IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.1375 of 2010

Against judgment/order dated 6.10.2010/8.10.2010, passed by Sri Abhimanyu Lal Srivastawa, Additional Sessions Judge, Fast Track Court-III, Banka in Sessions Trial Nos. 93/2010 and 554/2010.

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Devani Yadav s/o Late Rameshwar Yadav, resident of village Kuerba, Police Station Banka district Banka .... Appellant

With

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Criminal Appeal (DB) No. 1338 of 2010

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Keshar Yadav s/o Late Sahdeo Yadav, resident of village Kureba, Police Station Banka, district Banka ... . Appellant

With

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Criminal Appeal (DB) No. 1239 of 2010

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1. Binay Yadav s/o Late Matar Yadav,
2. Mahesh Yadav s/o Late Matar Yadav,
3. Suren Yadav s/o Late Matar Yadav and
4. Hiraman Yadav s/o Chintu Yadav @ Hari Narayan Yadav,

All residents of village Kureba, Police Station Banka, district Banka

.... Appellants

Versus

State of Bihar .... Respondent in all the appeal

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Appearance :
(In CR. APP (DB) No.1375 of 2010)
For the Appellant : Mr. Jagdish Prasad, Advocate
Mr. Ashok Kumar Verma, Advocate
(In CR. APP (DB) No.1338 of 2010)
For the Appellant : Mr. Praveen Kumar, Advocate
Mr. Bhumeshwar Yadav, Advocate
(In CR. APP (DB) No.1239 of 2010)
For the Appellants : Mr. Amarendra Kumar Jha, Advocate
For the State : Mr. Ashwini Kumar Sinha, Addl.P.P.
(in all appeals)

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CORAM: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH

and

HONOURABLE MR. JUSTICE ARUN KUMAR

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SAMARENDRA PRATAP SINGH)
Date: 20-02-2017

Sole appellant of Cr. Appeals (DB) No.1375 and 1338 of 2010, namely, Devani Yadav and Keshar Yadav have been convicted

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under sections 148 and 302/149 of the I.P.C. by the Additional Sessions Judge cum FTC III, Banka. For the offence under sections 302/149 of the IPC they have been sentenced to RI for life, whereas for the offence under section 148 of the IPC, they have been sentenced RI for three years. Appellants have also been fined Rs.5,000/- and in default they have been directed to undergo further six months imprisonment.

2. All the four appellants of Cr. Appeal (DB) No.1239 of 2010 have been convicted under sections 147 and 302/149 of the IPC. For the offence under section 147 of the IPC they have been sentenced to undergo two years RI; whereas for offence under sections 302/149 of the IPC, they have been sentenced to undergo imprisonment for life and a fine of Rs.5,000/- each and in default to undergo further six months RI. However, all the sentences were directed to run concurrently.

3. The prosecution case as made out in the fard beyan of Bhubneshwar Yadav s/o Late Kesho Yadav village Karaha Police Station Banka, district Banka recorded by SI Shashi Bhushan Singh SHO Banka Police Station on 30.7.2009 at 05.45 AM at village Kusaha, in short, is as follows:-

(a) The informant stated that he along with his brother Girdhari Yadav and father Kesho Yadav (not examined) were sleeping at his *Bathan* (a hutment for keeping cattle) in the village in

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the night of 29/30.7.2009.

(b) All of a sudden 10 to 12 persons came to his *Bathan*. The informant recognized 10 out of the 12 persons as follows:- Devani Yadav, Faujdari Yadav, both sons of Late Rameshwar Yadav, Keshar Yadav son of Late Sahdeo Yadav, Suren Yadav son of Late Matar Yadav, Jagarnath Yadav son of Late Fukar Yadav, Hiraman Yadav, Yogendra Yadav both sons of Chintu Yadav, Ranjit Yadav son of Keshar Yadav, Vinay Yadav son of Late Matar Yadav and Mahesh Yadav son of Late Matar Yadav, all residents of village Kurawa Police Station and District Banka. Out of these accused persons, four of them, namely, Devani Yadav, Faujdari Yadav, Keshar Yadav and Yogendra Yadav entered into the *Bathan* and assaulted his father by Dabia.

