

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.120 of 2011

Against judgment and order, dated 28.12.2010 and 30.12.2010 respectively, passed in Sessions case no. 4 of 2001/24 of 2010, Mohania Police station Case No. 109 of 1997, GR No. 729 of 1997, by the learned Additional Sessions Judge-cum-FTC-V, Kaimur.

1. Uma Shankar Tiwary S/O Tirthbasi Tiwary R/O Village Barahauli, P.S.- Mohania, District- Kaimur.
2. Vidyapati Tiwary S/O Tirthbasi Tiwary R/O Village Barahauli, P.S.- Mohania, District- Kaimur.
3. Sanjay Tiwary S/O Uma Shankar Tiwary R/O Village Barahauli, P.S.- Mohania, District- Kaimur

.....appellants

with

Criminal Appeal (DB) No. 93 of 2011

Vinod Tiwary S/O Tirthbasi Tiwary Resident Of Village- Dandwas, P.S.- Mohania, Distt.- Kaimoor At Bhabhua Appellant

Versus

The State Of Bihar Respondent in both appeals

Appearance :

For the appellant : Mr Kanhaiya Prasad Singh, Sr. Advocate
Mr. BK Singh and Mr. PM Sharan, Advocate
For the State : Mr. A.K.Sinha & SC Mishra, APP
For the informant : Mr. Mahesh Prasad and
Mr. R.K.Raman, Advocates.

CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

and

HONOURABLE MR. JUSTICE ARUN KUMAR

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)

Date: 08-04-2017

All the five appellants have been convicted under sections 302, 364, 120B and 148 of the IPC vide judgment, dated 28.12.2010, passed in Sessions case No. 4 of 2001/24 of 2010 (arising out of Mohania Police Station Case No. 109 of 1997, GR



No. 729 of 1997), by the learned Additional Sessions Judge-cum Fast Track Court-V, Kaimur. For the offence under sections 302, 364 and 120B IPC the appellants have been sentenced to under go RI for life vide order, dated 30.12.2010. For the offence under section 148 IPC, they have been sentenced to undergo two years RI with a fine of Rs.25,000/- each vide order, dated 30.12.2010, and in default of payment of fine, they have been ordered to 1 year further imprisonment. It is relevant to point out that there is only one appellant, namely, Vinod Tiwary, in Cr. Appeal (DB) No. 93 of 2011, whereas the other appellant, namely, Akshaibar Tiwary died during pendency of the appeal, as such, the appeal against him stood abated.

2. The prosecution case, as made out in the fard beyan of Narendra Pathak (PW 5), nephew of deceased Jawahar Pathak and resident of village Barej, Police Station Mohania, District Kaimur, presently residing at Dandwas, recorded by SI Ram Kirpal Sharma, officer-in-charge of Mohania Police Station on 22.6.1997 at village Dandwas at 10 AM, in short, is as follows:-

The informant stated that in the night on 21.6.1997, he was sleeping at the chamber of Jawahar Pathak along with his cousins Manoj Pathak @ Pappu Pathak, Kanhaiya Pathak and



Santosh Pathak @ Jhatpat Pathak, as in the evening they had sown paddy seeds in the field. Around 12 O'clock in the night, he felt uneasy and went some distance, north to the chamber, for easing. In the meantime, he saw, 14 to 15 persons, variously armed with gun, rifle, lathi and bhala having surrounded the chamber. On seeing the miscreants, the informant feared and hid himself behind a lath. In the electric light, he recognized eight (8) of the accused as (1) Uma Shankar Tiwary, (2) Rama Shankar Tiwary, (3) Akshaibar Tiwary, (4) Vinod Tiwary, (5) Vidya Pati Tiwary, all sons of Tirthbasi Tiwary, (6) Tirthbasi Tiwary, son of Gaya Tiwary (7) Sanjay Tiwary, son of Uma Shakak Tiwary and (8) Bhola Tiwary son of late Bachan Tiwary, all residents of village Barahauli, Police Station Mohania, at present residing at village Dandwas, Police Station Mohania, District Kaimur. One of the miscreants, namely, Tirthbasi Tiwary instigated others to kill all the persons sleeping in the chamber. On his instigation, the accused persons entered the chamber one by one and killed all the three cousins of informant by strangulating their neck. After killing, the accused persons dragged and threw the dead bodies in the field covered with water. The accused persons then caught his uncle Jawahar Pathak @ Ram Naresh Pathak and took him in the south east direction. When the accused persons left the chamber, the informant went there and



