

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.60 of 2017

Arising Out of PS.Case No. -192 Year- 1988 Thana -CHAUTHAM District- KHAGARIA

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Ranbir Yadav Son of late Hari Ballav Yadav Resident of Village- Chukti, Police
Station Mansi, District- Khagaria.

..... Appellant/s

Versus

The State of Bihar

..... Respondent/s

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Appearance :

For the Appellant/s	:	Mr. Ajay Kumar Thakur
		Mr. Ravi Ranjan
		Ms Babita Kumari
		Mr. Shashank Shekhar
For the State		Mr. S.N. Prasad
For the informant		Mr. Ashutosh Jha

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CORAM: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL

And

HONOURABLE MR. JUSTICE MADHURESH PRASAD

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE KISHORE KUMAR MANDAL)

Date:29.08-2017

The present appeal is filed by the sole appellant to challenge the judgment of conviction and order of sentence dated 24.12.2016/03.01.2017 respectively, recorded by the Additional Sessions Judge-I Munger in Sessions Trial No. 184 of 1989. The learned trial court, on appraisal of evidence, held him guilty under section 302 IPC and sentenced to undergo R.I. for life and also to pay a fine with default clause.

2. Briefly stated, the prosecution case presented at the trial is that the deceased Sunil Yadav (cousin brother of the appellant) was on the rooftop of the double-storied house of his uncle(P.W.2) when the she goat of the appellant fell down from the roof for which the appellant started blaming him and also started pelting stones on him. In the midst of



quarrel, the appellant went inside his house and came out with his rifle and fired upon the victim standing on the rooftop which hit him in his abdomen. He fell down on the roof itself. His father Madan Yadav (P.W.1), uncle Ram Sharan Yadav (P.W.2) and cousin Pandav Yadav (P.W.6) came there and saw the occurrence. They also helped the injured in shifting to the Sadar Hospital, Khagaria for treatment where his Fardbayan (Ext.1) was recorded on 06.12.1988 at 1.30 P.M. The doctor attending on him at Khagaria Sadar Hospital referred him to Patna for better treatment. He was taken to Patna but on way finding his condition precarious he was admitted in Nazareth Hospital at Mokama where he was treated for few days and ultimately the victim died on 17.12.1988 at the said hospital. The police acting on the Fardbayan made by the deceased and recorded by ASI Sri R. N. Singh of Khagaria police station started investigation. The Fardbayan was forwarded to the Mansi outpost as the occurrence had taken place within the jurisdiction of the said police outpost. P.W. 8 was then officiating as the officer-in-charge of the Mansi police outpost. He dispatched the Fardbayan to the Chautham police station for drawing up the FIR and started investigation. The FIR(Ext.6) was formally drawn up on the same day at Chautham police station at 8.45 P.M. P.W. 8 proceeded to the place of occurrence and reached the scene of occurrence at about 3.00 P.M.. He inspected the place of occurrence which is the rooftop of the double-storied house of P.W.2 having a railing on the northern side and collected the bloodstains scratched from the northern railing of the rooftop. He also seized pieces of stones, bloodstained clothes from the place of occurrence vide Ext.3, 3/1 and 4. He was shown the place from where the appellant had fired which, in his estimation, was 150 yards away from the place where the



victim was hit. He collected the clothes with blood marks to which P.W. 3 Anil Yadav, brother of the deceased and P.W. 6 Pandav Yadav became witnesses. In course of treatment, as narrated above, the victim (informant) died at the Nazarath Hospital. A death inquest report (Ext.5) was prepared at the mortuary of Nazarath hospital on 17.12. 1988 at 10 O' clock. The autopsy on the dead body was conducted at Mokama. On receiving the injury/medical report of the victim prepared at Nazarath Hospital, Mokama (Ext.7), the inquest report (Ext.5) and the post mortem report (Ext. 8), the I.O., finding the allegations true, submitted the charge-sheet. Cognizance of the offence was taken and the case was committed to the court of sessions. One of the accuseds Kailu Yadav died and the proceeding against him was abated. Charges against the appellant under section 302 was framed and read over/explained to him to which he pleaded not guilty and claimed the trial. He claimed his false implication due to family dispute and political rivalry. A plea of alibi was also taken.

