem examination. It is thus clear from this evidence of P.W.8 Dr. Yogesh Prasad Sah that the deceased died because of

being hit by three bullets and the time of his death is perfectly matching with the time of the incident as claimed by the prosecution. The post-mortem

was conducted at 04.25 P.M. of 12.03.2010. Evidence of this Autopsy Surgeon is gaining due corroboration from the contemporaneous report of the

post-mortem examination prepared by him. This evidence is sufficient to conclude that the prosecution has proved the fact that Rohit Kumar died

homicidal death in the afternoon of 12.03.2010.

9. Now, let us examine whether the prosecution has proved that the accused persons have caused homicidal death of Rohit Kumar and whether this act on the part of the accused amounts to the offence of commission of murder punishable under Section 302 of the Indian Penal Code.

10. P.W.7 Rahul Kumar, who happens to be brother of deceased Rohit Kumar, has lodged the F.I.R. of the subject crime for setting the criminal law

in motion. P.W.7 Rahul Kumar has stated in his evidence that on 12.03.2010 at about 12.15 P.M., he was having lunch at his house and at that time,

P.W.5 Kundan Kumar came and disclosed him that the accused persons fired a bullet at Rohit Kumar. It is in his evidence that then he as well as his

mother and others went to the bank of river and found dead body of Rohit Kumar with bullet injuries lying there. This witness narrated former

statement of his cousin P.W.5 Kundan Kumar to the effect that accused Nepali Yadav firstly fired a bullet below the eye of Rohit Kumar, co-accused

Vibhishan fired a bullet at back of Rohit Kumar and accused NileshYadav fired in the air. P.W.7 Rahul Kumar testified that then police came on the

spot and recorded his F.I.R. and as it was found correct, he signed that F.I.R. (Ext.2). Cross-examination of this witness shows that his house is at a

distance of about 500 yards from the spot of the incident and the width of river Ganga at the spot is about 5-6 kilometers. There are several shops at

the Sidhighat where the incident took place. It is brought on record from his cross-examination that when he reached on the spot of the incident,

P.W.5 Kundan Kumar, P.W.3 Manilal Yadav and P.W.6 Chhotu alias Rockey were present on the spot of the incident. It is further elicited from his

cross-examination that as soon as he reached on the spot of the incident, the police were informed about the incident and within 15 minutes thereof,

the Police Station Officer came on the spot of the incident. Similarly, it is further brought on record from cross-examination of first informant/P.W.7

Rahul Kumar that the Police Station Officer met P.W.5 Kundan Kumar at his house whereas other witnesses such as P.W.6 Chhotu alias Rockey

and P.W.3 Manilal Yadav and others met the Police Officer on the spot of the incident itself. He stated that P.W.5 Kundan Kumar after informing

him had again returned to the spot of the incident.



11. Perusal of evidence of P.W.7 Rahul Kumar, thus, shows that he is not an eye witness to the incident but he was informed about the incident by

P.W.5 Kundan Kumar and, thereafter, he as well as Kundan Kumar and others went to the spot of the incident immediately. This witness has proved

former statement of P.W.5 Kundan Kumar regarding the mode and manner in which the incident took place. His evidence makes it clear that as soon

as he reached on the spot of the incident, police were informed and within 15 minutes, the Police Station Officer came on the spot of the incident, met

this witness on the spot as well as at his house. This material elicited from the cross-examination of P.W.7 Rahul Kumar is relevant for deciding

whether there is inordinate delay in lodging the F.I.R. making the prosecution case suspects.

12. Duly proved F.I.R. of P.W.7 Rahul Kumar shows that it was recorded by Sub-Inspector C.P. Yadav, Station House Officer, Sultanganj Police

Station at 12.45 P.M. on 12.03.2010 at the spot of the incident i.e., Naya Sidhighat falling under the jurisdiction of Police Station-Sultanganj. There is

an endorsement at the end of this F.I.R. made by the Police Officer C.P. Yadav to the effect that after his return to the Sultanganj Police Station,

Police Station Case No.0048 of 2010 came to be registered on 12.03.2010 under Sections 302 read with 34 of the Indian Penal Code and Section 27

of the Arms Act. The printed F.I.R. which is also called as the formal F.I.R. shows that the crime in question came to be registered at 17 hours, i.e.,

at 05.00 P.M. of 12.03.2010 after receipt of the first information at the Police Station at that time. The first information, as seen from the formal

