

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.381 of 1994

1. Bhukhi Yadav son of Sukhandan Singh
2. Uma alias Sheo Parikha Yadav, Son of Bhukhi Yadav,
3. Jadubans Ram alias Jadubans Dusadh, son of Deo Dusadh,
4. Ramnath Kemkar, son of Pargas Kemkar,
5. Jagdish Kemkar, son of Gupteshwar Kemkar,
6. Mukteshwar Kemkar son of Krit Kemkar
7. Hari Koeri
8. Lakshman Koeri, Both sons of Sheodayal Koeri,
9. Harbans Koiri
10. Rajbans Koiri, sons of Sheo Charan Koiri,
11. Sri Kishun Ram, son of Ramashish Ram
12. Lallan Sah,
13. Lalmuni Sah, sons of Kripa Sah,
14. Rama Singh, son of Beni Singh
15. Bahadur Singh, son of Sudama Singh, All residents of Village-Bhanas, P.S.- Dinhra, District- Rohtas.

... .. Appellant/s

Versus

The State of Bihar.

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr. R.K.P.Singh, Advocate Mr. Bal Bhushan Choubey, Advocate
For the Respondent/s	:	Mrs. Shashi Bala Verma, APP

CORAM: HONOURABLE THE CHIEF JUSTICE

and

HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY)

Date : 07-03-2018

Heard learned counsel for the appellants and learned
counsel appearing on behalf of the State.

2. 15 appellants have filed the present appeal against
the judgment of conviction and order of sentence dated 9.8.1994
passed by the Seventh Additional Sessions Judge, Rohtas at
Sasaram in Sessions Trial No.202 of 1983. The Seventh
Additional Sessions Judge vide judgment and order dated 9th of



August 1994 convicted the appellants for offence under Section 302 read with Section 149 of the Indian Penal Code and also under Section 202 of the Indian Penal Code. The appellants have been sentenced to undergo rigorous imprisonment for life for offence under Section 302 read with Section 149 of the Indian Penal Code and three years rigorous imprisonment for offence under section 202 of the Indian Penal Code, however, the trial court directed both the sentences to run concurrently.

3. The prosecution case as per the fardebayan of Mukteshwar Singh, recorded by Sheo Shankar Prasad, Sub Inspector of Police Dinara on 11.4.1984 at 10:30 PM is that in the evening of 11.04.1984 at about 06:45PM, the informant and his brother were going for easing in the western side of their village. It is further alleged that near the Khalihan of Ram Jagi Singh, the accused appellants who were armed with gun bhala and lathi had caught the informant's brother Gupteshwar Singh and carried him in the khalihan of Ram Jagi singh and there they shot fire on him due to which the informant's brother Gupteshwar Singh died. It is further alleged that after killing the deceased, the accused persons had carried away the dead body of Gupteshwar Singh and on raising hulla by the informant his brother Deobansh Singh and other villagers arrived and had also seen the occurrence. It is



further alleged that accused Bhukhi was saying that he (deceased) is the person giving information to the police and getting them apprehended. It is further alleged that on the date of occurrence itself during the day hour the police had arrived in the village and after departure of the police, all the accused had threatened that the deceased will also face the same consequence which was faced by his brother Jag Narain. It is stated that in the last Sawan informant's brother Jag Narain was killed by villagers.

4. On the basis of the aforesaid Fardbeyan, Dinara P.S. case No. 41 of 1984 was registered for offence under section 147,148,149,302/201 of the Indian Penal Code and Section 26 of the Arms act. The Police thereafter started investigation and on completion of the investigation charge-sheet was submitted against 15 accused persons for offences under Section 302/202 of the Indian Penal code. The Chief judicial Magistrate after taking cognizance committed the case to the Sessions Court in view of the fact that the offence was excessively tribal by the Court of Sessions. On framing of the charges the accused persons pleaded not guilty and as such they were put on trial.

