

**IN THE HIGH COURT OF JUDICATURE AT PATNA**

**Criminal Appeal (SJ) No.202 of 2015**

Arising Out of PS.Case No. -121 Year- 2006 Thana -DAUDNAGAR District- AURANGABAD

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1. Kama Paswan,  
2. Buchul Paswan,  
3. Rahul Paswan, all sons of Deo Raj Paswan, resident of village- Tarar, P.S.-  
Daudnagar, District- Aurangabad (Bihar)

.... .... Appellants

Versus

The State of Bihar

.... .... Respondent

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**Appearance :**

For the Appellants : Mr. S.R.P. Baxi, Sr. Advocate

For the Respondent/s : Mr. Z. Hoda, Heard learned A.P.P. also.

Learned A.P.P. has opposed the prayer for bail.

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**CORAM: HONOURABLE MR. JUSTICE ADITYA KUMAR TRIVEDI**

**ORAL JUDGMENT**

**Date: 04-05-2017**

1. Appellants Kama Paswan, Buchul Paswan and Rahul Paswan have been found guilty for an offence punishable under Section 304(i) of Indian Penal Code and each one has been sentenced to undergo rigorous imprisonment for 07 years as well as to pay fine of Rs. 7,000/- each and in default of payment of fine, to undergo rigorous imprisonment for a period of one year, additionally and in case, the fine is deposited, half of the fine should be paid to the widow of the deceased by the learned Adhoc Addl. Sessions Judge-IV, Aurangabad in Sessions Trial no. 212 of 2007/15 of 2010 vide judgment of conviction dated 12.02.2015 and order of sentence dated 18.02.2015/19.02.2015.



2. PW3 Bhola Bhagat had recorded his *fardbeyan* on 03.08.2006 at about 4.15 am before A.S.I. at Government hospital, Daudnagar disclosing therein that on 02.08.2006 at evening hours while he along with his brother Deonandan Bhagat (deceased), neighbour Madan Bhagat, brother-in-law Manoj Malakar were doing fishing over a channel lying south of his village, at about 8 pm, his co-villagers Kama Paswan, Rahul Paswan, Buchwa Paswan-Baldan Devraj Paswan, Doya Paswan, Chandradeo Paswan came and took away 'gendra' of Devnandan Paswan whereupon, they began to drink. The aforesaid activity was resisted by Devnandan, as a result of which, they became annoyed and began to assault Devnandan Paswan with bamboo. He along with Madan Malakar intervened and during course thereof, he along with Madan were also assaulted. During midst thereof, Rahul Paswan took out *pasuli* and attacked upon him whereupon he rushed therefrom. On the other hand, they have brutally assaulted Deonandan Paswan, as a result of which, he became severely injured. Subsequently thereof, with the assistance of local people, lifted Deonandan to hospital where, during course of treatment, died.

3. On the basis of the aforesaid *fardbeyan*, Daudnagar PS case no. 121 of 2006 was registered whereupon, investigation commenced and concluded by way of submission of charge-sheet



against all the accused whereupon, cognizance was taken and as the offences being exclusively triable by the Court of Sessions on account thereof, the case was committed whereupon, the trial commenced and concluded in a manner acquitting the others while convicting the appellants, the subject matter of the instant appeal.

4. Defence case, as is evidence from the mode of cross-examination as well as statement recorded under Section 313 of Code of Criminal Procedure, is that of complete denial of the occurrence. It has also been pleaded that on account of dispute during course of election of *Mukhia*, they have been falsely implicated. However, neither any DW nor even a single chit of paper has been adduced on behalf of defence.

5. In order to substantiate its case, prosecution had examined altogether nine PWs, out of whom, P.W.1 is Vinod Ram, P.W.2 is Madan Malakar, P.W.3 is Bhola Bhagat, P.W.4 is Dr. Kapil Deo Pd. Singh, P.W.5 is Dr. Nawal Kishore Prasad, P.W.6 is Pintu Bhagat @ Pintu Malakar, P.W.7 is Basudeo Prasad, P.W.8 is Ram Narain Singh and P.W.9 is Aminuddin Khan.

