

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.822 of 2014

Arising Out of PS. Case No.-325 Year-2009 Thana- BRAHMPUR District- Buxar

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Dhanlal Yadav Son of Sri Kesho Prasad Yadav resident of village -
Raghunathpur, Police Station - Brahampur in the District of Buxar.

... .. Appellant/s

Versus

The State of Bihar

... .. Respondent/s

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Appearance :

For the Appellant/s

: Mr. Akhileshwar Prasad Singh,
Sr. Advocate

: Mr. Amrit Anunay

For the State

: Mr. S.N.Prasad, APP

For the Informant

: Mr. Neeraj Kumar @ Sanidh

: Mr. Ramakant Yadav

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**CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR
MANDAL**

and

**HONOURABLE MR. JUSTICE MADHURESH PRASAD
C.A.V. JUDGMENT**

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date : 10-11-2017

The sole appellant stands convicted under sections 302
and 449 IPC and sentenced to suffer R.I. for life with fine
having default clause vide judgment dated 13th August, 2014
rendered by the learned 1st Additional Sessions Judge, Buxar,
in Sessions Trial No. 56 of 2010. The appeal assails the
judgment of conviction.

2. The informant (P.W.2) gave a Fardbayan (Ext.1)
recorded by Sri A.N. Singh, Sub-Inspector of Police of Ara



Town Police Station (P.W.12) on 29.10.2009 at about 3.30 P.M. at Sadar Hospital Ara alleging that the appellant being the cousin (Phuphera) brother used to ask him since last few months to persuade his parents to provide him monetary support. The request for settlement of the dispute between the appellant and his parents was not heeded to by the informant. On 29.10.2009 at about 10.30 A.M. the appellant came to the Aangan(courtyard) of the informant armed with a **Dabia** (a heavy sharp-cutting weapon) and assaulted his mother Asturwa Devi on the back of her neck which caused grievous injury. When his father (P.W.3), who was also present in the courtyard(Aangan), attempted to save her, it is alleged that at the askance of his father the appellant assaulted P.W.3 with **Dabia** on his leg. When the people in the vicinity gathered, the appellant and his father(co-accused) escaped from the place of occurrence . P.W.1, being the daughter of the informant, was present inside the courtyard (Aangan) and was also threatened. After having seen the assault, she escaped from the courtyard and ran to her father who was in the field to inform about the incident. By the time the informant could reach home, the two injureds were carried by the co-villagers including P.Ws.9



and 10 to the nearby Primary Health Centre Raghunathpur. Looking to the nature of the injuries sustained by the deceased and P.W.3, the doctor attending on them immediately referred to the Sadar Hospital Ara. As the injured(s) were being carried to Ara, the mother died on the way. The father (P.W.3) was admitted to Ara Sadar Hospital where the informant was present. On getting an information the police arrived there and the Fardbayan was lodged wherein the informant himself did not claim as an eye-witness to the occurrence. Recording of the Fardbayan necessitated the investigation. The inquest proceeding over the deadody was carried out at the hospital itself in presence of P.W.2 (informant) and P.W.3. The deadbody was dispatched for post mortem examination. P.W. 13 was then posted as Medical Officer, Sadar Hospital Ara. He held the autopsy on the cadaver on the same day at about 4:45P.M. and furnished the post mortem report (Ext.9). The doctor found a sharp-cut wound on the back of the neck 6"x2"x2 ½"(depth). Back of the skull bone was also found cut. Survical vertebra cut to major artery and vessels were also found cut which led to the copious hemorrhage. In the opinion of the doctor, the death had occurred due to above



injuries caused by heavy sharp-cutting weapon.

3. On conclusion of investigation, charge-sheet was filed which led to the present trial on the file of the learned Trial Judge. The charges framed against the appellant were read over/explained to him which was denied. The appellant claimed his false implication in the case.