5. On behalf of the prosecution altogether five witnesses were examined in support of the prosecution case.



P.Ws. 1 to 4 are the witnesses on the point of occurrence and PW-5 is the I.O of the case. In addition to the oral evidence, the prosecution has also relied upon documentary evidence, exhibits 1/1,2 and 3, that is, signature of the witnesses of the seizure list, Fardebeyan and seizure list. Out of the five prosecution witnesses, PW 1 has not identified any one as is evident from paragraph 10 of the judgment. P.W. 2, the brother of the deceased who reached the place of occurrence on raising hulla, therefore, according to the defence, he was not the eye witness. This witness claimed to have seen the appellant No. 1 Bhukhi Yadav, Appellant No. 2 Uma @ Sheo Pariksha Yadav armed with gun, appellant No. 6 Mukteshwar and appellant No. 5 Jagdish armed with bhala, appellant No. 15 Bahadur Singh, appellant No. 11 Shri Kishun Singh and appellant No. 8 Lakshman armed with rifle and rest were armed with Danda as is evident from para-11 of the judgment. P.W.2 has stated in his evidence that earlier his brother Jag Narain was killed. The deposition of P.W. 3 was found unworthy and as such his deposition was discarded by the trial court during the consideration of the allegation leveled against the appellants. P.W.4 is the informant who has stated before the court that Appellant No. 1 Bhukhi Yadav and appellant No. 2 Sheo Pariksha Yadav were armed with gun, appellants Bahadur Singh,



Shri Kishun Ram and Lakshman Koiri were armed with rifle and the remaining accused were armed with lathi and bhala. In his deposition he has stated that when he raised hulla, his brother Deobans Singh, P.W.2, Subhas Choubey, P.W. 3 and Shri Kant Chaubey and Shyam Narain Choubey and others arrived to whom he narrated about the occurrence and also disclosed the names of the accused. This witness has mentioned that in the murder of his brother Jag Narain, appellant No. 8 Lakshman Koiri and appellant No. 11 Shri Kishun Ram were accused. P.W. 5 in his deposition has stated that the story developed by P.W. 2 in the court was not the earliest version during the course of investigation.

6. The trial court on the basis of scrutiny of the evidence adduced by the prosecution held out the appellants guilty for offence under Sections 302/149 and 202 of the Indian Penal Code and sentenced to undergo R.I for life for offence under Sections 302/149 IPC and three years R.I for offence under section 202 IPC.

7. Mr R.K.P Singh learned counsel for the appellants at the outset submitted that during the pendency of the appeal appellants Bhukhi Yadav, Mukhteshwar Kemkar, Hari Koiri, Harivansh Koiri, Shri Kishun Ram and Rama Singh died and as such the appeal on behalf of appellant Nos. 1,6,7,9,11 and 14



stands abated and the appeal is confined to the remaining appellant Nos. 2 to 5,8,10,12,13, and 15.

8. Mr R.K.P Singh submitted that appellant No.1 against whom there was specific allegation of assault causing death, has died during the pendency of the appeal. He further submitted that in the present case the dead body of the deceased was not recovered. According to the counsel for the appellants, the I.O of the case has only completed formality and the investigation was perfunctory. The I.O has not carried out investigation on scientific line.

9. Mr. R.K.P Singh has drawn the attention of the court to the fardebeyan and he highlighted that the occurrence took place at 6:45 PM on 11.04.1984 but the fardebeyan was recorded at 10:30 PM, therefore, according to him, there is unreasonable delay in lodging the fardebeyan, particularly when the police was camping in the village itself. Mr Singh submitted that in the instant case the formal F.I.R was drawn at 6:30 in the morning on 12.04.1984 and the same was sent through special messenger but it could reach the court of Chief Judicial Magistrate only on 13.04.1984. Such delay in reaching the fardebeyan/formal F.I.R, creates serious doubt about the authenticity of the prosecution case. He submitted that delay in sending the F.I.R is



crucial in the matter of previous enmity as there is every chance of concoction in the story and manipulation in the F.I.R.

