

(2011) 02 JH CK 0033

Jharkhand High Court

Case No: Criminal Appeal (DB) No. 70 of 2006

Bhagwan Prasad

APPELLANT

Vs

The State of Jharkhand

RESPONDENT

Date of Decision: Feb. 15, 2011

Acts Referred:

- Criminal Procedure Code, 1973 (CrPC) - Section 161, 164
- Evidence Act, 1872 - Section 45
- Penal Code, 1860 (IPC) - Section 201, 302

Citation: (2011) 8 RCR(Criminal) 1980

Hon'ble Judges: Sushil Harkauli, J; R.R. Prasad, J

Bench: Division Bench

Final Decision: Allowed

Judgement

1. By the impugned judgment and order dated 24.12.2005 passed by the Special Judge, C.B.I. Ranchi in S.T. No. 499 of 2003 {R.C. Case No. 6(S)/2001(D)} "State of Jharkhand (through C.B.I.) v. Sri Bhagwan Prasad"" the Appellant before us has been convicted u/s 302/201 IPC. He has been sentenced to imprisonment for life and a fine of Rs. 5000/-u/s 302 IPC, and a further simple imprisonment for one month in default of payment of the fine. The sentence awarded u/s 201 I.P.C. is two years R.I. The sentences have been directed to run concurrently.

2. We have heard Sri B.M. Tripathy, Sr. Advocate assisted by M/s C.P. Kiran, Nutan Sharma and Naveen Kumar Jaiswal Advocates appearing for the Appellant and Sri Mokhtar Khan, the learned A.S.G.I. representing the C.B.I., at great length over several days. Both sides have also given written submissions and cited a plethora of case law, much of which is either not applicable or not necessary on the facts of the present case. There is no eye witness. The case is based purely on circumstantial evidence. We therefore proceed to examine the prosecution case and evidence in the light of the law declared by the Supreme Court in the case of "Anil Kumar Singh

v. State of Bihar" reported in 2004 SCC 1167 which is as follows:

8. It is well settled that in order to base a conviction on circumstantial evidences, each and every piece of incriminating circumstance must be clearly established by reliable and clinching evidence and the circumstances so proved must form such a chain of events as would permit no conclusion other than the one of guilt of the accused and the circumstances cannot be explained on any hypothesis other than the guilt of the accused. The Court has to be cautious and avoid the risk of allowing mere suspicion, howsoever strong, to take the place of proof. A mere moral conviction or a suspicion howsoever grave it may be cannot take the place of proof.

3. Factually, the prosecution came to the Court with the allegations that the Appellant Bhagwan Prasad (hereinafter referred to as the accused), who on the date of occurrence was posted as the police officer-in-charge of Doranda police station in the city of Ranchi, had a love affair with the deceased Ms. Ranjana Palit (hereinafter referred to as the deceased) . Later, the accused wanted to get rid of the deceased because the deceased had become pregnant from the accused and she was insisting on marriage. The accused already had a wife and children, and in any case had subsequently got involved with another lady called Venu Karmkar, and had lost interest in the deceased for the past about seven months. Because of this motive, in a pre-planned manner the accused telephoned the deceased on her residential landline at about 5.30 p.m. on 21.10.1998 which was the Diwali day of that year, asking her to come to the accused so that the two could get married. The deceased dressed up fancily like a bride and put on a lot of ornaments and left her house between 5.30 and 5.45 p.m. At 5.45 p.m. the accused again telephoned at the residence of the deceased and was told by the maid-servant P.W 18 that the deceased had already left. Between 6.00 and 6.30 p.m. on that day the accused made an excuse that his service revolver was not working efficiently and borrowed the service revolver of his colleague PW-24 Rang Nath Sharma. Thereafter, from 6.30 p.m. to 8.00 p.m. the accused and the deceased went together to a restaurant called Ellora Hotel where they dined and had liquor. In the restaurant they were seen by PW-12 and PW-36. From 9.00 p.m. to 2.00 a.m. on the night between 21st and 22nd October 1998, the accused was busy at his police station, at the Chutia police station and at one Kali Pandal at Mohalla Doranda where raids were being conducted by him along with other policemen of the Doranda and Chutia police stations. {There has been an attempt by the prosecution to dispute this engagement of the accused between 9 p.m. and 2 a.m. by P.W 42 Shashi Bhsham Singh saying that there is no such entry at Chutia police station and also the deposition of the S.P. Tadasha Mishra P.W.43 who said that she had not authorized the accused for the activity outside the territory of his police station; but as against we have the deposition of the prosecutions important witness namely P.W. 24 Rang Nath Sharma who deposes about such activity in which he was also a participant, and his deposition finds corroboration from the paragraph 2 of the deposition of P.W. 33 Saroja Nand Jha}. To continue with the prosecution case, between 3.00 and 4.00 a.m.