F.I.R., is the Fardbeyan of P.W.7 Rahul Kumar. With the aid of this material that the crime in question was registered at 05.00 P.M. on 12.03.2010,

the learned counsel for the appellants argued that the F.I.R. is, in fact, registered belatedly in order to implicate as many as person, as possible. We

have noted this submission for rejection only. The delay in lodging the F.I.R. cannot be used as a formula for doubting the prosecution case. It can at

the most, put the court on its guard to search if any explanation has been offered for the delay in registration of the F.I.R. If the prosecution fails to

satisfactorily explain the delay and there is possibility of embellishment in the prosecution version on account of such delay, then only the delay would

be fatal to the prosecution case. If there is proper explanation to the delay, then such delay by itself cannot be a ground for disbelieving and discarding the entire prosecution case. The sequence of events soon following the crime and as described by the prosecution witnesses sounds quite natural and provides satisfactory explanation for a time of about 4 hours and 15 minutes in registration of the formal F.I.R. at the Police Station on the basis of the F.I.R. (Fardbeyan) lodged by P.W.7 Rahul Kumar at 12.45 P.M. of 12.03.2010 on the spot of the incident. As noted by us, after about 12.30 P.M. of 12.03.2010, P.W.7 Rahul Kumar was informed about the incident by P.W.5 Kundan Kumar. Then he reached to the spot of the incident. Thereafter the police were summoned. That is how, the Investigating Officer reached on the spot of the incident and recorded the F.I.R. of P.W.7 Rahul Kumar on the spot of the incident itself. Evidence of P.W.2 Munna Kumar shows that thereafter the police effected seizure from the spot of the incident by preparing a seizure memo to which he was a witness. From cross-examination of P.W.2 Munna Kumar, the defence itself has brought on record that after about 1½ hours, the police came on the spot and after recording the F.I.R. of P.W.7 Rahul Kumar, seizure list was prepared at about 02.30 P.M. and his signature was obtained thereon. This proves that the police was on the spot of the incident itself at about 02.30 P.M. From cross-examination of P.W.3 Manilal Yadav, the defence has brought on record that even statement of this witness came to be recorded by the police on the day of the incident at the spot of the incident itself. The witness was further cross-examined by the defence to bring on record that even statements of P.W.1 Vimla Devi, P.W.2 Munna Kumar and P.W.7 Rahul Kumar were also recorded by police on the spot of the incident after two hours. This goes to show that after recording the F.I.R. of P.W.7 Rahul Kumar, statements of witnesses under Section 161 of the Code of Criminal Procedure were being recorded by the police promptly on the spot of the incident itself, during the course of that day of the incident. Evidence on record further shows that on the spot of the incident itself, police inspected dead body and prepared Inquest Panchnama and then dead body was dispatched to the Jawaharlal Nehru Medical College and Hospital, Bhagalpur, on the day of the incident, i.e., on 12.03.2010. This is apparent from evidence of P.W.8

Dr. Yogesh Prasad Sah, who conducted post-mortem examination on the dead body of Rohit Kumar at 04.25 P.M. of 12.03.2010. This fact again

shows that even the formality of recording inquest and forwarding the dead body from the spot of the incident to the Government Hospital at

Bhagalpur, took place at the spot of the incident itself. From cross-examination of P.W.6 Chhotu alias Rockey, the defence has brought on record that

even his statement under Section 161 of the Code of Criminal Procedure came to be recorded by police on the day of the incident at the house of

deceased Rohit Kumar. This material coming on record from cross-examination of prosecution witnesses unerringly points out that on reaching the

spot and after recording the F.I.R. on the spot, the Police Officer was busy in further formalities such as recording statements of witnesses under

Section 161 of the Code of Criminal Procedure, effecting seizure, recording inquest and sending the dead body for post-mortem examination. The duly

proved F.I.R. (Fardbeyan) shows that the Investigating Officer had made endorsement thereon that after return to the Police Station, he had

registered the crime in question. He returned to the Police Station obviously after completing all these formalities. That is how, the formal F.I.R. and

registration of the crime took place at 17.00 P.M. of 12.03.2010. This explains the gap of 4 hours and 15 minutes in recording of the F.I.R.

(Fardbeyan) of P.W.7 Rahul Kumar and registration of the Crime No.48 of 2010 by preparation of the formal F.I.R. As such, in fact there is

absolutely no delay in registration of the F.I.R. and, as such, there is no question of adding embellishment to the prosecution case.