10. Mr R.K.P Singh, learned counsel for the appellants has highlighted the infirmity in the prosecution case. Firstly, he submitted that more than three hours delay in lodging the fardbeyan created doubt about the prosecution case, when the police was camping in the village itself. He next submitted that delay in sending the F.I.R also goes against the prosecution and it creates serious doubt about the manipulation and development of the prosecution case.

11. Commenting upon the perfunctory investigation, he submitted that the police has not conducted the investigation on scientific line. Neither the blood stained soil was sent for F.S.L report nor was any crime material purportedly used in the commission of the crime recovered and sent for laboratory test to corroborate and substantiate the prosecution case. Referring to the judgment of the Apex Court reported in the case of Laxmi Singh vs The State of Bihar & Ors.: A.I.R 1976 SC 2263, paragraphs 11 and 17 he submitted that the court has to grant benefit of doubts to the appellants. He submitted that failure of the investigation in not obtaining the F.S.L report to substantiate and co-relate the case of murder of the deceased and no blood stained



earth was sent for scientific examination to ascertain whether the blood was human blood or not and whether the blood was of the deceased or not are indicative of serious lapse of the prosecution as the aforesaid circumstances indicate inherent improbability of prosecution case and the omission of I.O. are serious and if viewed in the back drop of enmity renders the prosecution case under serious doubts.

12. Mr. Singh further highlighted the contradiction in the deposition of the witnesses on the point of genesis of the crime, place of occurrence and manner of occurrence. He submitted that closer scrutiny of the deposition of the witnesses would reveal that the prosecution has miserably failed to establish the case and bring home the charges against the appellants. He submitted that it would not be safe to convict the appellants in a case where the death is not positively proved by any evidence. He next contended that the seizure in the present case has not been established. He submitted that the fardbeyan was recorded at 10:30 PM on 11.04.1984, formal FIR was recorded on 12.04.1984 but the seizure list indicate the time as 5:45 on 12.04.1984. Counsel for the appellants referring to the manner of writing of time in the fardbeyan and the formal F.I.R submitted that FIR was drawn at 7:30 then there was no occasion that seizure list was



prepared at 5:40 AM, this creates doubt as the seizure list which contains the F.I.R No., could not have been incorporated in the seizure list prior to the lodging of formal F.I.R. at 7.30 AM on 12.4.1984.

13. Referring to the deposition of the witnesses, Mr. Singh submitted that from the attending facts and circumstances and the deposition of the witnesses, it appears that seizure was not done at the place of occurrence. He submitted that the action of the IO is doubtful. He submitted that in the present case from the scrutiny of the prosecution evidence, it would be evident that witnesses have made different statement before the police during investigation and they resiled substantially in the court and made different statement and as such the decision in the aforesaid circumstance relying upon the prosecution witnesses to convict the appellants is unsustainable.

14. Mr. Singh has drawn the attention of the court to the deposition of PW 1 who admitted that he has not identified any accused person. Referring to his deposition counsel submitted that this witness has admitted that he has not seen the occurrence rather he is a hearsay witness. Referring to para-3 of his deposition counsel submitted that according to this witness the police has seized black shoes, blood stained soil from Khalihan of



Ram Jagi Singh. The seizure list was prepared in presence of Subhas Choubey and he and Subhas Choubey has signed the seizure list. Referring to the deposition of P.W. 5 the IO of the case, he submitted that no such statement was made before the police and in the seizure list there is no such reflection of Black shoes seizure. A suggestion was given to this witness that he used to give evidence on payment. He is a professional witness.

15. Mr. Singh next contended with reference to the deposition of P.W. 2 that this witness has admitted that he is not the eyewitness of the occurrence. He arrived at the place of occurrence on raising hulla by the informant. In paragraph 4 he has stated that he accompanied his brother informant while going to the police station for lodging FIR. He admitted that in the midway they met Darogaji and Darogaji recorded the statement of the informant and he also gave his statement before the police. This witness has admitted in paragraph 6 that there is previous enmity with the accused persons when he stated that the accused persons are the Gotias of the accused involved in the murder of his brother Jag Narain.

