

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.936 of 2008

Arising Out of P. S. Case No. -22 Year-1997 Thana - Saharghat District-
MADHUBANI

1. Teju Yadav, son of Jiwach Yadav
2. Lakshmi Yadav @ Shitoli Yadav, son of Bhola Yadav
Both resident of village- Baswaria, P.S.- Shaharghat, District-
Madhubani.

.... Appellants

Versus

The State of Bihar

.... Respondent

with

Criminal Appeal (DB) No.748 of 2008

Arising Out of P. S. Case No. -22 Year-1997 Thana - Saharghat District-
MADHUBANI

1. Jagdeo Thakur, son of late Ramdhani Thakur
2. Ramashish Yadav, son of Jamindar Yadav
3. Devendra Yadav @ Probodh Yadav, son of Prabhu Yadav
4. Harihar Das, son of Palat Das
5. Jiwachh Yadav, son of Jagdeo Yadav @ Jagdish Yadav
6. Bahadur Yadav @ Ram Bahadur Yadav, son of Alopi Yadav.
7. Devendra Prasad Yadav, son of Thakai Yadav

All residents of village- Baswaria, P.S.- Saharghat, District- Madhubani.

.... Appellants

Versus

The State of Bihar

.... Respondent

With

Criminal Appeal (DB) No.830 of 2008

Arising Out of P. S. Case No. -22 Year-1997 Thana - Saharghat District-
MADHUBANI

Surya Narayan Yadav, son of Parmeshwar Yadav, resident of village-
Baswaria, P.S.- Shaharghat, District- Madhubani.

.... Appellant

Versus

The State of Bihar

.... Respondent

With

Criminal Appeal (DB) No.935 of 2008

Arising Out of P. S. Case No. -22 Year-1997 Thana - Saharghat District-
MADHUBANI

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1. Jagdish Yadav, son of Bisheshwar Yadav
2. Vijay Yadav @ Vijoy Yadav, son of Jagdish Yadav
Both resident of village- Baswaria, P.S.- Shaharghat, District- Madhubani.

.... Appellants

Versus

The State of Bihar

.... Respondent

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With

Criminal Appeal (DB) No.868 of 2008

Arising Out of P. S.Case No. -22 Year-1997 Thana - Saharghat District-
MADHUBANI

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1. Sri Narayan Yadav, son of Parmeshwar Yadav
2. Ram Sevak Yadav, son of Asharfi Yadav
Both resident of village- Baswaria, Police Station- Shahar Ghat, District-
Madhubani

.... Appellants

Versus

The State of Bihar

.... Respondent

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With

Criminal Appeal (DB) No.767 of 2008

Arising Out of P. S.Case No. -22 Year-1997 Thana - Saharghat District-
MADHUBANI

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1. Bacha Das @ Bachcha Das, son of Harihar Das
2. Laxmi Das @ Lakshim Das, son of Harihar Das
3. Ramashish Das, son of Harihar Das
4. Dahu Yadav, son of Nebu Yadav
5. Debu Yadav @ Debu Jadav, son of Bijul Yadav
6. Shaligram Yadav, son of Bahadur Yadav
7. Prabhu Yadav, son of Bhola Yadav
8. Saukhi Lal Yadav, son of Bijul Yadav
9. Jiwachh Yadav, son of Ram Bahadur Yadav @ Bahadur Yadav
10. Kaliya Devi @ Kalya Devi, wife of Ram Ekbal Yadav
All residents of village- Baswaria, P.S.- Shaharghat, District-
Madhubani.

.... Appellants

Versus

The State of Bihar

.... Respondent

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With

Criminal Appeal (DB) No.918 of 2008

Arising Out of P. S.Case No. -22 Year-1997 Thana - Saharghat District-
MADHUBANI

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Wakil Yadav, son of Chulhai Yadav, resident of village- Baswaria Police-
Station-Shaharghat, District- Madhubani.

.... Appellant

Versus

The State of Bihar

.... Respondent

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With

Criminal Appeal (DB) No.797 of 2008

Arising Out of P. S.Case No. -22 Year-1997 Thana - Saharghat District-
MADHUBANI

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1. Jiwachh Yadav, son of Sukhdeo Yadav
 2. Awadh Yadav, son of Lakhan Yadav
 3. Sikander Yadav, son of Awadh Yadav
 4. Ravindra Yadav, son of Awadh Yadav
 5. Sukhdeo Yadav, son of Lakhan Yadav
 6. Muneshwar Yadav @ Muneser Yadav, son of late Lattar Yadav
- All residents of village- Baswaria, P.S.- Shaharghat, District-
Madhubani.