(c) The informant soon escaped from there making *hulla* and saw them in the flash of torch. However, rest of the accused persons standing outside the *Bathan* chased him. The informant ran away from the scene and saved himself.

(d) The informant stated that the accused persons badly assaulted his father by *Dabia* causing cut injuries resulting into his instant death. After committing murder, the accused fled in the south direction.

(e) The informant, thereafter informed the villagers and

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Mukhia of Lodham Gram panchayat, namely, Mohan Lal Yadav about the occurrence. He stated that land dispute was the cause of murder and accused persons had also threatened few days ago.

4. On basis of fard beyan of the informant, Banka Police Station Case No. 324 of 2009 dated 30.7.2009 was registered u/s 147, 148, 149/302 of the IPC. Police after investigation submitted two charge sheets in the case. First charge sheet was submitted against Mahesh Yadav, Suren Yadav, Jagarnath Yadav and Binay Yadav, and supplementary charge sheet was submitted against accused Keshar Yadav, Hiraman Yadav and Devani Yadav while continuing the investigation against the rest accused. Learned Chief Judicial Magistrate, Banka took cognizance of the offence and committed the case to the court of sessions. Initially trial of the accused persons started separately under two sessions trials, namely, Sessions Trial Nos. 93 & 554 of 2010 which were later amalgamated. Charges were framed under sections 147, 148, 149/302 of the IPC to which the accused pleaded not guilty and claimed to be tried.

5. The prosecution in support of the case examined 9 witnesses including the informant Bhuvaneshwar Yadav as PW 6, Dr. Sohel Anjum as PW 9 and the I.O. Chandrika Choudhari as PW 8. Apart from the oral evidence, prosecution has also adduced

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documentary evidence, namely, signature of witness Ajab Lal Yadav on the seizure list marked as exhibit 2 & 2/A, seizure list marked as exhibit 3 & 3/1, *fard beyan* marked as exhibit 4, FIR marked as exhibit 5, Inquest report marked as exhibit 6, post mortem report marked as exhibit 7 and the FSL report marked as exhibit 7.

6. The defence of the accused in their statements under section 313 of the Cr. P.C. was complete denial of the occurrence on account of admitted land dispute. The defence did not examine any witness. However, it adduced certified copy of the plaint of Title suit no. 55l of 2008 marked as exhibit 'A' to demonstrate that there was a land dispute between accused Keshar Yadav and the prosecution side.

7. The trial court relying on the evidence of PW 3 Jhabban Yadav, PW 4 Ganesh Yadav, PW 6 (Bhuvaneshwar Yadav has convicted the appellants as indicated in the earlier paragraphs. Being aggrieved, appellant Devani Yadav and Keshar Yadav have filed separate appeals, namely, Cr. Appeal(DB) No. 1375 of 2010 and 1338 of 2010 respectively, whereas appellants Binay Yadav, Mahesh Yadav, Suren Yadav and Hiraman Yadav have preferred Cr.Appeal (DB) No. 1239 of 2010, which are being disposed of by this common judgment.

8. The prosecution, in order to substantiate its case,

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examined the informant Bhuvaneshwar Yadav (PW 6), Ganesh Yadav (PW 4) and Jhabban Yadav (PW 3) as eye witnesses and Naresh Yadav (PW 1), Shilendra Yadav (PW 2) and Rajendra Yadav (PW 5) as corroborative witness.

9. PW 6, the informant Bhuvaneshwar Yadav stated that the occurrence took place about 11 months ago, at about 1 AM. On that fateful night, he was sleeping in his *Bathan* along with his brother Girdhari Yadav, father Kesho Yadav and his uncle Ganesh Yadav. In the meantime, at about 1 am, 10 to 12 persons came to his *Bathan*. He recognized 10 of them in the flash of the torch. He stated that accused Keshwar Yadav and Yogendra Yadav pressed the chest of his father by *Lathi*, while accused Anandi and Chhatu pressed his legs. Thereafter, accused Devani Yadav started cutting his father by *Dabia.* He stated that after covering some distance, he and his uncle Ganesh Yadav raised hulla, whereupon Jhabban (PW 3), Rajendra (PW 5), Naresh (PW 1) and Shailendra (PW 2) soon came to the place of occurrence.

