



IN THE HIGH COURT OF JHARKHAND AT RANCHI

Cr. Appeal (D.B) No. 190 of 1994 (R)

(Against the judgment of conviction and the order of sentence both dated 30.11.1994 passed by the learned 4th Addl. Sessions Judge, Palamu, Daltonganj in Sessions Trial No. 228 of 1991)

 1. Satyendra Choubey
 2. Vinod Kumar Choubey
 3. Virendra Kumar Choubey
 All sons of Raj Kumar Choubey, R/o village Sursuria, Police Station-
 Nagar Untari, District-Garhwa

.....

..... ... **Appellants**

Versus

The State of Bihar

... ... **Respondent**

With

Cr. Appeal (D.B) No. 114 of 2013

(Against the judgment of conviction dated 13.02.2013 and the order of sentence dated 19.02.2013 passed by the learned Addl. Sessions Judge-1st, Garhwa in S.T. No. 32 of 1999)

Deo Kumar Chaubey, son of late Arjun Choubey, r/o village-Sulsulia, PO
 & PS-Nagar Untari, District-Garhwa

..... ... **Appellant**

Versus

The State Jharkhand

... ...

Respondent

With

Cr. Appeal (SJ) No. 483 of 2013

1. Sumant Chaubey S/o Deo Kumar Chaubey
 2. Rajendra Chaubey S/o Deo Kumar Chaubey
 Both residents of village-Sulsuliya, PO & PO-Nagar Untari, District-
 Garhwa

..... ...

Appellants

Versus

The State of Jharkhand

... ...

Respondent

CORAM: HON'BLE MR. JUSTICE SUJIT NARAYAN PRASAD
HON'BLE MR. JUSTICE RAJESH KUMAR

For the Appellants

: Mr. B.M. Tripathi, Sr. Advocate
 [in Cr. Appeal (DB) No.190 of 1994]
 Mr. Jai Shankar Tripathy, Advocate
 Ms. Nazia Rashid, Advocate
 [in Cr. Appeal (DB) Nos.114 of 2013 & 483 of 2013]

For the State

: Mr. Satish Prasad, APP

**C.A.V on 10.06.2025****Pronounced on 08/07/2025****Per Sujit Narayan Prasad, J.**

1. These criminal appeals filed under section 374 (2) of the Cr.P.C are linked together as these are arisen out of the same occurrence wherefrom case and counter-case were instituted by the parties against each other.

2. At the outset, it needs to mention here that one of the appellants, namely, Raj Kumar Choubey in Criminal Appeal No.190 of 1994 (R), had died during the pendency of the appeal and vide order dated 27.02.2023 Criminal Appeal No.190 of 1994 (R) *qua* the appellant, namely, Raj Kumar Choubey stands abated.

3. Criminal Appeal (DB) No.190 of 1994 is directed against the judgment of conviction and the order of sentence both dated 30.11.1994 passed by the learned Addl. Sessions Judge, Palamu, Daltonganj in Sessions Trial No. 228 of 1991 whereby and whereunder the appellants, above-named, have been convicted under sections 452, 341, 307/34, 302/34 of the IPC and sentenced to undergo imprisonment for life under section 302/34 of the IPC. They are further sentenced to undergo RI for 7 years each under section 307/34 IPC. They are further sentenced to undergo RI for 3 years each for other offence under section 452 IPC. The appellant, namely, Satyendra Choubey has also been convicted under section 27 of the Arms Act and sentenced to undergo RI for 3 years for the offence under section 27 of the Arms Act. All the sentences shall run concurrently.

4. Criminal Appeal (DB) Nos.114 of 2013 and 483 of 2013 are directed against the conviction dated 13.02.2013 and the order of sentence



dated 19.02.2013 passed by the learned Addl. Sessions Judge-1st, Garhwa in S.T. No. 32 of 1999 whereby and whereunder the appellants, above-named, have been convicted under sections 323 IPC. The convict-appellant, namely, Deo Kumar Chaubey in Criminal Appeal (DB) No. 114 of 2013 has also been convicted under section 304(1) IPC.

5. While convicting the appellants of the Cr. Appeal (SJ) No. 483 of 2013, the learned trial Court has opined that since the appellants, namely, Sumant Kumar Chaubey and Rajendra Kumar Chaubey are first offenders as not previous conviction has been proved on record against them, as such, they have been granted benefit of the Probation of Offenders Act and they were directed to be released on furnishing a probation bond of Rs.5000/- with two sureties which will be for maintaining good conduct for two years.

6. While sentencing the sole appellant of the Cr. Appeal (DB) No. 114 of 2013, namely, Deo Kumar Chaubey the learned trial Court has awarded sentence to undergo RI for 10 years under section 304(1) of the Indian Penal Code with a fine of Rs.5,000/- under section 323 IPC and in default of payment of fine, he is directed to undergo SI for 1 month.

7. Before advertng to the merit of the instant appeal, it would be apt to refer herein that this Court is conscious with the settled position of law that the fair procedure to adopt in a matter like the present case where there are cross cases and in the such type of cases, the same learned Judge must try both the cross cases one after the another and after the recording of evidence in one case is completed, he must hear the arguments but he must reserve the judgment. Thereafter he must proceed to hear the cross case and after recording all the evidence he must hear the arguments but



reserve the judgment in that case. The same learned Judge must thereafter dispose of the matters by two separate judgments. In deciding each of the cases, he can rely only on the evidence recorded in that particular case. The evidence recorded in the cross case cannot be looked into. Nor can the judge be influenced by whatever is argued in the cross case. Each case must be decided on the basis of the evidence which has been placed on record in that particular case without being influenced in any manner by the evidence or arguments urged in the cross case. But both the judgments must be pronounced by the same learned Judge one after the other. Reference in this regard may be taken from the judgment rendered by the Hon'ble Apex Court in the case of *Nathi Lal v. State of U.P.*, 1990 Supp SCC 145.

8. The Hon'ble Apex Court in the case of *Sudhir v. State of M.P.*, (2001) 2 SCC 688 had reiterated the same view as aforesaid and has observed that "it is a salutary practice, when two criminal cases relate to the same incident, they are tried and disposed of by the same court by pronouncing judgments on the same day. Such two different versions of the same incident resulting in two criminal cases are compendiously called "case and counter-case" by some High Courts and "cross-cases" by some other High Courts. Way back in the nineteen hundred and twenties a Division Bench of the Madras High Court (Waller and Cornish, JJ.) made a suggestion (Goriparthi Krishtamma, In re [1929 MWN 881] that "a case and counter-case arising out of the same affair should always, if practicable, be tried by the same court; and each party would represent themselves as having been the innocent victims of the aggression of the other".



9. Thus, it is settled connotation of law that each case must be decided on the evidence recorded in it and evidence recorded in another case cannot be taken into account in arriving at the decision. The Court ought to have decided the appeal before it only on the basis of the evidence recorded in the present case and ought not to have allowed itself to be influenced by the evidence recorded in the cross-case.

10. It is apparent from record that there was a running feud between two groups of the family which resulted in clash between these groups on the same day in the same transaction culminating in filing of FIR and complaint by the respective groups.

11. These two cases based upon FIR and complaint were investigated separately leading to two separate criminal trials. The trials proceeded separately though the two incidents were interconnected. Ordinarily, these two trials ought to have been tried by the same Judge or Court for better appreciation of the evidence and consistency in the decisions in the trials as observed by this Court in *Sudhir v. State of M.P. (supra)* and *Nathi Lal v. State of U.P. (supra)*.

12. However, the trial proceeded separately resulting in two different outcomes in which one group of accused were convicted for committing murder of the deceased (daughter of the appellant namely Deo Kumar Chaubey, appellant in Cr. Appeal (DB) No. 114 of 2013) and in the other case, the other group of accused were convicted under Section 323 and further one of the accused namely Deo Kumar Chaubey, appellant in Cr. Appeal (DB) No. 114 of 2013 has been convicted for the culpable homicide not amounting to murder for his own daughter (deceased) and accordingly, sentenced under section 304(1) of the IPC.



13. Thus, it is evident from the record that herein FIR and complaint were lodged by the two disputing groups of the family relating to the same transaction on the same day giving their own versions of the incident. Therefore, we must proceed to consider whether, on the evidence recorded in each case, the conviction and sentence recorded against the appellants can be sustained.

14. This Court taking in to consideration the peculiar fact and circumstances of the instant appeals is of the considered view that in the ends of the justice it would be apt to consider the merit of these appeals separately one by one.

Factual Matrix (in Criminal Appeal (DB) No.190 of 1994 (R)

15. The prosecution story of Criminal Appeal (DB) 190 of 1994(R) in brief as per the allegation made in the *fardbayan* by the informant-Deo Kumar Chaubey reads as under:

16. The prosecution case was instituted on the *fardbayan* of Deo Kumar Chuabey recorded on 21.02.91 at 6.30 PM in the house of the informant at village Sulsuliya is that on the same day at 12 o'clock the informant was going to village Sonpurwa where a Yagya was being performed. However, when he reached near his wheat field (plot no.1 situated towards east of his house, he saw his two nephews namely accused Binod Kumar Chaubey and Birendra Kunar Chaubey son of accused Raj Kumar Chaubey getting his wheat crops grazed through their buffalo. The informant protested to it, but they did not listen and extended threat to assault him.



17. It has further been alleged that in the meantime, accused Rajkumar Chaubey who is elder brother of the informant also came out of his house and instigated his two sons to assault the informant. The Informant, thereafter, fled away and took shelter in the house of Kameshwar Chaubey, a co-villager. However, accused Raj Kumar Chaubey, Binod Kumar Chaubey and Birendra Chaubey chased him and reached at the darwaja of Kameshwar Choubey. There was no male member in the house of Kameshwar Chaubey. The wife of Kameshwar Chaubey requested them with folded hands to get away.

18. In the meantime, co-villager Uday Chaubey (P.W.9) also reached there and he also requested the accused persons to go away. Thereafter, the aforesaid three accused persons returned back to their house. After two hours, the informant came out of the house of Kameshwar Chaubey and went to his house. It is stated that after 10 to 15 minutes when he was sitting on a khatiya (cot), in the main entrance of his house, at about 2.30 to 3 P.M., all the four accused, namely, Raj Kumar Chaubey and his three sons namely Binod Chaubey, Satyendra Chaubey and Birendra Chaubey entered into his house through the main door.

19. Accused Satyendra Chaubey was armed with a revolver whereas remaining three accused were armed with lathi. Seeing the accused persons, the informant went in the Angan of the house. However, all the four accused also followed him and came in the Angan whereas accused Raj Kumar Chaubey caught him and accused Satyendra Kumar Chaubey and Binod Chaubey began assaulting him with fists and slaps. Accused Raj Kumar Chaubey ordered other accused to enter into northern room of



the house and to see the valuables. Thereupon, accused Birendra Chaubey entered into the northern room of the house and took out Rs.5000/-which was kept in a tin box in the said room. It is stated that thereafter the accused persons dragged him and brought him in the main entrance *dhaba* of the house where accused Birendra Chaubey and Binod Chaubey tried to assault him with lathi, but the blow of lathi was obstructed by the roof of the house. The informant, therefore, did not sustain lathi injury.

20. In the meantime, accused Raj Kumar Chaubey gave order to kill the informant with the revolver. Thereupon, Satyendra Chaubey opened fire from his country made revolver with intent to kill the informant. But, the fire missed the target and hit Nirmala Kumari near her left ear. She fell down and died instantly. The accused persons, thereafter took to their heels and while fleeing away, accused Rajkumar Chaubey @ Khokhan Chaubey left his wooden slipper of left leg and spectacle at the place of occurrence. Accused Satyendra Chaubey also fled away living his pink colour lungi and accused Binod Chaubey left sky colour *hawai* slipper.

