

(2022) 08 PAT CK 0078

Patna High Court

Case No: Criminal Appeal (DB) No. 224, 267 Of 2014

Pradeep Yadav

APPELLANT

Vs

State Of Bihar

RESPONDENT

Date of Decision: Aug. 10, 2022**Acts Referred:**

- Indian Penal Code, 1860 - Section 34, 302
- Arms Act, 1959 - Section 3, 5, 7, 27, 39
- Evidence Act, 1872 - Section 157

Hon'ble Judges: A. M. Badar, J; Rajesh Kumar Verma, J**Bench:** Division Bench**Advocate:** Shiya Ram Sahi, Rabindra Prasad Singh, Prince Kumar Mishra, Rajesh Kumar, Dharmendra Nath Mishra, Gajendra Kumar**Final Decision:** Dismissed/Partly Allowed

Judgement

1. Appellant/accused Arun Yadav and appellant/accused Pradeep Yadav, by these two separate appeals are challenging the judgment and order dated

19.02.2014 and 20.02.2014 respectively, passed by the learned Ad hoc Additional Sessions Judge "II, Nawada, in Sessions Case No. 42 of 2013/16

of 2013, thereby convicting them and sentencing them appropriately. Appellant/accused Arun Yadav has been convicted of the offence punishable

under Section 302 of the Indian Penal Code and under Section 27 of the Arms Act 1959. Accordingly, he has been sentenced to suffer rigorous

imprisonment for life apart from imposition of fine of Rs. 10,000/- for the offence punishable under Section 302 of the Indian Penal Code. For the

offence punishable under Section 27 of the Arms Act, he is sentence to undergo rigorous imprisonment for three years. Some default sentence is also

imposed for non-payment of fine. Appellant/accused Pradeep Yadav has been convicted of the offence punishable under Section 302 read with

Section 34 of the Indian Penal Code and he has been sentenced to undergo rigorous imposition for life apart from imposition of fine of Rs. 10,000/-

and in default to undergo rigorous imprisonment for six months. As both these appeals are arising out of common judgment and order, they are being

decided by this common judgment. For the sake of convenience, the appellant shall be referred to in their original capacity as an accused.

2. The facts leading to the prosecution of the accused gathered from the Police report can be summarized thus:

(A) According to the prosecution case, these accused persons along with others, in furtherance of their common intention committed murder of

Munna Mian at about 7:30 PM of 31.10.2012 at Bhatta Garh falling under jurisdiction of Police Station Roh of District Nawada.

(B) Munna Mian was residing at village Bhatta Garh along with his family members including his mother PW 7 Hasiba Khatoon, his sister PW 10

Baby Khatoon (the First Informant) and his brother-in-law PW 9 Md. Khalid Akhtar. At about 7:00 to 7:30 PM of 31.10.2012, Munna Mian (since

deceased) along with his neighbor PW 5 Mohammad Jubair Ahmad were going towards the southern side of their village for answering the

nature's call. When they reached at the Toddy shop of PW11 Yugal Chaudhary, both the accused persons accompanied by others came from

southern side. They caught hold of Munna Mian and at the instigation of accused Pradeep Yadav, accused Arun Yadav fired a bullet at the left

temporal region of Munna Mian. Munna Mian suffered a fall and the people present there started shouting. The accused person along with their

associates ran away towards the southern direction. Because of the sound of Gun fire and shouts of people, PW 1 Md. Jawed Husain, PW 2 Md.

Reyazuddin, PW 7 Hasiba Khatoon and PW 10 Baby Khatoon rushed at the spot of the incident. According to the prosecution case, PW 6 Sakim

Shah and PW 9 Md. Khalid Akhtar so also PW 11 Yugal Choudhary, PW 12 Upendra Sharma and PW 13 Naresh Ravidas had witnessed the

incident of commission of murder of Munna Miya.

(C). Because of bullet wound, Munna Mian died on the spot of the incident instantaneously. Informant about the incident reached at Police Station

Roh. That is how Sub-Inspector Pramod Kumar, Station House Officer, went to Bhatta Garh where at about 8:30 PM of 31.10.2012 itself, PW 10

Baby Khatoon reported the incident and accordingly the FIR came to be lodged. Formal FIR came to be prepared thereafter by registering Crime No.

100 of 2012 for the offences punishable under Section 302 read with 34 of the Indian Penal Code and under Section 27 of the Arms Act.

(D). During the course of investigation, dead body of Munna Mian came to be inspected and in present of PW 1 Md. Javed Husain, inquest notes

came to be recorded. It was then sent for post mortem examination to the Sadar Hospital, Nawada, where PW 4 Dr. Prabhakar Singh had conducted

the autopsy on 01.11.2012. The spot of the incident came to be inspected by PW 15 Chandra Shekhar Azad, JSI of Roh Police Station. One country-

made pistol came to be seized from the vicinity of the spot of the incident. It was seized in presence of PW 2 Md. Riyajuddin and PW 8 Md. Abbas

by preparing seizure Panchnama. Statement of witnesses came to be recorded and on completion of routine investigation, charge sheet came to be

filed against the accused by keeping investigation in respect of others pending.