16. Mr. Singh submitted that identification of the accused persons by the witnesses is very doubtful as according to them they have identified from a distance of 200 to 250 yards



which is not possible at the time of sunset with special description indicated by the witnesses in the present case. Mr. Singh submitted that the trial court has committed the same illegality in conduct of the trial. He submitted that the trial court has only completed the formality of examination of the evidence of the accused person under Section 313 of the Cr.P.C. as only general question were put to the accused persons during the trial and they were not confronted with the materials surfaced during the trial forming basis of the conviction of the appellants.

17. Ms. Shashi Bala Verma, counsel appearing on behalf of the State submitted that the trial court has committed no illegality in convicting the appellants. The attending facts and circumstances of the case clearly indicate that appellants participated in the commission of the crime and they have done to death the deceased and thereafter took away the dead body of the deceased.

18. We have considered the submission of learned counsel for the appellants and the counsel for the State. We have also scrutinized the deposition of the witnesses in the present case. We find that except P.W.4, the informant of the case, all other witnesses are only hearsay witnesses. They reached the place of occurrence after the actual occurrence. We also find that there was



previous enmity and enmity cuts both ways. We cannot rule out the implication of the appellants on account of the previous enmity. While scrutinizing the entire materials on record, we noticed that there is unexplained delay. The police was camping in the village itself and according to the P.W. 2 the police recorded the statement in the midway. The delay of more than three hours in lodging the fardbeyan creates doubt about the prosecution case. We also noticed that the formal FIR was drawn at 7:30 AM on 12.4.1984 and the same was sent through special messenger but it could reach the CJM on 13.4. 1984, this delay is crucial and in view of the judgment of the Apex Court and creates serious doubt about the prosecution case. Reference in this connection may be made to the judgment of the Apex Court in the case of State Of Punjab vs Tarlok Singh :(1972) 3 SCC 869, para 5 and judgment of the Apex Court in the case of Ishwar Singh vs State Of U.P: AIR 1976 Supreme Court 2423, paragraphs 5 and 9 of which read as follows:

5. First, the High Court noticed the suspicion created by the circumstance that the copy of the First Information Report purported to have been lodged at 3.45 p.m. did not reach the Magistrate at Dasuya till 8 a.m. the next day, even though it was sent through a special messenger. The distance between the scene of occurrence & Dasuya was only 15 or 16 miles. The



inference sought to be drawn is that, in fact, the report was not lodged at 3.45 p.m., but at a much later hour, after the police had arrived at the scene of occurrence and there were consultations to decide what version should be put forward and who should be implicated for the murder. The prosecution, in fact, made no attempt to explain this delay. Such delay, thus, casts doubt on the prosecution version that the Report was lodged at 3.45 p.m. without lapse of unnecessary time.

5. Mr. Frank Anthony appearing for appellant Ishwar Singh submitted that in affirming the Judgment of the trial Court, the High Court also overlooked certain important aspects of the case that the Sessions Judge had failed to consider. He pointed out that the F.I.R. which is stated to have been lodged at 9.05 A. M. on February 14, 1973 was sent out from the police station the next day, February 15; the time when it was despatched is not stated, but it appears from the record that the Magistrate received it on the morning of February 16. The Court of the Magistrate was nearby, which makes it difficult to understand why the report was sent to him about two days after its stated hour of receipt at the police station. [Section 157](#) of the CrPC, 1898 as well as of 1973 both require the first information report to be sent "forthwith" to the Magistrate competent to take cognizance of the offence. No explanation is offered for this extraordinary delay in sending the report to