raised hulla on which his uncle Panna Lal Pathak, Rajendra Tiwary son of Uma Shankar Tiwary, Ram Daresh Pandey, Seosagar Kumhar son of Deo Kumhar and others rushed to the place of occurrence. In the morning, when Chaukidar arrived, he narrated the entire episode whereafter the latter went to the Police Station for giving informations regarding the occurrence. After sometime, police also arrived at the place of occurrence to whom he made his statement. Informant suspected that accused persons might have killed Jawahar Pathak. He stated that the motive of the occurrence is land dispute between the parties.

3. On the basis of the fard beyan of the informant Narendra Pathak (PW 5), Mohania Police Station Case No. 109 of 1997 dated 22.6.1997 was instituted under sections 147, 148, 149, 302 and 364 IPC was registered. After registration of the FIR, PW 8 Ram Kripal Sharma took over the investigation of the case. In course of investigation, further statement of informant as well as a number of witnesses, including PW 4 Panna Lal Pathak and PW 7 Rajendra Tiwary, were taken. I.O. interrogated one Ram Avtar Kumhar who was the first person to see the dead bodies lying in the field near the chamber. The I.O., as such on the statement of Ram Awatar Kumhar also went to nearby field, where the dead bodies were lying. Thereafter, he prepared inquest report and sent the dead



bodies of informant's cousin, namely, Hatpat Pathak @ Santosh Pathak, Kanhaiya Pathak and Manoj Pathak @ Pappu Pathak, all sons of Jawahar Pathak, for post mortem. He also inspected the chamber, where the deceased were said to be killed. As the informant stated that his uncle Jawahar Pathak was kidnapped by the accused persons in course of committing the offence, he began his search. After some search, the dead body of Jawahar Pathak was also recovered from Kudra river situated south of the village Nasra. He got the post mortem done of Jawahar Pathak. However, the doctor who conducted the post mortem of Jawahar Pathak, was killed and the FIR was lodged against unknown. Ram Avtar Kumhar suspected that the occurrence had been committed by Ravindra Kumhar in league with absconder and notorious Kavindra Kumar, a brother of Harendra Kumar @ Barka. Police arrested Ravindra Kumhar who took the name of Kavindra Kumhar, Dharmendra Prajapati, Gogal Pasi, who were also arrested by the police. Accused Ravindra Kumhar narrated the entire occurrence in the confessional statement. He also took the statement of Janki, daughter of Jawahar Pathak. She pointed needle of suspicion against PW 4 Panna Lal Pathak, one of the witnesses. She further stated that PW 4 and his sons tried to oust her from village Dandwas. The I.O. stated that during investigation, it transpired that the property



initially belonged to one Deodat Pandey, who sold the same to one Jokhu Pandey by way of sale deed in 1958. Jokhu had a daughter who was married to Tirthwasi Tiwari. Jokhu Pandey transferred his property to grand son of Guljari Devi, namely, Ramashankar Tiwari. Thus Tirthwasi Tiwari started living with his family on the property of Jokhu Pandey at village Dandwas. The I.O. further stated that finding the case not to be true against the appellants, he did not send up the accused persons for trial, while submitting the charge sheet against Ravindra Kumhar, Prajapati Pasi. Learned magistrate however differing with the police report took cognizance of offence, also against not sent up accused, and committed the case for trial. Charges were framed against all the 13 persons under sections 120B, 302,364, 148 IPC.

4. The trial court on consideration of materials on record, acquitted three of the 10 persons, namely, Ravindra kumhar, Gopal Pasi and Kavindra Kumhar, while convicting the rest of the accused persons under sections 148, 302, 364 and 120B IPC.