(E). The learned Trial Court had framed the charges against the accused. Both the accused pleaded not guilty and claimed trial.

(F). In order to bring home the guilt to the accused, the prosecution has examined in all 16 witnesses. Co-villager Md. Javed Husain who rushed on

the spot soon after the incident is examined as PW 1. He is a Panch witness to the inquest notes.

Another co-villager Md. Riyajuddin who rushed on the spot after the incident is examined as PW 2. He is a Panch witness to the seizure of the

country-made pistol.

Sergeant Major Dinesh Kumar Singh who examined the seized country made pistol is examined as PW 3. Autopsy surgeon Dr. Prabhakar Singh of

the Sadar Hospital, Nawada, is examined as PW 4. Alleged eye witness Md. Jubair Ahmad " a co-villager, is examined as PW 5. Shakim Shah,

cousin of the deceased who also claims to be an eyewitness to the incident is examined as PW 7. Hasiba Khatoon, mother of the deceased who

rushed on the spot soon after the incident is examined as PW 7. Md. Abbas, another Panch witness to the seizure of the country-made pistol is

examined as PW 8. Md. Khalid Akhtar is brother-in-law of deceased Munna Miya and husband of PW 10 Baby Khatoon. He is examined as PW 9.

PW 10, Baby Khatoon is the first informant. She is sister of the deceased. Alleged eye witnesses Yugal Chaudhary, Upendra Sharma and Naves

Ravidas are examined as PW 11, 12 and 13 respectively. They turned hostile to the prosecution. Sub-Inspector Mohan Kumar is strangely examined

twice as PW 14 and PW 16 instead of recalling him for recording his further evidence. He had produced the fire-arm in sealed condition on the first

occasion and on the second occasion he was examined to prove the Sanha entry. Investigating Officer Chandra Shekhar Kumar Azad, JSI of Roh

Police Station is examined as PW 15.

(G). The defence of the accused was that of total denial. They, however, did not enter in the defence.

(H). After hearing the parties, by the impugned judgment and order, the learned Trial Court was pleased to convict the accused and to sentence them

as indicated in the opening para of this judgment.

3. I heard the learned counsel appearing for both the appellants at sufficient length of time. It is argued that both the appellants are falsely implicated

in the crime in question. In fact Munna Mian was killed by somebody else and later on by filing the false FIR, both the appellants are falsely

implicated. It is further argued that the place of occurrence is not proved by the prosecution. PW 15 Chandra Shekhar Azad, Investigating Officer

stated that the incident took place on the road whereas other witnesses are stating some other spot as the place of incident. It is argued that the

Investigator had not collected blood stained earth from the spot of the incident and had not sent the same to the FSL for proving the spot of the

incident. To substantiate this contention, reliance is place on Lakshmi Singh and Others Vs. State of Bihar reported in AIR 1976 Supreme Court 2263.

It is further argued that the medical evidence is not corroborating the ocular evidence; rather the medical evidence is not in tune with the ocular

evidence. According to the learned counsel, the medical evidence shows that the bullet was fired from a distance of more than six feet and, therefore,

ocular evidence that it was fired from a close range can not be accepted. It is further argued that the prosecution case that accused Pradeep so also

his associates had caught hold of Munna Miya and accused Arun fired a bullet is improbable because there was possibility of the bullet hitting others

also. Reliance is placed on judgment in matters of Salim Zia vs. State of U.P reported in 1979 Supreme Court 391, Ram Narain Vs. The State of

Punjab reported in AIR 1975 Supreme Court 1727 and Kapildeo Mandan and Others vs. State of Bihar reported in 2008(1) PLJR (SC) 209 for

contending that the prosecution case becomes doubtful because of variation in the ocular and medical evidence. It is further argued on behalf of the

appellant that there was no source of light for establishing identity of the accused. PW 6 Sakim Shah is stating the direction from which the accused

and their associates were holding deceased Munna Mian and this fact, according to the learned counsel for the appellant, makes the prosecution case

doubtful.

4. As usual none appeared for the respondent/State of Bihar in these two appeals. At this stage we deem it appropriate to reproduce our observation

made in para-4 in our judgment dated 25.07.2022 in the matter of Nepali Yadav and Another Vs. State of Bihar which reads thus:

“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.â€

This position has not changed even in the instant appeals and as the respondent/State of Bihar was going unrepresented, we were

constrained to appoint Mr. Prince Kumar Mishra, the learned Advocate to act as an Amicus Curiae in this matter also in order to see that

interest of all the stake holders including the State are protected.

