

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.683 of 2010

(Against the Judgment of conviction dated 28.04.2010 and Order of sentence dated 04.05.2010 passed by the Additional Sessions Judge, Fast Track Court No.1, Chapra, Saran, in Sessions Trial No.211 of 2000).

Shiv Dayal Singh, son of Late Kali Singh, resident of village-Nandanpur, P.S.-Taraiya, District-Saran.

..... Appellant.
Versus
The State of Bihar
..... Respondent.
with

Criminal Appeal (DB) No. 620 of 2010

Surendra Pathak, son of Pundeo Pathak, resident of village- Bhagwatpur, P.S. Taraiya, District Saran(Chapra).

..... Appellant.
Versus
The State of Bihar
..... Respondent.

Appearance :

(In CR. APP (DB) No.683 of 2010):

For the Appellant : M/s. Vijay Kumar & Kapildeo Singh, Advocates.

For the State : Mr. Abhimanyu Sharma, A.P.P.

For the Informant : Mr. Ashok Kumar Singh, Advocate.

(In CR. APP (DB) No.620 of 2010):

For the Appellant : M/s. Vindkeshri Kumar, Senior Advocate & Basant Kumar Singh Advocates.

For the State : Mr. Ashwani Kumar Sinha, A.P.P.

For the Informant : M/s. Amresh Rahul & Brajesh Tiwari, Advocates.

**CORAM:HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH
and
HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA**

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA)

Date: 7 -09-2016

Both these appeals are directed against the common Judgment of

conviction dated 28.04.2010 and Order of sentence dated 04.05.2010 passed by the Additional Sessions Judge, Fast Track Court No.1, Chapra, Saran, in Sessions Trial No.211 of 2000, whereunder both the appellants, namely, Shiv Dayal Singh {in Criminal Appeal (DB) No.683 of 2010} and Surendra Pathak {in Criminal Appeal (DB) No.620 of 2010} have been convicted under Sections 302/34 of the Indian Penal Code and sentenced to undergo rigorous imprisonment for life.

2. The prosecution case, as set out in the fardbeyan (Ext.5) of the informant Nayan Devi (P.W.7), is that on 23.01.2000 at about 10.00 A.M., her husband Kavindra Pandey, after taking bath, was offering Puja at Braham Asthan situated at about 40-50 yards south from her house and she was taking water for offering Puja to the Hand-pump situated at 15-20 yards east to the Braham Asthan. All of sudden, she saw her brother-in-law Surendra Pathak {appellant in Criminal Appeal (DB) No.620 of 2010} having bomb, his son Kameshwar Pathak having Fasuli, Sanjay Pathak having Bhala, Krishna Pathak having Gupti, Ram Janam Pathak having Fasuli, Radha Mohan Pathak having Daab, Shiv Dayal Singh {appellant in Criminal Appeal (DB) No.683 of 2010} having Garasa and Birju Singh having pistol and Daab in their hands coming out from Arhar field situated near Braham Asthan. Surendra Pathak hurled bomb at her husband which caused injury in his leg then he ran towards house to save his life making cry. But Shiv Dayal Singh assaulted through Farsa from behind on right leg, Birju Singh assaulted with Daab on the upper part of right elbow, then her husband fell down. Thereafter, all the accused persons surrounded her husband and caused injury through Daab,



Fasuli and Garasa. Krishna Pathak, at that time, cut the neck of her husband and Sanjay Pathak caused fracture injury on his right hand. On the sound of explosion of bomb and hulla, her cousin father-in-law Manager Pathak (P.W.3), his son Jitendra Pathak (P.W.4), cousin mother-in-law Gayatri Devi (not examined) came but they were chased by the accused persons. On 'hulla' some villagers came, then all the accused persons fled away towards east. Thereafter, she alongwith others went near her husband, who was dead. He was stained with blood sustaining cut injury on right arm, left armpit, in left hand below the elbow upto wrist and fracture injury on right elbow. There was also blackish swelling below the left knee. She stated that cause of occurrence is old enmity.

3. On the basis of fardbeyan (Ext.5) of the informant, Nayan Devi(P.W.7), Taraiya P.S. Case No.6 of 2000 was instituted on 23.01.2000 for the offence under Sections 147, 148, 149, 302 of the Indian Penal Code and 3/4 of the Explosive Substance Act. The police submitted the charge-sheet No.25 of 2000 on 03.05.2000 against the accused-appellant Shiv Dayal Singh continuing the investigation against rest accused. After cognizance of the offence, the case of the accused-appellant Shiv Dayal Singh was committed to the court of sessions bearing Sessions Trial No.211 of 2000 and charge was framed on 06.09.2000 under Section 302 of the Indian Penal Code. Later on, police submitted the supplementary charge-sheet no.101 of 2000 against accused-appellant Surendra Pathak on 05.11.2000 and his case was also committed to the court of sessions for trial bearing Sessions Trial No.27 of 2002 and charge was framed against him also under Section 302 of the Indian

Penal Code on 05.07.2002. After examination of Dr. Deepak Kumar, who conducted the post-mortem examination over the dead of the deceased Kavindra Pandey, as P.W.1 in Sessions Trial No.211 of 2000 on 06.11.2000, the Sessions Trial No.27 of 2000 relating to accused-appellant Surendra Pathak was amalgamated with Sessions Trial No.211 of 2000. Due to that reason, Dr. Deepak Kumar was again examined as P.W.9 on 23.03.2006.