Side by side it also exhibited Ext.1 series- *fardbeyan* as well as signature of witnesses over respective documents, Ext.2- post mortem report, Ext.3- injury report of deceased, Ext.4- inquest report, Ext.5- formal F.I.R., Ext.6- case diary and Ext.7- injury report



prepared by PW4.

6. Learned counsel for the appellants while assailing the judgment of conviction and sentence have stated that the findings recorded by the learned lower court is not at all found substantiated with the materials available on the record and for that, it has been submitted that the learned lower court completely ignored the infirmities visualizing in the prosecution case sufficient to shake the prosecution version. In order to substantiate the same, it has been submitted that from perusal of the lower court record, it is evident that PW1 as well as PW3 are only material witnesses and after going through their evidences in consonance with the evidence of the I.O.; PW9, it is evident that there happens to be material contradiction prevailing in their evidence on account of exaggeration having made by them during course of their evidence and that being so, by such activity, the initial prosecution version as flashed under the *fardbeyan* as well as during statement under Section 161 Cr.P.C. has completely been controverted and on account thereof, discredited themselves. That being so, the prosecution case would have been disbelieved regarding acquittal of the appellants instead of convicting the appellants.

7. Furthermore, it has also been submitted that after going through the evidence of respective witnesses minutely, it is apparent



that they were not at all eye-witness to the occurrence. It has also been submitted that had there been their status as an eye-witness then in that event, the *fardbeyan* would have been recorded at an earliest instead of keeping watch and that is indicative of the fact that in a pre-planned manner, just to teach a lesson to the appellants including others (since acquitted), instant case has purposely been filed. That being so, the testimony of those two material witnesses could not be relied upon and discarding their audacity, nothing remains.

8. It has also been submitted that though the I.O., during course of his evidence, deposed that at the place of occurrence, he had found blood, *gendra*, bamboo and other articles but he had not seized any of it. Non-seizure of aforesaid items is indicative of the fact that whatever been incorporated in the place of occurrence was not at all on account of pious conduct of the I.O. nor that happens to be the real rather the same has been shown at the instance of prosecution. Categorical, truthful and genuine objective finding relating to the place of occurrence is expected at the hands of I.O. to facilitate just decision and any twist, failure collusionness is bound to cost his credibility and so, considering the conduct of the I.O. in consonance with the evidence of PW1 as well as PW3, it is apparent that prosecution completely failed to substantiate its case beyond all reasonable doubt and on account thereof, the judgment impugned is fit



to be set aside.

9. While controverting the submission having made on behalf of learned counsel for appellants, it has been submitted by learned Spl.P.P. that *falsus in uno, falsus in Omnibus* is not applicable in the Indian continent and on account thereof, the part of evidence even, found fit to be discarded would not allow the remaining evidence to vanish. If the evidence inspires confidence, it found sufficient to convict the accused. That being so, it has been submitted that from the evidence of PW1 as well as PW3, it is apparent that even discarding their status in the background of exaggeration, they have supported the occurrence committed at the end of appellants, the suggestion having made on behalf of defence to the witness is presence of PW1 at the place of occurrence and further, to be the author of the crime. That being so, presence of PW1 at the place of occurrence now no more remains under controversy and in likewise manner, PW3. Consequent thereupon, their evidences were rightly been accepted by the trial court while recording the judgment of conviction and sentence and the same is also to be confirmed by this Court by way of dismissing the appeal.

10. Before coming to the facts of the case, let a cursory perusal be given over the actual affair. True, it is that FIR should not be an encyclopedia. Furthermore, the evidentiary value of the FIR



happens to be with regard to corroboration or contradiction. Furthermore, in its connectivity, it looks desirable to incorporate that while examining PW3, informant, the defence failed to exercise in terms thereof by attracting him towards contents thereof by way of contradiction.

11. Apart from this, it is also apparent from the *fardbeyan* that presence of PW1 Vinod Ram, is not at all shown therein. That means to say, Vinod Ram has not been cited as FIR named witness. In likewise manner, brother-in-law of informant namely Manoj Malakar has not been examined nor there happens to be any sort of explanation on that very score. Another FIR named witness Madan Malakar found under category of hostile. In the aforesaid background now, one has to see whether prosecution has substantiated its case beyond all reasonable against the appellant ?