4. In order to substantiate the case beyond pale of reasonable doubt, the prosecution examined 13 witnesses. A brief resume of the witnesses are as follows:-

5. P.W.1 Puja Kumari is the daughter of the informant. At the time of occurrence she was around nine years old. She was present in the courtyard(Aangan) when the incident had occurred. According to her, after seeing the incident she after jumped the courtyard wall and ran to her father who was at the field to inform about the incident. Her evidence implicates the appellant in the crime as the assailant of the deceased who was none else but own aunti (Mami) of the appellant. P.W. 2 is the informant, who lodged the first information when the police arrived at the Ara Sadar Hospital. He himself admitted to have not witnessed the occurrence. He has however deposed on the attending facts and circumstances of the case. P.W.3 is the father of the



informant and husband of the deceased. He was present in the courtyard when the appellant entered armed with **Dabia** and assaulted on the back of the neck of his wife. When he tried to intervene the appellant also assaulted him with **Dabia** on his leg. He too was carried along with the victim first to the Primary Health Centre, Raghunathpur where he was treated of his injury by P.W.4 before being referred to Ara Sadar Hospital. The injury report of P.W.5 is Ext. 5 proved by P.W.4. P.W.5 Mohan Singh is the co-villager who is stated to have reached the place of occurrence after the incident. P.W. 6 Vinod Kumar Mishra also a co-villager has given a hearsay account of the occurrence. P.W.7. Krishna Kumar Singh and P.W.9 Hareram Yadav are the witnesses who claimed to have reached the place of occurrence soon after the incident. P.W.9 is the attesting witness to the Fardbayan. P.W.8 Satyendra Singh was, however, declared hostile. Both P.Ws 7 and 9 have, however, stated that when they reached the place of occurrence the appellant was present inside the courtyard armed with **Dabia**. P.W. 10 is the wife of the informant. In her examination-in-chief she has claimed herself as an eye witness to the occurrence. P.W.11 is a formal witness who has produced the material



object (Ext.1/Dabia) in court. P.W. 12 Shyam Bihari Rai is the I.O. of the case who conducted the investigation and submitted the charge sheet. P.W. 13 is the autopsy surgeon. A salient feature of the case is that before recording the Fardbayan the I.O. (P.W. 12) on receiving information about the incident went to the place of occurrence on the evening of 29.10.2009 and arrested the appellant from his house. His confessional statement was recorded by him, on the basis whereof P.W. 12 recovered the **Dabia** wrapped in a cloth from the house of the appellant which was seized under seizure memo in presence of two independent witnesses whose signatures have been marked as Ext. 6/A and 6/B. It was produced at the trial as material Ext.1. The defence, however, did not adduce any oral evidence.

6. In appreciation of the evidence produced by the prosecution, the trial court relying on the testimony of P.Ws 1,2,3,9 and 10 in the light of the documentary evidence produced at the trial held the charges having been proved beyond shadow of reasonable doubt.

7. Heard Mr. Akhileshwar Prasad Singh appearing for the appellant, Mr. S.N.Prasad, APP for the State and Mr. Neeraj Kumar @ Sanidh for the informant.



8. The judgment of conviction has been assailed on diverse counts. It has been submitted that P.W. 1 should not be accepted as an eye witness to the occurrence. As almost all the relevant witnesses have admitted that there was no prior enmity with the appellant, it is a case where there was no motive on the part of the appellant to commit the occurrence. Surprisingly, the appellant was taken into custody prior to the recording of the Fardbayan on 29.10.2009. Our attention in this regard is drawn to the evidence of the I.O. (P.W.12) who has stated that on getting an information about the incident having been committed by the appellant he went to the place of occurrence and arrested the appellant in the evening of 29.10.2009. He would also urge that if the information was received by the police about the incident, the same ought to have been reduced into a Fardbayan. The prosecution has withheld the first version of the prosecution case which casts a serious doubt on the veracity of the prosecution case. Even the S.D. entry was not produced by the prosecution. The counsel next submitted that the findings of the doctor in the post mortem report (Ext.9) contradicts the prosecution case. The doctor found rigor mortis all over the body of the deceased.



Presence of rigor mortis within six hours of the death of the deceased does contradict the time of the incident as spelt out by the prosecution. Referring to the cross-examination of P.Ws.7 and 10 as also the evidence of the I.O. (P.W.12), it has been urged that their evidence suffer from serious contradiction. On reading the evidence of the I.O., it shall appear that these witnesses had not stated before the I.O. what they had stated in court.