21. On the basis of the aforesaid fardbeyan, a case being Nagar Untari PS Case No.24/91 dated 21.2.91 was instituted under sections 452, 341, 323 380, 307, 302/34 of the IPC and 27 Arms Act.

22. After investigation, the police submitted the charge sheet against the appellants for the offences under sections 452, 341, 323, 307, 302/34 IPC and under Section 27 Arms Act, thereafter, the case was committed to the court of Sessions. The statements of the appellants were recorded under Section 313 of Cr.P.C.



23. Accordingly, the trial proceeded and the appellants were found guilty by the learned trial Court for committing murder of the daughter of the informant (appellant in Cr. Appeal (DB) No. 114 of 2013) namely Nirmala Kumari and has been convicted for the offence under Section 452, 341, 307/34, 302/34 of the IPC and sentenced to undergo imprisonment for life under section 302/34 of the IPC. They are further sentenced to undergo RI for 7 years each under section 307/34 IPC. They are further sentenced to undergo RI for 3 years each for other offence under section 452 IPC. The appellant, namely, Satyendra Choubey has also been convicted under section 27 of the Arms Act and sentenced to undergo RI for 3 years for the offence under section 27 of the Arms Act. The aforesaid order of conviction and sentence is under challenge herein.

Factual Matrix [in Criminal Appeal (DB) No.114 of 2013 with Criminal Appeal (SJ) No.483 of 2013]

24. As mentioned above, since these criminal appeals are arising out of case and counter-case and, as such, the facts in brief are similar to the facts of Criminal Appeal (DB) No.190 of 1994 (R) as the instant case has been lodged after filing of protest complaint petition(Ext.B) in the Court of ACJM, Garhwa by the informant Raj Kumar Chaubey(appellant/accused in Cr. Appeal (DB) No. 190 of 1994).

25. In the complaint-cum-protest petition, it is alleged that on 21.02.91 at about 01.30 PM bullock of the complainant (accused/appellant in Criminal Appeal (DB) No.190 of 1994 (R)) had grazed the wheat crops of the accused Deo Kumar Chaubey (appellant in Cr. Appeal (DB) No. 114 of 2013) from his field. Deo Kumar Chaubey @ Onkar Chaubey,



armed with Licence gun, went to the wheat field and started to abuse. The complainant came out of his house and told him that what loss has been caused to him, he is ready to pay or he may produce the ox in the Kanji house, The accused became furious and went to his house abusing the complainant.

26. On the same day at about 02.00 P.M., the accused Deo Kumar Chaubey @ Onkar Chaubey, his son Rajendra Chaubey @ Susu Chaubey, Sumant Chaubey and his wife Shardha Devi came at the door of the complainant and started to abuse him. when the complainant came out of his house and tried to get understand them, the accused Deo Kumar Chaubey pointed the gun upon him.
27. In the meantime, one of the sons of Deo Kumar Chaubey assaulted him from the back side on his head and he fell down. All three accused persons brought the complainant on their door and after pulling him. When Binod Chaubey, Birendra Chaubey (sons of the complainant) saw him they came there and tried to save their father.
28. In the meantime, a fire took place from the gun of Deo Kumar Chaubey, which hit Nirmala Kumari, the daughter of the accused Deo Kumar Chaubey. The accused persons started to see Nirmala Kumari. In the meantime, both the sons of the complainant brought him to their house. The complainant in the injured condition went to the P.S. Nagar Untari. He got his treatment in the Hospital.
29. The accused had lodged the case against complainant and his two sons of which G.R. No. 136/91. The complainant and his sons were remanded to jail custody. The licence gun of, accused Deo Kumar Chaubey was examined and it was found that recent fire was done from



the gun. The police did not register the F.I.R., when the complainant reached Nagar Untari Police station at 03.00 PM, his statement was recorded in the night at about 11.00 PM which was not correct.

30. In this case on the basis of the fardbeyan recorded by police at about 23 hours on 21.02.91 on the statement of Raj Kumar Chaubey, G.R. Case No. 137/91 was instituted u/s 341 and 323 I.P.C. and 27 Arms Act. But when the informant Raj Kumar Chaubey found that his case has been not been written correctly by the police, he filed protest petition on which cognizance of the offence was taken. After issuance of the summons to the accused persons and after appearance of the accused persons, the case was committed to the court of sessions.

31. Accordingly, the trial proceeded and the appellants were found guilty by the learned trial Court and the appellants, above-named, have been convicted under sections 323 IPC. Further, the convict-appellant, namely, Deo Kumar Chaubey in Criminal Appeal (DB) No. 114 of 2013 has also been convicted under section 304(1) IPC and sentenced accordingly. The aforesaid order of conviction and sentence is under challenge herein.

Submission of the learned senior counsel for the appellants [in Cr. Appeal (DB) No.190 of 1994 (R):

32. Mr. B.M. Tripathi, the learned senior counsel for the appellants has taken the following grounds for interfering with the finding recorded by the learned trial Court in the impugned judgment:

- (i) There is no specific attributability, as per the evidence adduced on behalf of the prosecution, brought on record so far as the appellants,



namely, Satyendra Choubey, Vinod Kumar Choubey and Virendra Kumar Choubey are concerned.

(ii) The conviction is based upon the consideration of the testimony of all the witnesses together and the learned trial Court has found the prosecution version to be in corroboration by taking the testimony of all the witnesses, but while doing so the testimony of the doctor who has been examined as PW10, as also the Investigating Officer who has not supported the ballistic report has not been taken into consideration, as P.W.10 doctor has specifically stated that the material recovered from the wounds of deceased were constituent of 12 bore cartridges which is used in gun firing and they are not used in revolver or pistols. Further the bullet has said to be fired from the country made pistol but there is no reference of recovery of any country made pistol in the seizure memo rather one licensee gun has been recovered.

(iii) It has been submitted that the pellet which has been found from the body of the deceased has not been fired from the country made pistol thus, the entire prosecution version as recorded in the FIR wherein it has been reported that the pellet has been fired from the country made pistol itself vitiate the entire prosecution version.

(iv) Further, P.W.7 Gopal Mishra have not been believed by the trial court and Rajendra Choubey (P.W.6) who is the son of the informant, has been tendered, as such in the aforesaid circumstances the prosecution story is not fit to be acceptable.

(v) From the deposition of Investigating Officer (P.W.15) his description of the place of occurrence and the manner of occurrence



alleged by informant are not consistent with the story of the Informant given in the fardbeyan wherein it has been alleged that the shot fired, hit on the temple of Nirmala Kumari, no pellet or marks of firing was found on the wall or the door in which direction of the firing is said to have been done.

(vi) Further, the prosecution has failed to explain the injuries on the appellant namely Raj Kumar Choubey which casts grave doubt on the prosecution story specially when the said appellant was examined on police requisition at 4 P.M on 21.02.1991.

(vii) Further on perusal of entire evidence it will be evident that none of the prosecution witness has stated about the premeditation among the accused/appellants and further no evidence has been brought on record in order to establish the common intention among the accused appellants, therefore the application of Section 34 IPC against all the appellants amounts miscarriage of justice.

(viii) The learned senior counsel has taken the ground that when there is a case and counter-case for the same transaction and there is two different trial and in one trial conviction under section 302 of the IPC and in other under section 304 (1) of the IPC and since it is a case of single murder and as such the conviction is either would be under section 302 IPC or section 304 (1) and both cannot go together reason being that if the accusation is against the present appellants based upon that the conviction is there under section 302/34 of IPC then what purpose the conviction is there under section 304 (1) IPC against Deo



Kumar Choubey, the appellant in Criminal Appeal (DB) No.114 of 2013.

(ix) The learned senior counsel based upon the aforesaid grounds has submitted that the prosecution has primarily failed in establish the charge said to be proved beyond all reasonable doubt and, as such, the judgment of conviction passed by the learned trial Court convicting the appellants, namely, Satyendra Choubey, Vinod Kumar Choubey and Virendra Kumar Choubey under sections 302/34 and 307/34 of the Indian Penal Code and under other section of IPC, therefore, is fit to be quashed and set aside.

Submission of the learned counsel for the appellants [in Criminal Appeal (DB) No.114 of 2013 with Criminal Appeal (SJ) No.483 of 2013]:

33. While assailing the judgment of conviction and sentence, Mr. Jai Shankar Tripathi, the learned counsel appearing in both the appeals has taken up the ground that the prosecution version as recorded in the FIR, subject matter of Criminal Appeal (DB) No.190 of 1994 (R) is also required to be taken into consideration wherein the prosecution version is that the pellet has been fired from the country made pistol while the recovery is of a licensee gun belongs to Deo Kumar Chaudhary, one of the appellants in these appeals, but admittedly the pellet which has been recovered from the body of the deceased has not been fired from the said licensee gun.

34. Learned trial Court has failed to take into consideration that this very occurrence the father of the deceased namely, Deo Kumar Choubey



has been convicted by the learned trial Court, which is apparently a mechanical order and judgment because for one murder there cannot be two different accused when there is case and counter case as such this case is nothing but abuse of the process of the court.

Submission of the learned APP for the State

35. The learned APP for the state has refereed factual aspects of the involved in the instant appeals that FIR and complaint were lodged by the two disputing groups of the family relating to the same transaction on the same day giving their own versions of the incident and the trial proceeded separately being Sessions Trial No. 228 of 1991 and Sessions Trial No. 32 of 1999 resulting in two different outcomes in which one group of accused (appellants in Criminal appeal (DB) No.190 of 1994) were convicted for committing murder of the deceased (daughter of the appellant namely Deo Kumar Chaubey, appellant in Cr. Appeal (DB) No. 114 of 2013) and in the other case, the other group of accused (appellant in Cr. Appeal (DB) No. 114 of 2013 and appellants Cr. Appeal (SJ) No. 483 of 2013) convicted under Section 323 and further one of the accused namely Deo Kumar Chaubey [informant in the Cr. appeal (DB) No. 190 of 1994 (R)] has been convicted for the culpable homicide not amounting to murder for his own daughter (deceased) and accordingly, sentenced under section 304(1) of the IPC, has fairly submitted that since herein case and counter case and for one murder there is two different accused as such the instant appeals should be decided as per the wisdom of the Court.

Analysis



36. We have heard learned counsel for the parties, perused the documents available on record as also the finding recorded by the trial Court in the impugned judgment.

37. We have also gone through the testimonies of the witnesses as available in the Trial Court Records as also the exhibits appended therewith.

38. This Court, before considering the argument advanced on behalf of the parties would like to discussed the settled connotation of law.

39. It needs to refer herein that the Hon'ble Apex Court in catena of decision has propounded the proposition that in the criminal trial, there cannot be any conviction if the charge is not being proved beyond all reasonable doubts, as has been held in the case of **Rang Bahadur Singh & Ors. Vrs. State of U.P.**, reported in **(2000) 3 SCC 454**, wherein, at paragraph-22, it has been held as under:-

"22. The amount of doubt which the Court would entertain regarding the complicity of the appellants in this case is much more than the level of reasonable doubt. We are aware that acquitting the accused in a case of this nature is not a matter of satisfaction for all concerned. At the same time we remind ourselves of the time-tested rule that acquittal of a guilty person should be preferred to conviction of an innocent person. Unless the prosecution establishes the guilt of the accused beyond reasonable doubt a conviction cannot be passed on the accused. A criminal court cannot afford to deprive liberty of the appellants, lifelong liberty, without having at least a reasonable level of certainty that the appellants were the real culprits. We really entertain doubt about the involvement of the appellants in the crime."