the Magistrate. This is a circumstance which provides a legitimate basis for suspecting, as Mr. Anthony suggested, that the first information report was recorded much later than the stated date and hour affording sufficient time to the prosecution to introduce improvements and embellishments and set up a distorted version of the occurrence. In this case the suspicion hardens into a definite possibility when one finds that the case made in Court differs at least in two very important particulars from that narrated in the F.I.R. Mahabir Singh, who lodged the first information report, stated in-Court that he had invited some people to his house to effect a settlement between him and Ishwar Singh, and that he had also sent Ghanshyam to call Ishwar Singh there. The F.I.R. does not mention anything like this. From the F.I.R. it appears as if the accused persons came uninvited to his house, demanded why he had demolished the drain, and started assaulting him and the other persons who were present there. It is also difficult to understand why Mahabir should invite anyone to his house for a settlement, if really Ishwar Singh had permitted him to demolish the drain as he claimed. Further, the F.I.R. does not mention that Mahabir and Satyapal wielded lathis in their defence when attacked and that this resulted in some of the accused getting injured; but that is what both Mahabir (P.W. 1) and Satyapai (P.W. 2) stated in their evidence in Court. These variations relate to vital parts of the prosecution case, and cannot be



dismissed as minor discrepancies. In such a case, the evidence of the eye-witnesses "cannot be accepted at its face value", as observed by this Court in *Mitter Sain v. State of U.P.* .

9. We have pointed out that the trial Court in convicting the appellants overlooked certain significant features of the case, namely, the inordinate and unexplained delay in despatching the first information report to the Magistrate; the difference in the account given by the prosecution witnesses and as appearing from the first information report of the occurrence; the absence of any statement in the first information report as to the injuries received by some of accused, and the non-examination of material witnesses. The High Court in affirming the Judgment of the trial Court also failed to advert to these circumstances. We do not therefore think that the case against the appellants has been proved beyond reasonable doubt. The appeals are accordingly allowed and the Order of conviction and the sentences passed on the appellants are set aside We direct that the appellants be set at liberty forthwith.”

19. On closure scrutiny of the evidence, it appears that the seizure list was prepared at 5:45 AM bearing FIR number, whereas the FIR itself was registered at 7:30 AM on 12.4.1884, it also creates serious doubt as there is lapse in the matter of recording the time of seizure which does not correspond to the



recording of formal FIR. On a scrutiny of the evidence, it appears that I.O. has completed perfunctory investigation as he has not sent the bloodstained soil collected for FSL report, there is lack of investigation on scientific line to corroborate the prosecution case.

20. We also find substance in the submission of the counsel for the appellants that the witnesses have improved version in the court. There is apparent contradiction in the deposition of the witnesses before the court and the earlier version before the police under Section 161 of the Cr.P.C. We also find merit in the contention of the counsel for the appellants that there are discrepancy in the deposition of the PWs and the seizure list.

21. We have also noticed that contrary to the mandatory requirement of examination of the accused under section 313 of the Cr.P.C. the trial court failed to confront the accused persons with the adverse material collected during the course of trial forming basis of the conviction of the appellants and only general question was put to the accused person and they were not confronted with the adverse material and as such the decision of the trial court is unsustainable in view of the law laid down by the Apex Court reported in the case of Sukhjit Singh



Versus State Of Punjab: (2014)10 SCC 270, paragraphs 11 to 14
of which reads as under:-

11. In this context, we may profitably refer to a four-Judge Bench decision in *Tara Singh v. The State* [AIR 1951 SC 441] wherein, Bose, J. explaining the significance of the faithful and fair compliance of Section 342 of the Code as it stood then, opined thus:

"30. I cannot stress too strongly the importance of observing faithfully and fairly the provisions of Section 342 of the Criminal Procedure Code. It is not a proper compliance to read out a long string of questions and answers made in the committal court and ask whether the statement is correct. A question of that kind is misleading. It may mean either that the questioner wants to know whether the recording is correct, or whether the answers given are true, or whether there is some mistake or misunderstanding despite the accurate recording. In the next place, it is not sufficient compliance to string together a long series of facts and ask the accused what he has to say about them. He must be questioned separately about each material circumstance which is intended to be used against him. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him. The questioning must therefore be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. Even when an accused person is not illiterate, his mind is apt to be perturbed when he is facing a charge of



murder. He is therefore in no fit position to understand the significance of a complex question. Fairness therefore requires that each material circumstance should be put simply and separately in a way that an illiterate mind, or one which is perturbed or confused, can readily appreciate and understand. I do not suggest that every error or omission in this behalf would necessarily vitiate a trial because I am of opinion that errors of this type fail within the category of curable irregularities. Therefore, the question in each case depends upon the degree of the error and upon whether prejudice has been occasioned or is likely to have been occasioned. In my opinion, the disregard of the provisions of Section 342 of the Criminal Procedure Code, is so gross in this case that I feel there is grave likelihood of prejudice."

