

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.71 of 1993

Arising out of PS. Case No. – 103 Year- 1987 Thana –Banka (Barahat)
District- BANKA

Syamdeo Pd. Singh @ Shambhu Mandal, S/o- Late Jaggan Mandal, resident of
Village- Lakra, Police Station- Barahat, District- Banka.

.... Appellant

Versus

The State of Bihar

.... Respondent

with

Criminal Appeal (DB) No. 121 of 1993

Arising out of PS. Case No. – 103 Year- 1987 Thana –Banka (Barahat)
District- BANKA

1. Udho Mandal, son of Chunchun Mandal
2. Ajay Mandal, son of Chunchun Mandal
Residents of Lakra, P.S. Barahat, District- Banka.

.... Appellants

Versus

The State of Bihar

.... Respondent

Appearance :

For the Appellants : Mr. Mritunjay Prasad Singh, Advocate.
Mr. Krishna Mohan, Advocate.
Mr. Praveen Kumar, Advocate.
For the Respondents : Mr. A.K. Sinha, A.P.P.
Mr. S.C. Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE V.N. SINHA

and

HONOURABLE MR. JUSTICE AHSANUDDIN AMANULLAH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE V.N. SINHA)

Date: 09-02-2015

These two appeals arise out of judgment/
order dated 10/11.02.1993 passed by 7th Additional
Sessions Judge, Bhagalpur in Sessions Trial No. 387



of 1987, whereunder the three appellants in the two appeals have been convicted for the offence under Section 302/34 of the Penal Code and sentenced to suffer Rigorous Imprisonment for life with further direction to pay a fine of Rs. 2,000/- each, in default of payment of fine, to suffer Rigorous Imprisonment for two years.

2. Prosecution case, as set out in the fardbeyan of Madan Sah (P.W. 10), recorded by Sub-Inspector B.P. Sinha of Barahat Police Station in the Police Station itself on 27.03.1987 at 11:00 P.M. is that he having come to the Police Station along with co-villager Sadhu Sah (P.W. 11) is recording statement that in the evening around 6:30 he was at Funsia Pond where co-villager (P.W.5) Pasuli Mistry came from village Lakra and informed him that three persons killed his brother Basant Sao with Ballam, Lathi. Informant along with co-villager Hari Sao, Birbal Sao, Amrit Sao, all the three not examined, and others came to Lakra village and found in a Barley field, situate by the side of pitch road, between the house of Manohar Thakur and Chaurasi Harijan (P.W.2) as also in front of the house of Mahendra Thakur (P.W.1), the dead body of his



brother Basant Sao lying flat. Blood was oozing out from his temporal region, left ear. In the fardbeyan informant also stated that the residents of the locality had seen the occurrence and named Chaurasi Harijan (P.W. 2), Satto Devi (P.W. 3), Ram Prasad Thakur (P.W. 4), Raghunandan Thakur (P.W. 6), Ram Chandra Mandal (P.W. 7), Kartik Thakur (P.W. 8) and Mahendra Thakur (P.W. 1), all residents of Village- Lakra amongst those who saw the occurrence. Informant further stated in the fardbeyan that his brother Basant Sao was killed by Chunchun Mandal and his two sons Ajay Mandal and Udho Mandal by Ballam, Lathi as they assaulted him on his head, ear with the two weapons and after killing, two of the assailants Chunchun Mandal, Ajay Mandal fled away towards south through road but Udho Mandal went towards western side outer area of the village. In the fardbeyan informant also stated about the motive behind the occurrence that Chunchun Mandal had executed a sale-deed for the lands as money of his brother, the deceased, was due with him, for which there was quarrel between them in Lakra Village one month earlier and Ajay Mandal, son of Chunchun Mandal had scuffle with him at



Funsia Chowk and that there was enmity between them. In the fardbeyan informant further stated that his deceased brother had also given loan to Shambhu Master for purchase of a Jersey cow and asked him to return the amount, which Shambhu Master was avoiding. Chunchun Mandal and his two sons are also related to Shambhu Master. Besides the informant P.W. 11 Sadhu Sah also put his signature over the fardbeyan. Officer-in-Charge, Barahat Police Station having recorded the fardbeyan forwarded the same to Banka Police Station for institution of a case under Section 302/34 of the Penal Code and took up the investigation. In the light of the fardbeyan Banka (Barahat) P.S. Case No. 103 dated 28.03.1987 for the offence under Section 302/34 of the Penal Code was registered by Officer-in-Charge, Banka Police Station on 28.03.1987. In the accused Column No. 5 of the First Information Report Chunchun Mandal and his two sons Udho Mandal, Ajay Mandal are made accused in the case. In the night itself Sub-Inspector B.P. Sinha of Barahat Police Station proceeded with the investigation and conducted inquest proceedings on 28.03.1987 at the place of occurrence in village