12. Before coming to the ocular evidence, first of all, medical evidence is to be seen. PW5, Dr. Nawal Kishore Prasad who was posted at P.H.C. Daudnagar where deceased Devnandan Bhagat was brought for medical treatment on 02.08.2006, examined and found following injuries on his person :

- (i) Two lacerated wound on head; one measuring 1 ¼ " x 1/2" x 1/4 " and other measuring 3/4" x 1/2 " x 1/4".
- (ii) Blackish with swelling on left eyelid, size- 1"x3/4"



(iii) Blackish with swelling left side of the forehead

(iv) Swelling right forearm 3"x1/2"

(v) Swelling right elbow joint 1"x3/4"

(vi) Swelling left forearm 1"x1"

X-ray suggested for injuries nos. (iv), (v) and (vi)

In the opinion of the doctor, the aforesaid injuries were caused by hard and blunt substance and were grievous in nature. The doctor had further deposed that injured was unconscious, froth was coming out from his mouth and was gasping. He had examined the injured at 12 midnight.

During cross-examination, nothing substantial has been elicited from him, save and except at para 8 wherein, he had stated that he had not opined the injury to be grievous.

13. PW4 is the doctor who had conducted autopsy over the dead body of deceased Devnandan Bhagat and found the following ante-mortem injuries :

(i) Stitched wound 1 ½ "x ½" x bone deep present on grontoparietal region of the head in the midline.

(ii) Stitched wound 1"x1/2"x bone deep present on left side of parietal region of the head.

(iii) Laceration of left side of that parietal region of the membrane of brain.



(iv) Laceration of left parietal region of brain with collection of blood and blood clot in cranial fosa.

(v) Fracture of left parietal bone of skull.

On its scrutiny, he had found undigested food in the stomach wherefrom smell of alcohol was also coming out. There was liquid and digested food in the small intestine while in large intestine, there was fickle and gas. The injuries were ante-mortem in nature caused by hard and blunt substance. He had conducted post mortem on 03.08.2006 at about 10.30 am.

During cross-examination at para 7, he had denied the suggestion that inquest report was not at all prepared till conduction of post mortem. In para 11, he had admitted that he had found smell of alcohol. If it is taken in excess then in that event, it will become poisonous. Unconsciousness as well as shock may develop on account of consumption of alcohol. However, no cross-examination is there either from PW5 or from PW4 with regard to injuries having over deceased nor the cause of death has been challenged at the end of the appellants and that being so, the cause of death on account of ante-mortem injuries having sustained over the deceased is found duly proved. In likewise manner the nature of injuries to be caused by hard and blunt substance. Though PW4 had found stitched wound, which not at all been disclosed by PW5 to have stitched, might have



important role to play, but as PW5 not been cross-examined on that score, hence goes out of consideration.

14. While coming to ocular evidence, it is evident that four witnesses have been examined on behalf of prosecution on that very score who are PW1, PW2, PW3 and PW6. PW7 and PW8 are formal witnesses who have proved the documents though PW9 has subsequently been examined. So far status of witnesses are concerned, PW2 Madan Malakar who happens to be FIR named witness had not stated anything about the prosecution case and as such, he was declared hostile. Even then, prosecution could not get anything positive in their favour. PW6 is the FIR attesting witness as well as inquest witness and accordingly, he had exhibited the *fardbeyan*, inquest report and further, stated that he had seen the dead body of deceased Devnandan and during course thereof, found injuries over his person and so, he does not happen to be witness of occurrence.

However, during cross-examination, he had admitted that he happens to be brother of informant. He had further disclosed that deceased died two hours after the occurrence at Daudnagar hospital where he was treated. He had further stated that he is unable to say what has been incorporated in the *fardbeyan*. He had also exhibited inquest report as Ext.4; and from column no. 3 thereof, it is evident that it was prepared on 03.08.2006 at about 4.35 am at the



verandah of P.H.C. Daudnagar.