13. Now, let us examine the eye witness account of the incident coming on record from the version of eye witnesses such as P.W.3 Manilal Yadav,

P.W.5 Kundan Kumar and P.W.6 Chhotu alias Rockey, who happens to be the maternal uncle as well as cousins of deceased Rohit Kumar

respectively. As these three eye witnesses are near relatives of deceased Rohit Kumar, the learned counsel for the appellants vehemently argued that

in the wake of enmity between the prosecuting party as well as the accused, evidence of such interested closely related witnesses cannot be relied

upon in order to base conviction. It is pointed out from cross-examination of P.W.1 Vimla Devi- mother of the deceased that the prosecuting party

was having old enmity with accused Nepali Yadav. It is further urged that despite availability of independent witnesses as the incident took place at

the populous locality having several shops, evidence of not a single independent witness is forthcoming and, therefore, the accused are entitled for the

benefit of doubt. For appreciating this argument, we will have to place on record the law relating to appreciation of evidence of related witnesses and

partisan witnesses having inimical dispositions with the accused. In *Balraje alias Trimbak Vs. State of Maharashtra*, reported in (2010) 6 SCC 673, the

Supreme Court has explained that when the eye witnesses are stated to be interested and inimically disposed towards the accused, it has to be noted

that it would not be proper to conclude that they would shield the real culprit and rope in innocent persons. The truth or otherwise of the evidence has

to be weighed pragmatically. The court would be required to analyze the evidence of related witnesses and those witnesses who are inimically

disposed towards the accused. But if after careful analysis and scrutiny of their evidence, the version given by the witnesses appears to be clear,

cogent and credible, there is no reason to discard the same. Thus, close scrutiny of evidence of such type of witnesses is required to be done and if

their evidence is found to be trustworthy, the same can be accepted. In *Dalip Singh v. State of Punjab*, AIR 1953 SC 364, the Supreme Court in

paragraph-26 observed thus:

“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 relative 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

generalisation. 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.â€

Similarly, in *Masalti Versus State of U.P.*, A.I.R. 1965 SC 202, following are the observations of the Supreme Court in paragraph-14:

â€14. â€|. There is no doubt that when a criminal court has to appreciate evidence given by witnesses who are partisan or interested, it has to be very careful in weighing such evidence. Whether or not there are discrepancies in the evidence; whether or not the evidence strikes the court as genuine; whether or not the story disclosed by the evidence is probable, are all matters which must be taken into account. 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. Often enough, where factions prevail in villages and murders are committed as a result of enmity between such factions, criminal courts have to deal with evidence of a partisan type. 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.â€

In *Harbans Kaur Versus State of Haryana*, (2005) 9 SCC 195, the Supreme Court has held thus in paragraph-6:

â€6. There is no proposition in law that relatives are to be treated as untruthful witnesses. On the contrary, reason has to be shown when a plea of partiality is raised to show that the witnesses had reason to shield actual culprit and falsely implicate the accused.â€

Similarly, in *Namdeo Versus State of Maharashtra*, (2007) 14 SCC 150, the following are the observations of the Supreme Court in paragraph-38:

â€38. â€| it is clear that a close relative cannot be characterised as an â€interestedâ€ witness. He is a â€naturalâ€ witness. His evidence, however, must be scrutinised carefully. If on such scrutiny, his evidence is found to be intrinsically reliable, inherently probable and wholly trustworthy, conviction can be based on the â€soleâ€ testimony of such witness. Close relationship of witness with the deceased or victim is no ground to reject

his evidence. On the contrary, close relative of the deceased would normally be most reluctant to spare the real culprit and falsely implicate an innocent one.â€

14. Keeping in mind this position of law regarding appreciation of evidence of hostile as well as related witnesses, let us examine the version of alleged eye witnesses in order to ascertain whether they had actually witnessed the incident and their evidence is intrinsically reliable, inherently probable and wholly trustworthy.

15. The star witness for the prosecution is P.W.5 Kundan Kumar, cousin of the deceased. This witness has to his credit one pending case of extortion and therefore requiring close scrutiny of his evidence. As per version of P.W.5 Kundan Kumar, on the day of the incident at about 12.30 P.M., he was taking bath in the Ganga ghat and deceased Rohit Kumar was also present there. P.W.5 Kundan Kumar testified that accused Nepali came there and quarreled with the deceased Rohit Kumar. Thereafter, accused Nepali fired a bullet at the left side of nose of Rohit Kumar and Vibhishan fired another bullet at the back of Rohit Kumar. Then accused Nilesh opened fire in the air to create terror amongst the people. P.W.5 Kundan Kumar further stated that then by running he went to the house of Rohit Kumar and informed the incident to the inmates of his house. Then they came back to the spot of the incident but by that time, Rohit Kumar was already dead. Then within half an hours, police came on the spot.