Lakra at 2:30 hours. Perusal of the Inquest Report (Exhibit-4) indicates that the inquest proceeding of the deceased was conducted in petromax light and the deceased was found killed by lathi, ballam as he had suffered four injuries in his temporal region. After inquest proceeding, the dead body was sent for post mortem which was conducted on 28.03.1987 at 9:00 A.M. The doctor conducting the post mortem examination on the dead body of deceased Basant Sao found as many as six injuries which were caused by hard, blunt object and time elapsed since death is about 24 hours. In the light of the assertions made in the fardbeyan/First Information Report, Investigating Officer examined the witnesses, submitted charge-sheet against Chunchun Mandal and his two sons named as accused in the First Information Report as also against Shayamdeo Mandal who was described in the body portion of the fardbeyan as Shambhu Master. In the light of the charge-sheet cognizance was taken of the offence found true during investigation and after supply of police paper case was committed to the court of Sessions. Trial Court framed charges against the four accused sent up for trial under order dated



20.06.1988, to which the four accused persons pleaded not guilty and claimed to be tried. During pendency of the trial one of the accused, namely, Chunchun Mandal left for his heavenly abode.

3. In support of the charges prosecution examined as many as 13 witnesses. P.W. 1 Mahendra Thakur, P.W. 2 Chaurasi Harijan, P.W. 3 Satto Devi, P.W. 4 Ram Prasad Thakur, P.W. 6 Raghunandan Thakur, P.W. 7 Ram Chandra Mandal, P.W. 8 Kartik Thakur are all residents of Village Lakra near whose house the place of occurrence is situate where assault is said to have taken place and the witnesses are named in the fardbeyan as the witnesses in whose presence the occurrence had taken place but the aforesaid witnesses have not supported the prosecution case in court. P.Ws. 12, 13 Mohammad Shakoar, Vedanand Yadav are Advocates' Clerk and examined as formal witnesses to prove the contents of the document. P.W. 5 Pasuli Mistry is an eye-witness of the occurrence, who saw Chunchun Mandal and his two sons running away from the place of occurrence and it is he who informed informant P.W. 10 Madan Sah about the occurrence, whereafter informant came to the place

of occurrence. P.W. 9 Bhola Devi is the mother of the deceased and claims to be an eye-witness of the occurrence. P.W. 10 Madan Sah is the informant. P.W. 11 Sadhu Sah is the one who had gone along with the informant to the Police Station and has put his signature over the fardbeyan as an attesting witness.

4. Defence though denied the charges but has not examined any witness to disapprove the allegations levelled against them.

5. Before proceeding to consider the submission of the counsel for the parties, it is appropriate for us to appraise the evidence of P.Ws. 5, 9 and P.W. 10, the informant.

(i). P.W. 5 stated in his evidence that the occurrence took place two years earlier on a Saturday around 5:45 in the evening when he was returning from Village Kamalpur on a tractor and when he reached Village Lakra near the house of a Scheduled Caste man, saw Basant Sao fallen flat on the ground in injured condition and accused Chunchun Mandal, Udho Mandal and Ajay Mandal running away. He informed persons at Funsia pond that aforesaid accused persons killed Basant Sao. He



further stated that he also informed about the occurrence to informant P.W. 10 Madan Sah. In Paragraph 2 P.W. 5 admitted that during the pendency of trial accused Chunchun Yadav died and identified the appellants Udho Mandal, Ajay Mandal present in dock. In Paragraph 5 P.W. 5 admitted that at the time of occurrence sun had already set. In Paragraph 6 P.W. 5 stated that he was returning on the tractor of Ram Roop Mandal and that he informed informant Madan Sah about the occurrence after coming to his house in village Funsia which is at a distance of 1 K.M. from Village Lakra and that he had come to the house of Madan Sah raising alarm. In Paragraph 7 informant stated that he saw Chunchun Mandal and his two sons Udho Mandal, Ajay Mandal running away towards east but did not notice their apparel. In Paragraph 8 P.W. 5 stated that by the time he reached the house of Madan Sah lanterns were already lit. In Paragraph 9 P.W. 5 stated that he saw Basant Sao fallen in the wheat field from a distance of 22 ½ ft. In Paragraph 10 P.W. 5 admitted that he did not record any police statement though summons had come from the Police Station to record statement but he did not visit



the Police Station. In Paragraph 11 P.W. 5, however, clarified that Madan Sah is not his relative but deceased Basant Sao was the cousin of Madan Sah. In Paragraph 12 P.W. 5 admitted that he visits the house of informant Madan Sah for rendering service to him. In Paragraph 13 P.W. 5 declined the suggestion that he had not seen any part of the occurrence.