4. During trial, the prosecution examined altogether 10 witnesses in support of its case, out of which P.W.8 Mukti Nath Choubey is of hearsay witness, whereas, on the other hand, the defence also examined altogether 8 witnesses.

5. P.W.2 Prakash Pathak is the son of the informant Nayan Devi (P.W.7) and the deceased Kavindra Pathak. He has stated in his evidence that on 23.01.2000 at about 10.00 A.M., he was at his door, then heard the sound of explosion of bomb. Thereafter, he went to Braham Asthan and saw that his father was fleeing away in an injured condition, who was being chased by Surendra Pathak (appellant), who had bomb and Farsa in his hand. Kameshwar Pathak having Daab, Sanjay Pathak having Bhala, Krishna Pathak having Gupti, Ram Janam Pathak having Farsa, Radha Mohan Pathak having Daab, Shiv Dayal Singh (appellant) having Farsa, Birju Singh having Daab and pistol in their hands were also chasing his father. Shiv Dayal Singh (appellant) gave Farsa blow at his father then he fell down in the field of Masoor and mustered. On the order of Surendra Pathak (appellant), Krishna Pathak cut neck and others also started to cause injury to his father. He alongwith his grand father Punyadeo Pathak (P.W.6) and mother Nayan Devi

(P.W.7) rushed to save him but they were also chased by the accused persons, then they returned. In cross examination, he has stated that when he heard the sound of explosion of bomb, he was at his courtyard but it is not in his memory, who was in the Angan besides him.

From the evidence of this witness, it appears that he is not an eye witness of hurling bomb at his father Kavindra Pathak by Surendra Pathak (appellant) rather he reached at the place of occurrence after hearing the sound of explosion of bomb and saw that his father was being chased by Surendra Pathak having bomb and Shiv Dayal Singh having Farsa in their hands alongwith other accused variously armed with weapons.

6. P.W.3 Manager Pathak is the uncle of the deceased. He has stated in his evidence that on 23.01.2000 at about 10.00 A.M., he was taking meal at his door, then heard the sound of explosion of bomb near Braham Asthan. Thereafter, he went there and saw the deceased Kavindra fleeing in an injured condition who was being chased by Shiv Dayal Singh having Farsa, Birju Singh having Daab and country made pistol, Radha Mohan Pathak having Daab, Ram Janam Pathak having Farsa, Kameshwar Pathak having Fasuli, Sanjay Pathak having Bhala, Krishna Pathak having Gupti and Surendra Pathak having bomb in their hands. The deceased Kavindra was assaulted by Shiv Dayal Singh through Farsa and Birju Singh through Daab, then he fell down in the mustered field. Surendra Pathak asked to kill, then Krishna Pathak cut the neck of Kavindra Pathak and others also caused injury to him. He alongwith his wife Gayatri Devi (not examined), son Jitendra Pathak (P.W.4), wife of Kavindra Pathak (P.W.7) and son of Kavindra Pathak

(P.W.2) rushed to save but the accused also chased them, then they fled away. He further stated that Darogaji had come in the village and recorded the fardbeyan of Nayan Devi (P.W.7), who put her signature on fardbeyan and he also put his signature. He proved his signature on the fardbeyan as Ext.1 He further stated that Darogaji seized the remains of the bomb explosion and prepared the seizure list on which Nayan Devi (P.W.7) and he put signature. He proves the signature of Nayan Devi and his signature on the seizure list as Exts.3 and 3/1. He further stated in his cross examination that he and Punyadeo Pathak (P.W.6) are sons of Subh Narain Pathak. Punyadeo Pathak had three sons, namely, Surendra Pathak (appellant), Kavindra Pathak (deceased) and Devendra Pathak. He further stated that the partition took place before 10-12 years in between Surendra Pathak, Kavindra Pathak and their parents and the house of the parents of Kavindra Pathak was situated in the north to his house. At the time of occurrence, the informant Nayan Devi (P.W.7), Prakash Pathak (P.W.2) and Jitendra Pathak (P.W.4) were present at the house. He has stated in cross examination that he had narrated the occurrence to Daroga Sharma and Dharmdeo Sah and, thereafter, he went to the police station and informed about the occurrence. He further stated that he put his signature at the police station but in same breath, he told that he put his signature at the door. He had gone to the police station on a bicycle and returned to village at 11.00-11.15 A.M. He has further stated that the blood was not fallen near Braham Asthan rather the blood was fallen in Masoor field where the deceased was lying. He denied the suggestion of defence that his other family members had not seen the occurrence.

