

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.476 of 1992

Arising Out of P.S.Case No. -5(2) Year- 1980 Thana Pakribrawan District- NAWADA

1. Rameshwar Sao son of Munshi Sao,
2. Sarvan Kumar son of Rameshwar Sao,
3. Sadhu Yadav son of Lakshman Yadav,
4. Mangar Yadav son of Gursahai Yadav,
5. Parmeshwar Yadav son of Etwari Yadav,
6. Rangu Yadav son of Dila Yadav,
7. Dhaneshwar Yadav son of Mahabir Yadav,
8. Nago Yadav son of Mangar Yadav,
9. Lakhan Yadav son of Chhotan Yadav,
10. Chhotan Yadav son of Etwari Yadav,
11. Arjun Yadav son of Parmeshwar Yadav,
12. Baldeo Yadav son of Mangar Yadav,
13. Chhatardhari Yadav son of Dila Yadav, all resident of village-Barhki Gulni, Police Station-Dhamaul &
14. Ganauri Yadav son of Prayag Yadav, resident of village-Sambey, police station-Warsaliganj, all district-Nawadah.
- Appellants

Versus

The State of Bihar

.... Respondent

with

Criminal Appeal (DB) No. 33 of 1993

Arising Out of P.S.Case No. -5(2) Year- 1980 Thana Pakribrawan District- NAWADA

Ganauri Yadav son of Gursahai Yadav, resident of village-Gulni, Police Station-Dhamaul, District-Nawadah.

.... Appellant

Versus

The State of Bihar

.... Respondent

Appearance :
(In CR. APP (DB) No. 476 of 1992)
For the Appellants : Smt. Nutan Sahay, Amicus Curiae.

For the Respondent : Shri Dilip Kumar Sinha, APP.

(In CR. APP (DB) No. 33 of 1993)
For the Appellant : Smt. Nutan Sahay, Amicus Curiae.

For the Respondent : Sushri Shashi Bala Verma, APP.

CORAM: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA
and
HONOURABLE SHRI JUSTICE GOPAL PRASAD
ORAL JUDGMENT

(Per: HONOURABLE SHRI JUSTICE DHARNIDHAR JHA)
Date: 13-08-2015

The two appeals arise out of judgment of conviction dated 07.12.1992 passed by the learned 3rd Additional Sessions Judge, Nawadah in Sessions Trial No.253 of 1984 by which the appellants except the appellant Ganauri Yadav son of Gursahai Yadav was held guilty of committing offence under Section 302/149 of the Indian Penal Code while the appellants Rameshwar Sao and Chhatardhari Yadav were convicted of the offence under Section 302 read with 109 of the Indian Penal Code. Appellant Ganauri Yadav son of Gursahai Yadav was held guilty of committing offence under Section 302 IPC and Sections 3 and 5 of the Explosive Substances Act. The appellants were heard on sentences and while appellant Ganauri Yadav son of Gursahai Yadav was directed to suffer rigorous imprisonment for life under Section 302 of the Indian Penal Code and rigorous imprisonment for ten years for committing offence under Section 3 of the Explosive Substances Act, he was not directed to suffer any sentence Section 5 of the Explosive Substances Act. The appellants Chhatardhari Yadav and Rameshwar Sao on account of being convicted under Sections 302/149 Indian Penal Code as also under Section 302/149 Indian Penal Code were each directed to undergo rigorous imprisonment for life on each of the two counts on their individual convictions. The rest of the appellants who had been convicted only under Sections 302/149 Indian Penal Code were to

suffer as per the order of sentence passed by learned trial Judge rigorous imprisonment for life. The sentences passed against appellants Ganauri Yadav son of Gursahai Yadav, Rameshwar Sao and Chhatardhari Yadav were directed to run concurrently.