15. Now coming to the remaining evidence, PW1 Vinod Ram had deposed that on the alleged date and time of occurrence, he along with Bhola Bhagat and his brother-in-law were engaged in fishing. Deonandan came carrying food for them. After sometime, Kama Paswan, Rahul and Buchul and others came there and after spreading *gendra* of Deonandan, they began to consume wine whereupon, Devnandan objected and took away his *gendra*. Having annoyed thereupon, Kama caught hold collar of Devnandan and began to assault. Again they all, that means to say Kama, Buchul and Rahul began to assault and during course thereof, Buchul gave axe blow over back of the head of Deonandan on account of which, he fell down and began to toss. Copious blood was there. Then thereafter, Rahul and Kama assaulted him with bamboo as a result of which, his eye was damaged and the hand fractured and then thereafter, they all escaped therefrom. Anyhow, all of them tried to lift Deonandan but they found themselves unable whereupon, Bhola had gone to his house, came along with cot and then all of them took Deonandan to village. Deonandan had informed police. Police came and then, lifted the dead body of Deonandan to police station by vehicle. He had not gone to police station. He had identified the accused in dock.



During cross-examination at para 5, he had admitted that accused persons have had joined with them in fishery. All of them remain at night at the place of fishery and then thereafter, they distribute the same in equal quantity. In para 7, he had admitted that police came at 10 O'clock. He was present there. Police had written something but what, he is unable to say. In para 8, he had disclosed that *marpeet* took place for half an hour and then thereafter, accused persons fled away. Bhola Bhagat brought cot from his house and then they have taken the dead body of Deonandan to the village. At that very time, his family members as well as villagers assembled there. Then thereafter, Bhola informed police. In para 9, he had stated that police came in 20 minutes. Police had enquired from Bhola and then something was written down but he could not see as to who had signed over the same. At paras 12, 13 and 14, there happens to be contradiction which is found corroborated with evidence of PW9 (para 23). Paras 18 and 19 happen to be suggestions.

16. PW3 is the informant. He had deposed that deceased was his full younger brother. On the alleged date and time of occurrence, he along with Vinod Ram and Manoj Malakar were at the channel where fishery was going on. His brother Devnandan came along with food for them. Madan Malakar also accompanied him. At that very time, Kama, Rahul and Buchul came near him, took out *gendra* of



Deonandan from the hut and then, began to drink wine whereupon Deonandan protested and then, snatched away *gendra*. Subsequently thereof, Kama provoked his associates Buchul and Rahul to murder Deonandan whereupon, Buchul gave a blow from back portion of axe over head of Deonandan which strike over back of head, as a result of which, he was injured. Blood ooze out. Then thereafter, Kama, Buchul and Rahul began to assault his brother with bamboo. He along with Vinod, Manoj and Madan intervened whereupon, they were also assaulted. The accused persons left therefrom on his alarm. His brother fell down after sustaining injuries, then had narrated the locations of the body where injuries were caused. Then thereafter, they lifted Deonandan over cot to his house and then, informed the police from mobile whereupon, police came and lifted Deonandan to hospital. They have also gone along with police by the same vehicle. Deonandan was admitted at PHC, Daudnagar where, during course of treatment, he died. At the same place, police recorded his *fardbeyan*. He had also stated that inquest was prepared at that very place.

During cross-examination, he had deposed at para 7 that save and except blood-stained bamboo as well as soil, the police had not taken anything from the place of occurrence. In para 8, he had stated that he along with Deonandan had gone over the police jeep. In para 9, he had stated that they were not at all examined by the



