

A SUNIL KUNDU AND ANR.
 v.
 STATE OF JHARKHAND
 (Criminal Appeal No. 1073 of 2008)

B APRIL 9, 2013

B **[AFTAB ALAM AND RANJANA PRAKASH DESAI, JJ.]**

C *Penal Code, 1860 – s. 302/34 – Murder – Prosecution for – Conviction by Courts below – Held: In view of serious lapses in the case, prosecution case not proved beyond reasonable doubt – Hence, the accused are liable to be acquitted.*

D *Criminal Jurisprudence – Prosecution must stand or fall on its own – If it has not proved its case beyond reasonable doubt, it cannot draw support from weakness of the defence case.*

E *Investigation – Defective investigation – Effect of – Held: Lapses and irregularities in investigation, if they do not go to the root of the matter, if they do not dislodge the substratum of prosecution case, they can be ignored – In the present case, lapses, being serious, cannot be ignored.*

F *Witness – Interested witness – Evidentiary value – Held: Evidence of interested witness, if consistent, can be relied upon and not to be mechanically over-looked – In the present case, the interested witnesses, not being truthful, their presence itself being doubtful, cannot be relied upon.*

G *Criminal Trial – Direct evidence and medical evidence – Inconsistency between – Effect of – Held: Where eye-witness is cogent, medical evidence recedes in background – But when eye-witness account is totally inconsistent with medical evidence, there is reason to believe that improvements are*

made in the Court to bring the prosecution case in conformity with the post-mortem report – In the present case, eye-witness account is inconsistent with medical evidence as regards firearm injury, hence not credible. A

The appellants-accused were prosecuted for murder of one person. The prosecution case is mainly supported by three eye-witnesses namely PWs 4, 5 and 6. Another eye-witness (PW3) turned hostile during trial. Trial court convicted all the accused u/s. 302/34 IPC and sentenced them to life imprisonment. High Court confirmed their conviction. Hence the present appeals. B C

Allowing the appeals, the Court

HELD: 1. In the present case, there is a major lacuna in the prosecution story. It has been alleged that at least two of the accused were carrying pistols; the deceased was fired at and he was injured. This case is not borne out by the medical evidence. No bullets or empty cartridges have been recovered from the scene of offence. In view of this major lacuna of the prosecution story and the inconsistencies in the evidence of the prosecution witnesses, it would not be possible to term them as minor inconsistencies or variations which should be ignored. Besides, all the three important prosecution witnesses namely, PWs 4, 5 and 6 are related to the deceased and, therefore, are interested witnesses. The evidence of an interested witness is not to be mechanically overlooked. If it is consistent, it can be relied upon and conviction can be based on it because, an interested witness is not likely to leave out the real culprit. But in the present case, the interested witnesses are not truthful. Their presence itself is doubtful. According to PW-6, they were present at the scene of offence, but their names are not mentioned in the FIR. The genesis of the prosecution case is suppressed. Moreover, admittedly, there is deep rooted enmity D E F G H

A between the accused and the deceased. Though enmity
is a double edged weapon, but possibility of false
involvement because of deep rooted enmity also cannot
be ruled out. [Para 15] [939-G-H; 940-A-D]

B 2. Use of firearms by the accused is not proved.
There are no firearm injuries on the deceased. When
there is cogent eye-witness account, the medical
evidence recedes in the background. However, when the
eye-witness account is totally inconsistent with the
C medical evidence and there is reason to believe that
improvements are made in the court to bring the
prosecution case in conformity with the post-mortem
notes, it is a cause for concern. In such a situation, the
tainted eye-witness' account cannot be believed keeping
aside the medical evidence. Tainted eye-witness account
D which is glaringly inconsistent with the medical evidence
as regards firearm injury has shaken the credibility of the
prosecution case. [Para 16] [940-E-G; 941-C, G-H]

E *Mani Ram and Ors. vs. State of U.P.* 1994 Supp. (2)
SCC 289; 1994(1) Suppl. SCR 63; *Kapildeo Mandal and*
Ors. vs. State of Bihar (2008) 16 SCC 99; 2007 (12)
SCR 668; *Anjani Chaudhary vs. State of Bihar* (2011) 2 SCC
747; 2010 (13) SCR 227; *Sahebrao Mohan Berad vs. State*
F *of Maharashtra* (2011) 4 SCC 249; *Sk. Yusuf vs. State of*
West Bengal (2011) 11 SCC 754; 2011 (8) SCR 83 – relied
on.