9. Counsel for the informant and the State, on the other and, supported the findings of guilt. Mr. Neeraj appearing for the informant submits that the evidence of P.Ws 1 and 3 narrating the ocular account of the incident proved the prosecution case beyond shadow of reasonable doubt . P.W.10 Chanmuni Devi(wife of the informant) has also supported the prosecution case as an eye witness. The defence has not been able to discredit their evidence in course of the cross-examination. Emphasis has been placed on the evidence of P.W. 1 who was deposing as a child witness. In the same tone, it has been argued that the evidence of P.W.3 is completely aboveboard as the defence was not able to discredit his evidence on any material aspect. P.W. 3 is the husband of the victim and also the



injured at the hands of the appellant. His presence at the place of occurrence and thus witnessing the occurrence stands established by the evidence of P.W.4 who had treated him immediately after the occurrence at the Primary Health Centre, Raghunathpur. The evidence of P.Ws 5,6, 7 and 9 throws/sheds sufficient light on the prosecution case. Although they are not the witnesses of the actual assault, but they have deposed about the presence of the appellant at the place of occurrence immediately after the incident. Some of them have stated that the appellant was present at the place of occurrence armed with a **Dabia** having bloodstains marks. There is no material contradiction in their evidence so as to disbelieve their testimonies. Combating the submission of the counsel for the appellant that the evidence of some of the witnesses namely P.Ws.7 and 10 suffer from contradiction, the counsel for the informant and the State have argued that there is no material contradiction. The I.O. was not cross-examined with reference to the statement made by these witnesses in course of investigation. In support of their submissions, reliance has been placed on **AIR 1973 SC 1409 (Ranbir vs. State of Punjab)** and **1989 Cr.L.J. 1876 (DB) (Md. Badaruddin**



Ahmed vs. State of Assam). It has also been argued that several witnesses were put court questions but in case of the material witness namely P.W. 10 neither the defence put any question as to what statement was made by these P.Ws before the I.O. nor the court put a question in order to do justice between the parties. The role of a Judge presiding over the trial was emphasized referring to **1981 (1) Cr. L.J. 609 (SC) (Ram Chander vs. State of Haryana).**

10. We have considered the rival submissions made at the Bar and perused the evidence on record.

11. P.W.1 is a child witness. The court before recording her statement tested her ability to understand and depose. She has narrated the prosecution case consistent with the case narrated by other witnesses. Except criticizing her evidence as a child witness, the defence has not been able to show any material inconsistency in her testimony. We are unable to find her a tutored witness. The criticism of her testimony made by the defence has not much substance. As noted above, her evidence unflinchingly implicates the appellant in the crime. What has been pointed out to us in her evidence are not on material part of her evidence. She has withstood the test of cross-examination,.



12. P.W.3 is the father of P.W.2 (Informant). He was present in the courtyard when the appellant followed by his father Keshav Yadav entered inside the courtyard armed with **Dabia**. His wife Asturwa Devi was at the hand-pump. At the instigation of co-accused Keshav Yadav, the appellant inflicted **Dabia** blows twice on her neck. The appellant also assaulted him on his both legs. An attempt was made thereafter to assault P.W.1 who fled away after scaling over the wall. On close perusal of his evidence, the Court is inclined to accept his narration of the prosecution case made by him. He is a witness whose presence at the spot was natural. He too received assault on his legs by the appellant. It has been submitted that his evidence runs contrary to the evidence of P.Ws 1 and 2. P.W.2 has clearly stated that when he reached home on getting information from P.W.1, the injureds had, by then, been taken away to the hospital for treatment. This witness has stated that his son reached the primary health centre within 5 to 10 minutes of his arrival. The defence has argued that the C.D. statement of P.W.3 was recorded after one month. It is found from his evidence that he remained hospitalized for a month and only after coming from the hospital his statement was



recorded by the I.O. The delay in recording the C.D. statement of this witness is clearly explained.

13. Another contention of the defence is that the doctor (P.W.13) found rigor mortis present on the whole body of the deceased. The occurrence had taken place at 10.30 A.M. Appearance of rigor mortis on the entire body was not possible within six hours. We do not find much force in the said submissions. Presence of rigor mortis depends on several factors. The defence has not cross-examined the doctor and get those factors explained. That apart, the medical evidence is advisory in nature. It assists the court in arriving at a just conclusion with regard to the guilt or otherwise of the accused. In case of direct ocular evidence, the court always undermines the finding of this nature to discredit the prosecution case unless it is so irreconcilable with the prosecution case. This is not the case. Law on this issue is well-settled and need no further articulation.