(ii). P.W. 9 Bhola Devi is the mother of deceased Basant Sao. She has stated in Paragraph 1 of her evidence that she knew accused Chunchun Mandal but he has died. The other two accused Udho Mandal, Ajay Mandal are his sons. Shambhu Mandal is the brother-in-law of Chunchun Mandal. In the same paragraph she further stated that Udho Mandal, Ajay Mandal and Shambhu Mandal are the accused in the present case. She also stated that deceased Basant Sao was her only son. In the same paragraph she further stated that 2 ½ years earlier on a Friday her son Basant Sao was killed. She further stated in the same paragraph that Chunchun Mandal worked as a mason and his two sons Udho Mandal, Ajay Mandal assisted the father as labourers. She further stated that Chunchun Mandal



also worked in her house as a mason on regular basis. She also stated in the same paragraph that accused Shambhu Mandal was on friendly terms with her son deceased Basant Sao and used to visit her house. She also stated that her son Basant Sao had lent Rs. 12,000/- to Chunchun Mandal in consideration whereof Chunchun Mandal executed a sale-deed for 12 kathas of land worth Rs. 6,000/-. Aforesaid land is situate in Village Lakra. Balance of Rs. 6,000/- is still due with Chunchun Mandal. Chunchun Mandal cultivated aforesaid 12 katha land as share-cropper for three years but did not share the produce and the land was given to Hari Mandal of village Lakra to cultivate the same as share-cropper which caused resentment to Chunchun Mandal. She further stated in the same paragraph that her son asked Chunchun Mandal to return the balance amount of Rs. 6,000/- which led to scuffle between him and accused Ajay Mandal at Funsia crossing. In Paragraph 3 P.W. 9 stated that the occurrence took place 2 ½ years earlier on a Friday in the month of Chaitra in the afternoon when she had come along with her deceased son to Village Lakra to the mill of Anandi Mandal for thrashing of

gram, barley crop grown on the land purchased from Chunchun Mandal. On the same day around 4:00 P.M. accused Shambhu Mandal came to the mill premises of Anandi Mandal and asked her son to come for refreshment along with Shambhu Mandal, Udho Mandal and Ajay Mandal, Chunchun Mandal also asked Basant Sao to join them for refreshment. P.W. 9, however, remained in the mill premises and heard the alarm that Basant Sao has been killed whereafter she came out of the mill premises and after covering a distance of 30 ft. saw accused Ajay Mandal, Udho Mandal assaulting her son Basant Sao with Bana, Chunchun Mandal assaulting him with stick, accused Shambhu Mandal was also standing nearby. She also saw her son having suffered the assault fallen down on the ground where he died. The occurrence took place in the field of Ram Prasad Mandal. After half an hour of the occurrence informant Madan Sah came to the place of occurrence and she informed him about the occurrence as also the name of the assailants. She further stated in the same paragraph that at the time of occurrence darkness had not set in. She also stated that she was taken to her house by the wife of



Madan Sah and her police statement was recorded on the following day of the occurrence. In Paragraph 6 P.W. 9 stated that deceased Basant Sao had also lent to accused Shambhu Mandal Rs. 6,000/- one year prior to the occurrence. In Paragraph 8 P.W. 9 stated that on hearing alarm she came out of the mill premises, saw accused Shambhu Mandal present in the field of Ram Prasad Mandal. In Paragraph 10 P.W. 9 further stated that till the date of occurrence there was cordial relationship between deceased Basant Sao and accused Shambhu Mandal, however, volunteered in the same paragraph that internally Shambhu Mandal had some grievance against her son. In Paragraph 23 P.W. 9 stated that when alarm was raised that Basant Sao has been killed, the mill owner Anandi Mandal was not inside the mill and had gone to his house. In Paragraph 25 P.W. 9 further stated that after hearing the alarm when she came out of the mill premises, Basant Sao was standing in the field in which her son after being assaulted had fallen down. In Paragraph 27 P.W. 9 stated that when her son Basant Sao was being assaulted, she went near him to protect and covered his body as also suffered lathi injury on her back



which was shown to the police officer.

(iii). P.W. 10 Madan Sah is the informant.