12 In *Hate Singh Bhagat Singh v. State of Madhya Bharat* [AIR 1953 SC 468], Bose, J. speaking for a three-Judge Bench highlighting the importance of recording of the statement of the accused under the code expressed thus:

"8. Now the statements of an accused person recorded under Sections 208, 209 and 342, Criminal PC. are among the most important matters to be considered at the trial. It has to be remembered that in this country an accused, person is not allowed to enter the box and speak on oath in his own defence. This may operate for the protection of the accused in some cases but experience elsewhere has shown that it can also be a powerful and impressive weapon of defence in the hands of an innocent man. The statements of the



accused recorded by the Committing Magistrate and the Sessions Judge are intended in India to take the place of what in England and in America he would be free to state in his own way in the witness-box."

13 The aforesaid principle has been reiterated in *Ajay Singh v. State of Maharashtra* [JT 2007 (8) SC 644 : 2007 (12) SCC 341] in following terms:

"14. The word "generally" in sub-section (1)(b) does not limit the nature of the questioning to one or more questions of a general nature relating to the case, but it means that the question should relate to the whole case generally and should also be limited to any particular part or parts of it. The question must be framed in such a way as to enable the accused to know what he is to explain, what are the circumstances which are against him and for which an explanation is needed. The whole object of the section is to afford the accused a fair and proper opportunity of explaining circumstances which appear against him and that the questions must be fair and must be couched in a form which an ignorant or illiterate person will be able to appreciate and understand. A conviction based on the accused's failure to explain what he was never asked to explain is bad in law. The whole object of enacting Section 313 of the Code was that the attention of the accused should be drawn to the specific points in the charge and in the evidence on which the prosecution claims that the case is made out against the accused so that he may be able to give such explanation as he desires to give."



14 In view of the aforesaid enunciation of law, there can be no scintilla of doubt that when the requisite questions have not been put to the accused it has caused immense prejudice to him, more so, when there is no evidence to establish his complicity in the alleged abduction.

22. Considering the totality of the facts situation we are of the considered view that in a case where the previous enmity is established the delay in lodging the FIR and sending the FIR to the CJM creates doubt about the prosecution case and in view of the judgments of the Apex Court mentioned hereinabove, creates serious doubt about the prosecution case. we also noticed the failure on the part of the investigation in sending the bloodstained soil for FSL report and the failure on the part of the I.O. to conduct investigation on scientific line to corroborate the allegation. We also noticed the infirmity in the conduct of the trial particularly non-confrontation of the adverse material in the trial while examining the accused persons under Section 313 Cr.P.C.

23. The cumulative effect of the aforesaid infirmity indicates that the conviction of the appellant in the present case is not safe as it is not beyond all reasonable doubts. We have noticed that in the present appeal the allegation of assault was basically levelled against the appellant Bhukhi Yadav leading



to death of the deceased, who died during the pendency of the appeal.

24. Thus in the totality of the facts of this case we noticed various contradictions, infirmity in the investigation as well as in trial. We also notice the chance of implication of the appellants in the present appeal due to previous enmity and as such we are of the considered view that in a situation like instant the conviction of the appellants cannot be sustained and as such extending the benefit of doubt, we hereby allow the appeal, set aside the judgment of conviction and order of sentence. Since the appellants are on bail, they are discharged from the liability of the bail bonds.

25. Accordingly, the appeal stands allowed.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

spandey/-

AFR/NAFR	NAFR
CAV DATE	NA
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