5. We heard Mr. Mishra, the learned Amicus Curiae. He vehemently argued that it is settled principal of criminal jurisprudence that when there is

slight variation between the ocular evidence and medical evidence, the ocular evidence always prevails. According to him, PW 5 Md. Jubair is a

natural witness to the crime in question. This witness is totally impartial and his version is gaining corroboration for other evidence on record.

Therefore, according to Mr. Mishra, the slight variation, if any, in the ocular evidence and medical evidence is of no consequence. He argued that PW

6 Sakim Shah and PW 9 Md. Khalid Akhtar, who have witness the incident, are fully supporting the prosecution case and there is nothing in cross-

examination of both these witnesses to doubt their testimony. Similarly, according to the learned Amicus Curiae, witnesses such as PW 7 Hasiba

Khatoon and PW 10 Baby Khatoon had seen the accused running from the spot of the incident. There is evidence regarding former statement of the

eyewitnesses which is corroborating the version of eyewitness. Mr. Mishra, the learned Amicus Curiae, has placed reliance on judgment in Suresh and

Another vs. State of U.P reported in (2001) 3 Supreme Court Cases 673 and Chhott Ahirwar vs. State of Madhya Pradesh reported in (2020) 4 SCC

126 to submit that common intention of the accused is reflected from their conduct in eliminating Munna Mian.

6. We have carefully considered the submissions so advanced and we have also perused the record and proceedings.

7. The case in hand is that of commission of murder of Munna Mian. Therefore, the prosecution is required to establish that Munna Mian died

homicidal death. The factum of death of Munna Mian occurring on 31.10.2012 is not in serious dispute. Ocular evidence coming from the mouth of his

near and dear ones such as PW 7 Hasiba Khatoon, PW 9 Md. Khalid Akhtar and PW 10 Baby Khatoon on this aspect went unchallenged. It is in

evidence of PW 15 Chandra Shekhar Azad that he took the inquest notes by inspecting the dead body of Munna Mian. This witness has duly proved

the inquest notes and his evidence is corroborated by evidence of Panch witness PW 1 Md. Javed Husain. The inquest notes show that blood was

oozing from wounds on left as well as right temporal region of deceased Munna Mian. PW 4 Dr. Prabhakar Singh who conducted autopsy on dead

body of Munna Mian of 01.11.2012 has deposed that he found following antimortem external injuries on dead body of deceased Munna Miya.

I. Lacerated wound of size 2½ X 1½ X brain deep margin inverted with blackening behind left Pinna just below mastoid process i.e., entry wound.

II. Lacerated wound of size 2½ X 1½ X brain deep, margins everted with herniation of brain matter behind right Pinna about mastoid process i.e.,

exit wound.

The autopsy surgeon further deposed that the wound No. 1 and wound No. 2 were communicative. Upon internal examination of the dead body, PW

4 Dr. Prabhakar Singh had found that there was fracture of both mastoid bone of the skull with extensive laceration of brain matter from injury Nos. 1

and 2. With this, the autopsy surgeon opined that cause of death of Munna Mian was haemorrhage and shock due to above noted injuries caused by

the fire arm. During cross-examination, this witness has stated that he found the marks of tattooing and blackening and no charring. He further stated

that charring is always caused when the fire arm is fired from a close range. This autopsy surgeon further deposes that in this case, the fire arm might

have been fired from a distance of more than six feet. He has further stated that the injury noted by him is not possible in sitting condition but it is

possible in standing position.

8. This is all about the evidence of the autopsy surgeon as well as the ocular evidence regarding homicidal death of Munna Mian. With this evidence, the prosecution has established homicidal death of Munna Mian.

9. Now let us examine whether the accused persons are responsible for causing homicidal death of Munna Mian. In order to prove the offence of

commission of murder of Munna Mian, the prosecution is heavily relying on evidence of three eyewitnesses, namely, PW 5 Md. Jubair Ahmad, PW 6

Sakim Shah and PW 9 Md. Khalid Akhtar. Similarly the prosecution is also relying on version of PW 1 Md. Jawed Hussain, PW 7 Hasiba Khatoon

and PW 10 Baby Khatoon for corroborating the version of eyewitnesses and to place on record the post event happenings. As against this, according

to the defence version, the so called eyewitnesses have not seen the incident and the prosecution has even failed to prove the spot of the incident

where Munna Mian was allegedly murdered. It is not in dispute that the accused persons are co-villagers residing in village Bhatta Garh. Though

when the eyewitness account is available, there is no need to prove motive of the crime in question, in the case in hand, as seen from evidence of PW

9 Md. Khalid Akhtar (brother-in-law of the deceased) three days prior to the incident, Munna Mian had objected the act of the accused persons in

drinking liquor near Kabristan. Cross-examination of PW 7 Hasiba Khatoon (mother of the deceased) shows that the said Kabristan is very near to

the House of deceased Munna Mian. According to PW 9 Md. Khalid Akhtar, the accused persons had threatened Munna Mian because of his

objection to their acts of drinking liquor at the Kabristan.