He has stated in Paragraph 4 of his evidence that on 27.03.1987 around 1:30 P.M. Basant Sao along with his mother had gone from his native village Funsia to village Lakra for barley, gram thrashing in the mill of Anandi Mandal. The crop was grown on their own land in Village Lakra which was purchased from Chunchun Mandal accused through a sale-deed. In Paragraph 5 informant stated that on 27.03.1987 around 6:00 P.M. he was at Funsia Village Tank when Fasuli Mistry came running from Village Lakra and informed him that Chunchun Mandal, Ajay Mandal and Udho Mandal killed Basant Sao with lathi-Bana. Fasuli Mistry also informed P.W. 10 that at the time of occurrence Shambhu Mandal was also present at the place of occurrence. Informant conveyed the aforesaid fact to his co-villagers Hari Sah and others and went along with them to Village Lakra and saw Basant Sao lying in a field which was between the house of Ram Prasad Thakur and others. Basant Sao had suffered injury in the parietal portion of his body and blood was oozing out. He also stated that near the dead body of Basant Sao, his



mother was also present and she informed him that Chunchun Manhda, Ajay Mandal and Udho Mandal killed her son with lathi-Bana and at the time of assault accused Shambhu Mandal was also present. P.W.10 further deposed that mother of the deceased also informed him that Ram Prasad Thakur, Manohar Thakur, Chaurasi Harijan, Kartik Thakur and Satto Devi had also seen the accused persons assaulting her son. Aforesaid witnesses also confirmed the factum of assault by the accused persons to him. In Paragraph 6 informant stated that on the date of occurrence itself he came to Barahat Police Station at 9:30 P.M. and informed the police officer about the occurrence, who met the informant at around 11:00 P.M., recorded his fardbeyan which was marked 'X' for identification. He further stated that over the fardbeyan Sadho Sah @ Sadhu Sah (P.W. 11) is the attesting witness and his signature has been marked Exhibit-1/1. In the same night informant and the Officer-in-Charge, Barahat Police Station came to the place of occurrence in village Lakra. In Paragraph 8 informant has stated that there was differences between Basant Sah and Chunchun Mandal with regard to accounting.



Basant Sah being rich man had advanced Rs. 12,000/- to Chunchun Mandal against which Chunchun Mandal sold 12 Kathas of land for Rs. 6,000/- and Rs. 6,000/- remained due. In the same paragraph P.W. 10 stated that Chunchun Mandal is the brother-in-law of Shambhu Mandal and one year prior to the occurrence Basant Sao had also lent Rs. 6,000/- to Shambhu Mandal for purchasing a cow and Basant Sao was always pressurizing him to return the same. In Paragraph 10 P.W. 10 accepted that till the date of occurrence Basant Sao and Shambhu Mandal were on visiting terms and on that day also Basant Sao had taken refreshment at the house of Shambhu Mandal. In Paragraph 12 P.W. 10 further stated that in the fardbeyan also he had mentioned that at the time of occurrence Shambhu Mandal was present at the place of occurrence, which fact he learnt from the witnesses. In Paragraph 16 P.W. 10 stated that he went to Barahat Police Station along with Sadhu Sah (P.W. 11) on a taxi. In Paragraph 17 P.W. 10 further stated that in his fardbeyan also he had stated that Pasuli Mistry did inform him that Chunchun Mandal, Ajay Mandal and Udho Mandal assaulted Basant Sao with lathi-





Bana and at that time Shambhu Mandal was also present. In the same paragraph P.W. 10 further stated that he does not remember whether the fact that on 27.03.1987 Basant Sao and his mother had come to Village Lakra for getting their crop thrashed is mentioned in the fardbeyan or not. In Paragraph 20 P.W. 10 accepted that in his fardbeyan he has not mentioned that near the dead body of Basant Sao his mother was also present and that she disclosed the name of the assailants to him. In Paragraph 21 P.W. 10 further accepted that he has not mentioned the name of mother of Basant Sao, P.W. 9 in the fardbeyan in any context. In Paragraph 23 P.W. 10 stated that for the earlier occurrence between Basant Sao and Chunchun Mandal a panchyati was held in Village Lakra but in that connection no case was ever registered. In the same paragraph he further stated that in his presence there had been no occurrence of assault between the deceased and the accused persons.

5. In the light of the aforesaid evidence of the three material witnesses i.e. P.Ws. 5, 9 and informant (P.W. 10) counsel for the appellants submitted that from perusal of the evidence of the



aforesaid three witnesses it would appear that neither P.W. 5 nor P.W. 9 nor the informant had seen the actual assault. It is submitted with reference to the evidence of P.W. 5 that while he was returning on a tractor from some other village to his native village and passing through village Lakra where the occurrence is said to have taken place, P.W. 5 saw the three accused making good their escape from the place of occurrence and then leaving the tractor he went running raising alarm to Funsia Tank that Basant Sao has been killed and he saw the three accused persons running away from the place of occurrence.