5. The prosecution in support of its case examined 9 witnesses and also adduced documentary evidence in order to substantiate its case, who are as follows:- PW 1 is Chandra Bhushan Pandey, PW 2 is Sheo Sagar Kumhar, PW 3 is Dr. Anil Kumar Singh, PW 4 is Panna lal Pathak, PW 5 is the informant Narendra



Pathak, PW 6 is Gupteshwar Mishra, PW 7 is Rajendra Tiwary PW 8 is Ram Kripal Sharma and PW 9 is Ajay Kumar Manjhi.

6. Out of 9 witnesses, 4 witnesses i.e. PWs. 2, 4, 5 & 7 have claimed to be eye witness of the occurrence. PW 1 Chandra Bhushan Sharma is the formal witness and has identified the dead body of Jawahar Pathak and is also witness to the inquest report. PWs. 6 & 9 are also formal witnesses. PW 3 conducted post mortem on the dead body of three deceased sons of Late Jawahar Pathak. PW 8 is the investigation officer of the case. He has proved the fard beyan, formal FIR and the inquest report.

7. PW 5 Narendra Pathak in his evidence has supported the prosecution case. He stated that on the relevant night he was present in the chamber along with his uncle Jawahar Pathak and his three sons Kanhaiya Pathak, Manoj Pathak @ Pappu Pathak and Jhatpat @ Santosh Sharma. At 12 in the night, while he went to ease himself, all of them were sleeping. He stated that at the relevant time he was present in the chamber near his field. His uncle Jawahar Pathak and three sons were sleeping in the chamber in which electric bulb was burning. At 12 O'clock in the night, he went to ease north of his chamber. In the meantime, 14 to 15 accused persons, variously armed, surrounded the chamber. The informant out of fear hid himself. In the burning of the bulb, he saw



accused persons having caught his uncle with arms pointed towards his chest. Accused Tirthwasi ordered to kill the family members of his uncle. Thereafter, the accused persons entered the chamber one by one and killed his three cousins and threw the dead bodies in the nearby field in which seeds were sown. Accused persons took his uncle Jawahar Pathak towards south east direction with them. He raised hulla, on which villagers including PW 2 Sheo Sagar Kumhar, PW 4 Panna Lal Pathak and Ram Daras Pandey (not examined) came to the place of occurrence. In the meantime Chaukidar came and then he went to the police station. Thereafter, the police came to the chamber at 10 AM and recorded his fard beyan.

8. PW 2 Sheo Sagar Kumhar has also supported the prosecution case. He stated that it was 12 O'clock, he was staying at the chamber of Jawahar Pathak for irrigating his sugarcane field. Electric Bulb was burning and motor was also running at the chamber. In the meantime, 14 to 15 persons variously armed with gun, rifle etc surrounded the chamber and killed three sons of Jawahar Pathak, while they took Jawahar Pathak with themselves towards south east direction.

9. PW 4 Panna Lal Pathak is the full brother of deceased Jawahar Pathak. He has also supported the prosecution case. He has



stated that the occurrence took place at 12 O' clock in the night. He was present near the chamber of Jawahar Pathak in Dandwas village. On that date, he was going to load sand from Asaura ghat on his tractor. At about 5 PM, when he was passing through the Chamber of Jawahar Pathak of Dandwas village, the light of his tractor got fused, so he did not proceed further and got down from the tractor. He stated that his brother Jawahar Pathak used to live in his Sasural in Dandwas. He further stated that he went to the house of his brother at 5 PM and at night after taking food he returned to the chamber of Narendra Pathak (the informant), Pappu Pathak, Jhatpat Pathak, Gajendra Tiwari and Jawahar Pathak. He had also brought the food of Jawahar Pathak and Kanhaiya Pathak, who consumed the same at 9 PM. Bulb was burning at the chamber and Seo Sagar had gone to irrigate the field, whereas Narendra, Jhatpat, Pappu, Kanhaiya and Jawahar Pathak were sleeping at the chamber. In the meantime, at 12 O' clock at night, 14 to 15 persons, armed with gun, rifle etc, surrounded the chamber. They caught Jawahar Pathak and strangulated to death, his three sons sleeping at the chamber using Gamacha and threw them in the wet field in which seeds were sown, on the order of Trithbasi Tiwari. The accused persons took Jawahar Pathak with them towards south east side.

