

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.29 of 2013

Arising Out of PS.Case No. -556 Year- 2010 Thana –MADHEPURA District- MADHEPURA

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Nand Kishore Yadav @ Mandal S/O Late Maheshwari Prasad Yadav Resident Of
Village Adarsh Nagar, Ward No. 8, P.S. Madhepura, District Madhepura.

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

with

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Criminal Appeal (DB) No. 1110 of 2013

Arising Out of PS.Case No. -556 Year- 2010 Thana -MADHEPURA District- MADHEPURA

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Santosh Kumar @ Kauwa S/O Sri Rajo Yadav Resident Of Mohalla- Madhepura,
Adarsha Nagar, Ward No.-8, P.S.- Madhepura, District- Madhepura

.... Appellant/s

Versus

The State Of Bihar

.... Respondent/s

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Appearance :

(In CR. APP (DB) No.29 of 2013)

For the Appellant/s : Mr. Kanhaiya Prasad Singh, Sr. Advocate
Mr. Anant Kumar, Advocate.

For the State : Mr. S.N.Prasad, APP

(In CR. APP (DB) No.1110 of 2013)

For the Appellant/s : Mr. Kanhaiya Prasad Singh, Sr. Advocate

For the State : Mr. S. N.Prasad, APP

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

and

HONOURABLE MR. JUSTICE SANJAY KUMAR

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date: 04 -02-2017

Both the appeals each filed by one appellant have been
heard together as they arise out of the same trial.

(1) Both the appellants were charged under Section
302/34 of the Indian Penal Code (IPC) for having caused the death of



the father of informant (PW-5). The learned Additional District and Sessions Judge *Ad hoc* Court No. III, Madhepura vide the judgment dated 29.11.2012 passed in Sessions Trial No. 99 of 2011 held them guilty under Section 302/34 of the IPC and the order of sentence dated 06.12.2012 directed the appellants to undergo imprisonment for life and a fine of Rs. 5,000/- (Five Thousand) to each of them. In default of the payment of the fine the appellants were to undergo further rigorous imprisonment for 06 months.

(2) The prosecution case, as disclosed in the '*fardbeyan*' (Ext.-2/2) lodged by the son of the deceased, namely Lalan Prasad Yadav (PW-5), in brief, is that on 28.12.2010, at about 5.45 P.M., the informant's father was taking tea at the tea shop of Narayan Mandal situated close to the college Chowk in the township of Madhepura. At the same time, Bisho Yadav (PW-1) had tied his cow in front of the shop. Appellant Santosh Kumar @ Kauwa was passing by the side of the tied cow and got smeared with cow dung from the tail of the cow. He became annoyed/irritated and started assaulting the cow. Bisho Yadav protested whereafter appellant Santosh Kumar @ Kauwa started abusing and grappled with him. In the meantime, Muneshwari Yadav (deceased) the father of the informant who was sitting in the tea shop came and tried to intervene. Enraged by this, the appellants Santosh Kumar @ Kauwa, Nandkishore, and co-accuseds Jitendra



Mandal and Rajkumar Paswan took out knife and gave knife blows to the deceased. Upon receiving those injuries he became seriously injured and fell on the ground. Seeing the congregation of the local people the accused persons fled from the place of occurrence. The injured was brought to the Sadar hospital, Madhepura and in course of his treatment he died. The '*Fardbeyan*' of the informant (PW-5) was promptly recorded at the hospital by Sub Inspector Hare Ram Singh. Upon endorsing the recording of the FIR, the Station House Officer (SHO) himself took up the investigation. An inquest report was drawn by the Investigating Officer (I.O.) PW-7 and the body was dispatched for post-mortem. PW.6 Dr. Rajeev Ranjan Singh held the autopsy on the dead body of the deceased on 29.12.2010 at about 11.20 A.M. and submitted the post-mortem report (Exhibit-3). The I.O. visited the place of occurrence, recorded the statement of the witnesses and finding the accusations true against the present appellants submitted the charge-sheet keeping the investigation open against 02 other named accused. Cognizance was taken and the case was committed to the Court of Sessions on 15.4.2011. On transfer, the case came on the file of the learned Trial Judge and Sessions Trial No. 99 of 2011 was registered. Charges were formally framed and read over to the accuseds to which they pleaded not guilty and claimed to be tried. After closure of the evidence of the prosecution the statement of the