6. It is further submitted that P.W. 5 having not seen the assault on the person of the deceased by the three appellants, he cannot be said to have seen the occurrence, only because he saw the two out of the three appellants running away from the place of occurrence and on the basis of his evidence the appellants cannot be fastened with the liability of assault on the person of the deceased. In this connection learned counsel submitted that appellant Shyamdeo Prasad Singh @ Shambhu Mandal has not even been seen by P.W. 5 as the one

running away from the place of occurrence and such being the position he cannot be connected with the occurrence at the instance of P.W. 5.

7. Learned counsel for the appellants, so far mother of the deceased P.W. 9 is concerned, submitted that she has claimed herself to be the full fledged eye-witness of the assault as according to her Chunchun Mandal and her two sons Ajay Mandal, Udho Mandal assaulted Basant Sao with lathi- Bana in her presence but such evidence is not to be relied upon in view of her own deposition that when she heard the alarm about the assault she was inside the mill premises of Anandi Mandal, covered the distance of 30 ft., came to the place of occurrence and protected her son by covering his body, was also assaulted is not to be trusted as about her presence at the place of occurrence P.W. 5 who passed through the place of occurrence has neither deposed nor conveyed about her presence at the place of occurrence to the informant nor informant has spoken about her presence in the First Information Report. According to learned counsel it would thus, appear that after the assault and departure of the assailants when the alarm about the assault was





raised P.W. 9 hearing the alarm covered the distance of 30 ft. and came to the place of occurrence, had no opportunity at all to see the assault. According to the learned counsel, had P.W. 9 been a witness of assault and conveyed the name of the assailants to the informant, such fact was required to have been mentioned in the fardbeyan by the informant which was lodged after more than five hours of the occurrence.

8. Counsel for the State though supported the judgment but conceded the position that the Investigating Officer of the case who recorded the fardbeyan and conducted the investigation as also the doctor who conducted the post mortem of the deceased has not been examined but submitted that Post Mortem Report having been admitted in evidence under Section 294 Cr.P.C. failure to examine the doctor to prove the contents of the Post Mortem Report may not be fatal for the prosecution as the contents of the Post Mortem Report have been admitted in evidence without any objection.

9. True it is that the contents of Post Mortem Report has to be read in evidence and there



is no difficulty in concluding that Basant Sao was killed as a result of the assault on his person by lathi-Bana but the question which this Court has to decide is about the identity of the assailant. P.W. 5 having not seen the actual assault on the person of the deceased cannot be said to be the eye-witness of the assault on person of the deceased. He being only a witness on the point that he had seen Chunchun Mandal and his two sons making good their escape from the place of occurrence, there can be multiple reasons for the three to have made good their escape from the place of occurrence and only because two of the appellants were seen by P.W. 5 to be running away from the place of occurrence, they cannot be fastened with the liability of having assaulted the deceased. P.W. 9, mother of the deceased though claimed herself to be an eye-witness of the assault but her evidence about being eye-witness does not inspire confidence in view of her own contradictory deposition that when alarm was raised about the assault on the person of the deceased she was inside the mill premises of Anandi Mandal, covered a distance of 30 ft. and then protected her son by covering his body and in the process also suffered



assault on her back. The factum of assault on the person is not found corroborated as the prosecution has neither produced her injury-report nor examined the doctor who treated her nor she claimed in her evidence that having shown the injury to the police officer she was referred to any hospital or doctor for treatment. Her evidence that she was present at the time of assault cannot be trusted in view of the evidence of P.W. 5 who passed through the place of occurrence soon after the assault has not noticed her presence at the place of occurrence but saw the father and the sons making good their escape from the place of occurrence. It is, therefore, evident that after P.W. 5 ran to Village Funsia raising alarm to inform P.W. 10 and others about the occurrence alarm was raised by villagers. P.W. 9 heard alarm inside the mill premises, came to the place of occurrence but as there was dispute between the deceased and Chunchun Mandal and his two sons implicated them as the assailants of the deceased. In the circumstances, we are of the view that the three appellants deserve grant of benefit of doubt. The impugned judgment of conviction, order of sentence is set aside and as the appellants are on bail, they

are discharged from the liabilities of their respective
bail bonds.

(V.N. Sinha, J)

(Ahsanuddin Amanullah, J)

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