16. P.W.5 Kundan Kumar was cross-examined on behalf of the accused persons. Surprisingly, from his cross-examination, the defence has brought on record that this witness P.W.5 Kundan Kumar had personally seen the incident of firing a bullet and after hearing the gunshot , people bathing so also the other persons present on the spot ran away and there was an atmosphere of chaos at the place of the incident. Then this witness also ran away and informed the incident to mother of deceased Rohit Kumar and within 5 minutes, he along with P.W.1 Vimla Devi-mother and P.W.7 Rahul Kumar-brother of the deceased Rohit Kumar along with 10-15 persons came back on the spot of the incident. The defence has further elicited from cross-examination of P.W.5 Kundan Kumar that when he revisited the spot of the incident with other relatives of the deceased, there no body was

present on the spot of the incident. Most importantly presence of other eye witnesses on the spot of the incident is also brought on record by the defence by cross-examining P.W.5 Kundan Kumar. To the question put to him in cross-examination, this witness has categorically stated that when he was taking bath at the Ghat, P.W.3 Manilal Yadav and P.W.6 Chhotu alias Rockey were also present there taking bath. Thus the defence has virtually not disputed the presence of eye witness on the spot of the incident at the time of the incident.

17. To our mind, cross-examination of P.W.5 Kundan Kumar is strengthening the prosecution case because of the material brought on record during the course of cross-examination of this witness. Presence of P.W.5 Kundan Kumar on the spot of the incident is not challenged in the cross-examination nor there is anything on record to doubt presence of this witness on the spot of the incident at the time of the incident. On the contrary, from his cross-examination, it is seen that when he was taking bath at the Ganga river, P.W.3 Manilal Yadav and P.W.6 Chhotu alias Rockey were also taking bath at the Ganga river where the incident took place. In a very natural way, P.W.5 Kundan Kumar reacted after the incident of killing of his cousin Rohit Kumar by firing bullets. Like other people present on the spot, this witness had also ran away from the spot of the incident immediately after the incident to inform the incident to the inmates of house of deceased Rohit Kumar. He did not stay on the spot of the incident and had not gone near Rohit Kumar. He narrated that there was chaos at the place of the incident. The after effect of the incident is also stated by him in cross-examination. He clarified that when he again return on the spot within five minutes with other relatives of the deceased, there was no body on the spot of the incident. Thus, as seen from cross-examination of P.W.5 Kundan Kumar, the populous place having lot of shops became virtually empty after murder of Rohit Kumar by firing gunshots at him so also because of firing bullets in the air which is attributed to accused Nilesh. Despite careful and close scrutiny of version of this witness, we are not in a position to find anything in his version which may make it doubtful or untrustworthy. There is no foundation laid during the course of his cross-examination that being on inimical term with the accused persons, this witness

has tried to implicate the accused persons falsely in the subject crime. No element of falsehood can be seen in the version of this eye witness by us.

His conduct during the course of the incident so also his post event conduct seems to be very natural and normal to us. Thus, evidence of P.W.5

Kundan Kumar makes it clear that accused Nepali fired a bullet at the face of deceased Rohit Kumar and accused Nilesh opened fire in the air

immediately thereafter to create the atmosphere of terror at the New Sidhighat of river Ganga. Let us now examine whether evidence of this eye

witness is gaining corroboration from the version of other eye witnesses so also the medical evidence adduced on record by the prosecution.

18. As stated by us, from cross-examination of P.W.5 Kundan Kumar, it is brought on record by the defence that P.W.3 Manilal Yadav and P.W.6

Chhotu alias Rockey were also present on the spot of the incident. Let us, therefore, examine what P.W.3 Manilal Yadav-maternal uncle of the

deceased states about the incident. This witness was an accused in the case of murder of one Pramod Yadav and had spent six months in jail. We will

have to be cautious while scrutinizing the statement of this witness who has criminal antecedents. As per his version, at about 11.45 A.M. of the day

of the incident, he along with one Rahul, Khudi Yadav as well as two others was taking bath in the Ganga river and deceased Rohit Kumar was also

present there. P.W.3 Manilal Yadav deposed that then accused Nepali Yadav, co-accused Vibhishan, accused Nilesh and Arun came there. He

testified that accused Nepali Yadav fired a bullet at the left side of nose of Rohit Kumar and Vibhishan fired a bullet at the back side of Rohit Kumar.