3. In order to substantiate the charges, the prosecution examined 08 witnesses whereafter the statement of the appellant was recorded under section 313 Cr. P.C. in which he denied the charges and pleaded his false implication due to political rivalry. To prove his case of alibi, the defence examined 03 D.Ws.

4. P.W. 1 Madan Yadav is the father of the deceased. He has supported the prosecution case as an eye-witness narrating the genesis of the occurrence, i.e., the quarrel that ensued between the victim and the appellant and pelting of stones. The scuffle broken out between the deceased and the appellant attracted him, his brother (P.W.2) and the nephew (P.W.6) who reached the place of occurrence and tried to forbid



the appellant when suddenly the appellant went inside the house and came out with his rifle and fired at the victim who was then on the rooftop which hit him. These witnesses immediately rushed to the rooftop and carried the victim to Khagaria Hospital where his fardbayan was recorded by the ASI Ram Narain Singh on which his son (victim) put up his signature in presence of two witnesses. This witness has proved the writings of the ASI and also the signature put in English thereon by his son Sunil Yadav (deceased). After recording of the Fardbayan, a doctor posted at Khagaria Hospital also recorded his statement(Ext.2) in presence of two witnesses whereafter he was referred to Patna but seeing his condition serious he was taken on the way to the Nazarath Hospital, Mokama where he remained under treatment for 10 days and thereafter died.

5. P.W.2 is the uncle of the informant and an eye-witness to the occurrence. In his examination-in-chief, he has supported the prosecution case on the genesis of occurrence, time, place and manner of the occurrence. It is pointed out that this witness has not presented himself for his further cross-examination. We find from the record that he was present for further cross-examination but was refused to be cross-examined by the defence whereafter the trial court discharged him. It has been contended by the defence that the evidence of this witness should not be looked into. The trial court has also not relied on his evidence.

6. P.W. 3 Anil Yadav is the full brother of the victim. At the relevant time, he was in the school. As he reached home, he saw the victim injured at the rooftop who disclosed to him about his assailant being the appellant. He is a witness to the seizure memo of the scratched bloodstains collected from the railing of the rooftop, the clothe stained with



blood and other articles seized by the I.O. from the place of occurrence. His signature on production-cum-seizure list is Ext. 3/1 The topography of the house of Ram Sharan Yadav (P.W.2) on whose rooftop the victim was present when fired at by the appellant was also prepared. It is a fairly large roof having a railing on the northern side. It may be noted here that from the evidence of the prosecution witness, particularly P.W.1, it is established that the appellant and P.Ws are close relatives. They live in separate house but a common 'Aangan' even after partition amongst them. According to P.W. 3, the house of P.W. 2 was adjacent north to the road and the lane. His statement was recorded by the I.O. at the hospital. He candidly denied the suggestion that the victim was killed by his other family member(s) or that he became a victim of firing made by him or someone else.

7. P.W.4 is a co-villager who has given the hearsay account of the occurrence. The prosecution got him declared hostile and cross-examined. His attention was drawn to his C.D. statement made by him to the I.O. It may be stated that P.W. 4 was a witness to the recording of the statement of the victim by the doctor (Ext.2) at the Sadar hospital before referring him to Patna.

8. P.W. 5 was then working as housemaid in the house of P.W. 2. In her examination-in-chief, she has said about the firing during the relevant time and place of occurrence. The prosecution, however, did not rely on her and she was declared hostile. She was cross-examined with reference to her C.D. statement wherein she had fully supported the prosecution case.

9. P.W. 6 is another relevant witness who has spoken about the occurrence as an eye-witness. He has stated that the occurrence was committed at 12.30 P.M. The she-goat of the appellant had fallen from the



rooftop which enraged the appellant who started accusing the victim and also hurled abuses. Subsequently, the appellant started pelting bricks/stones on him. On seeing this P.W. 1 and P.W.2, being the two uncles of the appellant, intervened and started pacifying the matter. At this juncture, the appellant hurriedly went inside the house and emerged with his rifle and fired at the victim who was then standing on the rooftop which caused injury in his abdomen. On receiving the injury, the victim leaned over the northern railing of the roof. This witness, along with P.Ws.1 and 2, rushed to the rooftop and brought the victim down and then carried him to Khagaria Hospital where his statement (Fardbayan) was recorded. He is also a witness to the seizure of the incriminating articles including the blood-smeared cement part scratched from the rooftop railing/fence. It was prepared by the officer-in-charge of the Mansi police outpost (P.W.8). He proved the signature of the I.O. (Ext.4). He has also proved the death inquest report prepared at Nazarath hospital, Mokama on 17.12.1988 signed by his father Ram Sharan Yadav(since dead) and one Bhola Yadav. He claimed that the death inquest report was prepared by the officer-in-charge in his presence. The entire death inquest report is Ext. 5. This witness also produced the death report handed over to him by the Nazarath hospital prepared by the doctor attending on the victim.