2. We have heard the two appeals together and we are disposing them of by this common judgment.

3. P.W.6 Jageshwar Yadav came to the Pakribarawan police station in the district of Nawadah with other villagers carrying the dead body of deceased Balchand Yadav and gave his statement that his uncle Balchand Yadav had purchased about 16 *dhurs* of homestead stand from one Ahmad Mian of his village some four years back for building a house thereon. The same piece of land was purchased also by the appellant Rameshwar Sao from a person of Manjhi community and on that account arose a dispute between deceased Balchand Yadav and the appellant Rameshwar Sao who wanted to take possession of the land which had been purchased by the deceased as well. The deceased had, though, succeeded in erecting a boundary-wall over the land purchased by him and thus had perfected his possession over it.

4. On account of the animosity which had arisen between the deceased Balchand Yadav on the one hand and the appellant Rameshwar Sao on the other, it was alleged that the said appellant along with the remaining appellants came to the house of the



deceased Balchand Yadav at about 11 P.M. on 13.02.1980, when the deceased Balchand Yadav, his son P.W.5 Buniyadi Yadav and the informant P.W.6 Jageshwar Yadav were sleeping there. A lantern was burning there and the informant had identified the accused persons in the light thereof. No sooner the appellants had arrived at the *Darwaza* of the deceased Balchand Yadav, than appellants Chhatardhari Yadav, Rameshwar Sao and Ganauri Yadav who happened to be the brother-in-law of appellant Chhatardhari Yadav and who was the resident of village-*Sambey* caught the deceased Balchand Yadav and dragged him down from the *Darwaza* into the *gali* (lane) situated in front of the *Darwaza*. The informant stated that he and others started raising alarm. The deceased Balchand Yadav snatched the *garasa* carried by appellant Ganauri Yadav of village-*Sambey* and that prompted the appellants Rameshwar Sao and Chhatardhari Yadav to remonstrate his companions to kill him by detonating a bomb. On this remonstration, it is alleged, the appellant Ganauri Yadav son of Gursahai Yadav picked out a bomb from the *Jhola* he was carrying and lobbed it on to the deceased Balchand Yadav which detonated as a result of which the deceased Balchand Yadav fell down there unconscious. The accused persons made good their escape just thereafter.

5. It was stated by the informant P.W.6 Jageshwar Yadav that in the meantime Medni Yadav (P.W.1), Kishun Yadav



(P.W.3), Revi Yadav (not examined) and Kailash Yadav (P.W.2) were attracted to the scene of occurrence and they appeared there and they had seen the accused persons while they were fleeing away. It was stated that Ganauri Yadav resident of village-Sambey was armed with a garasa while the other appellant Ganauri Yadav son of Gursahai Yadav who happened to be the main assailant of the deceased as per the FIR was carrying bombs in a *Jhola* and other appellants were armed with *lathies*.

It was, lastly, stated by the informant P.W.6 Jageshwar Yadav that the deceased Balchand Yadav had been injured in order to be killed on account of the enmity arising out of the land disputed and he had brought the dead body to the police station for initiating appropriate action.

6. It appears from column-4 of the original FIR that after the statement of the informant was reduced into writing, Sitaram Singh, the then Officer-in-Charge of Pakribarawan police station himself took up the investigation. But, what appears is that he was not examined by the prosecution during trial and, as such, we do not have any clue as to how the investigation had proceeded. However, what we find from the record is that the investigating officer had held inquest upon the dead body of deceased Balchand Yadav on 24.02.1980 at 11 A.M. and had prepared the document Ext-4 in that behalf. It also appears from the postmortem report (Ext-5) that the



dead body had been transmitted to the hospital for holding autopsy and that it was held and the postmortem examination report was prepared by Dr. A.S.A. Haque (P.W.9). As may appear from the evidence of P.W.8 S.I. Brahmdeo Narain Azad, he had received the charge of investigation from S.I. Sitaram Singh and he had perused the case diary regarding the investigation conducted by the said S.I. Sitaram Singh and after finding that the investigation had been concluded, he submitted chargesheet for the trial of the fifteen appellants of the two appeals.

7. The defence of the appellants was of false implication on account of enmity which had arisen out of dispute for a particular piece of land which was admitted by the prosecution in its very FIR.