.... Appellants

Versus

The State of Bihar

.... Respondent

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Appearance :

(In all the appeals)

For the Appellant/s :	Mr. Kanhaiya Prasad Singh, Sr. Advocate Mr. Ramakant Sharma, Sr. Advocate Mr. Patanjali Rishi, Advocate Mr. Laxmi Kant Sharma, Advocate
For the State :	Mr. Satya Narayan Prasad, A.P.P. Mr. Abhimanyu Sharma, A.P.P.
For the Informant :	Mr. Manish Kumar No.13, Advocate Mr. Rohit Kumar, Advocate

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

And

HONOURABLE MR. JUSTICE AMARESH KUMAR LAL

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 18-05-2015

All the eight appeals have been preferred against the

common judgment of conviction dated 30.06.2008 and order of

sentence dated 2.07.2008 passed by the Additional Sessions Judge,

F.T.C.I, Madhubani in Sessions Trial No.448 of 1999 by which accused Jagdish Yadav, Vijoy Yadav, Teju Yadav, Laxmi Yadav @ Sitoli Yadav and Wakil Yadav have been convicted under Section 302 of the Indian Penal Code for committing murder of Rajendra Das and Shyam Nandan Das, who were father and brother of the informant (P.W.9). The remaining accused persons have been convicted under Sections 302/149, 436/149 and 447 of the Indian Penal Code. Accused Jagdish Yadav has been further convicted under Sections 148 of the Indian Penal Code and Section 27 of the Arms Act. Accused Wakil Yadav, Surya Narayan Yadav, Devendra Yadav and Ram Sevak Yadav and Teju Yadav have been convicted under Section 148 of the I.P.C. Accused Ram Sevak Yadav has also been convicted under Sections 436 and 323 of the I.P.C. Accused Sri Narayan Yadav has also been convicted under Section 436 of the I.P.C. Accused Teju Yadav has also been convicted under Section 323 of the I.P.C. Accused Kaliya Devi has further been convicted under Sections 302/149 of the I.P.C. For the offence under Section 302 I.P.C., all the five appellants, namely, Jagdish Yadav, Vijoy Yadav, Teju Yadav, Laxmi Yadav @ Sitoli Yadav and Wakil Yadav have been sentenced to undergo imprisonment for life and also to pay a fine of Rs.5000/- each and in default, to suffer imprisonment for six months. For the offence under Sections 302/149, all the accused persons have been



again sentenced to undergo imprisonment for life. For the offence under Sections 436/149 of the I.P.C., the accused persons have been sentenced to undergo imprisonment for ten years and to pay fine of Rs.3000/-each and in default, to undergo simple imprisonment for one year. For the offence punishable under Section 148 of the I.P.C., all the accused persons have been sentenced to undergo imprisonment for two years and to pay a fine of Rs.1,000/-each. For the offence under Section 323 of the I.P.C., the accused Teju Yadav and Ram Sewak Yadav have been sentenced to undergo simple imprisonment for six months. For the offence under Section 324 of the I.P.C., the accused Devendra Yadav has been sentenced to undergo simple imprisonment for two years. However, all the sentences have been directed to run concurrently.

2. For the sake of convenience, we would refer to the appellants individually instead of referring to their respective appeals.

3. The prosecution case, as made out in the fardbeyan of Raj Kumar Das, resident of village-Baswariya, P.S.- Sahar Ghat, District- Madhubani recorded by Sub-Inspector B.K. Srivastava of Sahar Ghat police station on 5.04.1997 at 12.00 noon at his residence, in short as follows :