the accused, along with deceased and two other persons went on his maruti van to his official quarter where they were seen by PW-39 Ganesh Prasad Jha. At about 6.00 a.m. the body of the deceased was noticed burning at a secluded place near christian graveyard (hereinafter referred to as the place of occurrence). At about 6.30 a.m. P.W. 9 Nand Lal Prasad, a police-man of Hatia Police Station, on being informed, came to the place of occurrence. The fire was extinguished, and the body of the deceased was found in a badly burnt condition. The identity of the deceased could not be ascertained. Oil like substance was allegedly found near the body, meaning thereby that the body of the deceased has been doused with oil and set on fire. No sample of oil or oil stained soil was collected from the place of occurrence. At about 7.00 a.m. the inquest report (Exhibit-5) was prepared and the body was sent for post mortem. A bullet is alleged to have been found near the dead body, of which a seizure memo (carbon copy of which is Exhibit 12/1) was prepared at the same time ie. 7 a.m. It may be pointed out here that in the inquest report there is no mention of any fire arm injury on the dead body. Further, although there is a specific column (No. 7) in the format of the inquest report which relates to items found near the dead body, but there is no mention in that column or elsewhere in the inquest report about any bullet having been found. Also, though a the site plan (Exhibit-26) of the place of occurrence was prepared at the same time i.e. 7 a.m., but there is no mention or mark of any spot in that site plan showing any spot near the dead body from where the bullet is said to have been recovered. A fardbeyan (Exhibit-8) of PW-6 Devendra Nayak, watchman was recorded at the place of occurrence at 7 a.m., on the basis of which a criminal case was registered against unknown accused. There is also no mention of the bullet in the said fardbeyan although all other details and items have been mentioned.

4. At about 9.00 a.m. P.W. 1 B.B. Palit, the brother of the deceased, left his house to search for his sister because she had not returned home at night. He first went to R.M.C.H. but did not find any accident case relating to any lady victim, then he went to the school of the deceased but could not get any information there. Then he went to Doranda Police Station where he met the accused. The accused also expressed ignorance about the whereabouts of the deceased. Then he went to Jagarnathpur Police Station where he was told that a dead body of a lady has been found in the jurisdiction of Hatia Police Station. Then he went to Hatia Police Station where he was informed that the dead body has been sent to the morgue for post mortem. PW-1 went to the morgue, saw the dead body of his sister. He was apparently not sure about the identity of the dead body, so he went home, collected the maid servant Biswasi Munda (PW-18) and his nephew Ajay Kumar Palit (PW-7) and went back to the morgue where both these witnesses also identified the dead body.

5. At about 11.00 a.m. The bullet alleged to have been recovered from the spot material exhibit VI was brought to the Police Station and kept in the Malkhana of P.S. Hatia and an entry to that effect was made in the station diary. At about 10 minute past 3 p.m. the first Investigating Officer PW-9 Nand Lal Prasad returned to

the P.S. Hatia from the place of occurrence. On the same day in the evening at about 6.00 p.m. PW-1 B.B. Palit gave a letter (exhibit-1) to the Hatia Police Station that the dead body as well as the ornaments on her sister's body be handed over to him. The post mortem was conducted on 23.10.1998 at about 10.30 a.m. by Dr. Ajit Kumar Chaudhary PW-13. During that post mortem it was discovered that the deceased had suffered an ante mortem gun-shot injury, and the bullet has passed right through her body entering from the upper front part of the chest. After more than two months of the murder, from 29-12-1998 investigation was handed over and carried out by the C.I.D. as stated in para 2 of the deposition of PW 40 S.N. Chauhan of CID who was the second I.O. of the case. Much later, in April 2001 the investigation was transferred to the C.B.I. which registered the R.C. Case No. 6(S)/2001(D) on 23-04-2001, carried out investigations, and ultimately submitted a charge-sheet against the Appellant. The trial Court, as mentioned above, convicted and sentenced the Appellant who has preferred this appeal.

6. There are no eye witnesses to the incident. The charge has been sought to be proved by circumstantial evidence. The prosecution examined as many as 48 witnesses.