G 3. Another very important lacuna in the prosecution
case is that sanha entry made by the police on the
information of PW6, was purposely suppressed by the
prosecution, as it did not contain the names of the
accused. This is evident from the fact that when the trial
court directed the prosecution to produce the relevant
Sanha Entries, the officer-in-charge of the Police Station
sent a report along with the register containing sanha
H entries stating that the original sanha entries were not

available. This Court found that the pages containing the relevant Sanha Entries were torn and missing. When confronted with this, the investigating officer, PW-7 at one stage denied this allegation. Later on, he stated that he does not remember whether any sanha entry was made. When it was suggested to him that in the sanha entry, no names of the accused were mentioned and it was removed from the record to falsely implicate the accused, he said that it is a matter for investigation. This casts a shadow of doubt on the credibility of the prosecution story. [Para 17] [842-A-E, F-H]

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4. It is not correct to say that adverse inference needs to be drawn against the accused as they were absconding. Absconding by itself does not prove the guilt of a person. A person may run away due to fear of false implication or arrest. When the prosecution is not able to prove its case beyond reasonable doubt, it cannot take advantage of the fact that the accused have not been able to probablise their defence. The prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt. [Para 18] [943-A-B, C-D]

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5.1. The investigation of the present case was defective. It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. The lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root

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A of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored. [Para 19] [943-D-G]

B 5.2. In the present case, the lapses in investigation are very serious. PW-5 is a pancha to the seizure panchnama under which weapons and other articles were seized from the scene of offence and also to the inquest panchnama. Independent panchas have not been examined. The investigating officer has stated in his evidence that the seized articles were not sent to the court along with the charge-sheet. They were kept in the Malkhana of the police station. He has admitted that the seized articles were not sent to the Forensic Science Laboratory. No explanation is offered by him about the missing sanha entries. His evidence on that aspect is evasive. Clothes of the deceased were not sent to the Forensic Science Laboratory. The investigating officer admitted that no seizure list of the clothes of the deceased was made. Blood group of the deceased was not ascertained. No link is established between the blood found on the seized articles and the blood of the deceased. It is difficult to make allowance for such gross lapses. Besides, the evidence of eye-witnesses does not inspire confidence. Undoubtedly, a grave suspicion is created about the involvement of the accused in the offence of murder. Suspicion, however strong, cannot take the place of proof. In such a case, benefit of doubt must go to the accused. [Para 19] [943-G-H; 944-A-D]

Case Law Reference:

G	1994 (1) Suppl. SCR 63	relied on	Para 7
	2007 (12) SCR 668	relied on	Para 7
	2010 (13) SCR 227	relied on	Para 7
H	(2011) 4 SCC 249	relied on	Para 7

2011 (8) SCR 83 relied on **Para 18** A

**CRIMINAL APPELLATE JURISDICTION : Criminal Appeal
No. 1073 of 2008.**

From the Judgment & Order dated 20.08.2007 of the High
Court of Jharkhand, Ranchi in Criminal Appeal No. 1762 of
2004. B

WITH

Crl. Appeal No. 1419 of 2008, 1512 of 2009 C

**S.B. Sanyal, Nagendra Rai, Subhro Sanyal, Kumar
Rajeev, Shantanu Sagar, Smarhar Singh, Gopi Raman, Vishnu
Sharma for the Appellants.**

**Ratan Kumar Choudhuri, Amrendra Kr. Choubey,
Krishnanand Pandey for the Respondent.** D

The Judgment of the Court was delivered by

(SMT.) RANJANA PRAKASH DESAI, J. 1. The
appellants Sunil Kundu, Bablu Kundu, Nageshwar Sah and Hira
Lal Yadav ('A1-Sunil', 'A2-Bablu', 'A3-Nageshwar' and 'A4-
Hiralal', for convenience) were tried for offences punishable
under Section 302 read with Section 34 and Section 201 read
with Section 34 of the Indian Penal Code (for short, 'the IPC')
and Section 27 of the Arms Act, 1959 (for short 'the Arms
Act'). The Sessions Court by its judgment and order dated 15-
17/09/2004 acquitted them of charges under Section 201 read
with Section 34 of the IPC and Section 27 of the Arms Act. They
were, however, convicted for offence punishable under Section
302 read with Section 34 of the IPC and sentenced to life
imprisonment and to pay fine of Rs.5,000/- each. They carried
appeals to the High Court of Jharkhand, Ranchi. The High Court
confirmed their conviction and sentence. Hence, these appeals
by special leave. E
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A 2. This case is a glaring example of how cause of justice can be defeated by inefficient, lackadaisical and incompetent investigating agency. As we go ahead, the reasons for these observations would be clear.