4. On 5.04.1997 at about 10.30 A.M., the informant had gone to wash his she-buffalo in a pond situated south-west of his

house where Rajiv Yadav, son of accused Wakil Yadav also had arrived for washing his she-buffalo. The informant took a '*Lura*' (a kind of washing brush made from straw) from heap of straw kept at the bank of the pond and began to wash his she-buffalo to which Rajiv Yadav protested and started abusing the informant, who out of fear, returned to his house with she-buffalo and narrated this incident to his father and brother. By that time, the accused persons, namely, (1) Wakil Yadav armed with Farsa, (2) Surya Narayan Yadav armed with spade (3) Sri Narayan Yadav armed with Bhala (4) Jagdish Yadav armed with Bhala and pistol (5) Teju Yadav armed with Bhala (6) Vijay Yadav (7) Debu Yadav (8) Sukhdeo Yadav (9) Awadh Yadav (10) Sikandar Yadav (11) Ravindra Yadav (12) Bahadur Yadav (13) Prabhu Yadav (14) Laxmi Yadav (15) Harihar Das (16) Ramashish Yadav (17) Jiwachh Yadav, son of Ram Bahadur Yadav (18) Saukhi Lal Yadav (19) Ashok Yadav (20) Devendra Pd. Yadav (21) Bachcha Das (22) Laxmi Das (23) Devnandan Yadav (24) Jiwachha Yadav, son of Jagdish Yadav (25) Ram Sevak Yadav (26) Dahu Yadav (27) Prabodh Yadav (28) Krishna Yadav (29) Shaligram Yadav (30) Jagdeo Thakur, (31) Devendra Yadav (32) Ramashish Das (33) Jiwachha Yadav, son of Sukhdeo Yadav (34) Bhuneshwar Yadav (35) Malik Yadav (36) Ram Ekwil Yadav and 20-25 unknown persons forming unlawful assembly and armed variously came to his house. In

order to protect themselves, the informant along with his family members entered into their house. The accused persons put spread the 'Masoor' crops kept at his darwaza all over the house. Accused Surya Narayan Yadav and Ram Sevak Yadav sprinkled kerosene oil and set the house on fire. Accused Wakil Yadav was instigating others to kill all of them and to ensure that none of them came out alive from the house. On account of heat of fire, informant's father became restless, came out from the house and begged accused persons to spare them. In the meantime, accused Sri Narayan Yadav and Surya Narayan Yadav chased father of the informant and assaulted him with back portion of spade. Accused Surya Narayan Yadav further struck him on his neck which caused bleeding injury. Thereafter, accused Malik Yadav, Laxmi Yadav @ Sitoli Yadav, Jagdsih Yadav, Tezu Yadav, Vijoy Yadav threw him in the burning house, as a result of which, his father died. The informant, his brother Shyam Das, sister Lalita Devi hid themselves behind the creeper of 'beans' on the northern end of the house. In the meantime, accused Kaliya Devi instigated others to kill them. Thereupon, accused Jagdish Yadav, Bahadur Yadav, Vijoy Yadav, Laxmi Yadav @ Sitoli Yadav, Jiwachh Yadav, son of Ram Bahadur Yadav, Saukhi Lal Yadav, Jagdeo Thakur and Wakil Yadav took Shyam Das behind the creepers of the 'beans' and brought him near a well by dragging him. Thereupon, accused Jagdish Yadav,



Wakil Yadav, Vijoy Yadav assaulted him, causing injuries on the stomach and lower lateral portion of back of Shyam Das. Thus, he was thrown in the burning house. The informant's mother was also assaulted by accused Ashok Yadav and Devendra Yadav by Farsa, on account of which, she became unconscious. The informant alleged that accused Ram Sevak Yadav and Teju Yadav assaulted him with lathi causing injuries on his legs and hands. The informant's sister Lalita Kumari somehow escaped and started Hulla, whereupon, villagers arrived and tried to extinguish the fire. Accused Jagdish Yadav in order to threaten the villagers opened fire. According to the informant, the occurrence was witnessed by a number of co-villagers, namely, Ram Ballabh Thakur, Yogendra Ram, Nathuni Das, Pulkit Ram, Chandeshwar Yadav and others, who could also narrate the incident. The informant asserts that the accused persons set his house on fire in order to kill them and committed the crime and in that process injured him and his mother.

5. On the basis of the aforesaid fardbeyan of the informant, Saharghat P.S. Case No.22/1997 dated 5.04.1997 under Sections 147, 148, 149, 323, 324, 326, 307, 302, 341, 342, 427, 447, 449, 436, 120B of the I.P.C. and Section 27 of the Arms Act was registered and one Chandeshwar Prasad Singh, Officer-in-charge took up the investigation. In course of investigation, the police prepared



inquest reports, despatched the dead bodies for post mortem examination, the place of occurrence was inspected, seizure lists were prepared and the statements of witnesses were taken. The police after investigation, submitted charge sheet. The learned Magistrate, accordingly, took cognizance of offence and committed the case to the court of sessions. The charges were framed against the accused under different sections of the I.P.C. to which they pleaded not guilty and claimed to be tried.