7. In a nut-shell, the prosecution has sought to bring home the charge relying upon circumstances which are as follows:

(1) Motive: The accused had love affair with the deceased and wanted to get rid of the deceased because of all or any of the following two reasons:

(a) The deceased had become pregnant from the accused and she was insisting upon marriage to legalise her pregnancy and the accused being already married did not want to marry the deceased. {This is not proved, as has been shown below.}

(b) The accused had a subsequent affair with one Venu Karmkar because of which he had lost interest in the deceased. {This is not proved, as has been shown below.}

(2) Last Seen: The accused and the deceased were last seen together at Ellora Hotel between 6.00 p.m. and 8.00 p.m. shortly before the murder where both had dined together. {This is not proved, as has been shown below}

(3) Another Last Seen: The accused was thereafter again last seen in the company of the deceased at about 3 a.m. in his official quarter by a neighbor namely Ganesh Prasad Jha (P.W. 39). {This is not proved, as has been shown below.}

(4) Possession of weapon (fire arm) of assault: The accused borrowed his colleague's revolver on the eve of the murder, which revolver was the weapon of assault. {The evidence on this point is very doubtful, as has been shown below.}

(5) Connecting the fire arm to the death: According to the forensic report, the bullet which was found near the dead body of the deceased was fired from the weapon which had been borrowed by the accused. {This is not proved at all, as has been

shown below.}

8. So far as the motive above is concerned it consists of the desire to get rid of the deceased. Obviously there can be no direct evidence of such desire, and it is to be inferred from circumstances. However the first ground on the basis of which the prosecution wants the Court to infer existence of such desire is in two parts viz. (a) a love affair between the accused and the deceased, and (b) the resultant pregnancy. There are basically two witnesses to the alleged love affair. They are the brother of the deceased namely B.B. Palit PW-1 and the maid servant of the deceased namely Biswasi Munda PW-18. The other witnesses namely PW-7, PW-22 and PW-37 are basically hearsay witnesses and have been examined at a highly belated stage of the investigation. So far as PW-1 B.B. Palit is concerned, he did not disclose anything about the affair between the deceased and the accused, although he claims to have known about it from much earlier, till his statement was recorded u/s 164 Code of Criminal Procedure before the Magistrate on 24-11-1998, that is more than a month after the murder.

In this connection reference may be made to the decision of the Supreme Court in the case of *Kali Ram v. State of Himachal Pradesh* reported in 1973 SCC 1048 to the effect that if a witness professes to know about a gravely incriminating circumstance against a person accused of the offence of murder and the witness keeps silent for over two months regarding the said incriminating circumstance against the accused, his statement relating to the incriminating circumstance, in the absence of any cogent reason, is bound to lose most of its value.

This witness says that he knew about the affair and he also knew about the alleged pregnancy, which was visible from a bare look at the lady, because of the physical changes in her body. He did not mention any thing about any love affair between the accused and the deceased in the information (Exhibit-1) given by him to police in the evening of 22.10.1998, that is after the dead body had been identified. There is no mention of any such love affair in the letter dated 26-10-1998 addressed to the Home Minister (Exhibit A), which was dictated by Smt. Indu Palit, the mother of the deceased, and scribed by the PW-1. Even in his statement recorded u/s 164 Code of Criminal Procedure he did not state anything about the pregnancy of the deceased. He also lodged a protest petition on 20.5.2000 in which his statement on oath was recorded on 01.09.2000, but neither in the protest petition nor in the said statement on oath he said anything of that kind. The allegation about the pregnancy was made by this witness for the first time before the C.B .I. after about two and half years of the incident. A very weak explanation has been given by this witness that he did not mention it because of "family prestige". This explanation seems to be rather hollow in view of the fact (1) that the incident including the name of the accused was being highlighted by the media during this entire period, (2) his sister had been murdered by the accused and in such circumstances the natural reaction would be to give out every fact which would lead to the punishment of the culprit, and (3) his deceased