10. P.W. 7 Shushila Devi was another housemaid in the house of P.W. 2 and P.W. 6 (father and son respectively). At the time of occurrence, she was engaged in preparing cow dung cakes at the Darwaza of P.W.2 when she could notice pelting of stones between the family members when suddenly a firing was made which injured the victim who was standing on the rooftop of P.W. 2 as a result whereof the victim fell on the railing of the



rooftop. The railing was waist-height.

11. P.W. 8 is the I.O. of the case who was then posted as the officer-in-charge of Mansi police outpost who conducted the investigation, inspected the place of occurrence, prepared seizure list of the incriminating materials collected from the rooftop, recorded the statement of the witnesses and after collecting the death inquest report & the post mortem report of the victim laid the charge-sheet.

12. The learned trial court, after critically analyzing the evidence relied on the Fardbayan made by the victim and the supporting ocular account narrated by P.Ws. 1 and 6 which also found support from the evidence of P.W.2 and held the appellant guilty after rejecting his case of false implication and the plea of alibi. Be it noted, the trial court did not rely on Ext. 2 which was the statement of the victim recorded by the doctor at the Khagaria Hospital.

13. Heard Mr. A.K. Thakur for the appellant, Mr. S. N. Prasad for the State as well as Mr. Ashutosh Jha who appeared on behalf of the mother of the victim.

14. Criticizing the judgment, Mr. Thakur has submitted that Ext. 1 cannot be treated as the dying declaration. The trial court has not placed reliance on Ext. 2 which is another statement of the victim recorded at the hospital by the doctor. For similar reasons, Ext. 1 would not be treated as the dying declaration of the victim as neither the police officer who recorded the same nor the witnesses to the said declaration have been examined. Furthermore, there is a marked difference between the two statements allegedly made by the victim at the Khagaria Sadar Hospital. A statement, before it is treated as the dying declaration, must be as to the cause of the



declarant's death or as to any of the circumstances or the transaction which resulted in his death. Any previous or subsequent transaction so stated by the victim would not be treated as part of the dying declaration. Drawing attention of the Court to the post mortem report (Ext.8) it is pointed out that the cause of death found by the doctor is septicemia. It is also pointed out from the post mortem report that the doctor had not found the injury sustained by the victim sufficient to cause death in the ordinary course of nature or that the septicemia was the result of the said injury. In his submission, gunshot injury allegedly caused by the appellant was not the cause of death in the present case and thus the statement of the victim is not covered under section 32 of the Evidence Act (for short 'the Act'). He relied on **AIR 1964 SC 900 (Moti Singh and another vs. State of U.P. (Para 13-16) & AIR 2001 SCW 4526 Bhairon Singh vs. State of Haryana.** Arguing further, it is submitted that ASI Ram Narain Singh of Khagaria police station was the scribe of Ext.1 which was recorded in presence of Ram Swaroop Singh Yadav and Onkar Narth Khemka. Neither the ASI who recorded the Fardbayan nor the witnesses in whose presence the same was recorded has been produced by the prosecution. Ext.1 thus becomes doubtful. To solidify the said submission, he relied on **(2000)5 SCC 207 (Kansh Raj Vs. State of Punjab (Para 11) and AIR 1988 SC 1850 (Ram Bahadur Yadav vs. State of Bihar.** In the present case, it is submitted, the prosecution has withheld the injury report of the victim prepared at the Khagaria hospital. No doctor of Khagaria hospital where the victim was first treated and then referred has been examined. There is nothing on record to suggest that after receiving the so-called injury the victim was conscious and mentally and physically fit to give statement. He



also placed before us the material difference between Ext. 1 and Ext.2. As per Ext.1, the occurrence originated all on a sudden due to fall of the she-goat, when a quarrel and exchange of brickbats ensued whereafter the accused rushed to his room, took out the rifle and fired. In Ext. 2, the victim has given out somewhat different version. He had not stated the genesis of the occurrence as given out in Ext. 1. He would also urge that although the prosecution is not obliged to prove the motive but, if it has given out some, the prosecution is required to prove the same by cogent evidence. To further the said submission, he pointed out to us the finding of the I.O. when he visited the place of occurrence. It is next contended that the earliest version of the prosecution case has been suppressed by the prosecution.