6. The prosecution in order to establish its case examined 13 witnesses. Out of these 13 witnesses, P.Ws. 1, 2, 3, 4, 5, 8, 9 and 10 are on the point of commission of the offence. P.W.6 is the doctor, namely, Dr. P.K. Das, who conducted the post mortem examination on the cadaver on 7.04.1997 at 12.30 P.M. in Darbhanga Medical College and Hospital, Laheriasarai. P.W.7 is the other doctor, namely, Dr. Ram Kailash Mandal, who examined the injured, namely, Raj Kumar Das (P.W.9), Lalita Kumari (P.W.4) and Shanti Devi (P.W.5). P.W.1 is the investigating officer of the case, whereas, P.Ws. 12 and 13, namely, Suresh Chandra Tiwary and Shambhu Paswan respectively are formal witnesses. Besides ocular evidence, the prosecution also amongst other documents, exhibited inquest report, post mortem examination report and the seizure lists of the materials seized by the investigating officer.

7. The defence examined six witnesses in support of its case. These six witnesses are mostly on the point of alibi and also on the point of injury to Wakil Yadav, one of the appellants therein.

8. The case of the defence in the statements under Section 313 Cr.P.C. is complete denial of the occurrence and that the prosecution itself set fire to their house in order to implicate the accused persons on account of village politics.

9. The trial court on consideration of the materials on the record convicted the appellants and sentenced them, as already noticed in detail in the earlier paragraphs. Being aggrieved, the accused persons have filed eight sets of appeal.

10. Mr. Kanhaiya Prasad Singh, and Mr. Ramakant Sharma, Senior Advocates duly assisted with Mr. Patanjali Risi, Advocate appeared for the appellants. They submit that the post mortem examination report is a fraudulent document and ought to be discarded out-rightly. The doctor (P.W.6) who conducted the post mortem examination prepared a sham report, which has been strongly deprecated by the trial court. They submit that inherent contradictions and inconsistencies in the statements of P.W.9 (informant) would demonstrate that he has not seen the occurrence. Besides this, the statement of mother (P.W.5) of the informant should too be discarded as it was recorded after two and half months, for which, there was a

weak explanations, which is totally unacceptable. The statement of P.W.4 is too not reliable. The rest of the witnesses are chance witnesses and their testimony is too not free from doubts. The ocular evidence is not supported by the medical evidence.

11. On the other hand, the learned counsel appearing for the State as well as the informant submits that the ocular and the medical evidence produced on behalf of the prosecution fully establish the charge against the accused persons/appellants. They submit that apart from the informant, two injured, some villagers who happened to witness the occurrence, have also supported the prosecution case.

12. Before we examine the rival submissions of the parties, it would be relevant to examine the prosecution evidence. As noticed in the earlier paragraphs, the prosecution has examined P.Ws. 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10 on the point of commission of the offence. Out of these witnesses, P.W.8 Ram Balabh Thakur and P.W.10 Pulkit Ram have been disbelieved by the trial court and we find no reasons to take a contrary view.

13. We would first take up the evidence of the informant. P.W.9 Raj Kumar Das (informant of the case) has supported the prosecution case as spelt in the FIR. He reiterated the story of quarrel on the point of washing of the she-buffalo at the pond by *Lurra*. He



reiterated the allegations made in the FIR that the accused persons variously armed with lethal weapons came to his Darwaja and set fire to his house. When his father came out and begged mercy, the accused persons dragged him to nearby well, assaulted him and threw him in the burning house. He further stated that on account of fear, he along with his brother, mother and sister hid themselves within the creepers of 'bean' trees situated in the north side of the house. They were spotted by Kaliya Devi, who instigated others to kill them. Thereafter, the accused persons dragged his brother Shyam Das near the well, assaulted him and threw him in the burning house, on account of which, he died. He reiterated the prosecution version that accused Ashok Yadav and Devendra Yadav struck his mother with Farsa on her head and accused Ram Sevak Yadav and Tezu Yadav assaulted him with *lathi*.

14. P.Ws.1, 2 and 3 are co-villagers and are chance witnesses. They stated that while they were passing from near the house of informant, they noticed the accused persons at the house of the informant armed with various weapons. They have reiterated the prosecution version as stated in the FIR from the beginning till the end with some discrepancies on the point of dragging and on the point of throwing of the two deceased in the fire.