7. P.W.4 Jitendra Pathak is the cousin of the deceased and is the son of Manager Pathak (P.W.3). He has stated in his evidence that on 23.01.2000 at about 10.00 A.M., he was at his door and then saw that Surendra Pathak, Krishna Pathak, Kameshwar Pathak, Sanjay Pathak, Ram Janam Pathak, Radha Mohan Pathak, Shiv Dayal Singh and Birju Singh armed with bomb, Farsa, Daab, Gupti etc. coming out from Arhar field. Surendra Pathak hurled bomb at Kavindra Pathak, who fled away from Braham Asthan. Then Shiv Dayal Singh and Birju Singh attacked him with Farsa and Daab and caused injury to him. On sustaining injury, Kavindra Pathak fell down, thereafter, on the order of Surendra Pathak, Krishna Pathak cut the neck by Gupti, Radhan Mohan Pathak, Sanjay Pathak caused injury to Kavindra Pathak through Bhala and Lathi. When he, his father (P.W.3), mother (not examined), Prakash Pathak (P.W.2) and wife of Kavindra Pathak (P.W.7) tried to save, then they were chased by the accused persons. He has stated in his cross-examination that when he heard the sound of explosion of bomb, his father (P.W.3), mother and Prakash Pathak (P.W.2) were near him. The blood had not fallen near Braham Asthan. Kavindra Pathak had fallen 30-40 yards away from Braham Asthan in west, from where his house was 19-20 yards in east. The wife of Kavindra (P.W.7) was 10-15 yards away from Braham Asthan at the time of explosion of bomb. He had seen 7-8 injuries at the person of the deceased Kavindra Pathak. He also saw the black spot of bomb explosion on his body and the blood was oozing out from his body. He denied the suggestion of the defence that he had not seen the occurrence and due to enmity, the accused have been implicated.

8. P.W.5 Satyendra Tiwari, who is brother-in-law of the deceased, has stated in his evidence that one person came on motorcycle and informed him about the murder of his brother-in-law (Kavindra Pathak), then he went to the house of his brother-in-law alongwith that person where Darogaji was present. Darogaji prepared the inquest report of the dead body in his presence and in presence of Manager Pathak (P.W.3) and both put their signatures on the inquest report and he proved the inquest report as Ext.4. He has further stated that he reached the place of occurrence at 02.00 P.M. and Darogaji was present there.

9. P.W.6 Punyadeo Pathak is the father of the deceased Kavindra Pathak and also the appellant Surendra Pathak. He has stated in his evidence that on 23.01.2000 at about 10.00 A.M., he had gone to defecate, then saw Surendra Pathak, Kameshwer Pathak, Sanjay Pathak, Krishna Pathak, Ram Janam Pathak, Radha Mohan Pathak, Shiv Dayal Singh and Birju Singh coming out from Arahar field. Surendra Pathak hurled bomb at Kavindra Pathak, who sustaining injury started to flee. Thereafter, Shiv Dayal Singh caused injury through Farsa on his right forearm and Birju Singh caused injury through Daab, as a result whereof, Kavindra Pathak fell down in the field of mustered and masoor, then on the order of Surendra Pathak, Krishna Pathak cut the neck. His brother Manager Pathak (P.W.3), daughter-in-law Nayan Devi (P.W.7), grand son Prakash Pathak (P.W.2) and Jitendra Pathak (P.W.4) rushed to save then they were chased by the accused. He has stated in cross examination that his house is 35-40 yards away from the place of occurrence. He had gone to defecate in the field in south-west corner of the



Arahar filed. He has further stated that Prabhawati Devi is his wife, who had lodged the case for her share in his pay. He has three sons, namely, Surendra Pathak (appellant), Devendra Pathak and the deceased Kavindra Pathak. He has executed the gift deed in the name of wife of Devendra Pathak and Kavindra Pathak in respect of six Kathas of land. He has given three Kathas land to his son Surendra Pathak (appellant) but he could not say the plot number of the said land. He denied the suggestion of the defence that Kavindra Pathak alongwith Sheo Nath Singh of village-Nandanpur was accused in several criminal cases. He has also stated in cross examination that his son Kavindra Pathak was offering Puja at Braham Asthan near Peepal tree at the time of occurrence. He further stated that he had asked Manager Pathak (P.W.3) at about 10.30 A.M. to inform the police about the occurrence, thereafter, he went to the police station on a bicycle. Darogaji had come at about 12.00-12.30 O'clock in the day then recorded his statement.

From the evidence of this witness, it is clear that he is the father of the deceased and also father of Surendra Pathak (appellant) and at the time of occurrence, he had gone to defecate near the Arahar field from where he saw the occurrence.