B 3. At the trial, the case of the prosecution, in short, was that on 29/01/1996 at about 5.00 p.m. deceased Suresh Yadav (for convenience, "the deceased") reached near the shop of Bijan Kaur situated in Refugee Colony, Jamtara, Mihijam Pitch Road by a motorcycle driven by him. PW-3 Basudeo Mallick was sitting in the middle of the seat and PW-6 Narendra Yadav was sitting behind him. When they reached near the shop of C Bijan Kaur, they saw A1-Sunil, A2-Bablu, A3-Nageshwar and A4-Hiralal standing there. The accused started pelting stones on them, resulting in imbalance of the motorcycle. The motorcycle fell down. All the accused attacked the deceased D with knife and bhujali. They resorted to blank firing to scare the people. The deceased started running towards the southern side of the railway line but he collapsed in the field. PW-3 Basudeo Mallick was assaulted with an iron rod. PW-6 Narendra Yadav, who is an advocate by profession, somehow E managed to escape. He ran to Mihijam Police Station and informed about the incident. Along with the police, he came to the scene of offence. They shifted the deceased to the Chittaranjan Railway Hospital. At the hospital, PW-6 Narendra F Yadav's statement was recorded by the investigating officer - PW-7 Girish Prasad Mishra. It was treated as FIR. On the basis of the FIR, investigation was conducted and upon completion of investigation the accused came to be charged as aforesaid.

G 4. In support of its case, the prosecution examined nine witnesses. The prosecution story rests on the evidence of PW-4 Shankar Yadav, PW-5 Jaldhari Yadav and PW-6 Narendra H Yadav. The accused pleaded not guilty to the charge. They contended that they were falsely involved in this case out of previous enmity. They pleaded defence of alibi and examined 21 witnesses in support of their case. Their plea of alibi was rejected and they were convicted as aforesaid.

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5. We will first begin with the FIR lodged by PW-6 Narendra Yadav because it is not consistent with the prosecution case which was developed in the court. According to PW-6 Narendra Yadav, on 29/1/1996, at about 5.00 p.m., the deceased reached near the shop of Bijan Kaur situated in Refugee Colony, Jamtara, Mihijam Pitch Road by a motorcycle driven by him. PW-3 Basudeo was sitting in the middle of the seat and he was sitting behind PW-3 Basudeo. When they reached near the shop of Bijan Kaur, they saw A1-Sunil, A2-Bablu, A3-Nageshwar and A4-Hiralal standing there. The accused started pelting stones on them, resulting in imbalance of the motorcycle. A2-Bablu gave a blow with rod and the motorcycle fell down. Thereafter, A1-Sunil fired at the deceased and the deceased got injured. A3-Nageshwar stabbed the deceased with knife all over his body. A4-Hiralal fired at the deceased with a pistol and injured him. They also assaulted PW-3 Basudeo Mallik with an iron rod. Thereafter, he ran to Mihijam Police Station and brought the police to the scene of offence. They shifted the deceased to the Anupam Seva Sadan. On the doctor's advise, the deceased was shifted to the Chittaranjan Railway Hospital where he was declared dead. The incident had occurred due to previous enmity between the deceased on the one hand and A3-Nageshwar and A4-Hiralal on the other hand. He did not refer to the presence of PW-4 Shankar Yadav and PW-5 Jaldhari Yadav in the FIR.

6. We have heard Mr. Sanyal, senior advocate appearing for A1-Sunil and A2-Bablu and, Mr. Nagendra Rai, senior advocate appearing for A3-Nageshwar and A4-Hiralal. So far as the genesis of the case and the alleged unreliability of the evidence of PW-4 Shankar Yadav and PW-5 Jaldhari Yadav is concerned, Mr. Sanyal stated that he was adopting the submissions of Mr. Nagendra Rai. We have also heard Mr. Ratan Kumar Choudhari learned counsel appearing for the State of Jharkhand. We have perused their written submissions.