8. During the trial, nine witnesses were examined by the prosecution. P.W.1 Medni Yadav, P.W.2 Kailash Yadav and P.W.3 Kishun Yadav were not eye witnesses to the occurrence and they stated that after having awakened by explosion of the bomb they had rushed out of their houses to find that the present fifteen appellants were running away and they identified them and each of them had reached the place of occurrence as may appear from the evidence of P.W.1 that they had learnt as to how the deceased Balchand Yadav had been killed. P.W.1 Medni Yadav was very specific to state that P.W.6 Jageshwar Yadav the informant of the case



had narrated to him the whole sequence of events leading to the murder of deceased Jageshwar Yadav by lobbing a bomb on him by appellant Ganauri Yadav son of Gursahai Yadav when he had been dragged out of his *Darawaza* by three appellants, namely, Ganauri Yadav son of Prayag Yadav, Rameshwar Sao and Chhatardhari Yadav. P.W.5 Buniyadi Yadav was the son of the informant and he was also sleeping at the same *Darwaza* as appears stated in the FIR and as also appears stated by the witness and he had given an eye witness account to the whole occurrence. P.W.6 Jageshwar Yadav was the informant himself who had seen the occurrence as per his claim and had lodged the first information report. P.W.7 Ramsharan Jha was an Assistant in the office of the SDM, Nawadah and he had produced the letter of consent for prosecuting the accused person for offences under the Explosive Substances Act. P.W.8 S.I. Brahmdeo Narain Yadav, we have already noted, was the I.O. who had only submitted the chargesheet after having received the charge of investigation from the earlier investigating officer S.I. Sitaram Singh who had been not examined by the prosecution.

9. Five D.Ws. were examined by the defence and the evidence of D.Ws. was that the deceased Balchand Yadav was a man of criminal antecedent and he had been killed by his enemies.

10. After considering the evidence both of the prosecution and the defence, the impugned judgment was passed by

the learned trial Judge who also passed the sentences upon the appellants individually or collectively as pointed out at the very outset of the present judgment.

11. The learned counsel who had filed the appeal informed us that the instructions to them had been withdrawn by the appellants as back as in 1993 and the brief in respect of these appeals had also been withdrawn by them and also, he did not have any instructions. We, as such, had requested Smt. Nutan Sahay to assist us in hearing of the two appeals and, accordingly, she assisted us.

12. It was contended by Smt. Sahay, after taking us through the evidence of the witnesses that the evidence of P.Ws.1 to 3 was of no avail as they were not eye witnesses to the occurrence and as regards the evidence of P.W.1 Medni Yadav, his evidence becomes inadmissible on account of P.W.6 Jageshwar Yadav having not stated that he had narrated the incident and the manner thereof to him after he had arrived at the place of occurrence. Smt. Sahay was critical of the evidence of P.W.5 Buniyadi Yadav as well by submitting that he was evading being questioned by the police and it does not appear from his evidence that he had ever been found by the police to record his statement and, as such, it was not safe to treat that witness also trustworthy witness. Smt. Sahay was pointing out to the admitted land dispute and enmity between the parties and she was, as such, submitting that the evidence of P.W.6 Jageshwar Yadav may also not

be useful for the Court to uphold the conviction of the appellants. On these three submissions, Smt. Sahay was pleading for acquittal of the appellants.

13. Sushri Shashi Bala Verma, the learned Additional Public Prosecutor appearing for the State was contesting the submissions tooth and nail and in that connection submitted that mere enmity on account of the admitted land dispute could either be a motive as well the reason for false implication of the appellants. It was, as such, necessary for the Court to scan the evidence and judge the merit of the order of conviction which was passed against the appellants. The submission was that there was a source of identification at the scene of occurrence and again the appellants were none else than the co-villagers of the informant and the deceased Balchand Yadav and they were quite well-known to P.W.6 Jageshwar Yadav. It was submitted that P.Ws.5 and 6 had given unimpeachable evidence as eye witnesses and merely because they were related to the deceased could not be a ground for rejecting their evidence more so, when they have given very acceptable reason of remaining present at the *Darwaza* where the incident had taken place.