15. P.W.4 Lalita Kumar and P.W.5 Shanti Devi are sister

and mother of the informant and they have substantially supported the prosecution case.

16. P.W.6 Dr. P.K.Das is said to have conducted the post mortem examination on the dead bodies of Rajendra Das and Shyam Das on 7.04.1997. However, the post mortem examination report is dated 21.06.1997. In other words, the post mortem examination report has been prepared and signed belatedly after two and half months of the occurrence, which came for heavy criticism at the hands of the learned counsel for the appellants, to which we would advert at appropriate place.

17. P.W.7 Dr.Ram Kailash Mandal examined P.Ws. 4 and 5 (injured) and prepared their injury reports.

18. We thus find that the prosecution in order to establish its case has examined oral as well as documentary evidence including the post mortem examination report and inquest report.

19. We would first scan the evidence of Dr. P.K. Das (P.W.6), who conducted the post mortem examination on the dead bodies of both Rajendra Das and Shyam Nandan Das. P.W.6 stated that on 21.06.1997, he was posted as Tutor in D.M.C.H., Laheriasarai and he conducted medico legal examination at 12.30 P.M. on 7.04.1997 on the dead bodies said to be that of Rajendra Das and Shyam Nandan Das. As per the evidence of P.W.6, he found ante



mortem injuries. In his opinion, the dead bodies were moderately decomposed and fully burnt. The body was fully roasted and there was charring all over it. Time since death is within 2-5 days from 7.04.1997. He opined that the dead body was not identifiable as it was fully charred. The doctor had prepared the report under the heading medico legal report.

20. Mr. Kanhaiya Prasad Singh, learned Senior counsel appearing for the appellants submits that the medico legal report prepared by the doctor is not valid and it should be rejected out right. He submits that as the body received was fully roasted, burnt and charred, it was impossible for any doctor to have deciphered the injuries. On the contrary, the doctor even had gone to the extent of stating that he found blood clots on the body. The trial court while passing stricture, observed that the report has been manufactured by the doctor and no reliance can be placed on it.

21. We would agree with the submissions of the learned counsel for the appellants as well as the findings of the trial court. In our view, if a body is received in roasted and charred condition, having burn injuries to the extent of 80-85%, it would be very difficult for any doctor to decipher the injuries after two and half months. As such, we too resonate the views of the trial court that the medico legal report prepared by the doctor (P.W.6) is unreliable and the conduct of



the doctor was not above board and we would say no more. Besides this, we find that the Chief Judicial Magistrate had accorded permission to conduct the post mortem examination on 7.04.1997. It was for the police administration and the Civil Surgeon office/ D.M.C.H. administration to ensure preparation of post mortem examination report at the earliest, but the Medico Legal Report on the other hand is of 21.06.1997.

22. Furthermore, it is not in dispute that Rajendra Das and Shyam Nandan Das died on account of burnt injuries on 5.04.1997 in their own house at about 11.00 A.M. even by the defence. Their case is that the prosecution side themselves set fire to their house in order to implicate the accused persons with whom they were having enmity, and unfortunately, two of them died inside the house, as they could not come out timely. On the other hand, the prosecution case is that the accused persons with a common object set fire to the house, assaulted the deceased and others and thereafter, threw Rajendra Das and Shyam Nandan Das in the burning house.

23. The rival submissions of the parties would require closure scrutiny of ocular evidence. The core issue would be, whether the prosecution has been able to establish that the accused persons assaulted the deceased and threw them in the burning house. It is the prosecution case in the FIR that Sri Narayan Yadav and Surya



Narayan Yadav chased and assaulted the informant's father, namely, Rajendra Das with back of *Kudal* followed by another blow on his neck by Surya Narayan Yadav. Thereafter, it is alleged that accused Malik Yadav, Laxmi Yadav @ Sitoli Yadav, Jagdish Yadav, Tezu Yadav and Vijoy Yadav threw him in the burning house. Similarly, the prosecution case is that the accused persons spotted the informant's brother Shyam Nandan Das hiding within the creepers of 'beans' trees. On seeing him hiding, the accused persons, namely, Jagdish Yadav, Bahadur Yadav (since dead), Saukhi Lal Yadav, Jagdeo Thakur (dead), Wakil Yadav dragged him. Whereafter, accused Jagdish Yadav, Wakil Yadav and Vijoy Yadav after assaulting him with *Bhala* threw him in the burning house.