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A 7. Mr. Sanyal, senior advocate submitted that A1-Sunil is said to have fired at the deceased with a pistol. He is, however, acquitted of offence under Section 27 of the Arms Act. Besides, PW-1 Dr. Chakravorty stated in his evidence that there was no firearm injury on the deceased. Counsel
 B submitted that the State's submission that the firearm was used only to frighten people is not borne out by the evidence of witnesses. Besides, no bullets or empty cartridges were seized from the scene of offence. So far as A2-Bablu is concerned, counsel pointed out that while PW-6 Narendra Yadav stated in
 C the FIR that A2-Bablu hit the deceased with iron rod, in the court he stated that he was holding knife. This was done to bring his evidence in conformity with postmortem notes. PW-1 Dr. Chakravorty stated that he did not find any iron rod injury on the deceased. The prosecution story is, therefore, untrue. Relying on *Mani Ram & Ors. v. State of U.P.*¹, counsel
 D submitted that if the oral evidence is inconsistent with the medical evidence, it is a fundamental defect which discredits the prosecution case. Drawing our attention to *Kapildeo Mandal & Ors. v. State of Bihar*², counsel submitted that the accused are entitled to benefit of doubt where oral evidence is
 E inconsistent with medical evidence. He further submitted that when medical evidence does not support the presence of the accused, his presence is ruled out. (See *Anjani Chaudhary v. State of Bihar*³). Counsel also relied on *Sahebrao Mohan Berad v. State of Maharashtra*⁴.

F 8. Mr. Nagendra Rai, learned senior advocate submitted that the evidence of the prosecution witnesses is inconsistent with and belied by the medical evidence. He pointed out that
 G PW-5 Jaldhari Yadav deposed that he and PW-6 Narendra Yadav, the first informant took the dead body to the hospital and

1. 1994 Supp. (2) SCC 289.

2. (2008) 16 SCC 99.

3. (2011) 2 SCC 747.

H 4. (2011) 4 SCC 249.

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gave statement leading to registration of the FIR. This shows that it was recorded at the Chittaranjan Railway Hospital. Earlier statement made before the police has been suppressed. In the FIR and also in the court, PW-6 Narendra Yadav alleged that two persons had fired at the deceased, but no firearm injury was found on the deceased. There is a variance between the FIR and the evidence of PW-6 Narendra Yadav. PW-4 Shankar Yadav and PW-5 Jaldhari Yadav have improved their versions in the court. These two witnesses have stated that when they went to the hospital, PW-6 Narendra Yadav was present. But, their names are not mentioned in the FIR. According to the defence, S.D.E. No.473 dated 29/1/1996 was recorded at 5.55 p.m. when PW-6 Narendra Yadav had gone to the police station to inform the police about the occurrence, but no names were disclosed and hence, no names are mentioned therein. Sanha Entry No.473 is missing. Thus the earlier version recorded by the police has been suppressed by the prosecution. Evidence of PW-4 Shankar Yadav is of no use to the prosecution as he clearly stated that the accused were not known to him and he had heard about them from others. Counsel submitted that the place of occurrence is a busy place. No independent witness has been examined by the prosecution. Admittedly, there is enmity between the two sides. Medical evidence does not support the prosecution case. The prosecution has, therefore, failed to prove its case beyond reasonable doubt. Counsel submitted that the accused must, therefore, be acquitted.

9. Mr. Ratan Kumar Choudhary, learned counsel for the State, on the other hand, submitted that so far as the manner in which the incident took place is concerned, there is no variation in the evidence of PW-4 Shankar Yadav, PW-5 Jaldhari Yadav and PW-6 Narendra Yadav. There may be minor variations which do not affect the substratum of the prosecution case. Merely because the names of PW-4 Shankar Yadav and PW-5 Jaldhari Yadav are not mentioned in the FIR, it cannot be said that they were not present. It is true that PW-4 Shankar Yadav stated that he did not know the names of the accused,

- A but he stated that he got to know the names at the scene of offence and he identified the accused in the court. Counsel pointed out that the investigating officer stated in his evidence that due to terror created by the accused, no one came forward to give statement. The accused have criminal history and,
- B therefore, non-examination of independent witnesses does not affect the prosecution case. Counsel submitted that the medical evidence supports the prosecution case. Counsel submitted that the story about Sanah Entry No.473 is concocted to create doubt about the prosecution story. There is no such sanha entry.
- C Counsel submitted that conviction of the accused is perfectly legal and justified. The appeals, therefore, deserve to be dismissed.

10. Before going to the evidence of eye-witnesses, we shall advert to the post-mortem notes because while it is alleged that
- D the accused used firearms, the post-mortem notes do not show that the deceased had received any firearm injury. As per the post-mortem notes, there were 24 incised wounds and multiple abrasions of varying sizes over both knee joints of the dead body. Cause of death is stated to be "*due to profuse*
- E *heamorrhage and shock as a result of ante mortem injury Nos.(i) and (xv) caused by sharp cutting weapon*". They could be caused by a bhujali or chhura (knife). Injury Nos.(1) and (xv) are incised wounds. The post-mortem notes further state that injury No.(xxiii) can be caused by iron rod. Injury No.(xxiii) is
- F described as "*multiple abrasions of varying sizes over both knee joints*". PW-1 Dr. Chakraborty who conducted the post-mortem, reiterated the findings recorded in the post-mortem notes and stated that there was no firearm injury on the deceased. He denied that multiple abrasions found on both the
- G knee joints could be caused by a fall.