14. It was rightly submitted by Sushri Verma that the enmity on account of the dispute for a homestead land of about 16 *dhurs* which was stated in the FIR and not stated in the evidence by any witness could have given rise both to the motive for committing



the occurrence by the accused persons and simultaneously it could have been the reason behind false implication of any of the appellants. But, then we have already noticed that the evidence lacks on that part of the prosecution story that the deceased Balchand Yadav had after purchasing 16 *dhurs* of homestead land some four years prior to the incident had indeed purchased enmity with appellant Rameshwar Sao and that enmity had cemented after he had created the boundary-wall over the piece of land. Absence of evidence is there so we cannot judge it as the motive for commission of the offence. We could nonetheless accept that part of the story which has been stated in a very summary manner by P.W.6 Jageshwar Yadav when he stated that the offence had been committed for enmity in respect of a particular piece of land. It is a case of direct evidence of two witnesses, i.e., P.Ws.5 and 6 Buniyadi Yadav and Jageshwar Yadav and even if there had not been any motive for commission of the offence the charges may not fail. What we are supposed to do is to have a cautious approach in appreciating the evidence of the witnesses so much so that we have to strictly judge their evidence especially, that part of it which concerns the claim of the witnesses regarding their presence at the place of occurrence and then to judge the merit of the evidence as regards its use in upholding the judgment of conviction.

15. The competence of the witnesses as regards their claim of remaining present at the place of occurrence could not be



doubted by us. P.W.5 Buniyadi Yadav was the son of deceased Balchand Yadav and P.W.6 Jageshwar Yadav as appears from the evidence of P.W.5 in paragraph-4 was none-else than the son of the same lady who was the *Bhabhi* of deceased Balchand Yadav and whom the deceased had married after the death of his brother as appears from the evidence of P.W.1 Medni Yadav. Thus, P.Ws.5 and 6 were the step brothers or to put it in appropriate legal parlance, were half brothers on account of being borne from the womb of the same lady. Their presence was natural because the very *Darwaza* where the deceased was sleeping and where the two witnesses also claimed sleeping with the deceased was their own abode and there was nothing unusual about their claim that they were sleeping with the deceased in that night at the *Darwaza*. Thus, the competence of the witnesses as regards their claim of sleeping at the *Darwaza* does not appear any bit in doubt. We find that the defence was also conscious of this truth as regards the presence of P.Ws.5 and 6 and, as such, they had not dared suggesting the two witnesses that they were not sleeping at the *Darwaza*.

16. However, while considering the evidence of P.W.5 Buniyadi Yadav, we find some discordant statement coming from him and that had put us on some sort of alert as regards the acceptability of his evidence. The defence had cross-examined him as to when he had given the statement to the police or had not given at all. P.W.5



appears telling the Court as if he had not been questioned by the police. He was cross-examined in paragraph nos.7 and 8 of his deposition and he stated that after the death of his father, he had accompanied the dead body to the police station and from there to the hospital for postmortem examination and he came back on the next day from the hospital when the police had arrived at the village but he did not give his statement. When the police had arrived on the next day, the witness was again not available at his village because he had gone to *Dhamaul* market. The defence had not pursued the witness as regards the reason of the witness for going to the market and we very well appreciate this reason, as to why the defence should bring on record some of the explanations which were not obtained by the prosecution in that behalf. But, what appears stated by the witness in the very first line of paragraph-8 was that he had come back to his village in the evening from the market, but he was never questioned by the police. The investigating officer has not been examined and that proved a handicap for us in findings out as to what was the reason for not questioning P.W.5 who was one of the most competent witnesses of the incident. But what appears coming out from the evidence of P.W.5 in paragraph nos.7 and 8 is that the witness was probably evading to be questioned by the police. So in spite of not having said that he was not present there at the place of occurrence, we do not find it advisable that we could consider the evidence of

P.W.5. His evasive conduct in not facing the police for questioning, inspite of being named in the FIR as one of the persons who had slept there in the night, we did not find him eager to tell the police what he had seen in that fateful night when his father was killed. Was it not that P.W.5 Buniyadi Yadav was not present in that night at the *darwaja*, else, why should he shy away from the police.