10. PW 7 Rajendra Tiwari has also claimed to be eye



witness. He stated that at about 12 PM on the relevant night, he was sitting on the tractor at a distance of 40-50 meters from the chamber. In the meantime, 15 persons armed with lathi, bhalla, gun etc. surrounded the chamber. Bulb was burning in the chamber. He recognized eight (8) of them, including five appellants. He stated that the accused persons put Gamcha in the neck and strangulated to death Pappu Pathak, Jhatpat Pathak and Kanhaiya Pathak who were sleeping at the chamber. They threw the dead bodies in the paddy field covered by water. They took Jawahar Pathak with them in the south east side direction. PW 7 further stated that he and Panna Lal Pathak (PW 4), Ram Daras Pandey (not examined), Sheo Sagar Kumhar (PW 2) and Narendra Pathak, the informant (PW 5) raised hulla and reached the chamber, thereafter villagers came. Police came at 10 AM and recorded the statement of witnesses. At 5 PM, he learnt that the dead body of Jawahar Pathak was recovered from Mohania Police Station area.

11. PW 8 is the I.O. of the case. On 22.6.1997, he was posted as Officer-in-charge of Mohania Police Station. At about 9 AM he heard that Jawahar Pathak and his three sons have been killed at the chamber. On receipt of the information, he made station diary entry, bearing No. 574 and proceeded for village Dandwas along with other police personnel. He reached the place of



occurrence at about 10 AM, where he met Narendra Pathak and recorded his fard beyan. Thereafter on basis of the fard beyan, a formal FIR was drawn. In course of investigation, he prepared inquests of 3 sons of Jawahar Pathak which were marked as exhibits 1/8, 1/9 and 1/10. Thereafter, with the help of villagers he tried to find out whereabouts of Jawahar Pathak, who was missing. In course of investigation, he visited the place of occurrence which is the chamber made of mud and straw. The wall of the chamber was made of mud, while its roof was covered with straw. It was at the distance of 50 Yards towards north-east from the village Dandwas. The entrance of the chamber was in the south. Dead body of Kanhaiya Pathak and Manoj Pathak were lying at a distance of 8 Yards from the chamber. Straw was also found near the dead bodies. Dead body of Jhatpat Pathak @ Santosh Pathak was found lying in the field which was at the distance of 50 yards from the chamber. He further found a cot in front of the chamber and also an electric motor in the chamber. All the articles of the chamber were in order. He stated that as per witnesses, the deceased Jawahar Pathak was sleeping on the cot lying outside the chamber. The I.O. did not find any bulb either burning or switched off at the chamber. He also prepared a map of the place of occurrence which is marked as exhibit 12. In course of investigation, the dead body of Jawahar



Patkak was found in the river situated south of village Nasera. In course of investigation, it was suspected that brother of Harendra Kumhar might have committed this offence. As such, he arrested one Ravindra Kumhar and recorded his statement in the case diary. Names of Kavindra Kumhar, Dharmendra Prajapati and Gopal Pasi were also figured in the confession who were also arrested by him. The IO has further stated that when he asked the informant to show the place around the chamber where he had gone to ease and then hid himself and saw the occurrence, he did not show him that place. I.O. also did not find the trailer of the tractor said to be used for loading sand as narrated by PW 4 Panna Lal Pathak. I.O. has further stated that though he got the post mortem report of three deceased sons of Jawahar Pathak, but he did not get the post mortem report of Jawahar Pathak, as the doctor who conducted his post mortem was also killed in quick succession.