sister had earlier launched a criminal case in Bariyatu police station based on her love affair with one P.P.N. Rai, thus the back-ground is not so "prestigious" as to sustain the explanation. The post mortem report does not indicate any signs of pregnancy. Close relatives of the deceased PW-7 Ajay Kumar Palit (nephew), PW-22 Neela Dey (elder sister), and PW-37 Uma Rani Palit (neice) do not say anything about the pregnancy which according to PW-1 was so apparent. Learned Counsel for the CBI referred to deposition of the maid servant PW-18 Biswasi Munda where she says that she had been told by the deceased that the deceased was pregnant. This deposition by PW-18 could be relevant and admissible at best for proving that such a statement was made by the deceased to the witness. But it is not relevant or admissible for proving that the deceased was actually pregnant. It is not the case of the prosecution that the deceased was eliminated because she was defaming the accused by such statements. Further, this witness has deposed in paragraph No. 29 of her statement that the relations between the deceased and accused had become strained about 6-7 months prior to the murder and the accused had stopped visiting the deceased. They only used to quarrel on telephone. In the same paragraph PW-18 says that the deceased used to tell her about her pregnancy from the accused about 3-4 months prior to the murder, which would mean that the at the time of murder the deceased was more than six-seven months pregnant. Similar is the deposition of PW-1 (brother of the deceased) who says that signs of the pregnancy were visible from the appearance of the deceased. But Smt. Violet Kujoor, the principal of the college where the deceased was a teacher, was examined by the first Investigating Officer PW-9 and she did not disclose anything about the pregnancy. On the contrary it was disclosed by the principal that the deceased had sought "special ladies leave" for 22nd and 23rd October, 1998. This has been stated by PW-9 in para 35 of his deposition. According to the evidence of PW-20 Jitendra Kumar Singh, a teacher in the same school as the deceased, the "special ladies leave" is given for two days in a month up to the age of 60 years to lady teachers during their "periods". It is difficult to believe that a lady principal of a college would not be able to see a seven month pregnancy of a lady teacher of her school and permit her to seek special leave alleging menstrual cycle. All this evidence would cumulatively indicate that the deceased was not pregnant and at least not pregnant to the extent mentioned by PW-1 and PW-18. It has been argued that greater possibility is that the story about pregnancy has been concocted at a highly belated stage to give more strength to the prosecution by providing a strong motive for the murder. Therefore, as a motive we are left with some very shaky evidence about some kind of a vague affair between the deceased and the accused, which also must be examined in the light of this attempt by the prosecution to improve its case with regard to the alleged motive by a highly belated allegation of pregnancy of the deceased.

9. So far as the affair between the accused and Venu Karmkar is concerned, it is to be noted that the said Venu Karmkar has not been charge-sheeted. According to the

CID Investigating Officer Saumeshwar Narain PW-40, she was not found involved because there was no evidence. In the trial also there is almost no direct or circumstantial evidence on the basis of which it can be concluded that there was any love affair between the accused and the said Venu Karmkar. The witnesses on the point, PW-25 PW-27 and PW-28, who are neighbours of Venu Karmkar, merely say that the accused had gone to the house of Venu Karmkar only once or twice. This circumstance cannot possibly lead to an inference of any affair between the accused and Venu Karmkar. So far as the alleged desire on the part of the accused to get rid of the deceased is concerned, the only possible though remote and indirect evidence is of PW-18 i.e. maid servant. The reason has mentioned by this witness for intending such a desire on the part of the accused is about the pregnancy which as stated above, has been found not only to be not proved but also most improbable in the light of the other witnesses. Thus, the case totally lacks admissible evidence on the question of motive. There is some other hearsay evidence for example the evidence of PW-2 Neela Dey, elder sister of the deceased who again merely says that she was told about such affair by her sister. Although this witness PW-22 does say that there are some photographs of the deceased with the accused one of which was taken by the S.P. City Madam Mishra and some of them were handed over to the C.B.I. Officer at Delhi, but no such photographs have been produced in evidence from the side of the prosecution. If the C.B.I. had such important evidence on the point of motive in their possession it would normally be expected that they would produce the said photographs and have them proved by this witness PW-22 as being the same photographs which were handed over to the police or to the C.B.I. Since no such attempt has been made, therefore, the secondary and hearsay evidence of this witness on the point of motive cannot be relied upon at all.

10. People may lie but circumstances do not. In view of the conduct of PW-1 B.B. Palit on the morning after the murder, we are unable to place reliance upon the testimony of PW-18 the maid servant Biswasi Munda regarding the alleged disclosures by her to PW 1 on the night of the murder. PW-18 says that when the deceased did not return at night she told PW-1, the brother of the deceased, about the facts regarding the love affair, the pregnancy and also the fact that the deceased had left the house on the telephone call of the accused telling the maid servant that she was going to marry the accused. Yet on the morning of 22.10.1998 PW-1 goes out to search for his sister first to the R.M.C.H. where he does not get any information regarding any accident involving a lady victim then he goes to the school of the deceased and fails to get information there also. Then he goes to the Doranda Police Station. Normally if what PW-18 is saying had been correct, PW-1 would have gone first to the accused or to the Doranda Police Station where the accused was posted to obtain the whereabouts of his missing sister.