15. It is also argued P.W.8 in his deposition has stated that he received the Fardbayan from Khagaria police station and forwarded the same to Chautham police station for drawing the formal FIR which was registered on the same day in the evening at 8.45 P.M. whereafter he was given the charge of investigation and thereafter he had gone to the place of occurrence whereas Ext.2/1 (seizure-cum-production memo) would show that the I.O. had inspected the place of occurrence on 06.12.1988 at 1630 hours which was witnessed by P.W.6 and P.W.3 (Ext.4).

16. It is a case where the prosecution has failed to prove the place from where the accused resorted to firing. According to the FIR and the prosecution case, he resorted to firing from the ground near the house whereas the I.O. found such place on a road around 150 yards away. P.Ws 1 and 6, at least, have spoken that there was an altercation between the deceased and the appellant which continued for few minutes wherein abuses



were hurled which was intervened and tried to be pacified by them whereafter the appellant, in a fit of rage, came out with his rifle and fired at the deceased. It would thus necessarily demonstrate that both the deceased and the appellant who threw the she-goat were present at the ground/foot of the house having common 'Aangan' with the house of the appellant where scuffle and brickbats started. The witnesses, including the I.O., have stated that the road and lane were situated adjacent to the house of P.W. 2 on two sides (western and northern). Concluding his submission, it is stated that the prosecution has not been able to prove the case beyond reasonable doubt. Even accepting the prosecution case the conviction of the appellant u/s 302 IPC, in the facts of the case, would not be sustainable in law.

17. Counsel for the State as well as Mr. Jha, on the other hand, supported the finding(s) of guilt recorded by the learned trial court. They urged to treat the Fardbayan (Ext.1) as the dying declaration of the victim. There should not be any doubt with regard to the physical condition of the victim as, indisputably, he survived after infliction of injury for at least 10 days. The prosecution witnesses have clearly spoken that he was conscious and was able to speak. The doctor in the post mortem report (Ext.8) has also found that no vital organ of the victim was damaged or ruptured. The bullet had struck on his right chest and went through. Witness after witness have stated that the victim even after receiving assault was able to speak and had spoken to them about the appellant having shot at him. That apart, it is a case where the prosecution case has also been proved by the ocular evidence of P.W.1 and P.W.6 who are the family members of the victim as well as the appellant getting full support



from the evidence of P.W.3 and the post mortem report. The presence of these witnesses at the place of occurrence, during the relevant date and time of occurrence, has not been seriously challenged by the defence. They also point out that the learned trial court has also found that the evidence of P.W. 2 extends full support to the account of the occurrence stated by P.Ws 1 and 6. Countering the submissions of Mr. Thakur on not treating the Ext.1 as the dying declaration, they relied on **AIR 1998 SC 682 (para 9) [Najjam Faraghi vs. State of West Bengal)** and **AIR 1979 SC 1505 (Surajdeo Oza vs. State of Bihar)** wherein it was held that even in absence of the evidence of the doctor, if facts reveal that the victim was in a fit condition to make statement and the declaration given by him was short and the victim having died long after such declaration the same could be treated as dying declaration. The Court should not give undue importance to the minor discrepancy/omission/contradiction in the evidence of the PWs which do not affect the core of the case.

18. In the light of the rival contention, it is considered apposite to first examine the evidentiary value of the Fardbayan made by the deceased which became the basis of the prosecution case. All the prosecution witnesses narrated the case which was adequately grounded in the Fardbayan. The defence also, in the light of the case narrated in the Fardbayan (Ext.1) contested the cases and adduced oral evidence. The purpose of the Fardbayan is to ignite the investigation. Having said so, it is further relevant to consider the post mortem report (Ext.8). The autopsy surgeon at Nazarath Hospital found the following anti mortem injury on the deceased:-

“1. stitched wound is the paramedian plane extending from xiphoid to umbilicus; gaping of wound-at stitch no.3 continued last 5” from which serosaguanus offensive discharge coming out.