accuseds was recorded under Section 313 Cr. P.C. in which they denied all the allegations and pleaded their innocence. The defence of the accuseds-appellants was complete denial of the allegations and their false implication at the instance of the enemies and rival groups.

(3) In order to prove the charge(s), the prosecution, in all, produced 07 (Seven) witnesses, namely, PW-1 Bisho Yadav, PW-2 Rajaram Yadav, PW-3 Ashok Kumar, PW-4 Pawan Kumar Yadav, PW-5 Lalan Prasad Yadav (informant), PW-6 Dr. Rajeev Ranjan Singh and PW-7 Ajay Kumar, the I.O. of the case. Be it noted here that some other witnesses were also cited in the charge-sheet but the prosecution did not examine them on account of their being gained over. Besides the oral evidence, relevant documents were also proved by the prosecution. Ext.1 is the signature of witness Ashok Kumar over inquest report, Ext-1/1 is the inquest report in the pen of A.S.I. Hareram Singh, Ext.2 is the signature of informant over the '*fardbeyan*', Ext. 2/1 is the endorsement of registration of the case by the SHO over the '*fardbeyan*', Ext. 2/2 is the '*fardbeyan*' in the pen and signature of A.S.I. Hareram Singh, Ext. 3 is the post-mortem report whereas Ext.4 is the formal First Information Report (F.I.R.). We would further note that the aforesaid documents i.e. Ext.2/1, 2/2, 4 and 1/1 are available on record but these documents have neither been marked nor mentioned in the Exhibit list by the Court below. The



documents were proved by Investigating Officer PW-7 on 28.3.2012 and this fact stands mentioned in the order sheet itself. This is purely a clerical mistake and the appellants have not disputed to those documents at the time of argument.

(4) We have heard Mr. Kanhaiya Prasad Singh Sr. Advocate, who appeared in support of the appeal and the counsel for the State.

(5) The counsel for the appellant has submitted that the prosecution has miserably failed to prove the manner of occurrence and the implication of the appellants in the crime. PWs 2 and 3 have only given hearsay account of the case. From the evidence of PW-4 (another son of the deceased) it would appear that he has also not seen the assault being perpetrated on the victim. His evidence should also be considered as the hearsay witness. The informant (PW-5) has narrated the manner of occurrence but the same does not find support from the objective findings of PW-6 (doctor). The prosecution case is consistent that the appellant along with Jitan Mandal and Rajkuamr Paswan assaulted the deceased by means of knife. Only the two appellants herein were put on trial. What happened to the remaining accuseds is not appearing from the record. PW-1 Bisho Yadav who was present at the place of occurrence and given out the ocular account of the prosecution case should also be doubted as he has



failed to narrate the true version of the prosecution case. His presence at the P.O. has not been satisfactorily explained. It has been urged with vehemence that material aspect of the prosecution case were not stated before the I.O. during investigation. The evidentiary value of the prosecution witnesses lose their shine. Their evidence cumulatively do not firmly establish the guilt of the appellants.

(6) Learned APP, on the other hand, supported the impugned judgment of conviction. It is submitted that the evidences of PW-1 as well as the informant (PW-5) prove, without any shadow of doubt, the implication of the appellants herein in the said crime as both of them have given ocular account of the prosecution case. They have not contradicted themselves on material/relevant parts of the prosecution case. The other PWs have deposed on the circumstances attending prior to and after the actual assault. They give full credence to the prosecution case and establish the place of occurrence, time of occurrence and to some extent the manner of occurrence.