10. The accused persons then fled away. On fleeing of the accused persons, informant went near his father and found him dead. The informant informed to the local Mukhia about the occurrence on phone, who informed the police. The police reached the place of occurrence at about 6 am and took his statement. He stated that no

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criminal case is going on between the parties. However, accused Devani Yadav had asked his father to register a land which his father had refused to do.

11. PW 4 Ganesh Yadav is the uncle of the deceased. He too states that he was sleeping in the *Bathan* along with the informant PW 6, his brother, Kesho Yadav (the deceased) and his nephew Girdhari Yadav. He stated that accused Keshar and Yogendra Yadav pressed the chest of his brother by *Lathi,* whereas accused Anandi and Chhatu pressed his legs. Thereafter, accused Devani Yadav assaulted on the neck, head and right side hand of his brother by *Dabia,* while accused Yogendra, Faujdari also assaulted him by Sickles and rest accused persons had surrounded his brother at the relevant time. He stated that on hearing *hulla* other eye witnesses came to the place of occurrence.

12. PW 3 Jhabban Yadav stated that nine and a half month back at 1 AM, his father Ganesh Yadav was also sleeping with the deceased (Kesho Yadav), Bhuvaneshwar Yadav and Girdhari Yadav in the Bathan at the time of occurrence. After sometime, his father (Ganesh Yadav), cousin Bhuvaneshwar Yadav and Girdhari Yadav raised *hulla*, whereupon he rushed to the *Bathan* where accused Keshar Yadav and Yogendra Yadav were pressing the chest of his uncle (deceased) by *Lathi*, whereas accused Anandi and Chhatu had

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pressed his legs. Suren, Binay, Mahesh, Jagarnath, Hiraman Yadav and Ranjit Yadav had surrounded his uncle. The accused Devani Yadav assaulted on the head, neck, right side shoulder and leg of his uncle by Dabia.

13. PW 1 Naresh Yadav, a co-villager, and not an eye witness to the occurrence, stated that eight and a half months back at about 1 AM, he rushed towards the *Bathan* of Kesho Yadav on hearing *hulla*. In light of his torch he saw Keshar Yadav, Dewani Yadav, Faujdari Yadav, Yogendra, Hiraman, Chattu, Anandi, Ranjit Yadav, Suren Yadav, Mahesh Yadav, Binay Yadav fleeing from the place of occurrence. He also saw Kesho Yadav lying dead. He stated that Bhuvaneshwar Yadav (the informant PW 6) told him that accused persons killed his father. He claimed to have seen the accused persons fleeing away from the place of occurrence from the distance of 50 hands in flash of his torch.

14. PW 5 Rajendra Yadav too had claimed to be an eye witness to the occurrence. He too stated that eleven months back at 1 AM when he heard *hulla*, he went to the *Bathan* of Kesho Yadav and saw Devani Yadav, Faujdari Yadav, Keshar Yadav, Yogendera Yadav, Anandi Yadav and Chatru Yadav assaulting Kesho Yadav, while Binay, Mahesh, Suren, Jagarnath, Hiraman, Ranjit had surrounded him. He further stated that when he saw Kesho Yadav

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being assaulted, he raised alarm, whereafter people arrived and accused persons fled away. He stated that he went near the corpse of Kesho Yadav and saw 12-13 wounds on the person of the deceased. He stated that he had a torch in his hand and witnessed the occurrence in the torch light. In the cross-examination, this witness corroborated the injuries sustained by the deceased.

15. The prosecution examined PW 9 Dr. Sohel Anjum who conducted post mortem examination on the dead body of the deceased Kesho Yadav on 30.7.2009. He found as many as 11 injuries on the person of the deceased including the injuries on his neck, fracture of 1st cervical vertebra, scalp etc, all caused by sharp cutting weapon. According to him, the time since death was within 24 hours, which tallies with the prosecution case.