11. According to the case of the prosecution set up before the trial Court the accused called the deceased on telephone at about 5:30 p.m. The phone call was initially received up by PW-18, the maid servant and then the phone was handed

over to the deceased. The deceased left her house and after that the accused once again telephoned at about 5:45 p.m. and enquired from PW-18 who informed the accused that the deceased had left the house. Then between 6.00 to 6.30 p.m. the accused made an excuse about his fire arm not functioning properly and borrowed the fire arm of PW-24 Rang Nath Sharma. The accused and the deceased thereafter met and dined and had drinks up to 8.00 p.m. at a restaurant called Ellora Hotel. In the Ellora Hotel these two were seen together by the steward PW-12 and the waiter PW-36 Krishna Sahu. Thereafter from 9.00 p.m. till 2.00 a.m. the accused was busy conducting raids at Chutia Police Station and at Kali-Puja Pandal in Doranda. During this long period of 5 hours from 9.00 p.m. to 2.00 a.m. where the deceased had gone is not explained by the prosecution. However, at about 3.00 p.m. the deceased and the accused were again seen together along with some other persons at the official quarter of the accused by his neighbour Ganesh Prasad Jha PW-39. In the morning of 22.10.1998 at about 6.00 a.m. the dead body of the deceased was found burning. The police were called and a bullet was recovered near the dead body, which had been fired from the weapon borrowed by the accused from Rang Nath Sharma.

12. Thus, the circumstance of the deceased being last seen with the accused is at two places, once between 6 p.m. and 8 p.m. at Ellora Hotel and thereafter at 3 a.m. at the official quarter of the accused. Both the witnesses of Ellora Hotel PW 12 and PW 36 have turned hostile and the neighbour Ganesh Prasad Jha, PW-39 has also turned hostile at the trial and nothing worthwhile has been elicited from any of these three hostile witnesses in the cross-examination. Thus, there is absolutely no evidence regarding the alleged circumstances of the deceased and accused being last seen together shortly before the time of murder.

13. The next circumstance is the alleged borrowing of the fire arm by the accused from his colleague Rangnath Sharma, PW-24. It has been pointed out from the side of the accused-Appellant that although a few days after the incident the newspapers had started publishing about the murder of the deceased and also about the accused being responsible for the same, yet this vital fact about the weapon having been borrowed by the accused from Rangnath Sharma PW-24 was not disclosed by this witness till 20.12.2001 i.e. more than three years after the murder. Admittedly this witness says that he disclosed this fact for the first time after he was confronted in Delhi by the C.B.I. with the C.F.S.L. report to the effect that the bullet found near the dead body had been fired from the revolver of this witness, obviously meaning that the accusation was falling directly upon this witness. In these circumstances this witness told the C.B.I. for the first time that his revolver had been borrowed by the accused from him and retained throughout the night on which the murder was committed. In an unusual step, the C.B.I. did not waste any time but got the statement of this witness recorded before a Magistrate in Delhi u/s 164 Code of Criminal Procedure It has been argued that confronting this witness with the report with C.F.S.L. clearly implied a threat of involving this witness as an accused and

under that pressure this witness tried to extricate himself by this kind of a concocted statement about his weapon having been borrowed by the accused. Further, according to the argument of the Appellant the C.B.I. decided to tie this witness down by getting his deposition on oath recorded before a Magistrate u/s 164 Cr.P.C., before the effect of the threat could wear off. The argument proceeds to say that it has not been explained at all by the C.B.I. as to why the statement of this witness alone was got recorded by them u/s 164 Code of Criminal Procedure before a Magistrate in Delhi and not of other witnesses.

14. Later as an after-thought, three more witnesses were attempted to be added to corroborate the transaction of transfer of the fire arm. These are (i) the wife of Rangnath Sharma who has ultimately not been produced as a witness, (ii) PW-33 Sarojanand Jha who was also a policeman posted in Doranda Police Station during the relevant time, and (iii) a chance witness PW-35 Kaushal Kishore who is an L.I.C. agent and who happened to be present at the police station at the relevant time to witness this transaction of transfer of the fire arm. PW-35 Kaushal Kishore could not identify the accused in the Court room and therefore his testimony is of no value.

15. More importantly neither PW-33 Sarojanand Jha nor PW-35 Kaushal Kishore are mentioned as having been present at the relevant time according to the first statement on oath of the PW-24 Rangnath Sharma which was recorded u/s 164 Code of Criminal Procedure. Thus, these two witnesses have been attempted to be added subsequently. Because of all the above circumstances we, prima facie, find the testimony of these three witnesses, namely PW-24, PW-33 and PW-35 not to be reliable on the point of transfer of the fire arm. However, on this aspect we are not inclined to explore further, because as will appear from the discussion in the later part of this order, the prosecution has miserably failed to prove the said fire arm to be the weapon of assault.

