

IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Appeal (DB) No.191 of 1995

Arising Out of PS.Case No. -null Year- null Thana -null District- BHOJPUR

- =====
1. Sipahi Singh Yadav (since deceased), son of Tengar Singh Yadav.
2. Bhuti Singh Yadav, son of Tengar Singh Yadav.
3. Narmdeshwar Singh Yadav, son of Sipahi Singh Yadav.
4. Binder Singh Yadav @ Rabindra Singh Yadav, son of Sri Bhuti Singh Yadav @ Ramrup Singh.
All residents of village Rasauli, P.S. Piro, district Bhojpur at Arrah.

.... Appellants

The State of Bihar

Versus

with

.... Respondent

Criminal Appeal (DB) No. 209 of 1995

Arising Out of PS.Case No. -null Year- null Thana -null District- BHOJPUR

- =====
1. Ram Kishun Singh Yadav, Son of Tengar Singh Yadav.
2. Umesh Singh Yadav, son of Bhuti Singh Yadav.
Both residents of village Rasauli, P.S. Piro, District Bhojpur at Arrah.

.... Appellants

The State of Bihar

Versus

with

.... Respondent

Criminal Appeal (DB) No. 216 of 1995

Arising Out of PS.Case No. -null Year- null Thana -null District- BHOJPUR

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Devendra Singh Yadav, son of Bhuti Singh Yadav, resident of village Rashauli, P.S. Piro, District Bhojpur at Arrah

The State of Bihar

Versus

.... Appellant

.... Respondent

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Appearance :
(In CR. APP (DB) No.191 of 1995)

For the Appellants

For the State

For the Informant

:

:

:

Mr. Bind Keshri Kumar, Sr. Adv.
Mr. Ram Chandra Singh, Adv.
Mr. Jitendra Kumar Singh, Adv.

Mr. S.C. Mishra, A.P.P.

Mr. Sunil Kumar, Adv.



(In CR. APP (DB) No.209 of 1995)

For the Appellants : Mr. Ram Chandra Singh, Adv.
For the State : Mr. Dilip Kumar Sinha, A.P.P.
For the Informant Mr. Sunil Kumar, Adv.

(In CR. APP (DB) No.216 of 1995)

For the Appellants : Mr. Bind Keshri Kumar, Sr. Adv.
Mr. Ram Chandra Singh, Adv.
Mr. Jitendra Kumar Singh, Adv.
For the State : Mr. S.C. Mishra, A.P.P.
For the Informant Mr. Sunil Kumar, Adv.

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA

and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date: 31-10-2018.

1. All the above stated appeals have arisen out of common judgment of conviction and sentence order dated 01.07.1995 and 03.07.1995 respectively, passed by learned 9th Additional Sessions Judge, Ara in Sessions Trial No. 45 of 1992 and accordingly, the above stated appeals were heard together and are being disposed of by this common judgment.

2. The appellants, namely, Ram Kishun Singh Yadav and Umesh Singh Yadav of Cr. Appeal (D.B.) No. 209 of 1995 have been convicted for the offence punishable under Section 302 of the Indian Penal Code whereas appellant Devendra Singh Yadav of Cr. Appeal (D.B) No. 216 of 1995 and appellants no. 3 and 4 of Cr. Appeal (D.B.) No. 191 of 1995, namely, Narmdeshwar Singh Yadav and Binder Singh Yadav @ Rabindra Singh Yadav have been



convicted under Section 302 read with Section 149 of the Indian Penal Code and furthermore, appellant no. 1, namely, Sipahi Singh Yadav (since deceased) and appellant no. 2, namely, Bhuti Singh Yadav of Cr. Appeal (D.B.) No. 191 of 1995 have been convicted for the offence punishable under Section 447 of the Indian Penal Code and furthermore, appellants, namely, Ram Kishun Singh Yadav and Umesh Singh Yadav of Cr. Appeal (D.B.) No. 209 of 1995 have been convicted for the offence punishable under Section 304 of the Indian Penal Code and furthermore, appellant Devendra Singh Yadav of Cr. Appeal (D.B.) No. 216 of 1995 and appellant no. 3, namely, Narmadeshwar Singh Yadav and appellant no. 4, namely, Binder Singh Yadav @ Rabindra Singh Yadav of Cr. Appeal (D.B.) No. 191 of 1995 have been convicted for the offence punishable under Section 304 read with 149 of the Indian Penal Code. Furthermore, appellant no. 1, namely, Sipahi Singh Yadav (since deceased) and appellant no. 2, namely, Bhuti Singh Yadav of Cr. Appeal (D.B.) No. 191 of 1995 have been convicted for the offences punishable under Sections 147, 323 and 302 read with Section 149 of the Indian Penal Code. Again, the appellants, namely, Ram Kishun Singh Yadav and Umesh Singh Yadav of Cr. Appeal (D.B.) No. 209 of 1995 have been convicted for the offences punishable under Sections 148, 304, 302/149 of the Indian Penal Code and 27 of the Arms Act and appellant no. 3,