40. Likewise, the Hon'ble Apex Court in the case of **Krishnegowda & Ors. Vrs. State of Karnataka**, reported in **(2017) 13 SCC 98**, has held at paragraph-26 as under:-

"26. Having gone through the evidence of the prosecution witnesses and the findings recorded by the High Court we feel that the High Court has failed to understand the fact that the guilt of the accused has to be proved beyond reasonable doubt and this is a classic case where at each and every stage of the trial, there were lapses on the part of the investigating agency and the evidence of the witnesses is not trustworthy which can never be a basis for conviction. The basic principle of criminal jurisprudence is that the accused is presumed to be innocent until his guilt is proved beyond reasonable doubt."

41. Further, the principle of 'benefit of doubt' belongs exclusively to criminal jurisprudence. The pristine doctrine of 'benefit of doubt' can be invoked when there is reasonable doubt regarding the guilt of the accused, reference in this regard may be made to the judgment rendered by the Hon'ble Apex Court in the case of **State of Haryana Vrs. Bhagirath & Ors.**, reported in **(1999) 5 SCC 96**, wherein, it has been held at paragraph-7 as under: -

"7. The High Court had failed to consider the implication of the evidence of the two eyewitnesses on the complicity of Bhagirath particularly when the High Court found their evidence reliable. The benefit of doubt was given to Bhagirath "as a matter of abundant caution". Unfortunately, the High Court did not point out the area where there is such a doubt. Any restraint by way of abundant caution need not be entangled with the concept of the benefit of doubt. Abundant caution is always desirable in all spheres of human activity. But the principle of benefit of doubt belongs exclusively to criminal jurisprudence. The pristine doctrine of benefit of doubt can be invoked when there is reasonable doubt regarding the guilt of the accused. It is the reasonable doubt which a conscientious judicial mind entertains on a conspectus of the entire evidence that the accused might not have committed the offence, which affords the benefit to the



accused at the end of the criminal trial. Benefit of doubt is not a legal dosage to be administered at every segment of the evidence, but an advantage to be afforded to the accused at the final end after consideration of the entire evidence, if the Judge conscientiously and reasonably entertains doubt regarding the guilt of the accused."

42. Likewise, the Hon'ble Apex Court in the case of **Krishnegowda v. State of Karnataka** (Supra) at paragraph 32 and 33 has held as under:-

"32. --- The minor variations and contradictions in the evidence of the eyewitnesses will not tilt the benefit of doubt in favour of the accused but when the contradictions in the evidence of the prosecution witnesses proves to be fatal to the prosecution case then those contradictions go to the root of the matter and in such cases the accused gets the benefit of doubt. 33. It is the duty of the Court to consider the trustworthiness of evidence on record. As said by Bentham, "witnesses are the eyes and ears of justice.--- -

43. It needs to refer herein that The Hon'ble Apex Court, in the case of **Allarakha K. Mansuri v. State of Gujarat** reported in **(2002) 3 SCC 57** has laid down the principle that the golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted, for reference, paragraph 6 thereof requires to be referred herein which reads hereunder as :-

"6. -----The golden thread which runs through the web of administration of justice in criminal case is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted. ---"

44. It needs to refer herein before laying down the aforesaid view, the Hon'ble Apex Court in the case of **Sharad Birdhichand Sarda v. State**



of Maharashtra reported in (1984) 4 SCC 116 has already laid down the same view at paragraph 163 which is required to be referred which read hereunder as

"163. We then pass on to another important point which seems to have been completely missed by the High Court. It is well settled that where on the evidence two possibilities are available or open, one which goes in favour of the prosecution and the other which benefits an accused, the accused is undoubtedly entitled to the benefit of doubt.---"

45. In the backdrop of the aforesaid settled legal position this Court is now proceeding to consider the testimonies of witnesses which have been recorded by the learned trial Court.

Criminal appeal (DB) No.190 of 1994

46. It is evident from record that in order to substantiate the case, the prosecution had altogether examined 15 witnesses and they were PW1-Sumant Kumar Chaubey, PW2-Shardha Devi, PW3-Ramgati Chaubey, PW4- Parma Singh, PW5- Ramdeo Singh, PW6-Rajendra Kumar Chaubey, PW7- Gopal Misir (claimed to be an eye witness), PW8-Ram Charitra Choubey, PW9-Uday Shankar Choubey, PW10- Dr. Indreshwar Tiwary (who conducted postmortem over the body of the deceased), PW11-Hawildar Mauleshwar Singh, PW12-Deo Kumar Choubey, PW13- Dr. Sita Ram Gupta (who examined PW-12, the injured witness Deo Kumar Choubey), PW14-Biswas Topno and PW15-Iswari Dayal (the Investigating Officer).



47. At this juncture it would be purposeful to discuss the testimony of prosecution witnesses in order to answer the issues as referred in the preceding paragraphs.

48. PW1 Sumant Kumar Choubey has deposed that on 21.2.91 at about 2.30 P.M. he was sitting inside his house in the *dhawa*. His father was sitting in the southern *dhawa*. His brother Rajendra Chaubey, deceased sister Nirmala and mother Shardha Devi were also with him. He supported the fact that all the accused persons entered into his house. Seeing them, his father ran into his angan. However, they chased his father and also went into the angan. Accused Satyendra Chaubey was armed with a country made pistol whereas other three accused were armed with lathi. Accused Raj Kumar Chaubey caught his father and rest three accused began assaulting him with fists and slaps. He has, thereafter, deposed on the point of theft of Rs.5000/-. Accused persons, thereafter, dragged his father to the outer *dhawa*. However, all the inmates also followed them. The accused persons assaulted his father with lathi. He has also asserted that Nirmala Kumari had put her arm around the body of his father. Thereafter, at the instance of accused Raj Kumar Chaubey, Satyendra Chaubey opened fire with his country made revolver. His father took a turn giving a jolt and the fire hit Nirmala Kumari near her left ear as a result of which she died. The accused persons, thereafter, fled away. He has also stated that the accused persons went away leaving some of their belongings.

49. Attention of this witness has been drawn towards his earlier statement before the police in his cross-examination. It appears from para



56 of the cross-examination of the Investigating Officer (P.W.15) that this witness had not stated before the police that Rajendra Chaubey, Nirmala Kumari and Sharda Devi were also sitting with him. She had also not stated that on seeing the accused, his father rushed into the angan. He had also not stated that accused Raj Kumar Chaubey caught his father and rest accused assaulted him with fists and slaps. However, he has states that all the four accused were assaulting his father in the angan. As stated earlier, this witness has not stated about the factum of theft before the Investigating Officer. However, in paragraph 16 of his cross-examination, this witness asserted that when the accused persons entered into his house, he along with his mother, brother and sister were present in the inner western dhawa of the house. In para 17 of the cross-examination, he stated that on hearing the foot-steps he came in the southern portion of the western dhawa where his father was sitting. In para 19 of the cross-examination, he asserted that after seeing the accused persons, his father ran into the angan. The accused persons also followed his father. In para-21 of the cross-examination, he has again stated that Satyendra Choubey was armed with a country made revolver whereas others were armed with lathi. This witness has, thereafter, supported the entire prosecution story in his cross-examination, he has supported the fact that his father sustained lathi injuries and he was taken in the northern portion of the western dhawa by the accused persons. In para 26 and 27 of the cross-examination, he again asserted that when accused Raj Kumar Chaubey gave order to open fire, his father was standing inside the main entrance door with his face towards south. His sister Nirmala had put her arms around informant's waist and was standing left to her father. This witness, his mother and



brothers were also standing in the same dhawa. In para 30 of the cross-examination, he has stated that accused Satyendra Chaubey pressed his revolver of the chest of his father, but his father took a turn towards west and deceased Nirmala, came in front of the accused and sustained the fire arm injury near her left ear. In paragraph- 32 of the cross-examination he has stated that firing was made from point blank range.

50. PW2 Sardha Devi is wife of the informant (the mother of the deceased) who is said to be an eye witness and at the time of occurrence she was standing there. She has fully supported the prosecution version. She has deposed that on 21.2.91 at 2 PM her husband (informant) was sitting in the southern portion of the western dhawa when all the four accused persona entered into her house. Her husband went inside the angan but the accused persons also chased him. Accused Satyendra Choubey was armed with a revolver whereas other were armed with lathi. They assaulted her husband with fists and slaps. She tried to pacify them, but she was also pushed. She has also narrated the story of theft of cash. She has further deposed that the accused persons thereafter dragged her husband to the southern portion of the western dhawa. The accused persons were also assaulting him with lathi, but the blow of lathi was obstructed by the ceiling of the roof. The accused persons, thereafter, took her husband to the northern portion of the western dhawa where Raj Kumar Chaubey ordered Satyendra Chaubey to shoot her husband. she has also stated that when Satyendra Choubey pointed his country made revolver towards her husband, her husband turned towards right and deceased Nirmala came in front and sustained fire arm injury near her left



ear. She fell down and died. Thereafter, the accused persona fled away leaving some of their belongings. I

51. In the cross-examination, she has stated that when the accused persons entered into her house, she was sitting in her inner dhawa which was situated west of her angan. She has further stated that after seeing the accused persons, her husband ran towards the angan. The accused persons also followed him there. In paragraph 13 of the cross-examination, she has stated that when shooting took place, her husband was at a distance of 3 ft. from the main entrance door of the house and the accused persons were standing close south of him. In para-14 she also supported the prosecution story that deceased was standing left of her husband and she and other witnesses were standing towards west.

52. In the cross-examination, P.W.2 has asserted that she had raised hulla, but nobody turned up at the place of occurrence. In para 30 of the cross-examination, she has stated that there was a chauki towards south of the dead body and there was a khatiya adjacent south of the chauki over which cover of *Tosak* was kept. She has denied the suggestion that at the time of occurrence, deceased was standing about 4 to 5 ft. north east from her father. In para 32 she has also denied a suggestion that her husband brought accused Raj Kumar Chaubey from his house and at that time she and her sons were also accompanying her husband. She has further denied that subsequently accused Birendra Chaubey and Binod Chaubey also came to rescue their father when the informant stood over the chauki (bed) which was kept in the northern dhawa and pressed his licensee gun towards accused Raj Kumar, but in the meantime accused Birendra



Choubey turned the barrel of the gun towards east as a result of which the fire hit Nirmala, who was standing at a distance of 4 to 5 ft. north east from her father.

53. PW3-Ram Gati Choubey is a hearsay witness who was not present at the place of occurrence. He has put her signature over the inquest report and seizure memo. He has stated that the Investigating Officer has not searched the house of the accused Raj Kumar Choubey in his presence but he has stated that the Officer-in-Charge of Nagar Untari PS was present in the house and examining the dead body of Nirmala Kumari. He prepared inquest report in his presence over which he put his signature. Witness Ram Charitar Chaubey also put his signature over the same. He has proved both the signatures which have been marked Exts. 1 and 1/1. The Sub Inspector also seized one wooden slipper, one pair of *hawai* slipper, one spectacle and a lungi from near the dead body and prepared a seizure list over which he and Ram Charittar Chaubey put their signatures. The two signatures have been marked Exts.1/2 and 1/3. The Sub Inspector of Police also seized one bloodstained cover of Tosak and bloodstained earth and prepared a seizure list in his presence. He has proved his signature as well as signature of Ram Charittar Chaubey over the seizure list which have been marked Exts. 1/4, and 1/5, respectively. Though, he has denied that Sub-Inspector did not make any search of the house of accused Raj Kumar Chaubey in his presence, but he has proved his signature and the signature of Ram Charittar Choubey over the search list which have been marked Ext. 1/6 and 1/7 respectively.