16. We now proceed to examine the facts and evidence regarding the recovery of the bullet and its secure custodial chain till it was got examined by the C.F.S.L. It is the case of the prosecution that at about 7.00 a.m. the material exhibit-VI was found near the dead body and a seizure memo was prepared. What happened to the original seizure memo is not brought out, but its carbon copy has been exhibited in the trial as exhibit-12/1. PW-9 Nand Lal Prasad the original Investigating Officer claims to have collected this material exhibit in the presence of two independent public witnesses Gautam Prasad (who has not been examined) and Lalit Kumar PW-26. According to PW-9 the seizure list was prepared on the spot at about 7.00 a.m. on 22.10.1998. In the seizure memo as well as in his testimony before the Court PW-9 describes what was recovered from the spot. According to the description it was the front portion of the bullet of revolver being about three quarters of an inch or 2 cm. made of copper having the mark of firing pin in its bottom and scratches and dent in its front portion. This witness has been cross-examined thoroughly and he has stated unequivocally that he is having good knowledge of fire arms and

ammunitions and he knows the difference between a cartridge-shell, the projectile or the bullet and he knows what is the mark of a firing pin. This would create some doubt as to whether the article recovered was the bullet (projectile) part or the empty cartridge-shell. The explanation given that it was the bullet part with some part of the cartridge-shell attached is a scientific impossibility. And he is very positive about the mark of firing pin. This seized article is said to have been sealed by PW-9 and given to the clerk of the Police Station for being kept in the Malkhana of the Police Station. Whether it was sealed at the place of occurrence or in the police station is not disclosed. However, because according to the station diary entry No. 693 dated 22-10-1998 (exhibit 15/1) this item reached the police station at 11 a.m. and was kept in the Malkhana, while the PW 9 did not return to the police station till after 3 p.m. therefore the only possibility is that it would have been sealed at the place of occurrence. But in that event the station diary entry would not have contained the description of the article. The Investigating Officer Nand Lal Prasad P.W. 9 says in para 27 of his deposition that he handed over the bullet to the clerk of the police station after putting it in an envelope and further that he put it in the envelop after returning to the police station. This does not tally with the bullet reaching the police station at 11 a.m. as recorded in the Station Diary. The P.W. 26 Lalit Kumar who is the recovery witness says in paragraph 4 of his deposition that what was recovered was carried back to the police station in his hand by the I.O., which implies first that the item could not have reached the police station at 11 a.m. that before the I.O. returned at 3:10 p.m. and secondly that the item was not sealed at the place of occurrence. Actually this item was not sealed at all, as has been testified by the Investigating Officer of the C.I.D. PW-40. Again, this witness PW-9 returned to the Police Station at 3.10 p.m. as per the Station Diary Entry No. 699 dated 22-10-1998, and only thereafter he could have handed over this article to the clerk of the Police Station. But according to the disputed part (marked Exhibit D-2) of the Station Diary entry No. 693 dated 22.10.1998d (Exhibit-15/1), which in unusually small letters as compared to the other writing in the diary, this article was brought to the Police Station at 11 a.m. This Station Diary entry regarding receipt of this article and its being kept in the police Station also contains description similar to that given in the seizure memo exhibit-12/1. It has been argued that upon a bare look and in absence of any cogent explanation by the prosecution, this Station Diary entry could well be a subsequent insertion or interpolation and that could be one of the reasons for recording about the article in smaller handwriting, as if being attempted to be inserted between the lines. According to the argument there are several corroborating circumstances for this hypothesis. Firstly, as stated above in paragraph 3 of this order, recovery of this article does not find place in the fardbeyan, or in the inquest report or in the site plan all of which are contemporaneous documents. Secondly, the prosecution makes no attempt to investigate or explain as to what happened to the original seizure memo. Normally the seizure memo should have been sent to the Court of the Magistrate along with F.I.R. PW-9 admits in his cross-examination that he is not sure whether the seizure

memo was or was not sent to the Court of Magistrate along with the F.I.R. Third corroborating circumstance is that in the Station Diary entry 699 at 3:10 p.m. on 22-10-1998 records the return of P.W. 9 from the place of occurrence but does not say anything about his bringing the recovered bullet or its being kept in the Malkhana as deposed by P.W. 9 in para 27 of his deposition before the trial Court. The Malkhana Register has not been produced in evidence to corroborate when this item was entered in that register, and whether it was intimated in the monthly statement to the Court in Form No. 18 (vide Rule 119 read with Form No. 18 of the Police Manual).