10. P.W.7 Nayan Devi is the informant and the wife of the deceased Kavindra Pathak. She has stated in her evidence that the occurrence is of 23.01.2000 at 10.00 A.M. At that time, she alongwith her husband and son Prakash (P.W.2) was at Brahm Asthan. Her husband was offering Puja at Brahm Asthan. In the mean time, Surendra Pathak (appellant) having bomb and Farsa, Kameshwar Pathak having Daab, Sanjay Pathak having bhala,

Krishna Pathak having Gupti, Ram Janam Pathak having Farsa, Radha Mohan Pathak having Daab, Shiv Dayal Singh (appellant) having Farsa and Birju Singh having Daab and pistol in their hands came there. As soon as they reached there, Surendra Pathak (appellant) hurled bomb causing injury in the leg of her husband, who started to flee but he was chased by the accused persons. In course of chasing, Shiv Dayal Singh (appellant) gave Farsa blow at his right shoulder and Birju Singh caused injury to him through Daab near knee. Thereafter, her husband moved for a short distance and fell down in the field of mustered and Masoor. On the order of Surendra Pathak (appellant), Krishna Pathak caused injury through Gupti on his neck and others started to cause assault to her husband. Her husband died there due to injury. She further stated that besides her, Punyadeo Pathak (P.W.6), Manager Pathak (P.W.3), Jitendra Pathak (P.W.4) and others saw the occurrence. She has stated in her cross examination that she does not know that Taraiya P.S. Case No.369 of 1985 was instituted against her husband, Shiv Nath Singh and others in respect of kidnapping the wife of Karm Nath Tiwari. She has further stated that the occurrence took place at two places. At one place the bomb was hurled and at other place the injury was caused to the deceased in fleeing condition. She has stated that her house is situated 30 yards away in the north to the Brahm Asthan. She further stated that there was enmity and dispute with Surendra Pathak since 3-4 years as he had taken more land than his share. She further stated that when she reached near her husband, then she saw her husband lying dead and at two steps in east, she saw the blood stained. She has also stated in cross examination that her cousin father-in-law Manager

Pathak (P.W.3) had given the information of the occurrence at the police station. She could not say the time when her cousin father-in-law started for police station but Darogaji had come at 12 O'clock in the day and he recorded her statement at her door. She has also stated in cross examination that the house of Shiv Dayal Singh is 100 yards away from her house. Birju Singh is the son of the appellant Shiv Dayal Singh and Shiv Nath Singh is own brother of Shiv Dayal Singh. She could not say whether the litigation in between Shiv Dayal Singh and Shiv Nath Singh is going on or not.

It is apparent from the evidence of P.W.7 Nayan Devi that she is an eye witness of hurling bomb by the appellant Surendra Pathak at her husband Kavindra Pathak and also of causing assault to him by Shiv Dayal Singh and other accused in course of fleeing of her husband and also on falling in the field of mustered and Masoor crops.

11. Dr. Deepak Kumar, has been examined twice in this case as P.W.1 and P.W.9. He has stated in his evidence that on 24.01.2000 he was posted as Medical Officer at Sadar Hospital, Chapra and on that day, he held post-mortem examination over the dead body of the deceased Kavindra Pathak, aged about 45 years, son of Punyadeo Pathak of village-Bhagwatpur Verma Tola, P.S. Taraiya, District-Saran and found the following findings:-

(i) External injuries:

- (a) One incised wound 6" X 1/2" X neck cavity deep up-to bone extending from left anterior triangle to back of neck on left side cutting the artery, vein and nerves and muscles alongwith C2 and C3 vertebra.
- (b) One incised wound of size 10" X 15" X 1/2" X muscle deep

with compound fracture of right humerus.

- (c) One incised wound 3" X 1/4" X scalp layer deep with cutting frontal bone at middle part of scalp.
- (d) Once incised wound 8" X 10" X 1/2" X muscle deep over left forearm extending from left elbow to wrist.
- (e) Swelling of about 2" diameter with bruise black coloured and charred skin of size 4" X 2" over popliteal region of both lower legs.
- (f) One incised wound of size 6" X 2" X muscle deep and chest cavity deep over left axilla.

(ii) On dissection of neck C2 X C3 vertebra were found fractured on left side. All muscles and vessels on left side of neck were cut. Right humerus bone too was found fractured. The chest cavity was filled with dark clotted blood which was also present on middle part of brain. All other vessels were found intact and pale.

According to him, cause of death was due to haemorrhage and shock as a result of abovementioned injuries. The injury nos.(a) to (f) except injury no.(e) were caused by sharp cutting weapon may be Bhala, Daab and Kudal. Injury no.(e) was caused by some explosive substance. The time elapsed since death to post-mortem examination was within 24 hours. He proved the post-mortem report as Ext.1. In cross examination, he confirmed that injury No.(e) was caused by explosive substance and not by sharp cutting weapon

12. P.W.10 Surendra Ram is the Investigating Officer of the case. He has stated that on 23.01.2000, he was posted as Officer Incharge of Police Station-Taraiya. On that day, he heard a rumour about murder of Kavindra