11. The main plank of the argument of learned counsel for the accused is that since there is no firearm injury on the deceased, the entire prosecution story must fall to the ground.
- H Therefore, we must now turn to the evidence of PW-6 Narendra

Yadav. PW-6 Narendra Yadav is the first informant. His presence at the scene of offence cannot be doubted because all the witnesses including PW-3 Basudeo Mallik who turned hostile stated that he was sitting on the motorcycle which was being driven by the deceased. Besides, during this incident, he received injuries due to fall of the motorcycle. PW-2 Dr. Mishra stated in his evidence that on the date of incident i.e. on 29/1/1996 he examined PW-6 Narendra Yadav. He described the nature of injuries suffered by this witness and produced injury certificate which is at Ex-21. His evidence is consistent with the evidence of other witnesses only to the extent that when the motorcycle reached near the shop of Bijan Kaur, all the accused had assembled there; they started pelting stones and A3-Nageshwar hit with a rod and that the motorcycle fell down. After this, his evidence is inconsistent with the evidence of other witnesses. He stated that the deceased ran to the railway line towards the south. A1-Sunil fired at him with a pistol. A2-Bablu who was armed with a chhura inflicted injuries at many places on the body of the deceased. A3-Nageshwar beat the deceased with a rod. A4-Hiralal fired at the deceased with a pistol. PW3-Basudeo Mallik was beaten by A3-Nageshwar with rod. Then, he went to the police station and gave intimation regarding the incident. He brought the police to the scene of offence. The deceased was lying in unconscious condition. They shifted the deceased to Anupam Seva Sadan for treatment. On the advice of the doctor, the deceased was taken to the Chittaranjan Railway Hospital where he was declared dead. He stated that at the Chittaranajan Railway Hospital, his statement was recorded. He made a mistake in identifying of A2-Bablu in the court. The case of this witness that A1-Sunil and A4-Hiralal had pistols in their hands and they fired at the deceased which resulted in the firearm injury being caused to him is belied by the post-mortem notes. Admittedly, the postmortem notes do not indicate that the deceased had suffered any firearm injury. It is pertinent to note that no bullets or empty cartridges were recovered from the scene of offence. Therefore, this witness has obviously not

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A come out with the truth. It must also be borne in mind that he
ran to the police station after the deceased fell down and the
alleged cutting of throat of the deceased by the accused is not
witnessed by him. He has also not witnessed the alleged blank
firing resorted to by the accused while running away. It would
B not be out of place to mention here that he admitted in his cross-
examination that the deceased was living in the house of his
maternal uncle and he is his relation. He stated that he was also
staying with the deceased. He stated that after the police came
to the scene of offence, they seized the articles lying on the
C scene of offence whereas PW-5 Jaldhari Yadav stated that the
seizure panchanama was prepared in the evening at 8.00 p.m.
after the police came back to the scene of offence from the
hospital. We find it difficult to place reliance on this witness.

12. Statement of PW-3 Basudeo Mallick, who was also
D sitting on the motorcycle driven by the deceased was recorded
by PW-8 Satish Chandra Singh, Judicial Magistrate, under
Section 164 of the Code of Criminal Procedure. However, he
turned hostile. The prosecution could draw support from his
evidence only to the extent that he, PW-6 Narendra Yadav and
E the deceased reached Refugee Colony at 5.30 p.m. on the date
of the incident; that he was hit with a hard object on his head
and he fell down. PW-2 Dr. S.K. Mishra, who had examined
him on 29/1/1996 has described injuries suffered by him and
produced injury report (Ex-2). Thus, his presence and the fact
F that some incident took place on that day at Refugee Colony
are established. But, his evidence is of no further use to the
prosecution because on the major aspect of the prosecution
story, he has not supported it.