17. Third corroborating circumstance is that both PW-9 and PW 43 were specifically asked that when the PW 9 was given supervisory directions on 23-10-1998 by the S.P. Tadasha Mishra P.W. 43 (vide Memo No. 2780 dated 30-10-1998 Exhibit-J) with regard to the ongoing investigation, whether there was any instruction with regard to this recovered article and both say that there were no instructions whatsoever with regard to this article. This casts some doubt upon the statement of PW 43 where she says that when she reached the spot at 6:30 a.m. on 22-10-1998 she had seen the recovered bullet, as also upon her claim to identify the bullet (material exhibit VI) in Court. However, the significance of this article must have been realised by the Investigating Officer, or by the supervising S.P. and the supervising Addl. S.P. (D.W.-7) when the post mortem report mentioned a bullet injury on the body of the deceased. Despite this no instructions being given with regard to this recovered bullet would, in absence of cogent explanation, possibly mean that till that stage when supervisory instructions were being issued to the Investigating Officer there was no record of seizure of any such article. In fact the D.W.-7 Suresh Paswan submitted his detailed Supervision Note (Exhibit Y/4) has deposed in paragraph 8 of his deposition that so long as he was there at the place of occurrence nothing was recovered and no seizure list was prepared. He further says that even during supervision he was not informed whether anything was recovered at the place of occurrence on the date of the incident. He further says that he has prepared the supervision note in the prescribed form, and in the prescribed form there is a specific column for recovered articles in which he has written "nil".

18. PW-40, the Investigating Officer of C.I.D. who took over charge of investigation on 29.12.1998 says in his evidence that after taking charge of investigation he had once examined the bullet after taking it out from the Malkhana of the Hatia Police Station and had compared it with the seizure list but did not take it into his custody because C.I.D. does not have its independent Malkhana. He also says that he did not seal it on that day. He then says that on 20.12.1999 i.e. more than a year after the murder he took the bullet in his custody and at that time it was unsealed but he got it sealed on the same day and deposited it in the Court of C.J.M., Ranchi. However, he admits that it has not been mentioned in the diary when it was sealed. On 21.12.1999 he took it back from the C.J.M.'s Court and even at that time the diary does not mention whether it was received in a sealed or unsealed condition. He also

admits that he did not put any mark of identification on the exhibit. The bullet was then sent to the F.S.L., Patna from which a report came that it had been fired by .38 caliber regular fire-arm. From the F.S.L., Patna the C.B.I. took this article and sent it to C.F.S.L. at Delhi. The C.F.S.L. works in the same building which houses the office of the C.B.I. Although according to PW-23 the CFSL is not subordinate to the C.B.I. yet he describes himself in his deposition as "Sr. Scientific Officer-cum-Asstt. Chemical Examiner to the Govt. of India, C.F.S.L., CBI, New Delhi". He also says in his cross examination "I cannot assign any reason as to why I have mentioned the words C.B.I. along with my department's name of CFSL in my report". Along with this article the C.B.I. collected all revolvers which had been issued at the time of the incident to the police officers of Doranda Police Station, by the Armoury. These three revolvers included a revolver which had been issued to Rangnath Sharma, PW-24. The C.F.S.L. gave a report which is exhibit-28 on the trial Court record. This exhibit contains no data, no reasons for appreciating the nature and value of this report. Because this is a very crucial piece of evidence, therefore it is necessary to reproduce it completely and accurately which is being done below:

RESULT OF EXAMINATION

1. The three .38" Revolvers (marked W/1, W/2 and W/3) of the parcel Q-2 described above are "Firearms" as defined in the Arms Act, 1959 and are in working order.
2. The .38" fired bullet (marked BC/1 contained in the parcel No. Q-1 had been fired from the .38" Revolver (Marked W/1) of the parcel No. Q-2.

(A.DEY)

SR.Scientific Officer-1(Ball)

CFSL: CBI: New Delhi

19. The comparison is said to have been done by PW-23 Mr. A Dey. Although he states in his evidence before the Court that the material exhibit was compared with the test fired bullet under comparison microscopic but he admits that although he has material in his possession regarding detailed examination in a file which he has brought to Court but he does not produce the same or file it in evidence, and does not even give any reason why the same is not being produced in evidence. He admits that in his report he has not mentioned the method which he has adopted for examination/comparison nor he has mentioned the details of the experiment conducted in the laboratory for forming his opinion. Even the test fired bullet has not been submitted by him. There are no photographs, enlargements with any markings on the grooves found showing similarities and dis-similarities.