12. Mr. Kanhaiya Prasad Singh, learned Senior counsel appearing for the appellants of both the criminal appeals submits that the prosecution has assailed the impugned judgment of conviction on a number of scores. He stated that none of the co-witnesses i.e. PWs 2, 4, 5 and 7 claiming to be the eye witness to the occurrence, were present at the chamber when the occurrence is said to have taken place. He stated that these witnesses have tried to



develop the case during trial. He stated that none of the material witnesses i.e. PWs 2, 4 and 7 have made their statements before the police. He states that the evidence of I.O. as well as the evidence of other witnesses contradicts the statement of informant. For instance, the informant stated that the three sons of Jawahar Pathak were sleeping inside the chamber which was made of bamboo and was open from all sides. At 12 O'clock in the night, the accused persons surrounded the chamber. As per the informant, just before this incident, he went to ease himself at a distance of 50 yards and when he saw the accused persons surrounding the chamber, he hid himself behind a ridge, out of fear. The informant further stated that he saw the accused persons in the light of bulb which was burning in the chamber. The IO has stated that the chamber was made of mud wall and only the roof portion, was covered with straws. He too noticed that the face of the chamber was towards south side. Thus the informant could not have seen the occurrence as he had gone north of the chamber to ease himself. The I.O. did not find any electric bulb in the chamber nor did he find paddy seeds sown in the wet field nearby the chamber.

13. On the other hand, learned counsel appearing for the State as well as Mr. Mahesh Prasad and Mr. Raman, leaned counsels appearing for the informant defended the impugned



judgment and the consequent conviction and sentence of the appellants. They stated that the accused persons have killed the deceased on account of admitted land dispute. They next submit that Binod Tiwary took the plea of *alibi* which plea was not taken by him before the police in course of investigation and as such his involvement in the crime becomes all the more incriminating. The I.O. did not conduct the investigation properly for which a protest petition was filed in the court on 9.7.1997. They further stated that the doctor who conducted the post mortem of deceased Jawahar Pathak was also murdered, in all probability by the accused persons.

14. We have heard learned counsel for the parties and perused the materials on record.

15. We find that the place of occurrence is a chamber of Jawahar Pathak which is a lonely place situated 500 yards from the village Dandwas. It would be evident from the prosecution case narrated in the FIR that the informant would be the only probable eye witness as he was at the chamber along with his uncle Jawahar Pathak and his three sons who were sleeping there as they had just sown paddy seeds in the field on the same day. As per the informant, other witnesses like PW 2 Sheo Sagar Kumhar, PW 4



Panna Lal Pathak and PW 7 Rajendra Tiwari arrived at the place of occurrence on hearing hulla and have claimed to have seen the occurrence. Counsel for the appellants argued that even as per their statements, these three witnesses could not be said to be eye witness to the occurrence.

16. We would first examine whether the evidence of these three witnesses, who claim themselves to be the eye witnesses, are reliable or not. PW 2 is the resident of village Newas. He claimed to be present at the Chamber on the relevant night as he had come to irrigate the sugar cane field of Jawahar Pathak. He stated that at 12 O'clock in the night, the accused persons, 14 to 15 in number, came to the chamber and killed three sons of Jawahar Pathak by pressing their neck. He claimed to have seen the incident in the light of the bulb burning in the chamber. He had further stated that the accused persons had taken Jawahar Pathak with themselves, whose dead body was recovered subsequently from the river. He stated that the police came the following morning and recorded the statement of PW 5 Narendra Pathak. The case of the defence is that this witness did not make any such statement before the police. We find substance in the statement of leaned counsel for the defence. The I.O. (PW 8) stated that this witness did not state before the police that he had come to the chamber of Jawahar Pathak for



irrigating the sugar cane field. He also did not state that the bulb was burning in the chamber or electric motor was also running in the chamber at the relevant time. The I.O. further stated that this witness also did not state before him that he identified Uma Shankar Tiwary, Binod Tiwary, Ravindra Kumhar, Akshawar Tiwary. He also did not state that the accused persons caught Jawahar Pathak and took him away. He also did not narrate before him the manner of occurrence which he deposed for the first time in the court. On the other hand, the I.O. further stated that this witness stated before him that he learnt about the occurrence for the first time from PW 7 Rajendra Tiwari in the morning of 22.6.1997. In view of evidence of the I.O., it is completely exposed that PW 2 Shiv Sagar Kumhar made such statement for the first time before the trial court and never before the police under section 161 Cr.P.C. as such, we do not find this witness to be trustworthy and reliable, and thus his evidence cannot be accepted for sustaining conviction of the appellants.