Pathak of village-Bhagwatpur. Thereafter, he made Sanaha Entry No.346 and proceeded for the place of occurrence at 11.30 A.M. On reaching the place of occurrence, he recorded the fardbeyan of Nayan Devi (P.W.7), wife of Kavindra Pathak, on which Nayan Devi (P.W.7) and Manager Pathak (P.W.3) put their signatures and he proved the fardbeyan of Nayan Devi as Ext.5. He prepared the inquest report of the dead body of the deceased Kavindra Pathak in presence of Manager Pathak (P.W.3) and Satyendra Tiwari (P.W.5) and he proved the inquest report as Ext.4. In course of inspection, he seized the remains of explosion of bomb and one blood stained Gamchha in presence of Manager Pathak (P.W.3) and Daroga Sharma and proved the seizure list as Ext.6. He inspected the first place of occurrence, which was Braham Asthan of village-Bhagwatpur at 50 yards south to the house of the deceased and adjacent to east of the village road running north to south surrounded from other three sides by bamboo clamps. In the west-south, there was semi constructed house of Punyadeo Pathak (P.W.6). The house of the informant was situated 50 yards in north and the house of accused Surendra Pathak was 50 yards in east-north. The Arahar field of Rajeshwar Pandit was situated in east of the place of occurrence. The remains of bomb explosion and one LOTA used for offering Puja were found near Braham Asthan. The second place of occurrence was the mustered and Masoor field of the deceased Kavindra Pathak, where his dead body was lying. The left hand of the deceased was seriously injured and in the right hand, there was grievous cut injury. The left hand of the deceased was also found pooled with blood and his neck was also found cut. At that time, the

deceased was wearing white coloured Dhoti which was pooled with blood. The blood was found on the ground, near the dead body, the mustered and Masoor crops were found damaged. The house of the informant was situated 50 yards east- north corner and the house and field of Manager Pathak (P.W.3) was situated in the east to the place of occurrence. He further stated that the formal F.I.R. is in his pen and signature and proved the same as Ext.7. He stated in cross examination that on receiving the confirmed information of the cognizable offence, the F.I.R. is lodged. If the information of cognizable offence is unconfirmed, the Station Diary Entry is made. When he was present at the police station on the date of occurrence, Manager Pathak (P.W.3), cousin father-in-law of Nayan Devi, had not come at the police station. He knows Manager Pathak but he does not know whether he had gone to the police station for giving information or not. He further stated that he chased the murderers of Kavindra from 11.30 A.M. to 01.15 P.M. and, thereafter, went to the place of occurrence. He has further stated in cross examination that he had not sent the remains of bomb and Gamchha recovered from the place of occurrence to the Forensic Science Laboratory for examination and he had not obtained the sanction order for prosecution of Surendra Pathak for offence under the Explosive Substance Act and submitted the chargesheet without sanction order. He also stated in cross examination that Suman Devi, wife of Shiv Dayal Singh (appellant) had lodged Taraiya P.S. Case No.136 of 1999 against Shiv Nath Singh and his two sons and the deceased Kavindra. He denied the suggestion of the defence that Manager Pathak (P.W.3) had come to police station and had given information about the

occurrence but he had not disclosed the name of Shiv Dayal Singh (appellant) and Birju Pathak.

13. From the evidence of P.W.2 Prakash Pathak, P.W.3 Manager Pathak, P.W.4 Jitendra Pathak, P.W.6 Punyadeo Pathak and P.W.7 Nayan Devi, it is apparent that P.Ws.4, 6 and 7 are the eye witnesses of occurrence of arrival of appellants Surendra Pathak and Shiv Dayal Singh alongwith other accused near Braham Asthan from Araher field and hurling bomb by Surendra Pathak (appellant) at Kavindra Pathak (deceased), who was offering Puja and also chasing Kavindra Pathak, who started to flee away, and causing assault by Shiv Dayal Singh (appellant) through Farsa and accused Biru Singh through Daab and also causing injury by other accused on falling down of Kavindra Pathak on the order of Surendra Pathak (appellant) in mustered and Masoor filed. P.Ws.2 and 3 are also the witnesses of chasing of Kavindra Pathak (deceased) by the appellants and other accused and causing injury through Farsa by appellant Shiv Dayal Singh and also causing injury after falling down of Kavindra Pathak in the mustered and Masoor filed by other accused on the order of Surendra Pathak (appellant). Dr. Deepak Kumar (P.W.1/P.W.9), who held the post-mortem examination over the dead body of the deceased found six injuries on his person, out of which five injuries were caused by sharp cutting weapon and one injury was caused by explosive substance.

14. D.W.1 Hirdaya Nand Manjhi has stated in his evidence that he is posted as Dresser at Primary Health Centre, Jalalpur since 1998. On 22.01.2000, Dr. Jagdev Mandal (D.W.4) examined Shiv Dayal Singh

(appellant), whose name is at O.P.D. No.7106 as patient No.14. The entry was made by Dr. Jagdev Mandal (D.W.4) in his presence and he proved the O.P.D. Entry No.7106 as Ext.1. He also proved the O.P.D. prescription as Ext.B and certificate of Dr. Jagdev Mandal as Ext.C. In cross examination, he stated that he did not write anything in the O.P.D. Register and there is no signature of the doctor in the O.P.D. Register.