17. This leaves us to consider the solitary evidence of P.W.6, the information of the case. The informant has stated in his evidence the whole details of the incident as to how the appellants on 13.02.1980 at about 11 P.M., had arrived at the *Darwaza* and three of them, i.e., appellants Ganauri Yadav son of Prayag Yadav, Rameshwar Sao and Chhatardhari Yadav had caught the deceased Balchand Yadav and thereafter had dragged him down from the *Darwaza* to take him into the lane situated in front of the *Darwaza* and when the deceased had snatched the *garasa* which was in the hand of appellant Ganauri Yadav son of Prayag Yadav, two appellants, namely, Rameshwar Sao and Chhatardhari Yadav had remonstrated Ganauri Yadav son of Gursahai Yadav to kill the deceased by using the bomb. The remonstrations were quickly heeded to by appellant Ganauri Yadav son of Gursahai Yadav who picked out a bomb from the *Jhola* he was carrying and lobbed it on to the deceased Balchand Yadav who was hit on the bridge of his nose on the frontal side of his skull which was blasted off. The deceased fell

there and died.

The cross-examination part of the evidence of P.W.6 Jageshwar Yadav consists of many questions which were put to the witnesses and the witnesses appears fairly stating in paragraph-5 that deceased Balchand Yadav had some litigation earlier as well with one Jageshwsar of his village and he had been convicted and sentenced to six months imprisonment. The honesty of the witness in stating facts which could be incriminating against the deceased has influenced our minds more in placing reliance upon the witness as he could have very well denied and could have compelled the defence to produce the record but he was honest in conceding the question and that aspect of his evidence appears to us the fair conduct of the witness. P.W.6 had been cross-examined on the manner of occurrence in paragraphs-8,9 and 10 and on perusal of the statement in cross-examination in those paragraphs, what we find is that only additional details as regards the shorter statement of the witness in examination-in-chief have come on record through the cross-examination of P.W.6. He was questioned on the details of the place of occurrence and also as to whether any articles had been left behind by the accused persons and the witness was stating that the *garasa* which was snatched from the appellant Ganauri Yadav son of Prayag Yadav by the deceased and that had fallen on the ground after the deceased had been hit by the bomb and it remained there after the appellants had gone away and he handed



over the weapon to the investigating officer which fact appears not controverted by the defence rather appears supported by the other witnesses also that blood stained clothes, soil and *garasa* which were lying at the place of occurrence were seized by the investigating officer by preparing seizure memo. Further details of the place of occurrence were also brought on record by cross-examining P.W.6 in paragraph-11 and that indicates that the witness was present and he had given a very detailed description of the place of occurrence as regards the finding of blood which had oozed from the body of the deceased. On an overall consideration of evidence of P.W.6, what we find is that there was no reason appearing from his evidence which could make him an unreliable witness.

18. It was a dark night, of course, as appears stated by P.W.5 Buniyadi Yadav in paragraph-8 in his evidence, but there are two reasons for us to say that the identification could have been possible. The first reason is that there was a lantern kept burning there at the place of occurrence and witnesses have stated that the lantern was seized by the investigation officer along with other articles. It is true that the investigating officer had not been examined, but while perusing the evidence of the witnesses, we also do not come across any challenge to the fact that no lantern was found or produced before the investigating officer and it was not seized. The other reason on which we accept the identification evidence of the witnesses is that



the appellants were very well the villagers of the witnesses and it was a very small village in which houses of the caste-men of P.W.6 was somewhere around 60-65; 150 houses of Muslim were there while 60-65 houses of *Koiri* were also there. Almost 60-70 houses were of Manjhi people while 20-25 houses belonged to carpenters. P.W.6 had stated in paragraph-4 the distance of the houses of the appellants and it appears that their houses were not far away from that of the informant and on account of being villagers, there could not be any question that the appellants could not be known to the witnesses. The incident had occurred at 11 P.M. on 13.02.1980 and the appellants had come in a group to the *Darwaza* of the deceased Balchand Yadav and as may appear from the evidence of P.W.6, the deceased and the witnesses had been awakened from their sleep after having hearing the sound indicating the arrival of some persons and thereafter three of them had dragged out the deceased into the lane and the incident had finally occurred there. We do not see any reason as to why the identification of the appellants could be doubted.