14. Another contention of the defence is that the evidence of P.Ws 7 and 10 suffers from contradiction if read along with the evidence of the I.O. On the other hand, it has been argued by the prosecution that these are minor omission and not contradiction. If the I.O. has not



specifically been cross-examined with reference to the previous statements of the witness and given an opportunity to explain as to what the witness had stated, as in the present case. In this connection, it is relevant to refer to a judgment of the Apex Court in **Gian Chand & Ors. vs. State of Haryana {2013 (4) PLJR 7 (SC)}** held as under:

“The effect of not cross-examining a witness on a particular fact/circumstance has been dealt with and explained by this Court in Laxmibai (dead) Thr. L.Rs & Anr. Vs. Bhagwanthuva (Dead) Thr. L.Rs & Ors., AIR 2013 SC 1204 observing as under:-

“Furthermore, there cannot be any dispute with respect to the settled legal proposition, that if a party wishes to raise any doubt as regards the correctness of the statement of a witness, the said witness must be given an opportunity to explain his statement by drawing his attention to that part of it, which has been objected to by the other party, as being untrue. Without this, it is not possible to impeach his credibility. Such a law has been advanced in view of the statutory provisions enshrined in Section 138 of the Evidence Act, 1872 which enable the opposite party to cross-examine a witness as regards information tendered in evidence by him during his initial examination in chief, and the scope of this provision stands enlarged by Section 146 of the Evidence Act, which permits a witness to be questioned, inter alia, in



order to test his veracity. Thereafter, the unchallenged part of his evidence is to be relied upon, for the reason that it is impossible for the witness to explain or elaborate upon any doubts as regards the same, in the absence of questions put to him with respect to the circumstances which indicate that the version of events provided by him, is not fit to be believed, and the witness himself, is unworthy of credit. Thus, if a party intends to impeach a witness, he must provide adequate opportunity to the witness in the witness box, to give a full and proper explanation. The same is essential to ensure fair play and fairness in dealing with witnesses.” (Emphasis supplied) (See also: Ravinder Kumar Sharma Vs. State of Assam & Ors., AIR 1999 SC 3571; Ghasita Sahu Vs. State of Madhya Pradesh, AIR 2008 SC 1425; and Rohtash Kumar Vs. State of Haryana, JT 2013 (8) SC 181).

15. In the case at hand, on close perusal of the testimony of the I.O., it is explicit that no attention of the I.O. was drawn towards the previous statement made by several material witnesses including P.Ws 1,3,4 and 9.

16. What has been pointed out to us by the defence in the relevant evidence of the witnesses narrating the ocular description of the prosecution case, at best, are minor and natural omission. They again are not serious and glaring



omissions. It is difficult to find that there was a discernible effort made by the prosecution to improve upon or develop the prosecution case which is a relevant factor to be kept in mind particularly when the witnesses are related to each other. In the present case, both parties are closely related. If the defence has chosen not to place before the I.O. the previous statement sought to be contradicted for seeking explanation, in our view, what has been shown to us by the defence in the evidence of the relevant witnesses, shall not be treated as a contradiction much less serious contradiction in their evidence so as to negate the prosecution case.

17. It has been argued that the motive for occurrence has not been proved. The appellant was only requesting the informant to settle the dispute between him and his father. It was not such that could persuade the appellant to assault his own Mami (deceased) and Mama. Motive is not a sine qua non of the offence. The prosecution case shall not fail by judging it on the anvil of motive. The motive has a role to play in case of circumstantial evidence. What transpired or motivated the appellant to assault his own Mami and Mama is something which cannot be proved by the evidence. On this account, the truthfulness of the



prosecution case cannot be doubted so far as it finds support from the consistent ocular account of the incident testified by various witnesses which again finds support from the objective finding of the doctor and provides required assurance to the court regarding the truthfulness of the case and guilt of the appellant.

18. In what has been discussed above, the Court finds no merit in the contention(s) of the defence. Consequently, the appeal fails. Dismissed.

(Kishore Kumar Mandal, J)

I Agree (Madhuresh Prasad, J)

HR/-

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