10. Prior to examining the truthfulness and authenticity of version of eyewitnesses, let us put on record undisputed position emerging on record

regarding spot of the incident where murder of Munna Mian was committed. This will take care of argument of the learned counsel for the appellants

that the spot of the incident was not proved. Official witness PW 15 Chandra Shekhar Kumar Azad, the Investigating Officer, in his evidence has

clarified the spot of the incident as the road in front of House of PW 11 Yugal Chaudhary which runs in north-south direction where the shop of said

Yugal Chaudhary is also situated. Thus, according to the Investigating Officer, dead body of Munna Mian was found on the road in front of shop and

house of PW 11 Yugal Chaudhary. The defence has not disputed this version of the Investigator. PW 5 Md. Jubair Ahmad who claims to be an

eyewitness has stated that the incident took place on the road flowing in north-south direction, on the eastern side of which House and on the western

side of which the Toddy shop of PW 11 Yugal Chaudhary is located. This is version of PW 5 Md. Jubair appearing in cross-examination. Therefore, it

assumes importance. Another eyewitness PW 9 Md. Khalid Akhtar has described the spot of the incident in answer to the question put to him in

cross-examination by stating that the dead body of Munna Mian was on the road flowing from north to south direction and eastern side of that place,

house of PW 11 Yugal Chaudhary and on the western side of which shop of said Yugal Chaudhary is situated. Even PW 6 Sakim Shah, another

witness who claims to have seen the incidence has stated about the spot of the incident as front side of Toddy shop of PW 11 Yugal Chaudhary. PW

1 Md. Jawed Hussain who rushed on the scene of occurrence immediately after the incident has stated that the incident took place on the road

flowing from north to south direction on which on west side there is Toddy shop and on east side house of PW 11 Yugal Chaudhary is situated. PW 7

Hasiba Khatoon who also reached on the spot immediately has stated that dead body of her son Munna Mian was lying near shop of PW 11 Yugal

Chaudhary. As per version of PW 10 Baby Khatoon, she saw dead body of her brother Munna Mian drenched in blood near shop of PW 11 Yugal

Chaudhary. The defence has got this aspect reaffirmed in cross-examination of PW 10 Baby Khatoon. In answer to the question in her cross-

examination, PW 10 Baby Khatoon again reiterated that the spot of the incident was in front of the shop and on the road. With this unimpeachable

evidence regarding spot of the incident on record it is virtually not possible to harbour any doubt regarding the spot of the incident. The incident, as

seen from this trustworthy evidence did take place on the road in front of Toddy shop of Yugal Chaudhary. In order to prove a fact, proof of

mathematical precision is not required. The yard-stick is the proof beyond all reasonable doubts. We are unable to see any doubt in this evidence

adduced by the prosecution regarding the spot of the incident. Hence it was not at all required from the prosecution to collect the blood stained earth

from the spot and to get it tested from the FSL to fix the spot. Ruling in the matter of Lakshmi Singh (supra) as such, is of no avail to the appellants.

11. According to the prosecution case, deceased Munna Miya accompanied by PW 5 Mohammad Jubair Ahmad was going for answering the

nature's call and during that journey, the incident of his murder took place. Therefore, topography of the village also becomes relevant and it is

brought on record by defence by cross-examining PW 1 Mohammad Jawed Hussain. His cross-examination shows that PW 11 Yugal Chaudhary

resides on the southern side of the village. The village is situated on the northern side of the House and shop of PW 11 Yugal Chaudhary. This aspect

is further clarified by the witnesses examined by the prosecution. PW 5 Md. Jubair has stated that he along with Munna were proceeding towards

southern direction from the village for answering the nature's call. PW 6 Sakim Shah, at the relevant time, had already got himself relieved and

has stated in his evidence that he had returned from answering the nature's call and on the way, sat at the shop of PW 11 Yugal Chaudhary. This

version of PW 6 Sakim Sah also makes it clear that shop of PW 11 Yugal intervenes in between the place commonly used by the villagers for easing

themselves and the residential area of village Bhatta Garh. PW 9 Md. Khalid Akhtar has also clarified that the incident took place when he was

returning from the southern direction after answering the nature's call.