54. In the cross-examination, he has said that the informant was not present in the house. He further stated that there was no special mark on the articles which were seized from near the dead body. The Sub Inspector had seized the cover of Tosak from the cot which were kept south of the chauki in the dhawa. The cover was stained with a drop of blood. From the evidence of this witness, it would appear that the Sub Inspector had seized some articles from near the dead body and the dead body was lying inside the house of the informant.

55. PW4-Parma Singh and PW5-Ramdeo Singh are the constable and they are formal witness.

56. PW6-Rajendra Kumar Choubey is a co-villager of the informant who is also a formal witness.

57. PW7-Gopal Misra is a co-villager who has deposed that he had seen the occurrence when he went to the informant's house to take bullock cart. He has stated that he saw the occurrence. All the accused persons were beaten the informant at his dhaba. He has further deposed that Raj Kumar Choubey instigated and told Satyender Choubey to kill the informant whereupon Satyender Choubey open fire from his pistol which hit the daughter of informant. The daughter of the informant fell down. He has deposed that after the occurrence there was stampede and all the accused fled away from the place of occurrence. He also fled away from there. He had identified the accused Satyender Choubey, Virendra Choubey and Raj Kumar Choubey who were present in the dock.

58. During his cross-examination. He has deposed that he did not recall the date and year of the occurrence. He has stated that he himself



went to the police station at about 9-10 PM to give statement about the occurrence. He has stated that he had not seen the bloodstained or any wound on the body of the informant, his wife and his sons. He has stated that he had not cared that any wound was there on the body of Raj Kumar Choubey. He has stated that he heard the sound of firing of bullet. He has stated that he had seen that Satyendra Choubey, Vinod Choubey and Birendra Choubey had started assaulting Deo Kumar Choubey, his wife and sons with lathi, knife and fists and slaps for about 10-15 minutes. He has stated that he had seen the blood oozing from the middle of chest of the deceased. He has denied that at the time of occurrence the fired took place from the gun of Deo Kumar Choubey. He has denied the suggestion that he had not seen the occurrence.

59. PW8-Ram Charitra Choubey is the co-villager and was also tendered for cross-examination.

During cross-examination this witness has stated that the sub-inspector of police had investigated the matter who came to the village. He further stated that from the house of Deo Kumar Choubey one double barrel gun was seized and at that time he was present with Kamlesh Dubey.

60. PW9 Uday Shankar Choubey is a hearsay witness. He has stated that on hearing that firing took place at the house of Deo Kumar Choubey, he went there and he saw the dead body of Nirmala (deceased). He has identified the accused persons who were present at the dock at the time of his adducing evidence.



During cross-examination this witness has stated that on hearing the sound of firing he went to the house of Deo Kumar Choubey. He has denied the suggestion that the firing took place from the gun of Deo Kumar Choubey.

61. PW10-Dr. Indreshwar Tiwari has deposed that he conducted post-mortem upon the body of deceased and has found the following ante-mortem injuries:

- (i) *Lacerated oval wound 1 ½" x 1" x brain cavity deep on the left mastoid region of scalp with inverted margin blackening and shooting of the skin around the wound was found. Brain matter coming out of the wound.*
- (ii) *Defused swelling of the upper part of the right side of the neck behind right ear with multiple fracture of the underlying bones. Blood coming out through the right ear.*

On Dissection, skull bones and base of skull found fracture into multiple pieces except the frontal and parietal bone.

Brain matter extensively lacerated. Blood and blood clot found in the cavity. One cardboard piece, one plastic piece and 44 metallic pieces recovered from the brain matter and the cavity.

According to the doctor, weapon used was fire arms might be country made pistol, in which the 12-bore cartridge was used.

The cause of death was shock and hemorrhage due to the injury to the vital organ within 12 to 36 hours of the examination.

In the cross-examination, this witness has stated that cartridge used in gun and revolver are different and the materials recovered from the wound are constituents of 12-Bore cartridge which is usually used in gun firing. These cartridges are not used in revolver or pistol.



62. PW13-the doctor who has examined the injured witness-Deo Kumar Chaubey (informant) on 21.2.91 at 6 PM at Referral Hospital, Nagar Untari has found the following injuries on his person:

(i) one abrasion 1" x ½" / subcutaneous thickness on the lower part of the right knee joint.

(ii) Abrasion ½" x ½" x subcutaneous thickness on the lower part of the left knee joint.

(iii) Bruise 1" x 1" x on the lower part of the left nipple.

iv) Bruise 1" x 1" x on the dorsal aspect of right foot.

All the injuries were simple in nature caused by hard and blunt substance such as lathi within six hours of the examination.

63. This doctor has also examined the accused-Raj Kumar Chaubey at 4 PM, on the basis of the requisition sent by the officer-in-charge, Nagar Untari PS which have been marked as Ext8 and A/1 respectively and has found the following injuries on his person:

(a) Lacerated wound 3" x ½" x ¼" on the right side of occipital area.

(b) Lacerated wound ½" x ¼" x ¼" on the left cheek.

(c) Abrasion 1" x ½" x subcutaneous thickness on the left elbow joint.

(d) Abrasion 1" x ½" x subcutaneous thickness on the left ankle joint.

(e) Two bruises 3" x 1" and 3" x 1" on the upper part of back.

All these injuries were simple in nature caused by hard and blunt substance such as lathi within six hours of the examination.

64. PW11-Havildar Mauleshwar Singh was posted at Nagar Untari PS and he has produced the seized articles from the place of occurrence to the Court which are (i) wooden slippers, (ii) one pair of hawai slippers,



(iii) one lungi of light pink colour, (iv) empty cover of *toshak*, and (v) bloodstained earth which have been exhibited as X, X/1, X/2, X/3 and X/4, respectively.

During cross-examination this witness has stated that at the time of occurrence he was not posted at Nagar Untari PS and he brought a list of seizure list which was given the officer-in-charge of the said PS.

65. PW12-Deo Kumar Choubey is the informant of the case. He has deposed that on 21.2.91 at 12 O'clock Noon he was going to Sonpurwa to attend a Yagya which was being performed there. However, when he, reached there east of his house near his wheat field appertaining to plot no.1, he saw Binod Kumar Chaubey and Birendra Kumar Chaubey armed with lathi setting his wheat crops grazed through their bullock. He objected to it, but they did not listen and extended threat to assault him. In the meantime, his accused Raj Kumar Chaubey also came out of their house and instigated accused Binod Chaubey and Birendra Chaubey to assault the informant. In order to save his life, the informant ran away and took shelter in the house of Kameshwar in his village. However, all the three accused namely Raj Kumar Chaubey, Birendra Chaubey and Binod Chaubey also reached there They were no male member in the house of Kameshwar Chaubey. However, Uma Devi wife of Kameshwar Chaubey, tried to pacify the matter and requested the accused persons to go away. In the meantime, Uday Shankar Chaubey also came there and requested them to go away. Thereafter, the afore-mentioned accused persons returned back to their house. After two hours, the informant came out of the house of Kameshwar Chaubey and returned to his house. It was about 2.30 P.M.to 3 P.M. when he was sitting on a cot in the outer dhawa of his



house, when accused Raj Kumar Chaubey, Binod Chaubey and Birendra Chaubey armed with lathi and Satyendra Chaubey armed with a country made pistol entered into the house through the main entrance door. On seeing them, the informant ran to his angan. However, all the four accused followed him. Accused Raj Kumar Chaubey caught his both hands whereas accused Binod Chaubey and Satyendra Chaubey began assaulting him with fists and slaps. Accused Raj Kumar Chaubey gave order to other accused to enter into the northern rooms of the house and to find out the valuables. Thereupon, accused Birendra Chaubey went inside the room and brought out Rs.5000/- which was kept in a tin box. Thereafter, all the four accused brought him to the dhawa where he was earlier sitting. They were also assaulting him with lathi, but the force of lathi blow was being reduced as the same was obstructed by the roof. The informant was brought on the main entrance dhawa where accused Raj Kumar gave order to kill the informant with pistol. Thereupon, accused Satyendra Chaubey aimed his country made pistol at the chest of the informant. However, the informant turned and deceased Nirmala who was standing by the side of the informant with her both hands around the waist of the informant, came in front of the accused Satyendra Chaubey and the fire hit Nirmala Kumari near her left ear. She fell down and died. The accused persons, thereafter, fled away. However, while fleeing away, accused Raj Kumar Chaubey left his one wooden slipper of left leg(material Ext.I). He also left his spectacle. Accused Satyendra Chaubey left his pink colour lungi (Ext.II). Accused Binod Chaubey left his hawai slippers (Ext.III) The witness has also proved cover of *Tosak* which was seized by the I.O. and the same has been marked Ext. IV. The informant has asserted that the occurrence was



witnessed by his son Sumant Kumar Chaubey (P.W.1), Rajendra Kumar Chaubey (P.W.6), his wife Shardha Devi (P.W.2) and Gopal Mishra (P.W.7). He further deposed that the Sub Inspector of Police came and recorded his fardbeyan. He has proved his signature on the fardbeyan marked Ext.1/8. The I.O. had recorded his further statement also. He has stated that he had sustained injuries on his person also and he was treated at Nagar Untari Referral Hospital. The witness further stated that the size of barrel of the pistol was of 12-bore.

66. In the cross-examination, P.W.12 has stated that he had disclosed in the fardbeyan and in his further statement that the weapon used was a pistol. He has stated in his cross-examination that the material exhibits were seized by the Investigating Officer in his presence. However, he did not remember as to whether the same were sealed or not. He has denied that the material exhibits seized from the place of occurrence did not belong to the accused persons.

67. P.W.12 the informant had also described the place of occurrence and his house in his cross-examination. In para 23 of the cross-examination, he has stated that main entrance door is fitted with chukhat door and planks which opens towards north of his house. In the western side of the house there is a long dhawa running from north to south. This dhawa is divided into two parts by a wall living door space. In the southern portion of this dhawa, there is a door which opens towards west of the house. This is fitted with Chukhat door plank. In the southern dhawa, there is also a door which opens towards east in the inner dhawa of the house. One goes in the angan through this inner dhawa. In para 24 of the cross-examination, this witness has stated that the main entrance door



which opens towards north of the house is fitted in the northern portion of the western dhawa. However, at the main entrance door, there is a wall towards east separating the said dhawa which runs towards east to west living a door space. Near the main entrance door, the width of the dhawa, from east to west is 9 to 10 ft. The length of the northern portion of the western dhawa from north to south is 20 ft. There is another entrance door towards north of the house which opens in the dhawa which runs east to west towards north of the house. In para 25, this witness has said that there are two rooms towards north of the angan. There is also a dhawa towards east of the angan. From the eastern side of the northern room, one can go in the northern dhawa of the house which runs east to west. In the south of the angan also, there is a dhawa and, thereafter, there are two rooms. In between the two rooms, there is a stair case for going up higher. He has thereafter, given the size of the angan. The ceiling height of the western and éastern dhawa is 8 ft. In para 29, the informant has said that a chauki was kept in the main entrance dhawa at a distance of 7 ft. from the door. Adjacent to the chauki, a cot was also kept. A tosak with cover was kept on the said cot. This witness has further stated that the house of the accused is adjacent east of the house and the wheat field, in which the occurrence of grazing had taken place, was at a distance of 50 ft. from the house of the accused. In para-41 he has claimed that he was sitting in the southern portion of the western dhawa when the accused persons entered into his house. In para 51 of the cross-examination also, the informant had supported the occurrence. He has asserted that when incident of shooting took place he was facing towards south and the accused persons were facing towards north. Accused Satyendra Chaubey pressed his pistol at



him. At that time, his daughter was standing left to him and she had put her arms on the west waist of her father.