24. From the prosecution case, two situations emerge against the accused persons; one of assault and other of throwing the victims in the fire. So far as assault is concerned, the same does not find corroboration from any material evidence, as we have already held the post mortem examination report to be unreliable.

25. The Courts are of broadly of views that ocular evidence would prevail upon the medical evidence if the same is free of doubts. In the case of *Mohinder Singh Vs. The State reported in A.I.R. 1953 S.C. 415*, the three Judges Bench of the Hon'ble Apex Court laying down the law observed at paragraph 10 of the judgment

as follows :

“This is exactly what we also feel in this case, and it seems to us that the evidence which has been adduced falls short of proof in regard to a very material part of the prosecution case. In a case where death is due to injuries or wounds caused by a lethal weapon, it has always been considered to be the duty of the prosecution to prove by expert evidence that it was likely or at least possible for the injuries to have been caused with the weapon with which and in the manner in which they are alleged to have been caused. It is elementary that where the prosecution has a definite or positive case, it must prove the whole of that case”.

26. We find that the evidence of the witnesses that the deceased were assaulted before being thrown in the fire is not established by concrete evidence, as we have disbelieved the medical report. This brings us to the next issue whether the prosecution has been able to establish that all the accused persons with the common object dragged the two deceased and threw them in the burning house. We find that P.W.1 stated that accused Jagdish Yadav, Vijoy Yadav, Tezu Yadav, Malik Yadav and Sitoli Yadav threw Rajendra Das in burning house. P.W. 2 stated that accused Jagdish Yadav, Vijoy Yadav, Wakil Yadav, Sitoli Yadav, Malik Yadav and Tezu Yadav

threw the deceased Rajendra Das in the burning house. Similarly, P.W. 3 took the name of accused Jagdish Yadav, Vijoy Yadav, Sitoli Yadav and Tezu Yadav. P.W.4 has taken the name of accused Surya Narayan Yadav,, Shiv Narayan Yadav, Malik Yadav, Jagdish Yadav, Vijoy Yadav and Tezu Yadav.

27. So far as dragging of deceased Shyam Nandan Yadav and throwing him in the burning house, P.W.1 named the accused Jagdish Yadav, Bahadur Yadav, Wakil Yadav, Saukhilal Yadav and Jagdeo Yadav. P.W.2 named the accused Jagdish Yadav, Vijoy Yadav, Wakil Yadav, Sitoli Yadav, Bahadur Yadav, Jiwachh Yadav, son of Bahadur Yadav and Jagdeo Thakur. P.W.3 named the accused Jagdish Thakur, Vijoy Yadav, Sitoli Yadav, Wakil Yadav, Saukhi Lal Yadav, Bahadur Yadav and Jagdeo Yadav. P.W.4 named the accused Jagdish Yadav, Ram Sewak Yadav, Bahadur Yadav, Sitoli Yadav and Saukhilal Yadav.

28. Counsel for the appellants submits that the evidence of the witnesses is wholly unreliable, inconsistent and contradictory. The prosecution has tried to improve their case in the court. On these premises, learned counsel for the appellants submits that the prosecution has failed to establish the charges against the accused persons under Sections 302, 302/149 and 436/149 of the Indian Penal Code.



29. We would first examine the evidence of the informant (P.W.9). We find that the informant in the FIR stated that after altercation with Rajeev Yadav at the pond on washing of she-buffalo, he returned to his house and soon, thereafter, the accused persons numbering over 60 came to his *Darwaja* armed with lethal weapons and set fire to his house and threw his father and brother in the burning house. However, in his evidence, P.W.9 made a departure and stated that after the occurrence, accused Wakil Yadav came to his house and entered into an altercation and discussion with his father and thereafter, he returned with 60-65 accused variously armed with lethal weapons and set fire to his house. We further find that P.W.9 in FIR and in his evidence stated that Ram Sevak Yadav and Tezu Yadav assaulted him with *lathi* on legs and hands, whereas, according to the doctor P.W.7 Ram Kailash Mandal, the informant sustained two incised injuries and one lacerated injury. We find that P.W.9 has failed to give any explanation for the same. Furthermore, P.W.9 in paragraph 14 of his evidence stated that he sustained burn injuries at six to eight places on his body, whereas, again the doctor did not find any such injuries on his person. The informant in his evidence stated that when he came out of hiding from the cover of creepers of 'bean' tree, the accused persons were seen near about. The Investigating Officer in paragraph 16 of his evidence stated that the informant did

not state before him that he along with mother, sister and brother were hiding within the creepers trees. Furthermore, P.W.9 did not state before him that after altercation at the pond, accused Wakil Yadav had come to his house and started abusing his father.