12. With this evidence regarding the topography of the village, let us now peruse evidence of the eye witnesses. PW 5 Md. Jubair is a co-villager. As

per his version, at about 7:30 PM of 30.10.2012 he along with deceased Munna Mian were going towards the southern direction of the village for

answering the nature's call and when they reached near the Toddy shop of PW 11 Yugal Chaudhary, said Yugal offered them Khaini/Tobacco

and asked them to eat Khaini. As testified by PW 5 Jubair, Yugal then lighted the lantern and hanged it. When Yugal was standing in front of that

shop of PW 11 Yugal Chaudhary and eating Khaini, the accused persons came running from the southern direction. This witness further stated that

accused Pradeep and others caught hold of Munna Mian and accused Pradeep exhorted to fire and kill Munna Mian. Thereupon accused Arun fired a

bullet which hit the left temporal region of Munna Mian. PW 5 Md. Jubair Ahmad stated that then accused ran towards the northern direction. As per

his version, from the northern direction, PW 1 Md. Jawed Hussain PW 7 Hasiba Khatoon and PW 10 Baby Khatoon came. PW 5 Md. Jubair Ahmad

testified that then he told them about the incident. He has also stated that PW 6 Sakim Sah, PW 11 Yugal Chaudhary and PW 12 Upendra Sharma

were present at the time of the incident and PW 9 Md. Khalid Akhtar came from the southern side at the time of the incident. This is the eyewitness

account of the incident given by PW 5 Md. Jubair Ahmad who was accompanying the deceased at the time of the incident. From his cross-

examination itself, it is brought on record that the incident took place in front of shop of PW 11 Yugal Chaudhary while Munna Mian was standing and

eating Khaini. This witness was cross-examined as to how the accused Pradeep and others caught hold of Munna Miya and the duration within which

the incident took place. He stated that the incident took place within one minute. The defence has brought on record the source of light at the time of

the incident by questioning PW 5 Md. Jubair Ahmad. He answered that the lantern was burning at the shop of PW 11 Yugal Chaudhary at the time of

the incident. The part of body on which the wound was sustained by the deceased is also elicited from cross-examination of PW 5 Md. Jubair Ahmad.

He stated that the bullet hit one inch about the ear and by penetrating head of Munna Mian it passed out from right side of temporal region of Munna

Mian.

13. This is all that has come on record from version of PW 5 Md. Jubair Ahmad. His evidence is definite regarding the seat of injury suffered by the

deceased. This witness has candidly stated the situation prevailed on the spot at the time of incident. He has made it clear that deceased Munna Miya

was standing in front of the shop and was eating Khaini when he was done to death by the accused. The medical evidence which we will discuss

subsequently makes it clear that the wound suffered by Munna Mian was possible only in the standing position. Thus, even the medical evidence

unerringly points out that PW 5 Md. Jubair is a witness of truth and was present when the deceased sustained a gun shot injury. This witness resides

in the vicinity of House of Munna Miya. Therefore, it was but natural for him to accompany Munna Mian for going to answer the nature's call.

He has no motive to depose a lie against the accused persons. No such circumstances are brought on record from his cross-examination. His

evidence is very specific about the directions and the place of the incident. We see no reason to disbelieve this natural witness to the incident.

14. PW 6 Sakim Shah is another co-villager and his cross-examination makes it clear that after answering the nature's call, he was sitting at the

Toddy shop of PW 11 Yugal Chaudhary. This witness has stated that PW 5 Md. Jubair Ahmad and deceased Munna Mian came near that shop and

PW 11 Yugal Chaudhary offered them Khaini/tobacco and asked them to have it. This eyewitness clarified that PW 5 Md. Jubair Ahmad sat down

and Munna Mian was eating the Khaini while standing there. At that point of time, the accused and their associates came, four of them caught hold of

Munna Miya and Arun fired a bullet at the temporal region of Munna Miya. PW 6 Sakim Shah further depose that the bullet went through the head of

deceased Munna Mian and in the meanwhile PW 9 Md. Khalid Akhtar reached on the spot. As per version of PW 6 Sakim Sah they all started

shouting and the accused ran away towards the Nala. He further stated that thereafter mother and sister of the deceased came. Again in cross-

examination of this witness, the defence has questioned as to who held the deceased and from what direction. He gave that direction. From his cross-

examination, it is elicited that accused Pradeep was holding deceased Munna Mian from the eastern direction. The incident of offering Khaini by PW

11 Yugal Chaudhary is again got confirmed from cross-examination of this witness by the defence. PW 6 Sakim Sah has further stated that the fired

bullet hit at a distance of one inch from ear of Munna Mian and profused bleeding started from both sides of his head.

15. Cross-examination of this witness is thus establishing his presence on the scene of occurrence since prior to the incident. His cross-examination

shows that he was present on the scene of occurrence even before arrival of the deceased Munna and had witnessed the incident of killing Munna

Mian. The defence could not elicit any material from cross-examination of this co-villager for doubting his version about the incident. Even his

evidence regarding the wound sustained by Munna Mian is very clear and precise and shows that he is a witness of truth. His cross-examination

further shows that Munna Mian was shot dead outside the Toddy shop of PW 11 Yugal Chaudhary in standing position. This version is fully in tune

with the medical evidence. There is no reason for us to disbelieve version of this eyewitness, which is clear and consistent.