13. PW-4 Shankar Yadav is admittedly related to the
G deceased. It must be noted that this witness is a chance
witness. He is the resident of Mouza Kush Bediya. He stated
that he was coming from Kanboe to his house. He admitted
that from the place of incident, his house is about one mile
away. He really had no reason to be there. He has not explained
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why he was at the scene of offence on that day. He stated that he saw the accused standing near a grill making shop. The deceased came there. The accused started throwing stones on the deceased's motorcycle. He was hit by rod. He lost grip of the handle. The motorcycle fell down. The deceased started running away. The accused chased him and caught him. A1-Sunil fired. Because of the firing, people who had assembled there started running away. All the four accused started assaulting the deceased with bhujali and knife. When he fell down, A4-Hiralal Yadav cut his throat. According to this witness, PW-5 Jaldhari Yadav was present. After that, all the accused fled away. It is pertinent to note that he admitted that he did not know the names of the accused and he got to know the names of the accused from the people who had assembled there. He admitted that the deceased and his brother were accused in some other sessions case and the accused are witnesses in a criminal case where his brother is involved. Faced with the case set out in the FIR that the deceased was fired at by the accused and was injured, which is contrary to the post-mortem notes, this witness has tried to bring his evidence in conformity with the post-mortem notes. He stated that A1-Sunil fired but avoided to say that he fired at the deceased. He suggested that firing was merely done to scare people. This attempt has proved to be unsuccessful because the police have not recovered a single bullet or empty cartridge from the scene of offence.

14. PW-5 Jaldhari Yadav is also related to the deceased. He is a chance witness. According to him, on the date of incident, he had gone to the station to buy cattle feed. He stated that the place of occurrence would be less than a mile from the station. Before he could enter the shop, the members of the deceased's family came there and asked him to search for the deceased, but they did not tell him how far he should go to look for him. According to him, he did not ask them as to where the deceased had gone or at what time he used to return home. This story does not stand to reason. It is not understood how

A the members of the deceased's family would know that this witness would be in the market at the relevant time so that they could contact him and ask him to search for the deceased. It is not understood how without any particulars being furnished to him, he embarked on the task and went to the scene of

B offence, which was less than a mile away from the station. In any case, his evidence does not inspire confidence. He stated that on the date of incident when he was at Bijan Kaur's shop situated on Pitch Road, he saw motorcycle of the deceased. PW-3 Basudeo Mallik was lying on the ground. A1-Sunil, A2-

C Bablu, A3-Nageshwar and A4-Hiralal were beating the deceased with rod, bhujali and knife. PW-4 Shankar Yadav came there and started shouting '*Maar Diya; Maar Diya*'. About 20 to 25 stab injuries were inflicted on the deceased. According to him, A1-Sunil and A2-Bablu fired in the air.

D People got scared and they ran helter-skelter. He further stated that A3-Nageshwar and A4-Hiralal cut the throat of the deceased and all of them fled away. According to him, treating the deceased as dead, while running away, the accused resorted to blank firing. Just like PW-4 Shankar Yadav, this

E witness has also tried to bring his evidence in conformity with the post-mortem notes which do not show any firearm injury. It bears repetition to state that not a single bullet or empty cartridge was recovered from the scene of offence. The use of firearm by the accused is not supported by any evidence. He claims to have lifted the dead body, but he stated that his

F clothes were not smeared with blood. The police have not seized his clothes, which creates suspicion about the prosecution case. Moreover, from his evidence, it appears that PW-4 Shankar Yadav came after the deceased was assaulted, whereas PW-4 Shankar Yadav claims that he was there right

G from the beginning.

15. Having dealt with the evidence of these three important witnesses, we would like to focuss on the inconsistencies in their evidence. PW-4 Shankar Yadav stated that A1-Sunil fired and due to the firing, people got scared. PW-5 Jaldhari Yadav

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stated that A1-Sunil and A2-Bablu fired in air to scare the people. He further stated that treating the deceased as dead, they resorted to blank firing. PW-6 Narendra Yadav stated that A1-Sunil and A4-Hiralal fired and injured the deceased. Thus, there are three different versions given by three witnesses. According to PW-4 Shankar Yadav, only A1 Sunil was carrying the pistol. According to PW-5 Jaldhari Yadav, A1-Sunil and A2-Bablu had pistols and they fired in the air to scare the people. PW-6 Narendra Yadav goes a step further and says that A1-Sunil and A4-Hiralal fired and injured the deceased. Neither PW-4 Shankar Yadav nor PW-5 Jaldhari Yadav stated that A4-Hiralal had a pistol in his hand. There is no firearm injury on the deceased. PW-4 Shankar Yadav stated that A4-Hiralal cut the throat of the deceased whereas PW-5 Jaldhari Yadav stated that A3-Nageshwar and A4-Hiralal cut the throat of the deceased. According to PW-6 Narendra Yadav, A3-Nageshwar had a rod in his hand and he had attacked the deceased with the rod. He had also dealt a rod blow on the motorcycle. This is not consistent with PW-5 Jaldhari Yadav's case that A3-Nageshwar cut the throat of the deceased. This would mean that A3-Nageshwar was carrying a bhujali or knife. PW-6 Narendra Yadav stated that A2-Bablu gave several knife blows on the deceased but PW-5 Jaldhari Yadav stated that he fired in the air meaning thereby he had a pistol in his hand. It was argued by Mr. Ratan Kumar Choudhary, learned counsel for the State that different persons react differently to a particular situation and as such there may be minor variations in their statements. He submitted that minor contradictions and inconsistencies which do not go to the root of the prosecution version need to be ignored. In this case, it is not possible for us to adopt such an approach because there is a major lacuna in the prosecution story. It has been alleged that at least two of the accused were carrying pistols; the deceased was fired at and he was injured. This case is not borne out by the medical evidence. At the cost of repetition, we must state that no bullets or empty cartridges have been recovered from the scene of offence. If we keep this major lacuna of the prosecution story