2. stitched wound with gaseous discharge coming from the wound found on back of right side at the level of lines from ribs into sene of inferior angle of right scapula.

3. abrasion of about 10 centimeters at right elbow dorsal aspect.

4. drainage wound of abdomen at about 4.5 centimeters in the middle of right flank of abdomen.

Dissection- 1. scalp, skull and meninges- no ecomisis

2. larynx and trachea.

3. lunges- pale.

4. heart-blood present both ventricles.

5. sloughing and greenish perforation
discolouration of the wound and adjacent area of anterior abdominal wall.

6. liver pale

7. stomach-empty, posterior surface stitches.

8. collapsed loop of small intestine and gangrenous

changes present in the part of loop of small and large intestines.

9. spleen-salty color and pale on cuts.

10. both kidneys pale.

Nature of weapon- could not be ascertained as patient was already operated.”

19. Ext. 7 is the injury report of the victim prepared on 06.12.1988 at 2.20 P.M. at the Nazarath Hospital. The doctor attending on the victim found him conscious. On external examination, he found a penetrating/lacerated wound $\frac{3}{4}$ ”x $\frac{1}{2}$ ” with burned margin on anterior/front right side of chest which was wound of entry. Another lacerated wound on the back of the right chest and upper abdomen of the size $\frac{1}{4}$ ”x $\frac{1}{2}$ ” was found. What prominently appears from Ext.7 and Ext.8 that the fire arms injury had not caused the injury to other vital part of the body. In both the reports, the doctor did not opine that the injury caused by fire-arms was dangerous to life. The post mortem report is also silent as to the occurring of septicemia due to the fire arms injury.

20. Counsel for the appellant has argued with all ingenuity at his



command that the Fardbayan (Ext.1) should not be treated as a dying declaration as it does not relate to the cause or the circumstance of his death. Secondly, the scribe of Ext.1 or the witness in whose presence the same was recorded has not been examined. He further submitted that the doctor attending on the victim at Khagaria Hospital had also recorded the statement of the victim (Ext.2) which was discarded by the trial court as not reliable on the ground that neither the doctor nor the witness(s) in whose presence the same was recorded was produced before the court. For similar reason, it is submitted, Ext.1 should also not be treated as dying declaration. The inconsistency in two statements (Ext.1) and (Ext.2) has also been shown to us. In **AIR 1964 SC 900**, the Supreme Court in paragraph 16 held as under:-

16. The effect of this finding is that the alleged dying declaration of Gaya Charan Ex. Kha 75, cannot be admissible in evidence. Clause (1) of S. 32 of the Evidence Act makes a statement of person who has died relevant only when that statement is made by a person as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question. When Gaya Charan is not proved to have died as a result of the injuries received in the incident his statement cannot be said to be the statement as to the cause of his death or as any of the circumstances of the transaction which resulted in his death. This is obvious and is not disputed for the respondent State.

21. In case of **Bhairon Singh** (Supra) similar consideration was made by the Apex Court. The counsel for the defence has pointed out the material



difference in Exts.1 and 2 with regard to the genesis of occurrence. In **Mehiboobsab Abbasabi Nadaf vs. State of Karnataka (AIR 2007 SC 2666)**, the Apex Court did not accept the dying declaration finding inconsistent stand in two dying declarations of the declarant. Similar was the view in case of **Anmol Singh [(2008) 5 SCC 471]**.

22. In contra, the prosecution has submitted relying on **Kansh Raj (Supra)** that the court can accept the statement of the deceased as dying declaration even though the declarant died several days after the statement. The word “as to any of the circumstances of the transaction which resulted in his death” must have some proximate relation to the actual occurrence.

23. Section 32 of the Evidence Act is an exception to the general rule of exclusion to the hearsay evidence. The Court is expected to be careful and vigilant in considering the relevant evidence on the point. Besides some difference in two statements i.e. Ext.1 and Ext.2, both made by the victim, there is another reason not to accept Ext.1 as the dying declaration. Neither the scribe (Ext.1)/police officer who reduced it to writing nor the two witnesses in whose presence it was recorded has been examined. For similar reasons, the trial court had not accepted Ext.2 as the dying declaration. No doctor from the Khagaria Hospital was examined. These lacunae appearing from the record persuade us not to treat Ext.1 as the dying declaration. It shall be treated only as the statement of the victim on which the prosecution structured its case and the defence sought to demonstrate the weaknesses in the structure.