30. On closure scrutiny of the evidence of the informant (P.W.9), we hold his evidence as not fully reliable.

31. The defence next argued that evidence of Shanti Devi (P.W.5) should too not be taken into consideration while deciding the case as she made statement before the police only after two months of the occurrence, for which, there is no cogent explanation.

32. We find from the materials on record that the occurrence took place on 5.04.1997 and Shanti Devi (P.W.5) was examined on 3.06.1997. The said situation is too admitted by P.W.5 Shanti Devi in paragraph 3 of her evidence.

33. It is well settled that the statement of witnesses recorded belatedly takes away the credibility of the evidence itself, if without sufficient explanation. The same gives rise to suspicion and a question arises as to why such statement was not recorded at the earliest.

34. P.W.5 Shanti Devi indisputably is the wife of the deceased Rajendra Das and mother of the deceased Shyam Nandan Das. In her statement, she stated that she regained her consciousness

after two days of the occurrence in D.M.C.H. Thereafter, she went to the house of her *Jaut* where she stayed for over a month and thereafter, she made her statement before the police.

35. We find the conduct of P.W.5 was most unbecoming of a wife and the mother. She regained her consciousness after two days and then went to her *jaut* place. She ought to have been given statement instead of staying at *jaut* place over a month. The incised injury sustained on her head was 1" to ½" and as such, it cannot be said that she would not have been in a position to make statement for a month. We further find that the P.W.4 Lalita Kumari too made her statement belatedly for which there is also no valid explanation. It is difficult to place reliance on her evidence for similar reasons recorded in case of P.W.9. However, we find that P.Ws. 1, 2 and 3 have made statement before the police and the defence has not been able to elicit any material contradictions to render their evidence unreliable.

36. Mr. Kanhaiya Prasad Singh, learned senior counsel argued that P.W.3 should not be held reliable as in his evidence, he stated that he along with the informant retrieved the dead body from the burnt house, whereas, according to the P.W.9 and the police, it was the police which alone took out the dead body. In our view, the contradiction is minor in nature and it will not go to the root of the prosecution case.

37. We find that P.Ws. 1, 2 and 3 have named Jagdish Yadav, Bahadur Yadav (since dead), Wakil Yadav, Saukhilal Yadav and Jagdeo Thakur (since dead) of dragging and throwing the deceased Shyam Nandan Das in the fire. Similarly, P.W.2 named Jagdish Yadav, Vijoy Yadav, Wakil Yadav, Sitauli Yadav, Bahadur Yadav (dead), Jiwachh Yadav, son of Bahadur Yadav, Saukhilal Yadav, Jagdeo Thakur (dead) as having dragged and thrown the dead body in the fire. P.W.3 took the name of Jagdish Yadav, Vijoy Yadav, Sitauli Yadav, Wakil Yadav, Saukhilal Yadav, Bahadur Yadav (dead), Jagdeo Thakur (dead) as persons who threw the dead body of Shyam Nandan Das in the fire.

38. Similarly, P.W.1 took the name of accused Jagdish Yadav, Vijoy Yadav, Tezu Yadav, Malik Yadav and Sitoli Yadav as the persons who dragged and thrown the dead body of Rajendra Das on fire. P.W.2 has named the accused Jagdish Yadav, Vijoy Yadav, Wakil Yadav, Sitoli Yadav, Malik Yadav and Tezu Yadav. P.W.3 has named the accused Jagdish Yadav, Vijoy Yadav, Sitoli Yadav and Tezu Yadav for the same act. We find that Jagdish Yadav, Vijoy Yadav, Tezu Yadav, Saukhi Lal Yadav, Sitoli Yadav and Wakil Yadav have been named by above these witnesses i.e. P.Ws. 1, 2 and 3 of dragging and throwing one of the other deceased in the fire.

39. We find and hold appellants Jagdish Yadav, Vijoy

Yadav, Tezu Yadav, Saukhi Lal Yadav, Sitoli Yadav and Wakil Yadav guilty of the offence under Sections 302/149 of the Indian Penal Code. We further find and hold that as per the prosecution case, it was accused Surya Narayan Yadav and Ram Sewak Yadav, who have set fire to the house of the deceased. As such, we uphold their convictions under Sections 436/34 and 148 of the Indian Penal Code.