namely, Narmdeshwar Singh Yadav and appellant no. 4, namely, Binder Singh Yadav @ Rabindra Singh Yadav of Cr. Appeal (D.B.) No. 191 of 1995 have been convicted for the offences punishable under Sections 147, 302, 304/149 of the Indian Penal Code and appellant Devendra Singh Yadav of Cr. Appeal (D.B.) No. 216 of 1995 has been convicted for the offences punishable under Sections 148, 302, 304/149 of the Indian Penal Code and 27 of the Arms Act. Further the appellant no. 1, namely, Sipahi Singh Yadav (since deceased) and appellant no. 2, namely, Bhuti Singh Yadav of Cr. Appeal (D.B.) No. 191 of 1995 have been acquitted from the charge framed against them for the offence punishable under Section 447 of the Indian Penal Code. Accordingly, appellant no. 1, namely, Sipahi Singh Yadav and appellant no. 2, namely, Bhuti Singh Yadav of Cr. Appeal (D.B.) No. 191 of 1995 have been sentenced to undergo rigorous imprisonment for life under Section 302 read with Section 149 of the Indian Penal Code and six months rigorous imprisonment each for the offences punishable under Sections 147 and 323 of the Indian Penal Code. The appellants Ram Kishun Singh Yadav and Umesh Singh Yadav of Cr. Appeal (D.B.) No. 209 of 1995 have been sentenced to undergo rigorous imprisonment for life for the offence punishable under Section 302 read with Section 149 of the Indian Penal Code and to undergo rigorous imprisonment for ten years under



Section 304 of the Indian Penal Code as well as to undergo rigorous imprisonment for one year each under Section 148 of the Indian Penal Code and 27 of the Arms Act. Appellant no. 3, namely, Narmdeshwar Singh Yadav and appellant no. 4, namely, Binder Singh Yadav @ Rabindra Singh Yadav of Cr. Appeal (D.B.) No. 191 of 1995 have been sentenced to undergo rigorous imprisonment for life under Section 302 of the Indian Penal Code, to undergo rigorous imprisonment for ten years under Section 304 read with Section 149 of the Indian Penal Code and to undergo rigorous imprisonment for six months for the offence punishable under Section 147 of the Indian Penal Code. Appellant Devendra Singh Yadav of Cr. Appeal (D.B.) No. 216 of 1995 has been sentenced to undergo rigorous imprisonment for life for the offence punishable under Section 302 of the Indian Penal Code, to undergo rigorous imprisonment for ten years for the offence punishable under Section 304 read with Section 149 of the Indian Penal Code and to undergo rigorous imprisonment for one year each for the offence punishable under Sections 148 of the Indian Penal Code and 27 of the Arms Act. All the sentences were ordered to run concurrently.

3. It is pertinent to note here that during pendency of these criminal appeals, appellant no. 1, namely, Sipahi Singh Yadav of Cr. Appeal (D.B.) No. 191 of 1995 died and accordingly, his appeal



stood abated vide order dated 07.09.2018. It is also pertinent to note here that appellant no. 2, namely, Umesh Singh Yadav of Cr. Appeal (D.B.) No. 209 of 1995 and appellant no. 4, namely, Binder Singh Yadav @ Rabindra Singh Yadav of Cr. Appeal (D.B.) No. 191 of 1995 were found juvenile at the time of alleged occurrence and they were declared juvenile by the Juvenile Justice Board, Bhojpur, Ara.

4. PW-5 Akchhaya Kumar Singh Yadav went to Piro police station on 28.07.1991 along with Daroga Singh Yadav (PW-2), Kapil Singh Yadav (not examined), Putali Singh Yadav (not examined) and Lalka Singh Yadav (not examined). They also took the dead body of deceased Bihari Singh Yadav and PW-5 Akchhaya Kumar Singh Yadav gave his statement before the officer-in-charge of Piro police station at about 7:15 P.M. to this effect that on the same day at about 5:00 P.M., Ram Kishun Singh Yadav, Sipahi Singh Yadav and Bhuti Singh Yadav were forcibly making ridge on his field situated at Sahejni Kadiyahi. He along with Daroga Singh Yadav (PW-2), Kapil Singh Yadav (not examined) and Bihari Singh Yadav (deceased) went there and forbade them to do so upon which hot exchange of words took place. Thereafter, Ram Kishun Singh Yadav went running to his house and returned with a gun along with Devendra Singh Yadav, Umesh Singh Yadav, Binder Singh Yadav, Bhuti Singh Yadav and Narmdeshwar Singh Yadav and at that time



Devendra Singh Yadav was carrying gun in his hand, Umesh Singh Yadav was, too, carrying gun in his hand whereas the remaining persons were carrying lathi in their hands. As soon as the aforesaid persons came there, Ram Kishun Singh Yadav aimed the gun and asked Devendra Singh Yadav to kill them upon which Devendra Singh Yadav fired of his double barrel gun which hit on right scapular region of Bihari Singh Yadav as a result whereof he having sustained firearm injury fell down there. Thereafter, Narmdeshwar Singh Yadav and Binder Singh Yadav assaulted Bihari Singh Yadav by lathi as a result of which Bihari Singh Yadav sustained injury on his head. Ram Kishun Singh Yadav and Umesh Singh Yadav, too, fired of their respective guns which hit co-villager Shamhut Singh Yadav who was grazing his buffalo near the place of occurrence. PW-5 further claims that he ran towards Bihari Singh Yadav but Sipahi Singh Yadav and Bhuti Singh Yadav started assaulting him by lathi and also exhorted Umesh Singh Yadav to shoot him upon which Umesh Singh Yadav aimed to shoot him but he having got opportunity gave one lathi blow on the hand of Umesh Singh Yadav as a result whereof his gun slipped from his hand. PW-5 claimed that he picked up the aforesaid gun and after that the above stated persons fled away from there. After the occurrence, the injured Bihari Singh Yadav was being taken to Piro hospital for treatment but he died on his way.