D.W.4 Dr. Jagdev Mandal has stated in his evidence that on 22.01.2000, he was Medical Officer at Primary Health Centre, Jalalpur, and on that day, he examined patient Shiv Dayal Singh, aged about 40 years, son of Late Kali Singh of village-Nandanpur, P.S. Taraiya, District-Saran as O.P.D. patient and he was admitted and discharged on 25.01.2000 from the hospital. At that time, Hirdiya Nand Manjhi (D.W.1) was Dresser in the hospital. He further stated that the certificate issued by him is in his handwriting and signature, which is already marked as Ext.C. In cross examination, he has stated that on 22.01.2000, 14 patients were examined and Shiv Dayal Singh was last patient. Primary Health Center, Jalalpur is of six bed hospital and on 22.01.2000, only Shiv Dayal Singh was admitted for treatment. He further stated that in Ext.B, which is discharge slip, there is no date of discharge. He also stated that he did not know how many medicines were provided to the patient Shiv Dayal Singh by the hospital and how many medicines were purchased by him from the market.

From the evidence of D.Ws.1 and 4, it is apparent that Ext.A, which is entry No.7106 of O.P.D. Register relating to check up of Shiv Dayal Singh on 22.01.2000 does not bear the signature of the doctor against the



entry of patient no.14 on that date and the discharge slip (Ext.B) relating to patient Shiv Dayal Singh also does not bear the date of discharge. No bed head ticket is brought on record regarding the admission and treatment of Shiv Dayal Singh (appellant) in the hospital in between 22.01.2000 and 25.01.2000 as indoor patient. As such, the plea of alibi of Shiv Dayal Singh(appellant) that on the date of occurrence, i.e., 23.01.2000, he was indoor patient at Primary Health Centre, Jalalpur, appears to be untrustworthy.

15. D.W.2 Awadh Kishore Prasad of village-Bastha and D.W.3 Bihari Prasad of village-Bandhbarwa have stated that Surendra Pathak (appellant) and his son Sanjay Pathak used to reside in his village-Bastha in a temple in connection with offering Puja since 1998 and on 23.01.2000, Surendra Pathak was offering Puja in the temple of village-Bastha but both the witnesses have not been examined in course of investigation by the Investigating Officer.

16. D.W.5 Vijay Shankar Prasad, D.W.6 Ranjan Pandey, D.W.7 Gauri Shankar Tiwary and D.W.8 Parsu Ram Singh are Advocate's clerk and they have formally proved the certified copy of the Station Diary Entry No.342 to 355 as Ext.F, application dated 17.11.2005 filed in the court of Principal Judge, Family Court, Chapra as Ext.G, Final Form and formal F.I.R. of Taraiya P.S. Case No.101 of 2004 as Ext.H and I, written report dated 12.12.1999 of Suman Devi and formal F.I.R. drawn on the basis of the written report dated 12.12.1999 and the application dated 28.12.1999 filed in the court of the Chief Judicial Magistrate as Exts.L, M and N.

17. Learned counsel for the appellants made submission that it

would appear from the evidence of P.W.6 Punyadeo Pathak and P.W.7 Nayan Devi that they told Manager Pathak (P.W.3) to go to the police station to give information regarding the occurrence and, thereafter, Manager Pathak (P.W.3) went to the police station. P.W.3 Manager Pathak has admitted in his cross examination in paragraph-12 that he had informed about the occurrence to Darogaji at police station and also put his signature and he returned to his house at 11.45 A.M. and, thereafter, Darogajio had come. As such, recording of fardbeyan (Ext.5) of the informant Nayan Devi (P.W.7) by P.W.10 Surendra Ram, the Investigating Officer of the case, at the place of occurrence at 02.00 P.M., which is the basis of the present case, subsequent to information given by P.W.3 Manager Pathak would be treated as statement under Section 162 of the Code of Criminal Procedure. In fact, P.W.10 Surendra Ram, the Investigating Officer of the case, suppressed the initial information of the occurrence given at the police station by Manager Pathak (P.W.3), which was something different to the fardbeyan/statement (Ext.5) of P.W.7 Nayan Devi at the place of the occurrence at about 02.00 P.M.. As such, whole prosecution case becomes doubtful. In support of his submission learned counsel for the appellants placed reliance on the decisions in the case of **(1) Sevi and another (2) Koodakkal Karian and others Vs. State of Tamil Nadu and another {1981 CRI. L.J. 736 (Supreme Court)}** and in the case of **State of Andhra Pradesh Vs. Punati Ramulu and others {AIR 1993 Supreme court 2644}**.

Learned counsel for the appellant Surendra Pathak next submitted that while there is specific allegation in the F.I.R. that the appellant Surendra



Pathak hurled bomb at Kavindra Pathak near Braham Asthan due to which he sustained injury and started fleeing away and, thereafter, the appellant Shiv Dayal Singh caused injury to him through Farsa and other accused also caused injury to him through Farsa and other weapons and he died. The Investigating Officer has also found the remains of explosion of bomb at the place of occurrence but the same was not sent by him for examination to the Forensic Science Laboratory and the appellant Surendra Pathak has not been charged and found guilty under Sections 3/4 of the Explosive Substance Act. As such, the conviction of the appellant Surendra Pathak under Sections 302/34 of the Indian Penal Code is illegal. In support of submission, he placed reliance on a decision in the case of **Md. Ashad and others Vs. the State of Bihar {2002(3) PLJR 366}**.