68. PW14-Biswas Toppo is a constable who identified the signature of the officer-in-charge of Nagar Untari PS on Sanha NO.338 and 342 both dated 21.2.91 which have been exhibited 6 and 6/1 respectively.

During cross-examination, this witness has stated that the aforesaid sanha was not recorded in his presence. He has denied that he has ever worked with Ishwari Dayal, who was the then officer-in-charge of Nagar Untari PS.

69. PW15-Ishwari Dayal is the Investigating Officer. He has deposed that on 21.2.91 at 6.05 P.M. he heard rumour that an occurrence took place at village Sulsuliya in which a girl was shot dead. He made station diary entry no.338 dated 21.2.91 (Ext.6) and left the police station along with the Inspector of Police, Bhawnathpur, and Havaladar Ramadhar Singh. At 6.30 P.M. he reached village Sulsuliya and recorded the statement of informant Dev Kumar Chaubey. Informant put his signature over the fardbeyan. Two witnesses namely Jogendra Chaubey and Uday Shankar Chaubey also put their signatures on the fardbeyan (Ext.3). He, thereafter, prepared inquest report of deceased Nirmala Kumari in presence of the aforesaid two witnesses. He has proved carbon copy of inquest report marked Ext.2. He took up the investigation himself and recorded the further statement of the informant and issued requisition for Injury report (Ext.8) He inspected the place of occurrence which is the north facing Khaprail house of informant. The main entrance door of the house faces towards north and opens inside of the dhawa of the house. The dead body of Nirmala Kumari was found lying at a distance of 7 ft. South



from the main entrance door. Her head was towards east near the door which leads to the eastern dhawa and her legs were towards south. The dead body was in a pool of blood. Towards south of the dead body, there was a wooden chauki and adjacent to the chauki, there was a cot which was spread east to west. To the west of the dead body, the I.O. found one wooden slipper, one spectacle, one cotton lungi of pink colour and one pair sky Hawai slipper. He also found mark of blood on the cover of Tosak which was kept on the cot. He further stated that adjacent south of this main entrance dhawa, there was another dhawa. However, there is a door space between the two dhawa. In the southern portion of this dhawa, a door opens towards west and another door opens towards east which leads to inner dhawa. There is an angan adjacent east of the inner dhawa. The Investigating Officer has further given description of the angan which is surrounded by the dhawa from west side, east side and south side. Towards north of the angan, there are two rooms facing south. The Investigating Officer found sign of fresh grain in the wheat field of the informant. Some plants were Found uprooted. Mark of hoofs of cattle heads were also found in the field. The house of Kameshwar Chaubey is situated at a distance of about 300 to 400 yards north west from the house of the informant. The Investigating Officer has, therefore, proved the place of occurrence and according to him also the incident of shooting took place in the main entrance dhawa of the informant. The Investigating Officer has proved the genesis of occurrence in as much as he found sign of grazing of wheat crop of the informant.

70. The Investigating Officer seized the wooden slipper, spectacle, lungi and pair of *hawai* slippers in presence of the witnesses. He has



proved the carbon copy of seizure list which has been marked Ext.9. The Investigating Officer also seized blood stained earth from the place of occurrence and the cover of *tosak* which was stained with blood in presence of witnesses. Investigating Officer further recorded the statement of witnesses namely Sharda Devi and Rajendra Chaubey and sent the dead body for post-mortem. He also recorded the statements of other witnesses also and returned to the police station where formal F.I.R. (Ext.2) was drawn. On 22.2.91 one black colour lathi was produced before him by P.W.2 Sharda Devi which was seized in presence of witnesses. He has proved the seizure list marked Ext. 11. The I.O. also identified the wooden slipper, lungi, pair of hawai slipper and cover of *tosak* in the Court which have been marked Exts. I to IV. Bloodstained earth which he had seized from the place of occurrence has been marked Ext. V. He had made entries about these seizure in the station diary entry no. 342 dated 21.2.91 (Ext.6/1). The Investigating Officer, thereafter, obtained post-mortem report and injury report of the informant and submitted charge sheet.

71. During cross-examination at para-20 he has admitted that he had seen accused Raj Kumar Chaubey at Referral Hospital, Nagar Untari on 21.2.91 in injured condition and he had also issued a requisition for his injuries (Ext.A/1). In para 21, the Investigating Officer stated that he recorded the fardbeyan of accused Raj Kumar Chaubey at Referral Hospital on 21.2.91 at 11 PM and on the basis of which he registered a case against the informant Deo Kumar Chaubey and others. The Investigating Officer has, however, denied that he had met accused Raj Kumar Chaubey at Referral Hospital on 21.2.91 before 4 PM and had issued requisition for his medical examination. He also denied that he had learnt about the



occurrence through Raj Kumar Chaubey at that time. The I.O has further admitted that he had obtained injury report of Raj Kumar Chaubey from the doctor and the doctor has mentioned the time of examination as 4 PM. The Investigating Officer has, however, denied that he had learnt about the occurrence at Nagar Untari itself through accused Raj Kumar Chaubey, but he did not record the statement of accused Raj Kumar Chaubey. However, the Investigating Officer has admitted that he registered Nagar Untari P.S. Case No.25/91 u/s 341,323/34 I.P.C. and 27 Arms Act on the basis of the statement of accused Raj Kumar Chaubey. He has denied that he recorded the fardbeyan of this case after a long delay. He has admitted that he had not sealed the articles which he had seized from the place of occurrence. However, he has also admitted that he did not take trial of the articles seized from the place of occurrence from the accused persons.

72. The Investigating Officer has admitted that he recorded the statement of witness Sumant Kumar Chaubey and witness Gopal Mishra on 13.3.91 at the police station. He further admitted that he seized the licensee gun of the informant on 22.2.91 in connection with the counter case and sent the same to Sargeant Major, Daltonganj for examination. He also received the report of the Sargeant Major on 9.3.91.

73. The defence has, also examined five witnesses.

74. DW1 Ashok Singh has proved the fardbeyan and formal FIR of the counter-case which have been proved as Ext. B and C respectively.

75. DW2-Raj Kumar Prasad is an advocate's clerk of Garhwa Court. He had drafted the protest complaint petition at the instance of accused



Raj Kumar Chaubey and gave the same to the typist. After being typed, he compared the same with the draft. Accused-Raj Kumar Chaubey put his signature on the said complaint petition in his presence. He has proved the signature of accused-Raj Kumar Chaubey on the same which has been marked Ext.D.

76. DW3-Moti Prasad is a private typist of Garhwa Court who had typed the protest complaint petition. He has proved the entire protest complaint petition which has been marked Ext-E.

77. DW4-Rajdeo Rai is the then Sergeant Major, Police Line, Daltonganj. He had examined the gun of the informant from both barrel. He has proved his report which has been marked Ext-F. He has deposed that he had examined one regular D.B.B.L. gun which was seized in connection with Nagar Untari mad P.S.Case No.25/91 and found that firing was done from both barrels, of the gun in the recent past. He has proved his report as Ext.F. He has asserted that he is a ballistic expert though he did not have any diploma or degree in that science however he has obtained a certificate in this regard from the Department. He has however, also admitted that only chemical expert could say as to in how many days smell evaporates from the gun. He had examined the gun on 9.3.91 i.e. after 16 days of the occurrence. However, he has also stated that the gun might have been fired about a week or ten days ago. He has, however, admitted that the gun was not sent to chemical expert for chemical examination.

78. DW5-Havaladar Awadhes Kumar Singh is a formal witness. He has proved the carbon copy of requisition (Ext-G) sent by PW15 to the



Sergeant Major. Police Line, Daltonganj to examine the gun which was seized in connection with Nagar Untarii PS Case No.25/91 and carbon copy of a petition (Ext-H) submitted by PW15 before the Court of the learned ACJM, Garhwa, seeking a direction to Sergeant Major, Police Line, Daltonganj to examine the gun.

79. In the backdrop of the aforesaid settled proposition of law and after discussion of testimony of prosecution witnesses this Court in the instant appeal is to consider following issues: -

(i) Whether the material as has come in course of trial is sufficient to attract the ingredients of offence committed under Section 302/34 and 307/34 of the Indian Penal Code against the appellants? or

(ii) Whether the appellants are entitled for acquittal in absence of cogent evidences?

80. Since, all the aforesaid issues are inextricably interlinked, therefore, the same are being discussed and decided hereinbelow together.

81. The learned senior counsel for the appellant has contended that the doctor who has been examined as PW10, as also the Investigating Officer has not supported the prosecution story as P.W.10 doctor has specifically stated that the material recovered from the wounds of deceased were constituent of 12 bore cartridges which is used in gun firing and they are not used in revolver or pistols. Further the bullet has said to be fired from the country made pistol but there is no reference of recovery of any country made pistol in the seizure memo rather one licensee gun has been recovered. It has further been contended that the pellet which



has been found from the body of the deceased has not been fired from the country made pistol thus, the entire prosecution version as recorded in the FIR wherein it has been reported that the pellet has been fired from the country made pistol itself vitiate the entire prosecution version.

82. The learned senior counsel for the appellant has canvassed that the prosecution has failed to explain the injuries on the appellant namely Raj Kumar Choubey which casts grave doubt on the prosecution story specially when the said appellant was examined on police requisition at 4 P.M on 21.02.1991. The learned senior counsel has further emphasized that if entire evidence will be taken into consideration it will be apparent that none of the prosecution witness has stated about the premeditation among the accused/appellants and further no evidence has been brought on record in order to establish the common intention among the accused appellants, therefore the application of Section 34 IPC against all the appellants amounts miscarriage of justice.

83. At this juncture it would be purposeful to discuss the relevant part of the testimony of prosecution witnesses as well as FIR in order to answer the issues as referred in the preceding paragraphs.

84. From perusal of the FIR, it is evident that on the trivial issue of grazing of wheat crops of informant by the buffalo of accused/appellants alleged occurrence was happened. As per the fardbeyan of the informant Deo Kumar Chaubey, the appellant Rajkumar Chaubey ((since dead) who is elder brother of the informant has to his house and instigated his two sons to assault the informant. The Informant, thereafter, fled away and took shelter in the house of Kameshwar Chaubey, a co-villager. Thereafter, the aforesaid three accused persons returned back to their



house. After two hours, the informant came out of the house of Kameshwar Chaubey and went to his house.

85. It has further been alleged that after 10 to 15 minutes when he was sitting on a khatiya (cot), in the main entrance of his house, at about 2.30 to 3 P.M., all the four accused, namely, Raj Kumar Chaubey and his three sons namely Binod Chaubey, Satyendra Chaubey and Birendra Chaubey entered into his house through the main door. Accused Satyendra Chaubey was armed with a country made pistol whereas remaining three accused were armed with lathi. Seeing the accused persons, the informant went in the Angan of the house but all the four accused also followed him and came in the Angan whereas accused Raj Kumar Chaubey caught him and accused Satyendra Kumar Chaubey and Binod Chaubey began assaulting him with fists and slaps. and thereafter the accused persons dragged him and brought him in the main entrance *dhaba* of the house where accused Birendra Chaubey and Binod Chaudhary tried to assault him with lathi, and in the meantime, accused Raj Kumar Chaubey gave order to kill the informant with the said country made pistol. Thereupon, Satyendra Chaubey opened fire from his country made revolver with intent to kill the informant. But the fire missed the target and hit Nirmala Kumari (daughter of the deceased) near her left ear due to this she fell down and died instantly.