From the relevant evidence placed before us, in particular that of the doctor (PW-6), we find that it is a case of homicidal death of the deceased on account of ante- mortem injuries found on his person. PW-6, in his deposition, has stated that on 29.12.2010 while he was posted at Sadar hospital, Madhepura, at about 11.20 AM, he conducted the post-mortem on the dead body of Muneshwari Prasad



Yadav duly identified by the Chaukidar and found the following ante mortem injuries:-

- “1. Rigor mortis present on all the four limbs,
I (a) Pupil dilated and fixed.
2. External Injury
 - (I) There was one stabbed injury 1½” x 1” on posterior part of chest right side.
 - (II) Stabbed wound 1”x ½” on the back side of head
 - (iii) Stabbed wound 1” x 1” into muscle deep on rt scapular region
 - (iv) Stabbed wound 1” x ½” on the posterior part of chest below rt scapular.
3. Internal injury
 - On dissection of chest right lungs punctured, thyroxic cavity full of blood
 - Heart all Chamber empty and pale
4. On dissection of abdomen All viscerae pale and NAD”

The cause of death was due to haemorrhage and shock due to assault by sharp cutting weapon. The time elapsed since death was within 24 hours. Those injuries were sufficient to cause death in ordinary course of nature. The post-mortem report is placed as Ext.-3. The factum of death on account of the injury sustained by the deceased in course of occurrence giving rise to the present trial is therefore established. Whether the accuseds have done it in the manner alleged or not is now the relevant question to be examined.

(7) We shall now straightway advert to the evidence of the informant (PW-5). He is the son of the deceased. On the relevant



date and time of occurrence, he was at the vegetable market close to the College Chowk. Close to the College Chowk is the tea shop of Narayan Mandal. According to the prosecution, the place of occurrence is in front of this shop. His father (deceased) was taking tea at the said tea shop. He had gone to the nearby vegetable market from that shop and was returning to his father. While returning he was hardly five paces away from the place of occurrence when he saw the appellants Santosh Kumar @ Kauwa, Nandkishore Yadav along with co -accused Jitan Mandal and Rajkumar Paswan assaulting his father with knife. His father was hit on the forehead, left shoulder and back with knife. Having received the assault he fainted and fell on the ground. On 'hulla' the people around there started congregating whereafter the accused persons fled away. He with the help of the others including the brother Pawan Kumar Yadav (PW-4) and Ashok Kumar (PW3) (nephew of the deceased) carried him on rickshaw to the hospital where in course of treatment his father died. He has vividly narrated the place of occurrence, the reasons which aggravated the accuseds, particularly, appellant Santosh Kumar @ Kauwa to commit the crime. The police arrived at the hospital where he lodged the '*fardbeyan*' whereafter he put his signature thereover (Ext.2). His evidence has been severely criticized by the appellants with reference to the situs of the injuries found by the doctor on the person of the



deceased. It has been submitted that if the appellants were assaulting from the front who gave injury on the back of the deceased. The prosecution case as well as his testimony is not very specific as to who amongst the four accuseds was behind the deceased and inflicted knife blow on the back of the deceased. It is argued that if the evidence of the eye-witness is completely inconsistent with the medical evidence then the ocular version of the witness does not become trustworthy. His evidence becomes fragile. PW-6 doctor found one stabbed injury 1½” x 1” on the posterior part of chest right side, stabbed wound 1” x ½” on the back side of head, stabbed wound 1” x 1” into muscle deep on right scapular region and stabbed wound 1”x1/2” on the posterior part of chest below right scapular region. Our attention has been drawn to the evidence of the informant where he stated that his father received two injuries on forehead and one injury by knife on left shoulder and one knife injury on back. We are not unmindful of the fact that PW-5 is the own son of the deceased. In the circumstance which was not expected the occurrence had taken place. It is not expected of a witness like him placed in the aforesaid circumstances to narrate with precision who assaulted on which part of the body. That apart, the deceased following the quarrel in which he tried to pacify became the main target of assault by the appellants and two more. In natural course, in a bid to save himself



he made frantic efforts to save himself from the attack and possibly shrunk his body to reduce the exposed area of attack. It was but natural on his part to bend/dip in a bid to save himself. The appellants had one after another assaulted him on more than one occasions. In these circumstances appearing from the records, we do not find much substance in the submission that the injury on the back of the deceased, in view of the allegations, remained unexplained.