19. It was a case of killing the deceased by lobbing a bomb and as appears from the oral testimony of witnesses, Balchand Yadav was found bearing an injury just above his nose and the detonating of the bomb had blasted off almost the whole skull of deceased Balchand Yadav. P.Ws.1 to 3 who had arrived at the scene of occurrence also stated that they had seen the dead body of deceased



Balchand Yadav lying there and had found that the skull of Balchand Yadav had been blown off. The evidence of Dr. A.S.A. Haque (P.W.9) also suggests the same manner of occurrence which was narrated by P.W.6 Jageshwar Yadav. P.W.9 had found a lacerated wound measuring 6" x 4" x 3" over the face and eye damaging both eyes and the nasal bridge. The frontal bone was found fractured with the blackening of the margin all around. P.W.9 stated that the injuries were caused by explosion of a bomb and the same was ante mortem in nature and the cause of death was on account of the shock and haemorrhage caused by the injury. Thus, what appears from the evidence of P.W.9 is that the manner of occurrence and killing of deceased Balchand Yadav was fully corroborated by his evidence.

20. A question was raised by Smt. Sahay regarding the admissibility of evidence of P.W.1 Medni Yadav who claimed having been told the entire prosecution story as regards the manner of killing of deceased Balchand Yadav by P.W.6 to him. P.W.6 Jageshwar Yadav has not stated in his evidence that he had narrated the story as to how deceased Balchand Yadav was injured and killed to anybody and especially to P.W.1 Medni Yadav, though he had stated that P.W.1 Medni Yadav, P.W.2 Kailash Yadav and P.W.3 Kishun Yadav as also Revi Yadav (not examined) had come there and they had seen the dead body lying at the place of occurrence. The challenge to the admissibility of the evidence of P.W.1 Medni Yadav was set up

merely on the ground that P.W.6 had not corroborated the claim of P.W.1 Medni Yadav that he had been told by him the details of the occurrence. A similar issue was raised before the Supreme Court in ***Ramratan v. State of Rajasthan*** reported in ***AIR 1962 SC 424***. The Supreme Court after noticing the argument of the appellant in ***Ramratan*** had perused the draft of Section 157 of the Evidence Act and had gone on to hold as follows:-

"It is clear that there are only two things which are essential for this section to apply. The first is that a witness should have given testimony with respect to some fact. The second is that he should have made a statement earlier with respect to the same fact at or about the time when the fact took place or before any authority legally competent to investigate the fact. If these two things are present the former statement can be proved to corroborate the testimony of the witness in court. The former statement may be in writing or may be made orally to some person at or about the time when the fact took place. If it is made orally to some person at or about the time when the fact took place, that person would be competent to depose to the former statement and corroborate the testimony of the witness in court. There is nothing in S. 157 which requires that before the corroborating witness deposes to the former statement the witness to be corroborated must also say in his testimony in court that he had made that former statement to the witness who is corroborating him. It is true that often it does happen that the witness to be corroborated says that he had made a former statement about the fact to some person and then that person steps into the witness-box and says that the witness to be corroborated had made a statement to him about the fact at or about the time when the fact took place. But in our opinion it is not necessary in view of the words of S. 157 that in order to make corroborating evidence admissible, the witness to be corroborated must also say in his evidence that he had made such and such statement to the witness who is to corroborate him, at or about the time when the fact took place. As we have said already what S. 157 requires is that the witness to be corroborated must give evidence in court of some fact. If that is done, his testimony in court relating to that fact can be corroborated under S. 157 by any former statement made by him relating to the same fact, and it is not necessary that the witness to be corroborated should also say in his statement in court that he made some statement at or about the time when the fact took place to such and such person. The words of S.157 are in our opinion clear and require only two things indicated by us above in order to make the former statement admissible as corroboration. We are

therefore of opinion that the Sind and Pepsu cases were wrongly decided.”