86. Thus, from the recital of the fardbeyan it is evident that the alleged occurrence of murder of the deceased daughter was caused by appellant by firing from country made pistol.

87. At this juncture it will be purposeful to reiterate the testimony of the doctor who had conducted post-mortem on the dead body of the



deceased, wherein he has opined that weapon used was fire arms may be country made pistol, in which the 12-bore cartridge was used. But at the same time in his cross-examination, he had stated that Cartridges used in Gun and Revolver are different. He had further stated that the material recovered from the wound of the deceased while conducting Postmortem examination are the constituents of 12 bore cartridges usually used in gun firing and these constituents are not found in the cartridges used in Revolver or Pistol.

88. At this juncture it needs to refer herein that this Court is conscious with the settled legal position that where there is a contradiction between medical evidence and ocular evidence, the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, but at the same time it is equally settled position that when medical evidence makes the ocular testimony improbable, then it becomes a relevant factor in the process of the evaluation of evidence and when the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved. Reference in this regard may be made to the judgment rendered by the Hon'ble Apex Court in the case of ***Bhajan Singh v. State of Haryana, (2011) 7 SCC 421***, the relevant paragraph of the aforesaid judgment is being quoted as under:

38. Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.



89. The aforesaid same view has been reiterated by the Hon'ble Apex Court in the case of ***CBI v. Mohd. Parvez Abdul Kayuum, (2019) 12 SCC 1*** wherein it has been held by the Hon'ble Apex Court which reads as under:

57. ---It is not a case where medical evidence completely improbabilises the ocular evidence; only in that case the ocular evidence has to be discarded, not otherwise. Reliance has been placed on behalf of the accused on *Abdul Sayeed v. State of M.P.* [*Abdul Sayeed v. State of M.P.*, (2010) 10 SCC 259 : (2010) 3 SCC (Cri) 1262] thus: (SCC p. 274, para 39)

“39. Thus, the position of law in cases where there is a contradiction between medical evidence and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-à-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it *completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved.*”

90. In the instant case, it has come on record that there is no recovery of any country made pistol or revolver from the place of occurrence or from conscious possession of the appellants herein. Further herein the medical evidence completely rules out all possibility of the ocular evidence being true as such the ocular evidence may be disbelieved.

91. Thus, from the aforesaid it is evident that the aforesaid factum of firing from the country made pistol has not been proved by the prosecution against the present appellants beyond reasonable doubt.

92. Further, since the learned trial court by taking aid of the Section 34 of the IPC has convicted the present appellants for the alleged offence, therefore at this juncture it would be apt to discuss the ingredients of Section 34 of the IPC.



93. It needs to refer herein that under the provisions of Section 34 the essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention. As a result of the application of principles enunciated in Section 34, when an accused is convicted under Section 302 read with Section 34, in law it means that the accused is liable for the act which caused death of the deceased in the same manner as if it was done by him alone. The provision is intended to meet a case in which it may be difficult to distinguish between acts of individual members of a party who act in furtherance of the common intention of all or to prove exactly what part was taken by each of them.
94. Thus, from the aforesaid settled position of law it is evident that Section 34 has been enacted on the principle of joint liability in the doing of a criminal act. The section is only a rule of evidence and does not create a substantive offence. The distinctive feature of the section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under Section 34 if such criminal act is done in furtherance of a common intention of the persons who join in committing the crime.
95. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of minds of all the accused persons to commit the offence for which they are charged with the aid of Section 34, be it prearranged or on the spur of the moment; but it must necessarily be before the commission of the crime.



96. The true contents of the section are that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.
97. Further, the burden lies on the prosecution to prove that actual participation of more than one person for commission of criminal act was done in furtherance of common intention of all at a prior concert. However, it is not required for the prosecution to establish that there was a prior conspiracy or premeditation; common intention can be found in the course of occurrence.
98. To apply Section 34 apart from the fact that there should be two or more accused, two factors must be established: (i) common intention, and (ii) participation of the accused in the commission of an offence. If common intention is proved but no overt act is attributed to the individual accused, Section 34 will be attracted as essentially it involves vicarious liability. But if participation of the accused in the crime is proved and common intention is absent, Section 34 cannot be invoked reference in this regard may be taken from the judgment rendered by the Hon'ble Apex Court in the case of ***Jai Bhagwan v. State of Haryana (1999) 3 SCC 102.***



99. As held by the Constitution Bench of the Hon'ble Apex Court in *Mohan Singh v. State of Punjab AIR 1963 SC 174*, common intention denotes action in concert, and a prior meeting of minds—the acts may be different, and may vary in their character, but they are all actuated by the same common intention. However, prior concert in the sense of a distinct previous plan is not necessary to be proved. The common intention to bring about a particular result may well develop on the spot as between a number of persons. Thus, the question as to whether there is any common intention or not depends upon the inference to be drawn from the proven facts and circumstances of each case. The totality of the circumstances must be taken into consideration in arriving at the conclusion whether the accused persons had the common intention to commit the offence with which they could be convicted.

100. In the aforesaid backdrop of the settled position of law that, this Court has revisited the entire testimony including the material available on record wherefrom it is evident that none of the witnesses had stated in their examination-in-chief that the present appellant having common intention to kill the deceased. Therefore, in the aforesaid settled position of law as discussed in preceding paragraph this Court is of the view that the presents appellants having no common intention or premeditation of mind before the commission of alleged crime.

101. Further it is evident from the record that the persons of both sides i.e. informant as well as appellant Raj Kumar Choubey (since dead) have sustained injuries and both have been medically examined on the



requisition of the police and their injuries report have marked as annexure. From the aforesaid factual aspect, inference may be withdrawn that it is case of free fight on the trivial issue i.e. grazing of wheat crop of the informant by the animal of the appellants and it is settled position of law that in the case of free fight, the ingredients of Section 34 of the IPC have no application.

102. Since this Court has come with the finding in the preceding paragraph that the factum of firing by the appellant namely Satyendra Choubey by the alleged country made pistol has not been established beyond reasonable doubt, therefore it is of the considered view of this Court that appellants cannot be convicted for the offence under Section 302/34 IPC.

103. So far as the conviction under section 307/34 of the IPC is concerned, it needs to refer herein that the persons of both sides i.e. informant as well as appellant Raj Kumar Choubey (since dead) have sustained injuries and both have been medically examined on the requisition of the police and their injuries report have been marked as annexure before the learned trial court.

104. At this juncture it would be apt to referred herein the Section 307 IPC which reads as under:

“307. Attempt to murder.—Whoever does any act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is hereinbefore mentioned.



Attempts by life convicts. —When any person offending under this section is under sentence of imprisonment for life, he may, if hurt is caused, be punished with death.

105. The first part of Section 307 refers to “an act with such intention or knowledge, and under such circumstances that, if he by that act caused death, he would be guilty of murder”. The second part of Section 307, which carries a heavier punishment, refers to “hurt” caused in pursuance of such an “act”.

106. In *State of Maharashtra v. Balram Bama Patil* [*State of Maharashtra v. Balram Bama Patil*, (1983) 2 SCC 28], the Hon’ble Apex Court has observed that it is not necessary that a bodily injury sufficient under normal circumstances to cause death should have been inflicted, for ready reference the relevant paragraph is being quoted as under:

“9. ... To justify a conviction under this section it is not essential that bodily injury capable of causing death should have been inflicted. Although the nature of injury actually caused may often give considerable assistance in coming to a finding as to the intention of the accused, such intention may also be deduced from other circumstances, and may even, in some cases, be ascertained without any reference at all to actual wounds. The section makes a distinction between an act of the accused and its result, if any. Such an act may not be attended by any result so far as the person assaulted is concerned, but still there may be cases in which the culprit would be liable under this section. It is not necessary that the injury actually caused to the victim of the assault should be sufficient under ordinary circumstances to cause the death of the person assaulted. What the Court has to see is whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in this section. An attempt in order to be criminal need not be the penultimate act. It is sufficient in law, if there is present an intent coupled with some overt act in execution thereof.”

(emphasis supplied)



107. In State *of M.P. v. Saleem, (2005) 5 SCC 554*, the Hon'ble Apex Court has held which reads as under:

"13. It is sufficient to justify a conviction under Section 307 if there is present an intent coupled with some overt act in execution thereof. It is not essential that bodily injury capable of causing death should have been inflicted. The section makes a distinction between the act of the accused and its result, if any. The court has to see whether the act, irrespective of its result, was done with the intention or knowledge and under circumstances mentioned in the section. Therefore, an accused charged under Section 307 IPC cannot be acquitted merely because the injuries inflicted on the victim were in the nature of a simple hurt."

108. In *Jage Ram v. State of Haryana (2015) 11 SCC 366*, the Hon'ble Supreme Court has held that to establish the commission of an offence under Section 307, it is not essential that a fatal injury capable of causing death should have been inflicted, for ready reference the relevant paragraph is being quoted as under:

"12. For the purpose of conviction under Section 307 IPC, the prosecution has to establish (i) the intention to commit murder; and (ii) the act done by the accused. The burden is on the prosecution that the accused had attempted to commit the murder of the prosecution witness. Whether the accused person intended to commit murder of another person would depend upon the facts and circumstances of each case. To justify a conviction under Section 307 IPC, it is not essential that fatal injury capable of causing death should have been caused. Although the nature of injury actually caused may be of assistance in coming to a finding as to the intention of the accused, such intention may also be adduced from other circumstances. The intention of the accused is to be gathered from the circumstances like the nature of the weapon used, words used by the accused at the time of the incident, motive of the accused, parts of the body where the injury was caused and the nature of injury and severity of the blows given, etc."

109. It is evident from the aforesaid settled proposition of law that proof of grievous or life-threatening hurt is not a sine qua non for the offence under Section 307 of the Penal Code and the intention of the



accused can be ascertained from the actual injury, if any, as well as from surrounding circumstances. Among other things, the nature of the weapon used and the severity of the blows inflicted can be considered to infer intent.

110. Thus, it is apparent that whoever does any act, with the intention or knowledge, which may cause death and in furtherance to the said intention and knowledge, he was doing an act towards it. However, it is required to be seen by the evidence brought on record by the prosecution whether the ingredients to prove, the case of prosecution beyond reasonable doubt, the charge under Sections 307 IPC have been established.

111. The essential difference between the offence punishable under Section 307 IPC and Section 302 IPC is that the offence under section 307 IPC is not culpable homicide; the victim finally survives. What is required by the prosecution to establish is that the accused had necessary intention or knowledge that if successfully effected the alleged act would have caused death. In “***State of Maharashtra v. Kashirao***” reported in (2003) **10 SCC 434**, the Hon’ble Apex Court has held as under;

“20. “The essential ingredients required to be proved in the case of an offence under section 307 are:

- (i) that the death of a human being was attempted;
- (ii) that such death was attempted to be caused by, or in consequence of the act of the accused; and
- (iii) that such act was done with the intention of causing death; or that it was done with the intention of causing such bodily injury as: (a) the accused knew to be likely to cause death; or (b) was sufficient in the ordinary course of nature to cause death, or that the accused attempted to cause death by doing an act known to him to be so imminently dangerous that it must in all probability cause (a) death, or (b) such



bodily injury as is likely to cause death, the accused having no excuse for incurring the risk of causing such death or injury."

112. In the backdrop of the aforesaid settled proposition of law, now we are adverting to the facts of the case in hand in order to find out whether the alleged acts of the appellants come under the purview of attempt to murder or not.

113. In the aforesaid context it would be purposeful to reiterate the testimony of the doctor (PW13) who had examined the injured informant which has been referred as under:

(i) one abrasion 1" x ½" / subcutaneous thickness on the lower part of the right knee joint.