16. PW 8 Chandrika Chaudhari is the Investigating officer (IO) of the case. He stated that after taking over investigation, he inspected the place of occurrence, which was a *Palani/Bathan* of the informant. He stated that the deceased was sleeping on a *Khatia* and the informant was sleeping on a nearby *Chauki* at the time of occurrence. He found a lot of blood fallen on the ground. He also recovered blood stained *Dabia* from the place of occurrence. There was blood stains on the *Chauki* of informant and as also on the straw of thatched roof of *Bathan.* In course of investigation, he took

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restatement of the informant as well as statements of Ganesh Yadav (PW 4), Jhabban Yadav (PW 3), Shailendra Yadav (PW 2) and Naresh Yadav (PW 1). He seized blood stained Dabia, blood stained soil, clothes and prepared seizure list. He also sent the sample for forensic test. In the inquest report, he stated that the deceased had sustained a number of injuries caused by sharp cutting weapon. He also obtained post mortem report.

17. Mr. Jagdish Prasad, learned counsel appearing on behalf of appellant Devani Yadav has assailed the impugned judgment of conviction and sentence on more than one ground. He submits that the evidence of informant is not worthy of credence as during the trial he has developed the prosecution's case. In support of the submission, he submits that in the FIR the informant stated that only two persons (himself and his brother Girdhari Yadav) were sleeping along with the deceased, whereas in the trial he has stated that three persons (himself, his brother Girdhari Yadav and uncle Ganesh Yadav) were sleeping along with the deceased in the Bathan at the time of occurrence. Furthermore, during trial Girdhari Yadav has not been examined and to develop the story, Ganesh Yadav has been introduced as PW 4. Besides this, in the FIR he has not named any witness as who arrived either at the time of occurrence or soon thereafter. However in his evidence, during trial he stated that the occurrence was witnessed by Jhabban Yadav (PW 3), Ganesh Yadav

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(PW 4) and also by Naresh Yadav (PW 1), Shailendra Yadav (PW 2) and Rajendra Yadav (PW 5).

18. Referring to the deposition of the informant (PW 6) learned counsel submits that the prosecution has tried to shift the place of occurrence from the *Bathan* to the *Palani,* which was located just outside the two rooms of the *Bathan.* He submits that in the FIR the prosecution case was that the occurrence took place inside the *Bathan.* He submitted that even as per the evidence of PW 6, the *Bathan* consisted of two rooms, one room was used for keeping cattle and the other room was used as a shop and the rooms were also having doors. In such a situation, when the informant had run some distance from there after the accused persons entered the Bathan to assault his father, he could not have been in a position to witness the commission of offence. In addition to that, informant's brother Girdhari Yadav who was also sleeping with the informant and the deceased in the *Bathan* at the relevant time, has not been examined. Learned counsel submits that the blood stained clothes of deceased had not been sent for forensic examination by the I.O. He next submits that the informant has claimed to have identified the accused persons in the flash of torch. However, said torch has not been produced before the police. He submits that motive assigned to kill the deceased is land dispute but no criminal case was instituted by either parties against each other. Besides this, in the FIR, the

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informant stated that his father (the deceased) was sleeping on a *Khatia* at the time of occurrence, while the I.O. in his deposition stated that the dead body of informant's father was lying on a *Chauki* kept in the *Panani*. Besides this, eleven injuries had been found on the person of the deceased caused by sharp cutting weapon which indicates that the murder was barbaric in nature which might have been caused by some unknown person as the deceased was a person of criminal background. On these premises, learned counsel submits that it cannot be said that the prosecution has been able to prove the charges against the appellants beyond all reasonable doubts.

19. Learned counsel appearing for the appellant Keshar Yadav has adopted the submission of Mr. Jagdish Prasad, learned counsel for the appellant Devani Yadav.