21. After having said the above, the Apex Court considered the evidence of the case and finally held that in face of the evidence of a witness that he had been told by a particular witness, it was not at all necessary that the person who had told the witness a particular fact should also say that he had stated that fact to the witness. P.W.1 Medni Yadav had stated that he had come out of his house and had stood near the *banyan* tree which was situated just in front of his house on the tri-junction of the road and he had seen the accused persons running away by the road. He, thereafter, came to the scene of occurrence and found the deceased Balchand Yadav lying injured there. It was there that P.W.6 stated to him the names of the appellants as also the specific acts which had been committed by them. In that course, P.W.1 stated that the informant had stated that after their arrival at the *Darwaza* of deceased Balchand Yadav where he along with P.Ws.5 and 6 was sleeping, appellant Ganauri Yadav, son of Prayag Yadav, appellants Rameshwar Sao and Chhatardhari Yadav caught the deceased to drag him down from the *Darwaza* so as to taking him into the lane situated in front of the *Darwaza* where the deceased had snatched the *garasa* from the hands of appellant Ganauri Yadav which prompted the appellants Rameshwar Sao and Chhatardhari Yadav to remonstrate the appellant Ganauri Yadav son of Gursahai Yadav to kill the deceased by detonating the bomb and,



accordingly, the said appellant Ganauri Yadav son of Gursahai Yadav taking out a bomb from the Jhola which he was carrying, lobbed it on the nose bridge of the deceased as a result of which his skull was blown off. It is true that P.W.6 had not stated that these facts were stated by him to P.W.1, but in view of the decision of the Supreme Court in Ramratan (supra), it was at all not required that P.W.6 Jageshwar Yadav reiterated those facts and thus corroborate the claim of P.W.1 Medni Yadav that he had been told those facts by P.W.6. The evidence was admissible and what we further find is that the longest cross-examination of P.W.1 carried out by the defence could not bring on record any particular fact which could detract the value of the evidence of P.W.1. The evidence of P.W.1 was also lending support to the prosecution story not only on one fact that deceased Balchand Yadav had been injured by detonating a bomb, but also as to who were the persons who had detonated the bomb. We have already noted that support had also been lent by Dr. A.S.A. Haque by his evidence.

22. In addition to the above, P.W.2 Kailash Yadav and P.W.3 Kishun Yadav also stated that they were awakened from their sleep by the explosion of bombs and they had also came to the place of occurrence to find the deceased Balchand Yadav lying injured there who was subsequently shifted to the police station by the villagers and the informant where the report was lodged. This fact that Balchand

Yadav was injured by explosion of a bomb, stated by two witnesses, i.e., P.Ws.2 and 3 Kailash Yadav and Kishore Yadav respectively, also lend support to that part of the prosecution claim as regards the manner of causing the death of the deceased Balchand Yadav.

23. It is true that the investigating officer was not examined but we could not be pointed out any prejudice which could have been caused to the appellants on account of the non-examination of the investigating officer.

24. Thus, what we find is that the prosecution had succeeded in establishing the manner of occurrence as regards the murder of deceased Balchand Yadav, but while we were considering the evidence of the prosecution, what we found was that the evidence was there as regards the arrival of the appellants at the place of occurrence as also their running away from there, but specific overt-acts were alleged only against appellants Rameshwar Sao, Chhatardhari Yadav, Ganauri Yadav son of Prayag Yadav and Ganauri Yadav son of Gursahai Yadav. The evidence indicates that Rameshwar Sao, Chhatardhari Yadav and Ganauri Yadav son of Prayag Yadav had caught the deceased at his *Darwaza* and had dragged him out of it to bring him into the lane and when the deceased Balchand Yadav had snatched the *garasa* from the hands of the appellant Ganauri Yadav son of Prayag Yadav that had prompted the appellants Rameshwar Sao and Chhatardhari Yadav to