40. For discussions made in earlier paragraphs, we convict accused Sri Narayan Yadav and Surya Narayan Yadav only under Section 325 of the Indian Penal Code for assaulting Rajendra Das with spade on his head.

41. Counsel for the appellants submitted that there is inadequate evidence to hold rest of the accused persons shared common object of setting the house on fire or killing the deceased. However, as per counsel for the State mere presence of the accused as a part of the unlawful assembly is sufficient to convict them under Section 149 of the Indian Penal Code. He submits that it is not necessary that such person should have committed any overt act. The State in support of its submissions placed reliance on decisions reported in **2003 SC 538 and 2008 Cr.L.J. 1409**. There cannot be any dispute with respect to the propositions of law laid down by the Hon'ble Supreme Court in the case reported in 2003 SC 538 and 2008 Cr.L.J. 1409. However even as per the judgments of the Hon'ble



Supreme Court, two conditions must be established before a person is convicted with aid of Section 149 of the Indian Penal Code. Firstly, the prosecution has to demonstrate that he was a member of unlawful assembly. Secondly, the prosecution has also to demonstrate that he was a member of the unlawful assembly and shared the common object of setting fire to house and killing of the deceased.

42. In the instant case, we find that there is general allegation that a large number of accused persons variously armed came to the house of the informant. The prosecution levelled specific overt acts to some of the accused. The prosecution has examined number of witnesses, but none of them stated that the other appellants acted in any manner from which it can be inferred that they shared the common object of some of the accused persons to commit murder.

43. In this view of the matter, we hold that the prosecution has failed to establish its case beyond all reasonable doubt that the rest of the appellants shared common object either to commit murder or to set the house on fire. As such, we acquit the rest the appellants other than those mentioned at para 39 of the charges under Sections 302/149 and 436/149 and other offence of the I.P.C. They are discharged from the liability of their bond.

44. Now having held some of the appellants guilty under Sections 302/149, 436/149, 325 and 148 of the Indian Penal Code, the



other issue would be as to what punishment, they should be awarded. In our view, for the offence under Sections 302/149, we reiterate the sentence of life imprisonment awarded to appellants Jagdish Yadav, Vijoy Yadav, Tezu Yadav, Saukhi Lal Yadav, Laxmi Yadav @ Sitoli Yadav and Wakil Yadav by the trial court. It appears from the records that appellants, namely, Jagdish Yadav, Vijoy Yadav, Tezu Yadav, Laxmi Yadav @ Sitoli Yadav and Wakil Yadav are in custody. The appeals on their behalf are dismissed. The appellant Saukhi Lal Yadav is on bail. He should surrender before the trial court to serve out remaining sentence.

45. For the offence under Sections 436/149 of the Indian Penal Code, appellants Shri Narayan Yadav and Ram Sewak Yadav have been sentenced to undergo imprisonment for 10 years with fine of Rs.3000/- and in default of payment of fine, to undergo simple imprisonment for six months. In the facts of the case, their sentence is reduced to four years. However, we are not inclined to interfere with the fine amount imposed upon them. For the offence under Section 325 I.P.C., we hold the appellants Sri Narayan Yadav and Surya Narayan Yadav guilty and are sentenced to undergo imprisonment for three years. In case, they have already in custody for three years, they should not be taken into custody. No separate sentence is awarded for the offence under Section 148 of the I.P.C. All the sentences are

directed to run concurrently.

46. In the result, Cr. Appeal (DB) No.936 of 2008 is dismissed with modification in sentence, Cr. Appeal (DB) No.748 of 2008 is partly allowed, Cr. Appeal (DB) No.830 of 2008 is partly allowed, Cr. Appeal (DB) No.935 of 2008 is dismissed with modification in sentence, Cr. Appeal (DB) No.868 of 2008 is partly allowed, Cr. Appeal (DB) No.767 of 2008 is partly allowed, Cr. Appeal (DB) No.918 of 2008 is dismissed with modification in sentence and Cr. Appeal (DB) No.797 of 2008 is allowed.

47. This Court appreciate the assistance given by both the sides particularly Mr. Patanjali Rishi, Advocate who has prepared a neat and composite synopsis of the case.

(Samarendra Pratap Singh, J)

(Amaresh Kumar Lal, J)

V.K. Pandey/-
N.A.F.R.

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