24. It is urged that there is blatant falsity in the prosecution case. The I.O. has stated that after given the charge of investigation he took up the investigation. A formal FIR was drawn in the evening of 06.12.1988 at 8.45



P.M. The I.O. is said to have proceeded to the place of occurrence in the afternoon of the day of the recording of the Fardbayan and seized the incriminating articles under seizure memo from the place of occurrence at about 4.30 P.M. witnessed by P.Ws.3 and 6. On close perusal of the evidence of the I.O. (P.W.8), it is explicit that the Fardbayan recorded at about 1.30 P.M. at Khagaria Hospital was sent to the Mansi police outpost. The I.O. has admitted that he received the Fardbayan and then sent it to Chautham police station for drawing up of a formal FIR. As the SHO of the police outpost he was required to act promptly as a Fardbayan of a cognizable offence was already made and recorded which was perused by him. Drawing up of a formal FIR is a mere formality. We find no serious flaw from what was submitted by the defence. The occurrence was committed within the jurisdiction of the Mansi police outpost. P.W. 8 was the SHO of the outpost. With a view to act with promptitude, he had gone to the scene of occurrence after recording of the Fardbayan, without waiting for drawing up of a formal FIR. We see no substance in the submissions of the defence that such action of the I.O. can be criticized, or give rise to any doubt or suspicion in the prosecution case.

25. Another plank of the argument of the defence is that the genesis of the occurrence has not been proved. Fall of she goat from the rooftop ignited the quarrel between the deceased and the victim. The I.O., however, did not investigate on this aspect. It was a sheer laxity on his part. Turning to the ocular evidence of P.Ws 1 and 6, it is found that they have clearly spoken about the genesis of the occurrence. These witnesses are relatives of both the deceased, and the victim. In Ext. 1, the genesis of the occurrence has been stated. Merely because the I.O. did not investigate to verify the



genesis of the occurrence, in our view, it is difficult to discard the evidence of the PWs in court which unerringly proved the genesis, the place and the manner of occurrence besides the complicity of the appellant in the crime.

26. Our attention has been drawn to Ext.7(injury report) where the doctor found the injury on the front part of the chest having burnt edges. Harping on such finding, the defence has argued that it is a serious jolt to the prosecution case. The injury was caused by a rifle from quite a distance. The I.O. has estimated the distance approximately 150 yards. We are mindful that the rifle was used by the appellant for the assault. In a case, like the present one, presence of charring of skin around the wound of entry would not be sufficient to reject the entire prosecution case. Through different judgments, the Apex Court has settled the legal principle that the court is expected to independently apply its mind to the facts of the case and assess the evidence. An expert is not a witness of fact. His evidence is really of an advisory character. His duty is to furnish court the scientific test criteria to test the accuracy of conclusions. The court must assess all circumstances appearing on record and give its independent judgment. **(Ref: (2017) 6 SCC 263; para 254)**. Another principle of law well crystallized in criminal jurisprudence is that in case there is some contradiction between the medical evidence and the ocular evidence, primacy is given to the ocular evidence if found worthy of credit. We have perused and analyzed the evidence of P.Ws. 1 and 6 supported by evidence of P.W.3 which establish that the injury was caused to the deceased by a rifle from a distance. The evidence of these P.Ws do not appear to us to be doubtful nature. They are the relatives of both the deceased and the victim.



Their presence at the place of occurrence was natural. Seen thus, we find not much substance in the criticism of the prosecution case by the defence in the light of the finding of the doctor in Ext.7. Further Exts. 8 and Ext.7 have also been criticized as inadmissible because the doctor has not been examined but we have no reason to discard Ext.7 and Ext. 8 only on this count. They were marked exhibits without objection. The I.O. has stated about the receipt of Ext.7 and Ext. 8 from the Nazarath Hospital Mokama in course of investigation which were made part of the investigation report. P.W.6 has proved the death inquest report which is also in accord with the post mortem report.