17. We will now examine the evidence of PW 4 Panna Lal Pathak, who too has claimed to be eye witness. He is the resident of village Barage. He appears to be a chance witness. He stated that he was going to load sand on his tractor from village Osra. At about 5 PM he reached the chamber of Jawahar Pathak,



which is situated in village Dandwas. As the light of his tractor started malfunctioning at 5 PM, he decided to stay there. He went to the Sasural of Jawahar Pathak, where the latter was staying. After taking his food at the Sasural of Jawahar Pathak, he returned along with Narendra Pathak (informant), to the chamber of Jawahar Pathak. He had brought food for Jawahar Pathak and his son Kanhaiya Pathak, who took food at about 9 PM. He stated that the bulb was burning in the chamber and PW 2 Sheo Sagar Kumbar had gone to irrigate the sugar cane field. He stated that he came back with PW 5 to his chamber. PW 4 also stated that the dead bodies of the three sons of Jawahar Pathak were recovered from the nearby field and the body of Jawahar Pathak was also recovered from river Kudra, $\frac{3}{4}$ kilometers away from the place of occurrence. The defence had also drawn attention of the I.O. that this witness did not make statement under section 161 Cr.P.C. that he was making in the court. For instance, the I.O. stated that this witness did not state before him that he was going to sand ghat to load sand on his tractor. Furthermore, this witness also did not state before him that at 5 PM, he got down at the chamber of Jawahar Pathak and went to his Sasural for taking his food. He also did not state before him that he came back along with PW 5, Narendra Pathak to the chamber of Jawahar Pathak. He also did not state before him that he brought



food for Jawahar Pathak and Kanhaiya Pathak. He also did not state before him that bulb was burning before the Chamber. He also did not state before him that PW 2 Shiv Sagar Kumhar had gone to irrigate sugar cane field at the relevant time. He also did not state that he slept at the chamber. He also did not state that 14 to 15 people surrounded the chamber and killed three sons of Jawahar Pathak by strangulating their neck.

18. We thus find that this witness, for the first time, has stated new facts made several statements before the court, which he has not made before police under section 161 Cr.P.C. as such, we are constrained to hold that this witness is not an eye witness. Furthermore, according to this witness, PW 5 Narendra Pathak also slept at the chamber, whereas the latter (PW 5) stated that though he was also sleeping at the chamber but at the relevant time he had gone some distance to ease himself. The falsity of the evidence of this witness is further apparent from version of informant who stated in the Fard beyan that this witness came on hearing alarm after commission of the murder.

19. PW 7 Rajendra Tiwary is a resident of another village, namely, Bahuar. He is a chance witness. He stated that on the relevant night he was sitting on the tractor of PW 4 which was stationed 40 to 50 meters from the chamber of Jawahar Pathak. In



the meantime, 15 persons variously armed surrounded the chamber. He stated that the accused persons killed three sons of Jawahar Pathak by strangulating their neck by Gamcha. He stated that he recognized the accused persons in the bulb light of the chamber. He stated that three deceased were thrown in the field filled with water, in which seeds were sown.

20. Learned counsel for the defence argued that this witness had made these statements for the first time before this Court. To substantiate his submission, attention was drawn to the statement of the I.O. In the evidence, the I.O. has clearly stated that PW 7 had stated that he had parked the tractor 200 yards south to the chamber of Jawahar Pathak on road. He got up only on hearing hulla. He further stated that PW 7 disclosed to him that he recognized one Kumhar as the assailant of the deceased. The I.O. denied that this witness stated that there were 14 accused persons variously armed going towards the chamber of Jawahar Pathak. I.O. further stated that this witness did not state before him that the appellant killed the three sons of Jawahar Pathak by strangulating their neck with the aid of Gamcha. It thus appears that this witness has not come out with clear hands in the court. As such, we hold him untrustworthy and unreliable.