(8) We would note at this stage the submission of the appellants that in view of the statement of this witness and the objective finding of the Doctor regarding situs of the injury sustained by the deceased his evidence has become completely fragile. To support the said contention, reliance has been placed on **Ram Narain Singh Vs. State of Punjab, 1975 Cr. L.J. 1500 = AIR 1975 SC 1727** wherein the following was observed:-

“Where the direct evidence is not supported by the expert evidence, then the evidence is wanting in the most material part of the prosecution case and it would be difficult to convict the accused on the basis of such evidence. If the evidence of the witnesses for the prosecution is totally inconsistent with the medical evidence or the evidence of the ballistic expert, this is a most fundamental defect in the prosecution case and unless reasonably explained it is sufficient to discredit the entire case”.

(9) Every judgment has special reference to the facts of the case. The Court, in order to apply the said principle, has to



examine the relevant facts in which it was so observed/held. We perused the facts of the case and find them distinctly different. That apart, on close examination of his evidence, the circumstances in which the assault was made and the normal human behaviour of the person being attacked we do not find his evidence totally inconsistent with the expert evidence of PW-6. We have no doubt in our mind that the presence of this witness at the College Chowk is sufficiently explained and that while he was returning from the vegetable market which is not very far off he reached close to the place of occurrence and saw the assault and retreat of the appellants therefrom.

(10) PW-1 is the person who tied the cow in front of the shop which created nuisance which aggravated the appellant Santosh Kumar @ Kauwa and ignited the quarrel between him and this witness. In his deposition, he has stated that tending his cow from the veterinary hospital, he reached the College Chowk and tied the cow to an electric pole in front of the tea shop for taking tea. Appellant Santosh Kumar @ Kauwa crossing from that side was hit by the tassel of tail of the cow which caused to him some scratches and smeared the appellant with the cow dung stuck to the tassel whereafter appellant Santosh Kumar @ Kauwa started beating the cow which was protested by him whereafter he started scuffling with him. In the meanwhile, the deceased who was in the tea shop came



out and started pacifying the quarrel. Within few minutes thereafter, the appellant Santosh Kumar @ Kauwa along with accused appellant Nandkishore Yadav and co-accuseds Raj Kumar Paswan and Jitan Mandal started the assault on the deceased. Appellant Santosh Kumar @ Kauwa assaulted the deceased with knife, appellant Nandkishore Yadav also assaulted the deceased with knife. On receiving the assault, the deceased fell on the ground and was carried to the hospital where he died. It has been submitted that this witness is not truthful as considering the distance of the veterinary hospital he was not expected to reach the place of occurrence at the relevant time of the occurrence. We have perused his evidence. The veterinary hospital was 1 and ½ K. M. away from the place of occurrence. The place of occurrence as well as the veterinary hospital is on the main road. We do not find any material contradictions or flaw in his evidence in order to discredit his evidence.

(11) PW-2 is another son of the deceased. In his examination in chief he has stated that he was tending buffalo at Tulsibari where he was disclosed about the incident. On hearing this he went to the hospital and found his father dead. Obviously, he is not an eye- witness to the occurrence. He has clearly admitted that upon getting information about the incident he rushed to the college chowk and reached in half-an-hour and found none there. Thereafter he went



to the hospital. The I.O. (PW-7) in para- 19, has confirmed that this witness had accepted that he was not at the place of occurrence. His evidence is, therefore, not material.