Learned counsel for the appellant Shiv Dayal Singh next submitted that it would appear from the evidence of D.W.1 Hridaya Nand Manjhi and D.W.4 Dr. Jagdev Mandal, Dresser and Medical Officer at Primary Health Centre, Jalalpur, that the appellant Shiv Dayal Singh was examined by D.W.4 Dr. Jagdev Mandal on 22.01.2000 at the Primary Health Centre, Jalalpur and he was admitted there on 22.01.2000 and discharged on 25.01.2000. As such, the appellant Shiv Dayal Singh was not at the village of the place of occurrence on 23.01.2000 but the learned trial court has not considered the same and illegally convicted and sentenced the appellant Shiv Dayal Singh through the impugned Judgment and Order under Section 302/34 of the Indian Penal Code.

18. So far as the first submission of the learned counsel for the

appellants is concerned, there is no doubt that P.W.6 Punyadeo Pathak and P.W.7 Nayan Devi, the informant, have stated in their evidence that they asked P.W.3 Manager Pathak to go to the police station for giving information about the occurrence and he went to the police station. P.W.3 Manager Pathak in his cross examination at paragraph-12 also stated that he had informed Darogaji at the police station about the occurrence and put his signature at the police station but in the same breath, he stated that he put his signature at his door. From the evidence of P.W.3 Manager Pathak, it appears that he had put his signature on the fardbeyan of Nayan Devi (P.W.7) and the seizure list of remains of explosion of bomb and cloth and he proved his signature on the fardbeyan (Ext.5) and on Inquest Report as Exts.2 and 3. P.W.10 Surendra Ram, the Investigating Officer, has specifically stated in his evidence that he after hearing the rumour about the murder of Kavindra Pathak in village-Bhagwatput made Sanaha Entry No.346 at about 11.30 A.M. on 23.01.2000 and proceeded for the place of occurrence. He also stated in his cross examination at paragraph-16 of his evidence that when he was present at the police station on the date of occurrence, Manager Pathak (P.W.3), the cousin father-in-law of the informant, Nayan Devi (P.W.7) had not come for giving information about the occurrence. He could not say whether P.W.3 Manager Pathak had come to the police station for giving information or not. On going through the evidence of P.W.3 Manager Pathak, it is apparent that no suggestion is drawn by the defence, regarding making of his fardbeyan at the police station on which he had put his signature and that statement was something different to his statement given before the court and the fardbeyan

of P.W.7. More so, the evidence of P.W.3 is corroborative of the prosecution case as narrated in the fardbeyan (Ext.5) of P.W.7 Nayan Devi.

In the case of **Sewi and another (supra)**, according to the defence, the original First Information Report which was registered was something altogether different from what has been put forward as the First Information Report and that the present report has been substituted in the place of original First Information Report by destroying the same. On the request of the defence, the Sessions Judge directed the Sub-Inspector to produce the First Information Report Book in the Court so that the counterfoils might be examined. The Sub Inspector did not produce the First Information Report Book in the Court. In that circumstances, the Hon'ble Apex Court observed that F.I.R. book, if produced, would have contained the necessary counterfoils corresponding to the F.I.R. produced in Court. The Sub-Inspector when questioned stated that he searched for the counterfoil book but was unable to find it, an explanation which we find impossible to accept. We cannot imagine how any F.I.R. Book can disappear from a Police Station. Though he claimed that relevant entries had been made in the general diary at the Station the Sub-Inspector did not also produce the general diary in Court. The production of the general diary would have certainly dispelled suspicion. In the circumstances we think that there is great force in the submission of the learned counsel for the accused that the original F.I.R. has been suppressed and, in its place some other document has been substituted.

In the case of **Md. Ashad (supra)**, as relied upon by the learned counsel for the appellants, the Circle Inspector, who was the Investigating



Officer of the case, received information of the incident from police constable No.1278, who was on 'bandobast' duty and proceeded for the village of the occurrence and started the investigation in the case without making the entry in daily diary/general diary about the information received by constable No.1278, who was the first person to give information to him on which basis he had proceeded to the spot and taken up the investigation in hand. Only when the informant returned from the police station alongwith the written complaint to the village then the same was registered by the Circle Inspector. In that circumstances, the Hon'ble Apex Court observed that the complaint could not be treated as the F.I.R. in the case as it certainly would be a statement made during the investigation of a case and hit by Section 162, Cr.P.C.

The aforesaid two decisions, as relied upon by the learned counsel for the appellants, would not be applicable in the present case as it is apparent from the evidence of Surendra Ram (P.W.10), the Investigating Officer of the case, that on 23.01.2000, he heard rumour regarding the murder of Kavindra Pathak in village-Bhagwatpur. Thereafter, he made Sanaha Entry No.346 dated 23.01.2000 and proceeded for the place of occurrence. This witness has also stated in his cross examination that when he was present at the police station, Manager Pathak (P.W.3) had not come there. Moreover, Manager Pathak (P.W.3) while has stated about going to the police station for giving information about the occurrence and also to inform to Darogaji saying that he put his signature but in the same breath he stated that he put his signature at the door. More so, Manager Pathak (P.W.3) has given statement

in corroboration of the First Information Report of P.W.7 Nayan Devi. No any suggestion is drawn to P.W.3 Manager Pathak that he had given the statement at the police station something different to the statement as given in the court and as detailed in the fardbeyan of the informant Nayan Devi (P.W.7).