Then accused Nilesh opened fire in the air and the trio then ran away. This witness stated that Rohit Kumar died on the spot.

19. To discredit this witness, he was cross-examined on behalf of both the accused persons separately. From his cross-examination, it is brought on

record that he had gone for taking bath on the northern bank of the river and width of the river was about 5-6 kilometers. He was 5-10 cubits inside

the river at the time of the incident. In paragraph-10 of his cross-examination, for the reasons best known to it, the defence has brought on record

presence of all accused persons on the spot of the incident at the time of the incident. It is elicited from cross-examination of P.W.3 Manilal Yadav



that when he was taking bath, he saw accused Nepali Yadav, Vibhishan Yadav and accused Nilesh Yadav on the spot of the incident. He has also stated in his cross-examination that there were many shops at the Ghat and 15-20 Pandas were also present there apart from about 1000 people, who were taking bath. Apart from this, there is nothing in the cross-examination of P.W.3 Manilal Yadav.

20. The question put to P.W.3 Manilal Yadav in cross-examination and answer elicited from him makes it clear that the defence has not disputed presence of accused Nepali Yadav and Nilesh Yadav on the spot of the incident at the time of the incident. Similarly, from cross-examination of P.W.3 Manilal Yadav, it is brought on record that when police came on the spot, he was present there and his statement was recorded by police on the spot of the incident. There is nothing in evidence of P.W.3 Manilal Yadav to suggest that he was not present on the spot of the incident at the time of the incident and no efforts were taken by the defence to make his presence on the spot of the incident doubtful. Rather by bringing presence of the accused persons on the spot of the incident through the mouth of this witness, the defence has cemented the prosecution case of murderous assault by the accused persons on the deceased Rohit Kumar at the Ganga Ghat.

21. With the aid of evidence of P.W.3 Manilal Yadav that he was taking bath on the northern bank of river Ganga, the learned counsel for the appellants attempted to make the prosecution case doubtful by stating that the spot of the incident is not proved by the prosecution and the evidence regarding the spot of the incident is discrepant. To support this argument, our attention is drawn to the evidence of P.W.4 Pawan Kumar, who acted as Panch witness to the inquest. This witness Pawan Kumar, as seen from his version, went to the Ganga Ghat after the incident because he stated that he came to know about the incident from P.W.5 Kundan Kumar. In cross-examination, this witness has stated that the incident took place on southern bank of the Ganga river and he has seen the incident with his own eyes. To our mind, P.W.4 Pawan Kumar has deposed before the court in very casual manner and he is not a witness of truth. Though in his chief examination he has not claimed to be an eye witness to the incident and has

stated that he learnt about the incident from P.W.5 Kundan Kumar, in cross-examination, he ventured to state in his cross-examination that he has seen the incident by his eyes. In cross-examination, he states that the incident took place on southern bank of river Ganga. Obviously, he has not

actually seen the incident. He had not exhibited any seriousness while deposing before the court. Hence, we are unable to place reliance on version of

P.W.4 Pawan Kumar to discredit the otherwise truthful case of the prosecution. The doubt in respect of the prosecution case must be a reasonable

doubt flowing from the record and not a trivial doubt created by a stray sentence made by a casual witness. Even otherwise minor discrepancies on

trivial matters not touching the core of the prosecution case does not render the prosecution case untrustworthy warranting its rejection as a whole.

When doubt arises in respect of certain facts alleged by some witnesses, the proper course is to ignore that fact only, unless it goes to the root of the

matter. In the case in hand, the discrepancy crept because of irresponsible statement made by P.W.4 Pawan Kumar is trivial in nature and the fact

remains that version of prosecution witnesses makes it clear that the incident of murder of Rohit Kumar took place on the bank of the river Ganga.

Therefore, minor discrepancy to that effect, as seen from the stray statement of P.W.4 Pawan Kumar who himself is not an eye witness cannot be

given any overwhelming importance in the matter. Thus, we see no reason to disbelieve version of P.W.3 Manilal Yadav about the incident of murder

of Rohit Kumar by the accused persons by firing gunshots at him.