doctor. In para 10, he had deposed that he came at PS at about 8 pm by police jeep. *Darogaji* was present there. He had disclosed the whole event before the police. Police had not recorded his statement nor had taken L.T.I. Even in jeep, he answered the query of the police. At about 9 pm, he reached at the PS where again, his statement was not recorded. In para 11, he had further stated that I.O. had not taken any recourse in the night. In para 15, he had stated that at the time of occurrence, there was uproar. No one had come after hearing uproar and even after occurrence, no one came. Munsii Mahto, Tulsi Mahto, Awadhesh Mahto and others have their residential houses at extremely southern side of the village. He did not meet with them. In para 16, he had stated that the occurrence took place for half an hour. *Darogaji* had not seized the axe. Axe did not belong to him while other items were. *Darogaji* had taken away one bamboo piece. In para 17, he had stated that there were three injuries over the backside of the head and one at front side. There were 6-7 injuries over the body. They had not consumed wine before the occurrence. Even after quarrel, none had taken wine. Deonandan was not at all used to drink, however, was addicted to *ganja*. In para 18, he had stated that during course of *marpeet*, he was 3-4 steps away from Devnandan. *Marpeet* took place at the South of the hut. None was present in the North, East and West of the hut. He had not taken bamboo. Accused persons



repeatedly hurled bamboo. Madan and Pintu also did not lift bamboo. They did not lift Deonanandan. In para 19, he had stated that during course of occurrence, they had not escaped from there. His brother also remained there, again stated that after sustaining injury, he fell down. Then, he denied the suggestion. In para 20, there happens to be contradiction and found corroboration with the evidence of PW9, para 24.

17. PW9 is the I.O. He had stated that on 02.08.2006, he was posted at Daudnagar P.S. On that day, he had seen the injuries over the person of Deonandan and then thereafter, issued injury report (Ext.7) and referred him to P.H.C. for treatment. While the injured was being treated, he was waiting there for regaining sense, received information that on 03.08.2006 at about 4 am, Deonandan died at the hospital. Then thereafter, he recorded *fardbeyan* of Bhola Bhagat, brother of deceased on 03.08.2006 at about 4.15 am (Ext.1/A). Then thereafter, he prepared inquest report in carbon process in presence of Ajay Malakar and Pintu Malakar (Ext.4) and then thereafter, sent the dead body for post mortem. He returned back with the *fardbeyan* whereupon, O/C had registered Daudnagar PS case no. 121 of 2006 under Section 302/34 of Indian Penal Code and investigation was entrusted upon him. Then, just after taking charge of investigation, he received injury report. He had visited place of occurrence on



03.08.2006 at about 11 am which happens to be 1 km South-East from village Tarar. Village Manar happens to be at the distance of 1 km in the Northern side, Mayapur is at 9 km in Western side. He had further found one hut at the place of occurrence wherein, deceased along with his brother used to sleep. He had further found the *chillon* (an instrument for fishing) 10 hands away from there. At a distance of 15 hands from the hut, he found *gendra* and further, blood spot surrounded it. He also found one bamboo stick having blood spot thereupon. He recorded statement of eye-witnesses, recorded further statement of informant and arrested accused Doma Paswan, took his statement, got supervision note and then thereafter, completing investigation, submitted charge sheet. Supplementary charge-sheet was also submitted against remaining accused and then thereafter, there happens to be statement recorded where PW2 declared hostile.

During cross-examination at para 14, he had deposed that he did not prepare seizure list at the place of occurrence nor he had seized any article from the place of occurrence.

18. After having minute observation of the materials available on record, it is crystal clear that death of deceased is out of controversy and in likewise manner, ante-mortem injuries were caused by hard and blunt substance, the cause of death. In likewise manner, from the evidence of PW9, it is evident that he had not



disclosed the names of person who accompanied the deceased, but he had issued injury report and sent the deceased/ injured for treatment and then after death, fardbeyan of informant, PW3 was recorded. It is further evident that during course of inspection of P.O., he had found the blood, blood stain bamboo, *gendra* but did not seize any item. However, P.O. has not been challenged neither the I.O. disclosed that he reached at the village on an information, carried the injured along with informant, any kind of statement was made by the informant regarding occurrence nor there was cross-examination at the end of appellants on that very score. However, from his evidence, it is apparent that before recording of fardbeyan, he had occasion to see the injured, prepared injury report and sent the injured to hospital for treatment. Furthermore, instead of recording fardbeyan of others, he waited to regain sense by the injured for recording fardbeyan.