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A in mind and consider the abovementioned inconsistencies in
the evidence of the prosecution witnesses, it would not be
possible to term them as minor inconsistencies or variations
which should be ignored. Besides, all the three important
prosecution witnesses are related to the deceased and,
B therefore, are interested witnesses. We are aware that the
evidence of an interested witness is not to be mechanically
overlooked. If it is consistent, it can be relied upon and
conviction can be based on it because, an interested witness
is not likely to leave out the real culprit. But in this case, the
C interested witnesses are not truthful. Their presence itself is
doubtful. According to PW-6 Narendra Yadav, they were
present at the scene of offence, but their names are not
mentioned in the FIR. The genesis of the prosecution case is
suppressed. Moreover, admittedly, there is deep rooted enmity
D between the accused and the deceased to which we have
made reference earlier. We are mindful of the fact that enmity
is a double edged weapon but possibility of false involvement
because of deep rooted enmity also cannot be ruled out.

16. As we have already stated the major lacuna in this case
E is that use of firearms by the accused is not proved. There are
no firearm injuries on the deceased. It is true that when there
is cogent eye-witness account, the medical evidence recedes
in the background. However, when the eye-witness account is
totally inconsistent with the medical evidence and there is
F reason to believe that improvements are made in the court to
bring the prosecution case in conformity with the post-mortem
notes, it is a cause for concern. In such a situation, it is difficult
to say that one must believe the tainted eye-witness' account
and keep the medical evidence aside. In this connection, we
G may usefully refer to the judgment in *Sahebrao* where this Court
observed that when the doctor's experience has not been
questioned, he is the only competent person to opine on the
nature of injuries and cause of death. We may also refer to the
judgment of this Court in *Anjani Chaudhary*, where the medical
H evidence did not support the appellant's presence as there was

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no injury on the deceased which could be caused by a lathi and the appellant was stated to be carrying a lathi. Since the eye-witnesses therein were not found to be reliable, this Court acquitted the appellant therein. In *Kapildeo Mandal*, all the eye-witnesses had categorically stated that the deceased was injured by the use of firearm, whereas the medical evidence specifically indicated that no firearm injury was found on the deceased. This Court held that while appreciating variance between medical evidence and ocular evidence, oral evidence of eye-witnesses has to get priority as medical evidence is basically opinionative. But, when the evidence of the eye-witnesses is totally inconsistent with the evidence given by the medical experts then evidence is appreciated in a different perspective by the courts. It was observed that when medical evidence specifically rules out the injury claimed to have been inflicted as per the eye-witnesses' version, then the court can draw adverse inference that the prosecution version is not trustworthy. This judgment is clearly attracted to the present case. In *Mani Ram*, PW-2 the only sole eye-witness therein stated that the two appellants therein chased deceased-Basdeo and both of them fired at him from the kattas while he was running. However, according to the postmortem report, injury No.7, which was caused by a firearm, was situated on the right shoulder and front of upper arm and outer part. There was no injury either on the back or anywhere behind the shoulder. Since the prosecution case was that the deceased was fired at while he was running, firearm injuries should have been there on his back. In view of this discrepancy, this Court observed that where the direct evidence is not supported by the expert evidence then the evidence is wanting in the most material part of the prosecution case and, therefore, it would be difficult to convict the accused on the basis of such evidence. We feel that the accused can draw support from this case also. Tainted eye-witness account which is glaringly inconsistent with the medical evidence as regards firearm injury has shaken the credibility of the prosecution case.