20. Learned counsel for appellants Binay Yadav, Mahesh Yadav, Suresh Yadav and Hiraman Yadav submits that the case of these appellants stand on better footing than that of appellants Devani Yadav and Keshar Yadav because no overt act has been alleged against them. Learned counsel also submits that PWs 1, 2 and 5 have stated that they saw the accused persons only fleeing away from the place of occurrence. They have not named any of the accused persons by name.

21. On the other hand Mr. Ashwini Kumar Sinha, learned

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Additional Public Prosecutor appearing for the State defended the judgment of conviction and sentence passed against the accused persons. He submits that the informant Bhuvnashwar Yadav (PW 6), Ganesh Yadav (PW 4) and Jhabban Yadav (PW 3) are eye witness to the occurrence and they have supported the prosecution case. They consistently stated that on the fateful night of 22/23.7.2009 at about 1 AM appellants and others, totalling 10 to 12 persons, came to the *Bathan* of the deceased Kesho Yadav. They were armed with *Lathi*, Sickle and *Dabia*. Without any altercation, accused Keshar Yadav and Yogendra Yadav pressed the chest of Kesho Yadav by *Lathi,* whereas accused Anandi and Chhatu pressed his legs. Witnesses clearly stated that accused Devani Yadav repeatedly assaulted on the neck, head and right side shoulder of Kesho Yadav by *Dabia,* while accused Yogendra, Faujdari also assaulted him by Sickles. Rest accused persons surrounded Kesho Yadav to facilitate the offence. Referring to the post mortem report, learned Additional Public Prosecutor state that eleven injuries have been found by the doctor in the post mortem examination of the deceased caused by the sharp cutting weapon. He submits that witness Naresh Yadav (PW 1) and Shailendra Yadav (PW 2) at least have corroborated the prosecution's case to this extent that on hearing *hulla* when they went to the place of occurrence, they saw 10 to 12 accused persons including the appellants fleeing away from there. While referring to

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paragraph 10 of the deposition of the I.O., learned Addl. P.P. submits that the I.O. during course of investigation found that the *Chauki* of deceased was in the Palani. He recovered a blood stained Dabia from there. He found blood stains on the *Chouki*, on the straw of thatched roof of Palani as well as on the soil near the *Chouki*.

22. Learned counsel for the State submits that from the evidence of the informant Bhuvaneshwar Yadav (PW 6) as well as the I.O. (PW 8) it is evident that the informant's *Bathan* was 20 hands away from his house and had two rooms, one room was used for cattle and other room was used for shop. Both the rooms were having doors and thatched roof. There was some space close to these rooms which was also having thatched roof. The said space has been depicted as *Dalan* by the informant and *Palani* by the I.O. in their evidence. He submits that the *Bathan* generally includes room(s) and *Dalan/Palani* as well to meet the multifarious need of the dwellers. Learned counsel further submits that as the *Bathan* was not within a boundary, deceased, his two sons (the informant and Girdhari Yadav) and brother (Ganesh Yadav) were sleeping in the *Dalan/Palani*, where the occurrence took place. It is quite possible for the informant and other witnesses to see the accused persons from some distance performing specific role in facilitating the gruesome murder of Kesho Yadav. He further submits that even the minor contradiction as to whether the deceased was sleeping on the

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Khatia or on the *Chauki* would not be of much consequence and it does not cut at the root of the prosecution's case as at least three witnesses, namely, Jhabban Yadav (PW 3), Ganesh Yadav (PW 4) and Bhuvaneshwar Yadav (PW 6) have stated that accused Keshar Yadav and Yogendra Yadav pressed the chest of Kesho Yadav by *Lathi*, whereas accused Anandi and Chhatu pressed his legs and the accused Devani Yadav repeatedly assaulted on the neck, head and right side shoulder of Kesho Yadav by Dabia.

23. We have heard learned counsel for the appellants, the State and perused the materials on record.

24. The issue for consideration is whether the prosecution has been able to establish the guilt against the accused persons under sections 302/148/149 IPC beyond all reasonable doubts.