(ii) Abrasion ½" x ½" x subcutaneous thickness on the lower part of the left knee joint.

(iii) Bruise 1" x 1" x on the lower part of the left nipple.

iv) Bruise 1" x 1" x on the dorsal aspect of right foot.

114. This witness has categorically opined that all the injuries were simple in nature caused by hard and blunt substance such as lathi. Thus from the aforesaid it is evident that injuries which was caused by the appellants upon the injured informant was simple in nature and caused by the lathi, therefore it can be safely inferred that in the alleged commission of crime the requisite ingredients of Section 307 as discussed hereinabove is not available as such the conviction of the present appellants under section 307 of IPC is also not sustainable herein.

115. However, it has come one record that the appellants namely Vinod Kumar Choubey and Virendra Kumar Choubey having lathi at the time of alleged commission of crime and all the prosecution witnesses had specifically stated that assault by lathi was made by the aforesaid son of



the Raj Kumar Choubey. Thus, the aforesaid statement of the prosecution witnesses particularly informant on this point i.e. assault made with lathi by the aforesaid appellants Vinod Kumar Choubey and Virendra Kumar Choubey upon him, has fully corroborated by the testimony of P.W.13 i.e. Doctor who had examined the injured informant.

116. On the basis of the aforesaid discussion, it is considered view of this Court that appellants namely Vinod Kumar Choubey and Virendra Kumar Choubey has committed the offence under section 321 of the IPC punishable under Section 323 of the IPC.

117. The present appellants have been convicted under Section 452 and 341 IPC by the learned trial Court. In the aforesaid context it requires to refer herein the Section 452 and 341 IPC, which has been quoted as under:

“452. Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting and person in fear of hurt, or of assault, or of wrongful restraint, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

341. Whoever wrongfully restrains any person shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both.”

118. Thus from the perusal of the aforesaid sections it is evident that Whoever commits house-trespass, having made preparation for causing hurt to any person or for assaulting any person, or for wrongfully restraining any person, or for putting and person in fear of hurt, or of assault, or of wrongful restraint shall be punished with imprisonment of either description for a term which may extend to seven years.



119. From perusal of the entire evidence on record it is evident that it the case of free fight between the close cognate and for same transaction case and counter case was instituted. Further none of witnesses has stated that they were wrongfully restrain by the present appellants, therefore it is considered view of this Court the conviction of the present appellants under the Section 452 of the IPC is not sustainable herein.

120. Further it has come on record that there is no recovery of the alleged country made pistol which has been alleged to be used in the said offence and in the preceding paragraph this Court has categorically held that the use of said country made pistol in alleged commission of crime is doubtful, as such it is considered view of this Court that the conviction of the present appellants under Section 27 Arms Act is also not sustainable herein.

Criminal appeal (DB) No. 114 of 2013 and Criminal appeal (SJ) No. 483 of 2013.

121. As referred hereinabove the aforesaid appeals have been preferred against the conviction dated 13.02.2013 and the order of sentence dated 19.02.2013 passed by the learned Addl. Sessions Judge-1st, Garhwa in S.T. No. 32 of 1999 whereby and whereunder the appellants, above-named, have been convicted under sections 323 IPC. The convict-appellant, namely, Deo Kumar Chaubey in Criminal Appeal (DB) No. 114 of 2013 has also been convicted under section 304(1) IPC.

122. While convicting the appellants of the Cr. Appeal (SJ) No. 483 of 2013, the learned trial Court has opined that since the appellants, namely, Sumant Kumar Chaubey and Rajendra Kumar Chaubey are first



offenders as not previous conviction has been proved on record against them, as such, they have been granted benefit of the Probation of Offenders Act and they were directed to be released on furnishing a probation bond of Rs.5000/- with two sureties which will be for maintaining good conduct for two years.

123. While sentencing the sole appellant of the Cr. Appeal (DB) No. 114 of 2013, namely, Deo Kumar Chaubey the learned trial Court has awarded sentence to undergo RI for 10 years under section 304(1) of the Indian Penal Code with a fine of Rs.5,000/- and sentenced to fine of Rs. 5,000/- under section 323 IPC and in default of payment of fine, he is directed to undergo SI for 1 month.

124. At this juncture it would be purposeful to discuss the testimony of prosecution witnesses in order to answer the issues as referred in the preceding paragraphs.

125. It is evident from record that in order to substantiate the case, the prosecution had altogether examined 09 witnesses and they were PW.1 Ramdhyan Pal, PW.2 Binod Kumar Chaubey, who is the son of the complainant Raj Kumar Chaubey, PW.3 Ramcharitar Chaubey, PW.4- Dinesh Kumar Chaubey, PW.5 Raj Kishor Chaubey, PW.6 Virendra Chaubey, PW.7 Raj Kumar Chaubey (complainant/informant), PW.8 Krishna Tiwary has proved the report of Sergeant Major Rajdeo Rai, Ext.6 and PW.9 Mirtunjay Dubey has stated that he did not know about the occurrence and he has been declared hostile.



126. PW.1 Ramdhyan Pal has proved the signature of Raj Kumar Chaubey on the protest petition, Ext. 1. He has further proved the signature of the counsel of the Raj Kumar Chaubey Ext.1/1 also.

127. PW.2 Binod Kumar Chaubey, who is the son of the complainant Raj Kumar Chaubey, has stated that the occurrence took place on 21.02.91, Thursday, at about 2 to 2.30 P.M. He was in his village. He heard hallah of his father, who was saying for saving him, he came near his house and saw that Dev Kumar Chaubey, Sumant Chaubey, Rajendra Chaubey and Shardha Devi were bringing his father towards their house, beating him. Deo Kumar Chaubey was armed with gun and Sumant and Rajendra were armed with lathi. He tried to save his father. In the meantime, his younger brother also came and he also tried to save his father. Accused Deo Kumar Chaubey went his Varan dah and fired the gun for killing Raj Kumar Chaubey. In the meantime, Nirmala Kumari aged about 11-12 years, the daughter of the accused Deo Kumar Chaubey, came there and the cartridge shoot her and she died at the spot. If Nirmala would have not come, the cartridge would have hit Raj Kumar Chaubey. He and his brother brought his father to his house. His father had got head injury. They went to the police station thereafter.

128. PW.3 Ramcharitar Chaubey has stated that occurrence took place on 21.02.91 at about 2 to 2.30 P.M. It was Thursday, on that day, he was going to Sonpura to see nee the 'yajna'. When he reached near the door of Sunil Tiwary, he saw that there was abusing at the door of Raj Kumar Chaubey. Deo Kumar Chaubey, Sumant Chaubey, Rajendra Chaubey and Shardha Devi were abusing. Deo Kumar Chaubey was armed with gun



and Sumant Chaubey and Rajendra Chaubey were armed with lathi. When Raj Kumar Chaubey came out of his house, Sumant Chaubey and Rajendra beat him by lathi and he got head injury. Deo Kumar Chaubey told them to bring Raj Kumar Chaubey and he would kill him. Thereafter, they were bringing Raj Kumar Chaubey in their dhaba. Raj Kumar Chaubey raised hallah to save him, In the meantime, both sons of Raj Kumar Chaubey namely Vinod Chaubey and Birendra Chaubey, he and other persons came there. Both the sons caught his father. Thereafter, Deo Kumar Chaubey went in his dhaba with his gun. In the meantime, Vimla, the daughter of Dev Kumar Chaubey, came after seeing the yajana and she reached between Dev Kimar Chaubey and Raj Kumar Chaubey. In the meantime, Deo Kumar Chaubey fired the gun which hit the girl and she died.

129. PW.4 Dinesh Kumar Chaubey has stated that occurrence took place on 21.02.91 at about 2 to 2.30 P.M. It was Thursday. He was in Sonpurwa 'yajna'. He came to know that there was quarrel between both the brothers namely Deo Kumar Chaubey and Raj Kumar Chaubey and fire was also done. Thereafter, he came to the place of occurrence. When he reached, the occurrence had taken place. He saw that on the door of Deo Kumar Chaubey, the dead body of his daughter Nirmala Kumari was lying. The cartridge has pierced in the left kanpatti. He had heard that cartridge from gun of Deo Kumar Chaubey hit the girl.

130. PW.5 Raj Kishor Chaubey has stated that the occurrence took place on 21.02.91 at about 2 to 2.30 P.M. At that time, he was going to bazaar. At the door of Deo Kumar Chaubey, there was halla Gulla. He reached there and saw that Dev Kumar Chaubey, Rajendra Chaubey and



Sumant Chaubey were pulling Raj Kumar Chaubey and were telling that kill him after carrying. Deo Kumar Chaubey was armed with double barrel gun. Sumant and Rajendra were armed with lathi. They carried away Raj Kumar Chaubey at their door. On hallah, Binod Chaubey and Birendra Chaubey both sons of Raj Kumar Chaubey reached there and started to pull their father towards them. In the meantime, Deo Kumar Chaubey left the hand of Raj Kumar Chaubey and went near his door and fired his gun. In the meantime, Nirmala Kumari daughter of Deo Kumar Chaubey reached there and the cartridge hit her. Thereafter the sons of Raj Kumar Chaubey brought him to their house. Nirmala Kumari had died on the spot. The police had reached at about 10.30 PM. in the night. The license of the gun was in the name of Deo Kumar Chaubey himself. The cattle of Raj Kumar Chaubey had entered in the field of Deo Kumar Chaubey. due to it, they were pulling Raj Kumar Chaubey at their door. Raj Kumar Chaubey had got injury. Therefore, he had also gone to the P.S. with him, Dinesh Chaubey had gone later on. Raj Kumar Chaubey had given statement to the Daroga.

131. PW.6 Virendra Chaubey is another son of the complainant Raj Kumar Chaubey, He has stated that the occurrence took place on 21.02.91. It was Thursday. It was 2 to 2.30 P.M. He was in his village. He heard the voice of his father, who was telling to save him. He went towards his house and saw that Deo Kumar Chaubey, Sumant Kumar Chaubey and Rajendra Kumar Chaubey @ Susu and Shardha Devi were bringing his father towards their house beating him. He tried to save him. The head of his father had injured. There were abrasions on his entire body. Deo Kumar Chaubey became angry and fired from his gun, which hit his own daughter



Nirmala Kumari in place of his father. The daughter died there. He brought his father to his house. Thereafter they went to Nagar Untari Police Station. His father gave statement at the police station, thereafter he sent Hospital where his treatment was done.

132. PW.7 Raj Kumar Chaubey is the complainant/injured himself. He has stated that occurrence took place on 21.02.91 at about 2 to 2.30 P.M. On that day at about 10 to 11 P.M. one of his cattle had an entered in the field of wheat crop of the accused Deo Kumar Chaubey. Deo Kumar Chaubey, with his double barrel gun, went to his field and started to abuse him taking his name. He went there and forbade him from abusing. He told him as to what loss has been caused to him, he may take the same or to carry the cattle to kani house. Both of them return to their house.