19. Now, coming over appreciation of evidence of PW1 and PW2, it is evident that PW1, during course of evidence, had made material development and on that very score, has been cross-examined and his attention towards aforesaid piece of evidence has been drawn in para 13 and 14 which is found duly corroborated by PW9 (para 23) and in likewise manner, evidence of PW3, though relating to his further statement in para 20 has been cross-examined and is found duly corroborated by PW9 para 24. That being so, there happens to



be material contradictions duly coming out from the evidences of aforesaid witnesses and on account thereof, one has to see how far it is going to affect upon reliability of their evidence. The Hon'ble Apex Court in **Bhagwan Jagannath Markad and others vs. State of Maharashtra** reported in **2016 (10) SCC 537** has dealt with the issue in detail.

Para 18- “ *It is accepted principle of criminal jurisprudence that the burden of proof is always on the prosecution and the accused is presumed to be innocent unless proved guilty. The prosecution has to prove its case beyond reasonable doubt and the accused is entitled to the benefit of the reasonable doubt. The reasonable doubt is one which occurs to a prudent and reasonable man. Section 3 of the Evidence Act refers to two conditions – (i) when a person feels absolutely certain of a fact-“believes it to exist”, and (ii) when he is not absolutely certain and thinks it so extremely probable that a prudent man would, under the circumstances, act on the assumption of its existence. The doubt which the law contemplates is not of a confused mind but of prudent man who is assumed to possess the capacity to “separate the chaff from the grain”. The degree of proof need not reach certainty but must carry a high degree of probability.*



Para 19- While appreciating the evidence of a witness, the court has to assess whether read as a whole, it is truthful. In doing so, the court has to keep in mind the deficiencies, drawbacks and infirmities to find out whether such discrepancies shake the truthfulness. Some discrepancies not touching the core of the case are not enough to reject the evidence as a whole. No true witness can escape from giving some discrepant details. Only when discrepancies are so incompatible as to affect the credibility of the version of a witness, the court may reject the evidence. Section 155 of the Evidence Act enables the doubt to impeach the credibility of the witness by proof of former inconsistent statement. Section 145 of the Evidence Act lays down the procedure for contradicting a witness by drawing his attention to the part of the previous statement which is to be used for contradiction. The former statement should have the effect of discrediting the present statement but merely because the latter statement is at variance to the former to some extent, it is not enough to be treated as a contradiction. It is not every discrepancy which affects the creditworthiness and trustworthiness of a witness. There may at times be exaggeration or embellishment not affecting the credibility. The court has to sift the chaff from the grain and find out the truth. A statement may be partly rejected or partly accepted. Want of independent witnesses or unusual behaviour of witnesses of a crime



*is not enough to reject evidence. A witness being a close relative is not enough to reject his testimony if it is otherwise credible. A relation may not conceal the actual culprit. The evidence may be closely scrutinized to assess whether an innocent person is falsely implicated. Mechanical rejection of evidence even of a “partisan” of “interested” witness may lead to failure of justice. It is well known that principle “falsus in uno, falsus in Omnibus” has no general acceptability. On the same evidence, some accused persons may be acquitted while others may be convicted, depending upon the nature of the offence. The court can differentiate the accused who is acquitted from those who are convicted. A witness may be untruthful in some aspects but the other part of the evidence may be worthy of acceptance. Discrepancies may arise due to error of observations, loss of memory due to lapse of time, mental disposition such as shock at the time of occurrence and as such the normal discrepancy does not affect the credibility of a witness.”*

20. Taking into account the totality of the event, nature of the evidence, conduct of the I.O. and further, the circumstances visualizing therefrom, it is evident that on account of material exaggeration having in the evidence of PW1 as well as PW3, their status as an eye-witness to occurrence is not found to be duly substantiated and in likewise manner, considering the conduct of the



I.O. as exposed hereinabove, the cumulative effect completely demolish the prosecution case whereunder appellants have been identified as author of the crime and consequent thereupon, the findings so recorded by the learned lower court did not attract concurrence. Hence, the same is set aside. The appeal is allowed. Appellants are in custody. Therefore, are directed to be released forthwith, if not wanted in any other case.

(Aditya Kumar Trivedi, J.)

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