25. It would appear from the prosecution's case that the occurrence took place in the dead of night at about 1 am in a remote village. It is further evident from the evidence of the informant Bhuvneshwar Yadav (PW 6) recorded in paragraph 10 of his deposition that his house and *Bathan* were located at two different places and the distance between these two places was 20 hands. *Bathan* was having two rooms with doors. There was no boundary around the *Bathan*. There was a shop in one of the rooms, and the other room was being used for keeping cattle. He stated that he along

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with his father (the deceased), brother Girdhari Yadav and uncle Ganesh Yadav (PW 4) were sleeping just outside these two rooms of the *Bathan* called *Dhaba.* This place was open from all sides. Two of the witnesses, namely, Ganesh Yadav (PW 4) and his son Jhabban Yadav (PW 3) would be natural witness, as their presence at the place of occurrence cannot be doubted as they are family members and reside there. In such a situation, non- mentioning of the name of these two witnesses, namely, Ganesh Yadav (PW 4) and Jhabban Yadav (PW 3) in the FIR would not be fatal, as mentioning of all the details is not possible in the FIR, as one would be ruffled by such act of barbarism committed in the dead of night. Furthermore, *fard beyan* has been recorded within four hours at 5.45 AM soon after the occurrence. The witness Ganesh Yadav (PW 4) also stated that he was sleeping in the *Bathan/Palani* along with the informant Bhuvaneshwar Yadav (PW 6), his brother Girdhari Yadav. Jhabban Yadav (PW 3) also stated that the deceased was sleeping in the *Bathan* along with Ganesh Yadav (PW 4) and Bhuvaneshwar Yadav (PW 6). As such, non-mentioning of their names in the FIR would not be fatal to the prosecution. Thus we would agree with the submission of learned Additional P.P. that the occurrence did not take place inside the *bathan* or room.

26. So far as identification of accused persons are concerned, admittedly all of them are co-villagers. More so, in the

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FIR as well as in the evidence, the informant has stated that he identified the accused persons in the flash of torch. Other eye witness have also stated in their evidence that they identified the accused persons in the torch light. However, lapses on the part of the I.O. to seize the torch from the informant and to produce it at the time of trial, would not affect the prosecution case as there is consistent evidence of witnesses that the accused persons were identified in the torch light.

27. It is true that no criminal case was pending between the parties, nonetheless, civil suit was pending between them, which is evident from paragraph 7 of the deposition of the informant (PW 6). In the circumstances, it cannot be said that there was no motive for the appellants to kill informant's father.

28. Recovery of blood stained Dabia, soil from the place of occurrence and the blood stained clothes from the house of accused Keshar Yadav fully corroborate the prosecution's case. Non-examination of blood seized from the place of occurrence would also not cut at the root of the prosecution's case as PW 9 (Dr. Sohel Anjum) who conducted post mortem examination, found eleven injuries on the person of the deceased, caused by a sharp cutting weapon, which may be given by *Dabia*.

29. Appellants' submission that the deceased had criminal

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background, as such, he might have been killed by some criminal group, is not supported by any evidence collected during the trial.

30. In view of the discussions made above, we find that the prosecution has succeeded in bringing home charge under sections 148 and 30/149 of the IPC against the appellant Devani Yadav of Cr. Appeal (DB) No. 1375 of 2010 and appellant Kehsar Yadav of Cr. Appeal (DB) No.1338 of 2010. These appeals are dismissed and the appellants Devani Yadav and Kehsar Yadav are accordingly directed to surrender forthwith, if are already on bail, to serve the remaining part of their sentence.

31. We find that the prosecution has not been able to prove charges under sections 148 and 30/149 of the IPC against the four appellants Binay Yadav, Mahesh Yadav, Suren Yadav and Hiraman Yadav of Cr. Appeal (DB) No.1239 of 2010 as they have only been found to be standing at the place of occurrence outside the *bathan*. This appeal, as such is allowed and these four appellants, who are on bail, are discharged from the liability of bail bond.

(Samarendra Pratap Singh, J)

(Arun Kumar, J)

Shashi.

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