remonstrate the appellant Ganauri Yadav son of Gursahai Yadav to kill the deceased by a bomb whereupon the appellant Ganauri Yadav son of Gursahai Yadav brought out a bomb from the *Jhola* he was carrying and lobbed it on the deceased which landed at his nose causing the injuries which had resulted in his death. Except these four appellants, we did not find out any overt-act except of arrival and departure by way of running from the place of occurrence against any of the other appellants. It is true that Section 149 Indian Penal Code creates a distinct offence of acting in prosecution of the common object of the unlawful assembly and as such the accused persons who had been members of the unlawful assembly are presumed to know as to what was to be committed by them all or any members of the unlawful assembly. Even if no overt-act is committed by all except the one who had committed the act, all accused are to be presumed to know the commission of that act. But if the evidence is so uncertain and indefinite, well nigh, bald, then in our opinion it could not be justifiable to hold that they had formed an unlawful assembly so as to prosecuting a particular common object and in that course any member of the unlawful assembly had committed any particular overt-act. We are aware of the legal position that in a case of conviction by virtue of Section 149 of the Indian Penal Code, it is not always necessary for the prosecution to allege and prove that all the members of the unlawful assembly were knowing as to what was the common



object they were to prosecute, but there must be some semblance of evidence suggesting that the accused persons had indeed fixed up the goal to be achieved by the assembly of theirs by any of them. While perusing the evidence in the present case, we cannot get satisfactory material so as to raising that particular inference that all the appellants had known from before or had even known at the time of commission of the offence that it was the common object of killing the deceased Balchand Yadav. The other appellants than those alleged to have committed a particular overt act did not have any particular reason so as to targeting the deceased Balchand Yadav so much so to be annihilated. We find materials insufficient as regards appellants other than appellants Rameshwar Sao, Chhatardhari Yadav, Ganauri Yadav son of Gursahai Yadav and Ganauri Yadav son of Prayag Yadav. In that view of the matter, we acquit the rest of the appellants of the charges for which they had been held guilty of.

25. After we have ordered the acquittal of eleven appellants, we uphold the conviction of the four appellants Rameshwar Sao, Chhatardhari Yadav, Ganauri Yadav son of Gursahai Yadav and Ganauri Yadav son of Prayag Yadav. However, we cannot convict them by virtue of Section 149 Indian Penal Code as the group was no longer an unlawful assembly. The very evidence which appears against each of them does suggest that they had acted together to achieve a particular goal and that act was furthered by a particular



intent and that intent was to kill the deceased Balchand Yadav in that particular manner. It is not unusual that an order of conviction recorded by virtue of Section 149 Indian Penal Code could be converted into one by virtue of Section 34 Indian Penal Code. Accordingly, we hold appellants Rameshwar Sao, Chhatardhari Yadav, Ganauri Yadav son of Prayag Yadav and Ganauri Yadav son of Gursahai Yadav guilty of committing the offence under Section 302/34 Indian Penal Code and we uphold the sentences of rigorous imprisonment for life passed against each of them. We convict appellant Ganauri Yadav son of Gursahai Yadav distinctly for committing the offence under Section 302 Indian Penal Code as also those under Sections 3 and 5 of the Explosive Substances Act and we do not want to disturb the sentences which had been passed upon appellant Ganauri Yadav son of Gursahai Yadav passed by the learned trial Judge on the above counts.

26. In the result, we dismiss the appeal of Rameshwar Sao, Chhatardhari Yadav and Ganauri Yadav son of Prayag Yadav (Cr.Appeal (DB) No.476 of 1992) as regards those appellants with the modification in the order of conviction just indicated by us. We dismiss the Cr.Appeal (DB) No.33 of 1993 filed on behalf of appellant Ganauri Yadav son of Gursahai Yadav with the modification, we have just ordered in the order of conviction. As regards the other appellants, we acquit them of the charges they had

been held guilty of. The appellants acquitted by us and those whose conviction had been upheld are on bail. The acquitted appellants shall be discharged from the liabilities of their individual bail bonds. The bail bonds of Rameshwar Sao, Chhatardhari Yadav, Ganauri Yadav son of Prayag Yadav and Ganauri Yadav son of Gursahai Yadav are hereby cancelled. Let them surrender in the court below to serve out the sentences passed upon each of them.

27. Smt. Nutan Sahay has ably assisted the Court as Amicus Curiae and the Court desires that she be paid one fee of hearing by the Patna High Court Legal Services Committee and for that purpose let a copy of the first and last pages of this judgment be made over to Smt. Sahay.

(Dharnidhar Jha, J)

(Gopal Prasad, J)

Brajesh Kr./-mrl.

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