16. PW 9 Md. Khalid Akhtar is brother-in-law of deceased Munna Mian. As per his version, after answering the nature's call he was returning

from the southern side of the village and during the course of this return journey both accused and their associates came from behind him while

running and had crossed him to went ahead. Then this witness stated that when they reached in front of Toddy shop of PW 11 Yugal Chaudhary,

accused Pradeep and others caught hold of Munna and accused Arun fired a bullet at the temporal region of Munna Mian. He further stated that PW

6 Sakim Sah and PW 5 Md. Jubair Ahmad so also PW 11 Yugal Chaudhary, PW 12 Upendra Sharma and PW 13 Naresh Ravidas were already

present on the spot of the incident. PW 9 Md. Khalid Akhtar testified that the accused ran away and PW 7 Hasiba Khatoon, PW 10 Baby Khatoon

and PW 1 Jawed Hussain came on the spot of the incident. He vouched that they all disclosed the incident to PW 7 Hasiba Khatoon, PW 10 Baby

Khatoon and PW 1 Jawed Hussain. In answer to the question put in cross-examination, PW 9 stated that there was slight darkness on the spot of the

incident and he was at a distance of about 50 to 60 feet when the gun shot was fired at Munna Mian. PW 9 Md. Khalid Akhtar is relative of the

deceased. However, there is nothing on record to demonstrate that this witness has to gain something by false implication of the accused. No such

circumstances are brought on record from version of this witness. It is seen from his evident that the accused went ahead by crossing him and

committed murder of Munna Mian. This witness was having opportunity to see the incident as he was just 50 to 60 feet away from the place of the

incident which occurred on the road. The accused were known to him. There was sufficient light at the time of the incident as seen from cross-

examination of this witness.

17. From scrutiny of evidence of all the three eyewitnesses, it is crystal clear that their evidence is clear, consistent and cogent. The defence has not brought on record any material to disbelieve their version about the incident. They all have stated in unison that Munna Mian was fired when he was standing and was being held by other accused persons. Cross-examination PW 4 Dr. Prabhakar Singh makes it clear that deceased Munna Mian sustained gun shot wound while he was in standing position. Medical evidence on record shows that deceased Munna received gun shot wound behind left Pinna i.e., near left ear and that there was exit wound on Pinna of right side. These three eyewitnesses have clearly stated that the bullet went through and through causing entry and exit wound near both ears of deceased Munna Mian. Thus, medical evidence is fully supporting version of all these three eyewitnesses.

18. Now let us examine whether other evidence on record is supporting the version of these three eyewitnesses. PW 1 Md. Javed Hussain is a co-villager who was having breakfast in the eatery of one Kailu Shah. That eatery was at the house of Munna Mian. Evidence of this witness shows that after hearing the sound of Gun shot, by lighting the torch he rushed towards the spot of the incident. PW 7 Hasiba Khatoon and PW 10 Baby Khatoon in whose house that eatery was situated have corroborated the version of this witness by stating that PW 1 Javed was ahead and they were running behind him to rush to the spot after hearing the sound of Gun shot. PW 1 Javed further deposed that while rushing to the spot of the incident he noticed five persons including both the accused coming from the south direction and accused Arun was holding a Pistol in his hand. As per his version when he went ahead, he saw the dead body of Munna drenched in blood. He has spoken about presence of PW 5 Md. Jubair Ahmad, PW 6 Sakim Shah, PW 9 Md. Khalid Akhtar, PW 11 Yugal Choudhary and PW 13 Naresh Ravidas on the spot of the incident. PW 1 Javed Hussain further deposed that PW 5 Jubair Ahmad had disclosed them that PW 11 Yugal Chaudhary offered Khaini/tobacco and when Munna Mian was rubbing that Khaini/tobacco accused persons came from southern direction, four of them including accused Pradeep Yadav caught hold of accused Munna Mian

and Arun Yadav fired a bullet at Munna Mian. This witness has spoken about preparation of inquest Panchnama in the light of lantern of PW 11

Yugal Chaudhary. Evidence of this witness is not at all shattered in the cross-examination and former statement of PW 5 Jubair in respect of the

incident proved by this witness is not even challenged in the cross-examination by the defence. PW 5 Jubair had made the statement narrating the

happening of incident to this witness immediately after the incident when mind of PW 5 Jubair was not polluted by the external forces. PW 1 Jawed

had reached on the spot of the incident within a short span of time. Even if we accept evidence of Investigating Officer PW 15 Chandra Shekhar

Azad then also it is evident that house of Munna Mian was at a distance of 500 yards i.e., less than 1500 feet from the spot of the incident. This

witness PW 1 Jawed had disclosed that distance to be about 40-50 feet whereas PW 10 Baby Khatoon had stated that the said distance is 60-70 feet.