21. This takes us to the evidence of the informant



Narendra Pathak (PW 5). The informant is again not a resident of village Dandwas but of village Barage. He stated in his evidence that on the relevant night, he was at the chamber of Jawahar Pathak along with Pappu Pathak, Kanhaiya Pathak and Jhatpat Pathak. A bulb was burning in the chamber which was raised with aid of Bamboo clamps and was covered on top with straw. At 12 O'clock in the night, he went to ease near a ridge, which was 50 meters north to the chamber. In the meantime, 14 to 15 persons surrounded his chamber. He identified eight of the accused persons including the appellants. He stated that they all killed three sons of Jawahar Pathak and took him with them. He raised hulla whereupon witnesses and villagers came. He also narrated the entire incident to local Chaukidar who came in the morning. He stated that in the morning the local Chaukidar came to the chamber. He narrated the whole story whereafter he proceeded to 'thana' to inform the police. After sometime police came at about 10 AM and recorded his fard beyan and inspected the place of occurrence which was the chamber of Jawahar Pathak built of bamboo covered with straw roof. Police recovered two dead bodies from the nearby field and the third dead body was also recovered from the field 30 meters away from the two bodies. The dead body of Jawahar Pathak was recovered from a river. This



witness admitted that the police took the statement of Manju Devi, sister of Jawahar Pathak. We find that this witness too has not come with clean hand in the court. The I.O. in his evidence stated that the wall of the chamber was made of mud and straw and the chamber was open towards the south. He further stated that there was no electric bulb in the chamber. This witness did not show the place to the police much less the spot, where he had gone to ease and from where he saw the entire occurrence. It is thus apparent from the evidence of the I.O. that this witness has not substantiated the place from where he saw the occurrence. Furthermore, PW 4 Panna Lal Pathak stated that he was sleeping with PW 7 Rajendra Tiwary near the chamber, whereas PW 5 Narendra Pathak stated that on hearing hulla PW 4 Panna Lal Pathak came to the place of occurrence. As such, we do not find it safe to rely upon the evidence of this witness to sustain the conviction of the accused persons.

22. The appellants argued that there is land dispute and they have been implicated on account of enmity. It is well settled that the enmity cuts both ways and the prosecution has not been able to establish with cogent materials that it is the accused persons who had committed the murder of the deceased.



23. On the other hand, the I.O. stated that as per PW 7 (Rajendra Tiwary) one Ramawatar Kumhar was one of the assailants. Furthermore, PW 2 Shiv Sagar Kumhar had stated before the police that for the first time he learnt about the occurrence from one Ramawatar Kumhar, whereas the informant PW 5 (Narendra Pathak) stated that PW 2 Shiv Sagar Kumhar also witnessed the incident as he was irrigating the sugar cane field. All these materials show that there are material deficiencies in the case of prosecution with regard to the manner of occurrence and whether these appellants have committed murder of the deceased. Furthermore, the daughter of the deceased stated that Santosh was killed by unknown miscreants which again runs contrary to the statement of the informant. Apart from these infirmities, the I.O. also did not send the accused persons for trial.

24. The informant has argued that the I.O. had not conducted the investigation for which a protest petition was filed. We find that the protest petition is vague and allegation is general in nature against the I.O. Similarly, killing of the doctor who conducted the post mortem of the deceased, in no manner, would suggest that the appellants were in fact his killers as in that case the FIR was lodged against the appellants but no charge sheet was



submitted against them.

25. For the forgoing reasons, we are of the considered view that the trial court ought to have given the benefits of doubt to the appellants and acquitted them of charges. The appeal is allowed and the impugned judgment of conviction and sentence is set aside. Appellants are set at liberty.

(Samarendra Pratap Singh, J)

(Arun Kumar, J)

Shashi.

NAFR	
CAV DATE	NA
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