133. He had further deposed that on that day at about 2 to 2.30 P.M. accused Deo Kumar Chaubey armed with his double barrel gun and his son Sumant Chaubey and Susu Chaubey @ Rajendra Chaubey armed with lathi and Shardha Devi came to his door and started to abuse him. He came after hearing the abuse and forbade them from abusing. On it, he pointed the gun towards him. In the meantime, one of the sons of Deo Kumar Chaubey beat him from the back side on his head and he fell down. Thereafter, Rajendra Chaubey and Sumant Chaubey caught him and were trying to pull him towards their door. On his hallah, his sons Birendra Chaubey and Vinod Chaubey reached there and they tried to pull him and both the sons of Deo Kumar Chaubey pulling him towards them. Due to it, Deo Kamar Chaubey became angry and from some distance fired the gun towards him with intent to kill him. In the meantime, his daughter



Nirmala Kamari came there and the gun hit her. She fell there. On it, the accused persons started to see the girl leaving him. His sons brought him to his house. He went to P.S. where; he gave his statement at about 03.30 P.M. and told him the entire occurrence. The police issued a memo and sent him to the Referral Hospital for treatment. The police had written his statement but what was written by him, he could not know. Later on, he came to know that police have written the entire statement. His statement was done in the in Hospital. His statement was written at 03.30 P.M. Thereafter he said that his statement was written at 10.30 P.M. also in the Hospital, which was written wrongly. He was arrested by the police u/s 302 I.P.C. and remanded to jail custody. It was a false case by Deo Kumar Chaubey. He was in jail till one and a half month in that case. When he came out from the jail and he got copy of the case, he came to know that case was weakened. Thereafter, he filed complaint case.

134. The learned counsel for the appellants has contended that the prosecution version as recorded in the FIR, subject matter of Criminal Appeal (DB) No.190 of 1994 (R) is also required to be taken into consideration wherein the prosecution version is that the pellet has been fired from the country made pistol while the recovery is of a licensee gun belongs to Deo Kumar Chaudhary, one of the appellants in these appeals, but admittedly the pellet which has been recovered from the body of the deceased has not been fired from the said licensee gun.

135. It has further been contended that learned trial Court has failed to take into consideration that this very occurrence the father of the deceased namely, Deo Kumar Choubey has been convicted by the learned



trial Court, which is apparently a mechanical judgment because for one murder there cannot be two different accused when there is case and counter case as such this case is nothing but abuse of the process of the court.

136. In the backdrop of the aforesaid settled proposition of law and after discussion of testimony of prosecution witnesses as well as contention of the learned counsel for the appellants this Court in these appeals is to consider following issues: -

(i) Whether the material as has come in course of trial is sufficient to attract the ingredients of offence committed under Section 304(1) of the Indian Penal Code against the appellants namely Deo Kumar Chaubey? or

(ii) Whether the appellants are entitled for acquittal in absence of cogent evidences?

137. Since, all the aforesaid issues are inextricably interlinked, therefore, the same are being discussed and decided hereinbelow together.

138. Herein as per the complaint-cum-protest petition, wherein it has been alleged that on 21.02.91 at about 01.30 PM bullock of the complainant (accused/appellant in Criminal Appeal (DB) No.190 of 1994 (R)) had grazed the wheat crops of the accused Deo Kumar Chaubey (appellant in Cr. Appeal (DB) No. 114 of 2013) from his field. Deo Kumar Chaubey @ Onkar Chaubey, armed with Licence gun, went to the wheat field and started to abuse.

139. On the same day at about 02.00 P.M., the accused Deo Kumar Chaubey @ Onkar Chaubey, his son Rajendra Chaubey @ Susu Chaubey,



Sumant Chaubey and his wife Shardha Devi came at the door of the complainant and started to abuse him and when the complainant came out of his house and tried to get understand them, the accused Deo Kumar Chaubey pointed the gun upon him.

140. In the meantime, one of the sons of Deo Kumar Chaubey assaulted him from the back side on his head and he fell down. and When Binod Chaubey, Birendra Chaubey (sons of the complainant) saw him they came there and tried to save their father.

141. In the meantime, a fire took place from the gun of Deo Kumar Chaubey, which hit Nirmala Kumari, the daughter of the accused Deo Kumar Chaubey. The accused persons started to see Nirmala Kumari. In the meantime, both the sons of the complainant brought him to their house.

142. Thus, from the factual aspect it is evident that there is allegation against the Deo Kumar Choubey that he had fired his gun during the said feud which hit Nirmala Kumari, the daughter of the accused Deo Kumar Chaubey and the said Nirmala Kumari, died on the spot instantly.

143. It has further come on the investigation that the gun of the appellant Deo Kumar Chaubey has been sent for the examination to the ballistic expert. Further, PW.8 Krishna Tiwary has proved the report of Sergeant Major Rajdeo Rai which has been marked as Ext.6.

144. From perusal of the report of Sergeant Major, it is evident that he had examined one regular D.B.B.L. gun which was seized in connection with Nagar Untari P.S.Case No.24/91 (Session Trial No. 228 of 1991) and he found that firing was done from both barrels, of the gun in the recent past. He has however, also admitted that only chemical expert could say as to in how many days smell evaporates from the gun. He had



examined the gun on 9.3.91 i.e. after 16 days of the occurrence. However, he has also stated that the gun might have been fired about a week or ten days ago. He has, however, admitted that the gun was not sent to chemical expert for chemical examination.

145. Thus, from the aforesaid factual aspect it is evident that one regular D.B.B.L. gun which was seized in connection with Nagar Untari P.S.Case No.24/91 (Session Trial No. 228 of 1991), but in the said report it has not come that the material i.e. one plastic piece and 44 metallic pieces, which has been found from the brain matter and the cavity, has actually been fired from the said gun, therefore in absence of such finding it cannot be stated that the prosecution has successfully proved the charge under section 304(1) of the IPC against the appellant Deo kumar Chaubey beyond reasonable doubt.

146. At this juncture it needs to refer herein that the Hon'ble Apex Court has categorically held in the case of ***Ravi Sharma v. State (NCT of Delhi)***, (2022) 8 SCC 536 that the report of the ballistic expert is obviously scientific evidence in the nature of an opinion. It is required to use this evidence along with the other substantive piece of evidence available on record, for ready reference the relevant paragraph of the aforesaid judgment is being quoted as under:

“19. The report of the ballistic expert is obviously a scientific evidence in the nature of an opinion. It is required to use this evidence along with the other substantive piece of evidence available. The report is inconclusive with respect to the firearm belonging to the appellant being used for committing the offence.”

147. Further, the Hon'ble Apex Court in the almost similar circumstances which is available herein has observed in the case of ***Sukhwant Singh v. State of Punjab***, (1995) 3 SCC 367 that where injuries



are caused by firearms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent. For ready reference the relevant paragraph of the aforesaid judgment is being quoted as under:

21. There is yet another infirmity in this case. We find that whereas an empty had been recovered by PW 6, ASI Raghbir Singh from the spot and a pistol along with some cartridges were seized from the possession of the appellant at the time of his arrest, yet the prosecution, for reasons best known to it, did not send the recovered empty and the seized pistol to the ballistic expert for examination and expert opinion. Comparison could have provided link evidence between the crime and the accused. This again is an omission on the part of the prosecution for which no explanation has been furnished either in the trial court or before us. It hardly needs to be emphasised that in cases where injuries are caused by firearms, the opinion of the ballistic expert is of a considerable importance where both the firearm and the crime cartridge are recovered during the investigation to connect an accused with the crime. Failure to produce the expert opinion before the trial court in such cases affects the creditworthiness of the prosecution case to a great extent.

148. Now re-adverting to fact of the instant case it is evident that there is no cogent evidence available on record to prove that the appellant namely Deo Kumar Chaubey was the author of the gunshot which killed Nirmala Kumari (daughter of appellant/accused namely Deo Kumar Chaubey). Further, the ballistic report did not support the prosecution case substantially as there is no finding in the said report regarding the pellets (metallic ball) found in the brain matter of deceased, has been fired from the said Gun belonging to the appellant.



149. Thus, even at the cost of repetition, this Court is of considered view that there was no evidence on record suggestive of the inference which was drawn by the learned trial Judge against the present appellant namely Deo Kumar Chaubey (appellant in Criminal Appeal (DB) No. 114 of 2013) that he was author of the shot that hit and killed the deceased Nirmala Kumari, therefore the conviction of the appellant namely Deo Kumar Chaubey under Section 304 (1) is not sustainable herein.

150. So far as the conviction of the appellants (Cr. Appeal (DB) No. 114 of 2013 and Cr. Appeal (DB) No. 483 of 2013) under Section 323 of the IPC is concerned it is evident that the persons of both sides i.e. complainant Raj Kumar Choubey (since dead) and the appellant Deo Kumar Chaubey have sustained simple injuries and both have been medically examined on the requisition of the police and their injuries report have been marked as annexure before the learned trial court.

151. Therefore, on the basis of discussion made hereinabove, this Court is of the considered view that the conviction of the appellants (Cr. Appeal (DB) No. 114 of 2013 and Cr. Appeal (SJ) No. 483 of 2013) by the learned trial Court under Section 323 of the IPC requires no interference.

Conclusion

Cr. Appeal (DB) No. 190 of 1994(R)

152. Thus, on the basis of discussion made hereinabove it is considered view of this Court that the conviction of the appellants of the **Cr. Appeal (DB) No. 190 of 1994 (R)** under sections 452, 341, 307/34, 302/34 of the IPC is not sustainable in the fact and circumstances of the instant case, therefore the appellants of **Cr. Appeal (DB) No. 190 of 1994**



(R) are hereby acquitted from all the charges. Further the appellant, namely, Satyendra Choubey has also been acquitted from the charge under section 27 of the Arms Act.

153. Since, this Court has found that the appellants of **Cr. Appeal (DB) No. 190 of 1994 (R)**, namely, Vinod Kumar Choubey and Virendra Kumar Choubey guilty for the offence under section 321 of the IPC punishable under Section 323 of the IPC, accordingly they have been sentenced for the period already undergone by them.

154. This Court, therefore, is of the view based upon the discussions made hereinabove, that the impugned judgment (assailed in Cr. Appeal (DB) No. 190 of 1994) needs interference, accordingly, the judgment of conviction and the order of sentence both dated 30.11.1994 passed by the learned 4th Addl. Sessions Judge, Palamu, Daltonganj in Sessions Trial No. 228 of 1991 is hereby quashed and set aside.

155. Since from the record it is evident that appellants of **Cr. Appeal (DB) No. 190 of 1994 (R)** are on bail, therefore they are discharged from the liability of their bail bond.

156. In view of the above, **Cr. Appeal (DB) No. 190 of 1994 (R)** is hereby partly allowed.

Cr. Appeal (DB) No. 114 of 2013 and Cr. Appeal (SJ) No. 483 of 2013

157. Thus, on the basis of discussion made hereinabove it is considered view of this Court that the conviction of the appellant namely Deo Kumar Chaubey (appellant in **Cr. Appeal (DB) No. 114 of 2013**) under Section 304 (1) of the IPC is not sustainable in the fact and circumstances of the instant case, therefore the appellant namely Deo



Kumar Chaubey are hereby acquitted from the charge under Section 304

(1) of the IPC.

158. Further this Court is of the considered view that the conviction of the present appellants by the learned trial court under Section 323 of the IPC requires no interference by this Court.

159. Accordingly, the judgment of conviction dated 13.02.2013 passed by the learned Addl. Sessions Judge-1st, Garhwa in S.T. No. 32 of 1999 are modified to the extent as discussed above.

160. With the aforesaid observations/directions, the **Cr. Appeal (DB) No. 114 of 2013** is hereby partly allowed and **Cr. Appeal (SJ) No. 483 of 2013** stands dismissed.

161. Since from the record it is evident that appellant of Cr. Appeal (DB) No. 114 of 2013, namely, Deo Kumar Choubey is on bail, therefore he is discharged from the liability of his bail bond.

162. Pending I.As, if any, stands disposed of.

163. Let lower Court records be transmitted to the Court concerned, forthwith.

(Sujit Narayan Prasad, J.)

I Agree.

(Rajesh Kumar, J.)

(Rajesh Kumar, J.)

Sudhir
Jharkhand High Court,
Dated:08/07/2025
AFR