27. This takes us to the next crucial submission of the defence. It is pointed out that in the post mortem report (Ext. 8) the doctor has opined that the death occurred due to septicemia, but he did not find that the septicemia resulted out of the injury caused to the victim by fire arm. The autopsy surgeon found the victim having been earlier operated upon in course of treatment. The defence has pointed out both from the injury report (Ext.7) and post mortem report (Ext.8) that the doctor treating him and/or performing the autopsy on the dead body did not find the injury sustained by the deceased by means of a rifle-shot was sufficient to cause the death in an ordinary course of nature and thus the case will not fall within the ambit of section 302 IPC. Judgments galore have been cited to prove the said contention.

28. In **Shanmugam vs. State of Tamil Nadu [(2002) 10 SCC 4]** on which strong reliance has been placed by the defence, the Apex Court on analyzing the attending facts found that the appellant on being questioned by his brother (deceased) as to why he was whistling at a place frequented by



ladies, all of a sudden entered his house and came out with a spear and attacked the deceased with it inflicting severe injuries on him held that there was no intention to cause the death. The Apex Court also noticed the nature of the injuries and medical opinion of the doctor which unmistakably pointing to the fact that the bodily injuries inflicted on the deceased were of such nature that they were likely to cause death. It was held that the appellant could be appropriately convicted under section 304, part I IPC instead of section 302 IPC.

29. In **Maniben vs. State of Gujarat [(2009) 8 SCC 796]** referred by the counsel for the defence, the Apex Court concurred with the view of the trial court in convicting the appellant under section 304, part II IPC. The trial court had found the injuries sustained by the deceased were not sufficient in the ordinary course of nature to cause death. In **Kishan Chand vs. State of Punjab (1994 Cri. L. J. 19)** the trial court convicted the appellant under section 302 IPC as he had inflicted solitary blow on the head of the deceased with **Gandasa**. The Hon'ble Supreme Court having found that the appellant had dealt only one blow and the injured/deceased died two weeks thereafter and may be due to intervening cause, held him guilty of having committed culpable homicide not amounting to murder punishable under section 304, part II IPC.

30. The significant features of the present case, as noticed above, is the appellant is the cousin of the deceased. P.Ws 1 and 6 have stated that a scuffle had taken place between him and the deceased for some time immediately preceding the assault. The appellant was blaming the deceased for the fall of his she-goat from the rooftop. Enraged appellant then brought a rifle from the room and fired at the deceased who had then



reached the rooftop of the house of his uncle (P.W.2) and was standing by the side of the northern fence/railing of the roof accessible from the road/lane. The victim was first taken to the District Hospital, Khagaria and thereafter he was being carried to Patna. However, on way he was admitted in Nazareth Hospital, Mokama where he was operated upon in course of treatment. Nearly 10 days thereafter he died. The doctor also found septicemia as the cause of death. We do not find from either Ext. 7 or Ext.8 that any vital organ of the victim was damaged or ruptured. The doctor has also not reported that the septicemia occurred due to the fire arm injury. It may possibly due to intervening cause. It is, thus, abundantly clear that there was no premeditation. The intention to cause death was lacking. The Apex Court having found the aforesaid circumstances crystallized from the evidence in case of **Gurmukh Singh vs. State of Haryana (judgment delivered on 25.08.2009)** held the appellant guilty u/s 304, part II IPC. However, when the injury is caused by fire arms the appellant was aware that such injury was likely to cause death or to cause such bodily injury which was likely to cause death of the receiver of the assault in the ordinary course of nature.

31. We may note that the defence has not made any submissions on the alibi of the appellant as deposed by the defence witness. However, it may be stated that their evidence cannot be relied upon for the reasons recorded by the trial court in para 30 of the impugned judgment.

32. For the foregoing reasons, we are persuaded to hold that the appellant can appropriately be held guilty of having committed the offence punishable under section 304, part II IPC. We order accordingly. He is directed to suffer R.I. for 10 years and to pay a fine of Rs. 50,000/-, as



directed by the trial court. In default of payment of fine, he shall further suffer R.I. for 02 years.

33. With the aforesaid modification(s) in the conviction and sentence, the appeal is dismissed.

(Kishore Kumar Mandal, J)

I agree (Madhuresh Prasad, J)

HR/-

AFR/NAFR	NAFR
CAV DATE	12.07.2017
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