22. The next eye witness is P.W.6 Chhotu alias Rockey-cousin of the deceased. His presence on the spot of the incident at the time of the incident is

also brought on record by the defence through cross-examination of another eye witness P.W.5 Kundan Kumar. It is in evidence of P.W.6 Chhotu

alias Rockey that on the day of the incident at about 12.15 P.M., he was present at the Sidhighat. At that time, P.W.5 Kundan Kumar and P.W.3

Manilal Yadav were also present there. P.W.6 Chhotu alias Rockey further stated that at that place, accused Nepali fired a bullet at the left side of

nose of Rohit Kumar and Vibhishan fired a bullet at his back. Accused Nilesh also fired a gunshot and they ran away. Rohit Kumar died on the spot.

Cross-examination of this witness shows that the incident took place when he was taking bath in the river Ganga and he saw the incident when he heard the gunshot. After the incident, as stated by P.W.6 Chhotu alias Rockey, all persons ran away and he also ran away from the spot. That is how, his statement came to be recorded at the house of deceased Rohit Kumar. Thus, cross-examination of this witness also could not bring on record any material to doubt his presence on the spot of the incident or attempt on his part to falsely implicate the accused persons in the crime in question. His evidence is natural and probable. After the incident, he ran away from the spot because of fear. The conduct exhibited by him is natural conduct of a normal human being. There is no scope for mechanical rejection of version of this witness for the sole reason that he is close related with the deceased.

23. We have discussed eye witness account of the incident coming on record from the mouth of P.W.5 Kundan Kumar, P.W.3 Manilal Yadav and P.W.6 Chhotu alias Rockey. As stated by us, evidence of all these three eye witnesses read as a whole appears to have a ring of truth. Their presence on the spot of the incident is firmly established through their version and presence of the accused persons on the spot of the incident at the time of the incident is also established by their version and that too coming on record from their cross-examination. There is general agreement and consistency in regard to the substratum of the prosecution case in evidence of all these three eye witnesses examined by the prosecution. They all duly identified the accused persons while in the dock. From evidence of these three eye witnesses so also from evidence of first informant Rahul Kumar, we have noted that the spot of the incident was a populous spot situated at the bank of river Ganga where people goes for offering obeisance and for taking holy dip in the sacred water. There were lot of shops at that place apart from lot of visitors. The incident took place at broad day light. Still except related witnesses, the prosecution has not examined any independent witness. However, the reason for non-examination of the shop keepers or the persons present on the scene of the occurrence can be fathom from the material elicited from cross-examination of the prosecution

witnesses. Cross-examination of P.W.5 Kundan Kumar makes it clear that as soon as the gunshots were fired, the Sidhighat became empty because all people ran away because of chaos followed due to the gunshots. When this witness returned back to the spot of the incident, there was no body on the spot of the incident. Cross-examination of P.W.6 Chhotu alias Rockey shows that after the incident, all people present there ran away from the spot. Thus, when no body from such huge gathering had courage to remain present on the spot of the incident after firing of the gunshot, we cannot expect to them to appear before the court for deposing against the accused persons. The people are generally reluctant to come forward to depose before the court. If the prosecution case is otherwise truthful and acceptable, it cannot be rejected merely because of all prosecution witnesses had not been examined or independent witnesses were not produced to corroborate the evidence. It is not correct to reject the prosecution version only on the ground that all witnesses to the occurrence have not been examined. It is not proper to reject the case of prosecution for want of corroboration by independent witnesses, if the case made out is otherwise true and acceptable. We have assessed the trustworthiness of evidence of eye witnesses P.W.3. Manilal Yadav, P.W.5 Kundan Kumar and P.W.6 Chhotu alias Rockey. The same is worthy of reliance and there is nothing to doubt the testimony of these three eye witnesses. Thus, when version of these three eye witnesses can be accepted and acted upon then non-examination of other witnesses which may be available and which could have been examined but were not examined is of no consequence. There is no question of drawing adverse inference against the prosecution on this count. Ultimately, evidence is required to be weighed and not counted. Section 134 of the Evidence Act makes it clear that no particular number of witnesses shall in any case be required for the proof of any fact.

24. It is also urged that because of non-examination of the Investigating Officer, prejudice is caused to the accused because the contradictions could not be brought on record through the version of the Investigating Officer. We find no substance in this contention also. We may note provision of Section 145 of the Evidence Act in this regard. It reads thus:

145. Cross-examination as to previous statements in writing.- A 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 him.