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A 17. There is yet another very important and distressing
lacuna in the prosecution case. Learned counsel for the
accused submitted that PW-6 Narendra Yadav went to the
police station and informed the police about the incident in
question. A sanha entry was made. However, PW-6 Narendra
B Yadav did not name the accused. It was submitted that this
sanha entry was purposely suppressed by the prosecution as
it did not contain the names of the accused. It was suggested
that the FIR of PW-6 Narendra Yadav is a doctored document
and the names of the accused were subsequently added at the
C hospital. In order to examine whether there is any substance
in this submission, we carefully examined the record. We found
that after recording the above submissions of the defence
counsel, the trial court by its order dated 23/10/2003 directed
the prosecution to produce Sanha Entry Nos.465 to 476 dated
D 29/1/1996 i.e. the date of incident. The officer-in-charge of
Mihijam Police Station sent a report dated 4/11/2003 along
with the register containing sanha entries stating that the original
sanha entries of 29/1/1996 are not available. The said report
is at Ex-O. Along with the said letter, the relevant register is
E produced. In order to find out whether really the sanha entries
dated 29/1/1993 are missing, we went through the said register
carefully and we found that the pages containing Sanha Entry
Nos.465 to 476 dated 29/1/1996 are torn and missing. This
appears to support the case of the accused that the sanha
entries dated 29/1/1996 were purposely not produced because
F they contained information of the occurrence communicated by
PW-6 Narendra Yadav first in point of time and the names of
the accused were not mentioned therein. When confronted with
this, the investigating officer, PW-7 Girish Mishra at one stage
denied this allegation. Later on, he stated that he does not
G remember whether any sanha entry was made. When it was
suggested to him that in the sanha entry, no names of the
accused were mentioned and it was removed from the record
to falsely implicate the accused, he said that it is a matter for
investigation. This casts a shadow of doubt on the credibility
H of the prosecution story.

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18. It was argued that the accused were absconding and, therefore, adverse inference needs to be drawn against them. It is well settled that absconding by itself does not prove the guilt of a person. A person may run away due to fear of false implication or arrest. (See *Sk. Yusuf v. State of West Bengal*^F). It is also true that the plea of alibi taken by the accused has failed. The defence witnesses examined by them have been disbelieved. It was urged that adverse inference should be drawn from this. We reject this submission. When the prosecution is not able to prove its case beyond reasonable doubt it cannot take advantage of the fact that the accused have not been able to probablise their defence. It is well settled that the prosecution must stand or fall on its own feet. It cannot draw support from the weakness of the case of the accused, if it has not proved its case beyond reasonable doubt.

19. We began by commenting on the unhappy conduct of the investigating agency. We conclude by reaffirming our view. We are distressed at the way in which the investigation of this case was carried out. It is true that acquitting the accused merely on the ground of lapses or irregularities in the investigation of a case would amount to putting premium on the deprecable conduct of an incompetent investigating agency at the cost of the victims which may lead to encouraging perpetrators of crimes. This Court has laid down that the lapses or irregularities in the investigation could be ignored subject to a rider. They can be ignored only if despite their existence, the evidence on record bears out the case of the prosecution and the evidence is of sterling quality. If the lapses or irregularities do not go to the root of the matter, if they do not dislodge the substratum of the prosecution case, they can be ignored. In this case, the lapses are very serious. PW-5 Jaldhari Yadav is a pancha to the seizure panchnama under which weapons and other articles were seized from the scene of offence and also to the inquest panchnama. Independent panchas have not been

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A examined. The investigating officer has stated in his evidence
that the seized articles were not sent to the court along with the
charge-sheet. They were kept in the Malkhana of the police
station. He has admitted that the seized articles were not sent
B by him about the missing sanha entries. His evidence on that
aspect is evasive. Clothes of the deceased were not sent to
the Forensic Science Laboratory. The investigating officer
admitted that no seizure list of the clothes of the deceased was
made. Blood group of the deceased was not ascertained. No
C link is established between the blood found on the seized
articles and the blood of the deceased. It is difficult to make
allowance for such gross lapses. Besides, the evidence of eye-
witnesses does not inspire confidence. Undoubtedly, a grave
D suspicion is created about the involvement of the accused in
the offence of murder. It is well settled that suspicion, however
strong, cannot take the place of proof. In such a case, benefit
of doubt must go to the accused. In the circumstances, we
quash and set aside the impugned judgment and order. The
appellants-accused are in jail. We direct that the appellants –
E A1-Sunil Kundu, A2-Bablu Kundu, A3-Nageshwar Prasad Sah
and A4-Hira Lal Yadav be released forthwith unless otherwise
required in any other case.

20. The appeals are disposed of in the aforestated terms.

K.K.T.

Appeals allowed.