Unchallenged formal statement of PW 5 Md. Jubair made to PW 1 Jawed regarding the mode and manner of the incident fully corroborates version

of PW 5 Jubair and is relevant under Section 157 of the Evidence Act. This witness has seen the accused running away from the spot of the incident

after committing the murder. Thus, the prosecution has brought on record presence of the accused on the spot of the incident immediately after the

incident through evidence of this witness PW 5 Jawed.

19. Similar is the evidence of PW 7 Hasiba Khatoon and her daughter PW 10 Baby Khatoon who are near relatives of the deceased. Despite careful

scrutiny of their evidence, we see no reason to disbelieve them. None of them have claimed to be an eyewitness to the incident. On the contrary they

have truthfully stated that they followed PW 1 Jawed to the spot of the incident. Both of them have stated that on the road in front of shop of Yugal,

they saw Munna Mian lying while drenched in the blood. These two witnesses have also heard from the eyewitnesses as to how the incident of killing

Munna Mian took place. The important aspect of evidence of these two witnesses is that they both had seen the accused persons running away from

the spot of the incident. PW 7 Hasiba Khatoon has deposed that at that time accused Arun was holding pistol. In cross-examination of PW 7 Hasiba

Khatoon, presence of eyewitnesses is again got reaffirmed by the defence. In cross-examination of PW 10 Baby Khatoon, source of light is brought on record. She has stated that the writing work was done by police in the light of lantern of PW 11 Yugal Chaudhary. PW 5 Md. Jubair had clarified in his evidence that prior to the incident PW 11 Yugal Chaudhary had lighted the lantern at his shop. She has stated in cross-examination that the accused was holding pistol but was not firing from it. Thus, both these eyewitnesses who reached on the spot of the incident immediately after the incident had witnessed both the accused running away from the spot of the incident and then immediately both these witnesses had seen dead body of Munna Mian drenched in blood. These witnesses have clearly stated about presence of eyewitnesses on the spot of the incident when they reached there. Thus, evidence of PW 7 Hasiba Khatoon and PW 10 Baby Khatoon is also fully corroborating the version of eyewitnesses.

20. The prosecution has claimed that a pistol came to be seized from near the spot of the incident and that pistol was got examined from ballistic expert PW 3 Dinesh Kumar Singh. However, the prosecution has failed to trace out the projectile. The prosecution has not got the projectile and the empty cartridge tested in order to determine that the projectile and the empty cartridge were fired from the seized pistol. Hence, this evidence is not any assistance to the prosecution.

21. According to the learned counsel for the appellants, there is variance in the medical and the ocular evidence. He has submitted that the medical evidence shows that the bullet was fired from the distance of more than 60 feet and, therefore, the incident itself is improbable. Here it needs to be noted that none of the prosecution witnesses have claimed that the bullet was fired from the point blank range. They have only deposed that the bullet was fired at the temporal region of deceased Munna Mian. Medical evidence shows that there were marks of tattooing and blackening at the wound but there was no charring. PW 4 Dr. Prabhakar Singh has deposed that charring occurs when the fire-arm is fired from a close range. As no eyewitness has stated that the firing was from the close range, it cannot be said that in absence of evidence of charring, the prosecution case is

doubtful. In the matter of Salim Ziya the Supreme Court was discussing about fragmentation of the bullet after entering in the body. Such is not the case in hand. In Ram Narayan (Supra), the Supreme Court has held that when evidence of witnesses is totally inconsistent with the medical evidence or the evidence of the ballistic expert then there is fundamental defect in the prosecution case. Such is not the case in hand. Here the prosecution witnesses have not deposed that the firing was from the point blank range. In Kapil Deo Mandal and Others (Supra) the Supreme Court has held that in case of variance between the medical evidence and ocular evidence, oral evidence of eyewitness has to get primacy over the medical evidence, unless and until the oral evidence is totally inconsistent with the medical evidence. Facts of the instant case shows that the ocular evidence is trustworthy and truthful.

22. As a matter of rule, it cannot be said that the accused and his associates would never caught hold of the victim when a bullet is to be fired at the victim. Here eyewitness account of holding the deceased by accused Pradeep Yadav and his associate is totally unshattered in cross-examination of eyewitnesses. Firing at the deceased by accused Arun while the deceased was being held by accused Pradeep Yadav and their associates is also not shattered in the cross-examination. In all probability, though not from the point blank range, the deceased was shot from a near distance. Therefore, it cannot be said that the prosecution case is improbable or unbelievable.

23. The net result of foregoing discussion makes it clear that the prosecution has proved that when accused Pradeep and others were holding Munna Mian, accused Arun fired a bullet causing instantaneous death of Munna Mian. The bullet was fired by aiming the head of deceased Munna Mian.