Despite careful scrutiny of evidence of prosecution witnesses, we could not notice that they were cross-examined as to previous statements made by them in writing or reduced into writing with an intention to contradict these witnesses. Attention of not a single witness was brought to their previous statements by showing or reading over their previous statement to them and by putting necessary questions to them by showing their previous statements to them. As attention of the witnesses was not drawn to their previous statements reduced in writing during the course of investigation, there was no question of proving the contradictions through the Investigating Officer.

25. P.W.1 Vimla Devi -mother of the deceased had put embellishment to her version by claiming to be an eye witness to the incident when, in fact, she came to the spot of the incident after getting information about the incident through P.W.5 Kundan Kumar. Her evidence is of no assistance to the prosecution. She has stated in her chief examination that she went to the spot with her brother Mani Yadav. However, presence of P.W.3 Manilal Yadav on the spot at the time of the incident is well established from cross-examination of the eye witnesses by the defence.

26. P.W.2 Munna Kumar is son of sister of P.W.1 Vimla Devi. He is also not an eye witness to the incident. He reached at the spot of the incident upon being informed by P.W.7 Rahul Kumar. His evidence as such is of no assistance to the prosecution case so far as the actual incident is concerned. However, his cross-examination makes it clear that after recording the F.I.R., the Station House Officer was on the spot of the incident for a long time doing necessary formality such as effecting seizure and recording statement of the witnesses. Few hours delay in recording the crime

by preparing the formal printed F.I.R. is getting explanation from his cross-examination. P.W.9 Md. Nisar is a formal witness.

27. Thus, for the reasons stated in the foregoing paragraphs, we hold that the prosecution has established that accused Nepali Yadav fired a bullet at

deceased Rohit Kumar which landed in the muscle of occipital bone of deceased Rohit Kumar. The deceased was also having another gunshot injury

at his back and third gunshot injury at the upper border of his right hip bone. Evidence of the prosecution witnesses is regarding two gunshots at the

deceased Rohit Kumar, one by accused Nepali Yadav and another by Vibhishan Yadav. However, the deceased was also found to be having third

bullet injury on upper border of right hip bone and that bullet was found to be lodged between sacral and first lumbar vertebra of the deceased. Because

of finding of this third gunshot injury on the deceased, the prosecution case cannot be doubted because evidence of eye witnesses shows that after

two gunshots were fired at the deceased, they fled from the spot of the incident. The third gunshot might be after the eye witnesses ran away from

the spot. Thus, the ocular and medical evidence coming on record makes it clear that the accused persons were intending to cause death of Rohit

Kumar. That is why the bullets were fired on his face and back. The offence of murder as such is made out by the prosecution. So far as accused

Nilesh Yadav is concerned, evidence on record shows that he had shared the common intention of committing murder of deceased Rohit Kumar with

the other accused persons. The common intention on the part of accused Nilesh Yadav can be gathered from the proved fact that after the incident of

firing bullets at deceased Rohit Kumar, accused Nilesh started firing in the air to terrorize the people present on the spot of the incident. He himself

had carried the firearms and was present on the spot of the incident where the other accused fired a bullet at the deceased. Therefore, conduct

displayed by accused Nilesh Yadav during the course of crime exhibits his common intention to share the ultimate act of commission of murder of

deceased Rohit Kumar. Accused Nilesh had certainly preconceived or premeditated the result by accompanying other accused to the New Sidhighat

carrying a firearm with him and by using that firearm for terrorising the public at large at the scene of occurrence. Thus, we see no infirmity in the

impugned Judgment as well as Order of conviction and resultant sentence imposed on the appellants/accused by the learned trial court. The appeals as such are devoid of merit and the same are, accordingly, dismissed.

28. We record our appreciation for strenuous efforts taken by Mr. Prince Kumar Mishra, the learned Advocate, appointed to act as Amicus Curiae in

assisting us for arriving at the correct conclusion in the matters. We quantify the fees payable to him at Rs.5000/- and direct the High Court Legal

Services Authority, Patna to pay the said amount to Mr. Prince Kumar Mishra, the learned Advocate, appointed to act as Amicus Curiae to represent

the State.

29. The copy of this Judgment be forwarded to the Chief Secretary, the State of Bihar in the light of our observations in paragraph-4 of this Judgment.

We hope and trust that this small effort on our part will motivate the State of Bihar in setting its house in order.