19. So far as the second submission made on behalf of the appellant Surendra Pathak is concerned, P.W.10 Surendra Ram, the Investigating Officer of the case, has specifically stated that he had not sent the remains of the explosion of bomb for test to the Forensic Science Laboratory nor he had obtained any sanction order for prosecution under the Explosive Substance Act. While chargesheet was submitted under Sections 3/4 of the Explosive Substance Act, as appears from the record, but charge was only framed against both the appellants under Sections 302 of the Indian Penal Code for committing the murder of the deceased Kavindra Pathak and both have been convicted and sentenced under Sections 302/34 of the Indian Penal Code through the impugned Judgment and Order.

In the case of **Md. Ashad (supra)**, the police on hearing the sound of explosion of bomb surrounded the locality where one accused was found carrying a bag containing 10 bombs and other accused were found armed with loaded country made pistol and live cartridges and the accusation was of making attempt to hurl bomb. The bomb was put in a bucketful of water and the seizure list was prepared but the same was not sent for examination to the Forensic Science Laboratory. The Division Bench of this Court observed that if the articles which were allegedly seized from the appellants were kept in bucketful of water it was a lapse on the part of the

police, the benefit of doubt arising from which must go to the accused. It is not possible to accept the submission without any expert evidence on the point that after being kept in water the articles were not fit for any kind of forensic examination by expert. It would be unfair to the appellants if we accept the make-belief case of the prosecution about the articles being 'explosive substance' without any legal proof to that effect. The Court found the conviction of the appellants under Sections 3 and 4 of the Explosive Substance Act illegal and, accordingly, held that the appellants could not be convicted under Section 148 of the Indian Penal Code which provides for punishment to a person found guilty of rioting with deadly weapon which when used would cause death.

The aforesaid decision is not applicable in the facts and circumstances of the present case as the appellants were only charged under Section 302 of the Indian Penal Code and not under Sections 3/4 of the Explosive Substance Act and, accordingly, convicted and sentenced under Section 302 of the Indian Penal Code . Dr. Deepak Kumar (P.W.1/P.W.9), who held the post-mortem examination over the dead body of the deceased has stated in his evidence that injury nos.(a) to (f) except injury no.(e) were caused by sharp cutting weapon and injury no.(e) was caused by some explosive substance and also confirmed in cross examination that injury no.(e) was caused by explosive substance and not by sharp cutting weapon. As such, the conviction of Surendra Pathak (appellant) under Sections 302/34 of the Indian Penal Code in absence of charge under Sections 3/4 of the Explosive Substance Act for causing bomb explosion injury is not illegal.



So far as the third submission as made on behalf of the appellant Shiv Dayal Singh about his alibi is concerned, while D.W.1 Hridaya Nand Manjhi and D.W.4 Jagdev Mandal, who respectively are said to be posted as Dresser and Medical Officer at Primary Health Center, Jalalpur, have stated that the appellant Shiv Dayal Singh was examined on 22.01.2000 by entering his name in O.P.D. Register at serial no.7106 as last patient on 22.01.2000 and he was admitted for treatment and discharged on 25.01.2000. But D.W.1 Hridaya Nand Manjhi has stated that in entry at serial no.7106 in the O.P.D. Register, the name of the appellant Shiv Dayal Singh is detailed but against the entry, the column of signature of the doctor is blank. Ext.D, which is Discharge Certificate issued by the Dr. Jagdev Mandal (D.W.1) also does not bear the date of discharge which is itself admitted by D.W.4 Dr. Jagdev Mandal. While the appellant Shiv Dayal Singh is said to be admitted at Primary Health Center, Jalalpur on 22.01.2000 and discharged after treatment on 25.01.2000 but no Bed Head Ticket is brought on the record. As such, I find no substance in the submission of the learned counsel for the appellant Shiv Dayal Singh that he was under treatment at Primary Health Centre, Jalalpur, on 23.01.2000 and discharged from there on 25.01.2000.

20. On going through the evidence of the prosecution and the discussions, as made above, it is apparent that the prosecution has succeeded in proving the case under Sections 302/34 of the Indian Penal Code against the appellants beyond all reasonable doubts and, as a result, finding no merit in these appeals, the same are dismissed.

The appellant Shiv Dayal Singh {in Criminal Appeal (DB)

No.683 of 2010} is already in custody whereas the appellant Surendra Pathak {in Criminal Appeal (DB) No.620 of 2010} is on bail, therefore, his bail bond is cancelled and he is directed to surrender before the court below forthwith to serve out remaining period of sentence.

(Rajendra Kumar Mishra, J)

Samarendra Pratap Singh, J: I agree

(Samarendra Pratap Singh, J)

Pradeep Srivastava.

AFR/NAFR	NAFR
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