(12) PW-3 the nephew of the informant, has deposed that on the relevant date at about 4 to 5 pm in the evening he was at the college chowk. After purchasing the vegetables he was proceeding towards his house when heard about the assault on the deceased by the appellants. Immediately, he reached the place of occurrence and saw the deceased in an injured condition. The victim was carried to the hospital by the informant and PW-4 followed by him where the '*fardbeyan*' was lodged by the informant. On the same day, in course of treatment, the injured died and thereafter '*panchnama*' of the dead body was prepared by the I.O. on which he signed as a witness. He has identified his signature on the inquest report (Ext.1). From his cross-examination, it is found that he is a temporary staff in the PG Department of the University. On each day at about 4 pm in the evening he used to go to the college chowk on foot. On that day also he was at the college chowk close to the place of occurrence. We do not find much in his evidence to support on the actual manner of occurrence. He is a witness to the inquest and only states about the fact that the deceased had sustained assault and injury at the college chowk and thereafter he was taken to the hospital where he died.



(13) PW-4 is another son of the deceased. We find from his evidence that he runs a cycle repairing shop very close to the place of occurrence. There is not much dispute on this point. He stated that on the relevant date and time of occurrence his father had carried food for him and he was washing utensils after taking food at the shop of Narayan Mandal. In the meantime, he heard the '*hulla*' and quarrel of appellant Santosh Kumar @ Kauwa with Bisho Yadav (PW-1) In the meantime, his father came out from the shop and tried to pacify whereafter appellant Santosh Kumar @ Kauwa, appellant Nandkishore Yadav and Raj Kishore Paswan and Jitan Mandal assembled at the place of occurrence and started assaulting his father by means of knife. The appellant Santosh Kumar @ Kauwa after assaulting the deceased and holding out threats left the place. Thereafter he with the help of others carried his father to the Madhepura Sub Divisional Hospital where in course of treatment he died. The police arrived at the hospital and recorded the '*farbeyan*' of Lalan Yadav (PW-5).

(14) It has been submitted with reference to his deposition (PW-4) at para-21 that he has not named Nandkishore Mandal, one of the appellants before the police. In this regard, our attention has been drawn to para 22 of the testimony of PW-7 (I.O.). On this count, his evidence has been criticized by the counsel for the



appellants. It is also submitted that the name of this witness do not figure in the '*fardbeyan*' (Ext.2). Law in this regard is well-settled. The FIR is not an encyclopedia of all relevant facts. The informant being son of the deceased must be in state of shock as his father was assaulted unexpectedly by the accuseds. He had carried his injured father to the hospital where he died before any surgery could be performed on him. It is not expected, in such circumstance, to name all persons who had actually seen the occurrence and was accompanying the injured to the hospital. Every case has to be tested broadly on the principle of probability. This witness not naming one of the appellants before the police may be an omission. Every omission is not contradiction. Analyzing his entire evidence we find particles of truth in his evidence which do not discredit the prosecution case materially as projected at the trial.

(15) In view of the discussions made above, we have no hesitation to hold that the evidence produced at the trial by the prosecution firmly establish the time of occurrence, the place of occurrence, the manner of occurrence and the participation of the appellants in the crime which caused death of the father of the informant. The prosecution case has been proved beyond shadow of reasonable doubts.

(16) Before we conclude, it is pertinent to consider one



of the submissions of the learned counsel for the appellants. It has been submitted that accepting the prosecution case four accused persons had inflicted knife blows on the deceased, only two of them are facing trial. What happened to the two other accuseds is not discernible from the records. The prosecution case, on this count, should be doubted. We are unable to accede to the said submission. The Court has to consider only the case presented by the prosecution. What was the fate of the two other accuseds involved in the crime would not be gone into by the Court. The said contention of the appellants has, therefore, no force in the eye of law.

(17) For the reasons stated above, we find no merit in the appeal(s). They are, accordingly, dismissed.

(Kishore Kumar Mandal, J)

I agree

(Sanjay Kumar, J)

Shyam/-

AFR/NAFR	NAFR
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