Accused Pradeep was holding him. Common intention of accused Pradeep in commission of the act of murdering deceased Munna Mian is writ large from evidence of the prosecution. Munna Mian was done to death with an intention of causing his death. In the matter of Chhota Ahirwar the

Supreme Court has dwelled on the principle of vicarious or joint liability of the accused as envisaged by Section 34 of the Indian Penal Code.

Paragraphs 24 to 28 of that judgment are relevant and they reads thus:

24. Section 34 is only attracted when a specific criminal act is done by several persons in furtherance of the common intention of all, in

which case all the offenders are liable for that criminal act in the same manner as the principal offender as if the act were done by all the

offenders. This section does not whittle down the liability of the principal offender committing the principal act but additionally makes all

other offenders liable. The essence of liability under Section 34 is simultaneous consensus of the minds of persons participating in the

criminal act to bring about a particular result, which consensus can even be developed at the spot as held in *Lallan Rai v. State of Bihar*

[*Lallan Rai v. State of Bihar*, (2003) 1 SCC 268 : 2003 SCC (Cri) 301]. There must be a common intention to commit the particular offence.

To constitute common intention, it is absolutely necessary that the intention of each one of the accused should be known to the rest of the accused.

25. Mere participation in crime with others is not sufficient to attribute common intention. The question is whether, having regard to the

facts and circumstances of this case, it can be held that the prosecution established that there was a common intention between the

appellant-accused and the main accused Khilai to kill the complainant. In other words, the prosecution is required to prove a premeditated

intention of both the appellant-accused and the main accused Khilai, to kill the complainant, of which both the appellant-accused and the

main accused Khilai were aware. Section 34 of the Penal Code, is really intended to meet a case in which it is difficult to distinguish

between the acts of individual members of a party and prove exactly what part was played by each of them.

26. To attract Section 34 of the Penal Code, no overt act is needed on the part of the accused if they share common intention with others in

respect of the ultimate criminal act, which may be done by any one of the accused sharing such intention [see *Asoke Basak* [*Asoke Basak v.*

State of Maharashtra, (2010) 10 SCC 660]. To quote from the judgment of the Privy Council in the famous case of *Barendra Kumar Ghosh*

[Barendra Kumar Ghosh v. King Emperor, 1924 SCC OnLine PC 49] , â€œthey also serve who stand and waitâ€.

27. Common intention implies acting in concert. Existence of a prearranged plan has to be proved either from the conduct of the accused, or from circumstances or from any incriminating facts. It is not enough to have the same intention independently of each other.

28. The question in this case is, whether the prosecution has been able to establish a prearranged common intention between the appellant-accused and the main accused Khilai to kill the complainant in pursuance of which the accused Khilai open fired from his pistol. The answer to the aforesaid question has to be in the negative for the following reasons:â€

24. What is required under law is that the accused persons sharing the common intention must be physically present at the scene of occurrence and be shown not to have dissuaded themselves from the intended criminal act for which they share the common intention. It is proved by the prosecution that while accused Arun was armed with a pistol, accused Pradeep caught hold of deceased Munna Mian and thereby facilitated Arun to eliminate Munna Mian. This establishes common intention shared by accused Pradeep making him liable for the final act of commission of murder of Munna Mian.

25. Accused Arun is also convicted of the offence punishable under Section 27 of the Arms Act by the learned trial Court. Section 27 prescribes punishment for using arms in contravention of Sections 5 and 7 of the Arms Act. Contravention of Section 3 of the Arms Act is alleged by the prosecution by contending that the accused was not holding the valid license for possessing the fire-arm which he had used in commission of the crime in question. For bringing home the guilt of accused of Arun for this contravention of law the prosecution was enjoined to prove that the prosecution is backed with valid sanction as envisaged by Section 39 of the Arms Act, 1959. For absence of prosecution, the accused Arun could not have been found guilty of the offence punishable under Section 27 of the Arms Act.

26. In the result the following orders:

I. Cr. Appeal (DB) No. 224 of 2014 of accused Pradeep Yadav is dismissed by upholding his conviction as well as resultant sentence.

II. Criminal Appeal (DB) No.267 of 2014 of accused Arun Yadav is partly allowed. His conviction as well as resultant sentence for the offence

punishable under Section 302 of the Indian Penal Code is confirmed. However, he is acquitted of the offence punishable under Section 27 of the Arms

Act.

27. We put on record words of appreciation for the able assistance rendered by Mr. Prince Kumar Mishra, learned Amicus Curiae, to this Court in

arriving at the proper conclusion for deciding in that appeal by keeping in mind the interest of all stake holders. We direct the High Court Legal

Services Authority to pay an amount of Rs.5,000/- to Mr. Prince Kumar Mishra, learned Amicus Curiae, for the services rendered by him.

28. Let the Lower Court Records be sent back to the learned Court below with a copy of this judgment and order.