20. It is too well settled to require any authority that the expert evidence is but only an opinion. It is the reasons for that opinion which are necessary to be examined by the Court for arriving at an independent conclusion by the Court whether the Court would be inclined to agree with the expert's opinion or not to agree with that

opinion. However some case law on the point is referred below.

21. It is, to say the least, bewildering that even a premier investigating agency of the country like the C.B.I. could have committed such a blunder in leading evidence before the trial Court in the form this kind of an opinion of the C.F.S.L.

22. It may be mentioned here, apart from the other description also not tallying with the description in the seizure memo and the station diary, the article which was ultimately produced before the Court purporting to be the seized article does not contain any mark of firing pin. Although P.W. 46 N.S. Kharait Dy. S.P. CBI in paragraph 26 of his deposition and P.W. 47 Kailash Sahu Inspector CBI in paragraph 24 of his deposition have admitted that such a statement was given by the P.W. 40 to the CBI u/s 161 Cr.P.C., but P.W. 40 S.N. Chauhan the second I.O. of CID has denied this when he was confronted (in para 29 of his cross examination) with his statement recorded by the CBI u/s 161 Code of Criminal Procedure in which he has stated "I further state that the bullet seized by local police was a fired bullet and there was not any firing pin mark on the bullet. I think that Sri Prasad (the first I.O. PW 9) had made a mistake in writing so. It also cannot be denied that Sri Prasad might have written correctly, but the bullet may have changed at any stage, as it was not sealed and any specific mark/number of the bullet was not available on the seizure list." In fact the defence has taken care to specifically ask PW-23 Mr. A. Dey of CFSL during cross-examination as to whether the mark of firing pin could have been destroyed by his putting a diamond mark at the base of the article for identification. The witness has denied this. The firing pin mark at the bottom of the recovered article is clearly mentioned in the original seizure memo and as mentioned in the station diary entry and has been also positively testified by PW-9. Which would mean that the article produced before the Court and claimed by the prosecution to have been found fired from the revolver of PW-24 is not the same which is alleged to have been found near the dead body, even if it is assumed that any such article was found there at that time about which also there is serious doubt. In the circumstances, we are of the opinion that not only has the prosecution failed in establishing the secure custodial chain in respect of what was allegedly recovered, from the time of recovery till the time of its examination by C.F.S.L., but it has also utterly failure to explain the discrepancy between the description of the article in question as given in the original seizure memo exhibit-12/1 and the station diary entry exhibit-15/1 and what has been actually tested and produced before the trial Court after testing, the C.B .I. has also relied upon an expert report exhibit-28 and the expert evidence PW-23 which is merely seem to be rejected.

23. In the case of [Haji Mohammad Ekramul Haq Vs. The State of West Bengal](#), it has been held by the Supreme Court in para-4 that the High Court was correct in not placing any reliance upon an expert opinion which was not supported by any reasons.

24. In the case of [State of Himachal Pradesh Vs. Jai Lal and Others](#), it has been held in para 18 as under:

18. An expert is not a witness of fact. His evidence is really of an advisory character. The duty of an expert witness is to furnish the Judge with the necessary scientific criteria for testing the accuracy of the conclusions so as to enable the Judge to form his independent judgment by the application of this criteria to the facts proved by the evidence of the case. The scientific opinion evidence, if intelligible, convincing and tested becomes a factor and often an important factor for consideration along with the other evidence of the case. The credibility of such a witness depends on the reasons stated in support of his conclusions and the data and material furnished which form the basis of his conclusions.

25. In [Mahmood Vs. State of U.P.](#), it has been held in para 19 that where the expert had not given any reasons for his opinion it would be highly unsafe to convict one on a capital charge without any independent corroboration, solely on the bald and dogmatic opinion of such a person, even if such opinion is assumed to be admissible u/s 45 of Evidence Act.

26. To summarise, we find (a) that the motive which has been proved is at best that there was some relationship between the accused and the deceased which is hardly sufficient by itself to sustain a conviction or for that matter even to provide a motive for a serious offence like murder; (b) there is absolutely no evidence of the accused and deceased being last seen together; (c) the recovery of the bullet of from the scene is doubtful; (d) from the stage of the alleged recovery till stage of testing, the bullet has not remained in doubt-free secure custody; and (e) the evidence that the bullet alleged to have been recovered from the scene of crime was fired from the alleged weapon of assault is also of no value.

27. In the circumstances, it is impossible to sustain the conviction of the Appellant. Accordingly, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant who has not been given bail during the pendency of this appeal will be set at liberty forthwith, unless his further detention is warranted in connection with some other case.