5. On the basis of statement of PW-5, Piro P.S. Case No. 120 of 1991 for the offences punishable under Sections 147, 148, 149, 302 of the Indian Penal Code and 27 of the Arms Act was registered against the above stated F.I.R. named accused. The case was investigated and after completion of investigation, charge sheet against the appellants and others was submitted for the offences punishable under Sections 147, 148, 149, 302 of the Indian Penal Code and 27 of the Arms Act.

6. After cognizance and commitment, appellants Ram Kishun Singh Yadav and Umesh Singh Yadav stood charged for the offences punishable under Sections 148, 302, 302/149 of the Indian Penal Code and 27 of the Arms Act. Appellant Sipahi Singh Yadav (since deceased) and Bhuti Singh Yadav stood charged for the offences punishable under Sections 147, 323, 447, 302/149 of the Indian Penal Code, appellant Devendra Singh Yadav stood charged for the offences punishable under Sections 148, 302, 302/149 of the Indian Penal Code and 27 of the Arms Act and appellants Binder Singh Yadav (wrongly mentioned in format of charge as Birendra Yadav) and Narmdeshwar Singh Yadav stood charged for the offences punishable under Sections 147, 302 and 302/149 of the Indian Penal Code. The appellants and others denied the charges and claimed to be tried.



7. In course of trial, prosecution examined, altogether, six witnesses and also got exhibited post mortem reports of the deceased persons as Ext. 1 and Ext. 1/1, signature of informant on F.I.R. as Ext. 2, carbon copy of inquest report as Ext. 3, seizure list as Ext. 4, F.I.R. as Ext. 5, inquest report as Ext. 6 series, case diary of aforesaid Piro P.S. Case No. 120 of 1991 as Ext. 7, certified copy of charge sheet submitted in Piro P.S. Case No. 120 of 1991 as Ext. 8 and certified copy of final report submitted in Piro P.S. Case No. 83 of 1992 as Ext. 9. The statements of appellants and others were recorded under Section 313 of the Cr.P.C. in which they claimed their innocence. The defence also examined four witnesses and got exhibited formal F.I.R. as Ext. A, copy of complaint petition no. 347 C of 1991 as Ext. B, injury report of appellants as Ext. C, certified copy of map as Ext. D, certified copy of order dated 15.06.1994 as Ext. E, certified copy of protest petition as Ext. F, Original sale deed and certified copy of sale deed as Ext. G and G/a respectively and certified copy of deposition of G.R. No. 1841/91 and Trial No. 225 of 1993 as Ext. H, H/a and H/b.

8. The learned trial court after scrutinizing the evidences available on the record passed the judgment of conviction and sentence order in the manner as I have already stated.



9. Learned counsel appearing for the appellants challenged the impugned judgment of conviction and sentence order submitting that the learned trial court failed to appreciate the evidences available on the record in right perspective and completely ignored this fact that the prosecution party was aggressor and as a matter of fact, it was prosecution party who attacked on the appellants while they were constructing ridge in their field. He further submitted that investigating officer has not been examined in this case and the prosecution failed to prove the place of occurrence. Continuing his submission, he submitted that prosecution party claimed that the appellants were constructing ridge on the field of informant whereas the appellants claimed that while they were constructing ridge in their field, prosecution party attacked on them and deceased Bihari Singh Yadav and deceased Shamhut Singh Yadav died due to firing made by the prosecution party but due to non examination of the investigating officer, the prosecution could not succeed to prove as to where ridge was being constructed and who was aggressor. He further submitted that learned trial court permitted the prosecution to exhibit the case diary and taking help of entries made in the case diary, the learned trial court tried to establish the place of occurrence but learned trial court failed to understand that contents of case diary were not admissible in evidence and the contents of case diary could have only



be used to impeach the credibility of prosecution witnesses.

10. Learned counsel appearing for the appellants further submitted that PW-5 in his ferdbeyan claimed that he along with PW-2 Daroga Singh Yadav, Kapil Singh Yadav, Futali Singh Yadav and Lalka Singh Yadav had gone to the police station and the case was lodged in presence of the aforesaid witnesses but except PW-2 Daroga Singh Yadav, the aforesaid persons were not examined by the prosecution. He further submitted that prosecution examined PW-1 Shri Bhagwan Singh and PW-4 Birendra Kumar Singh but the name of aforesaid witnesses was not disclosed in the ferdbeyan of the PW-5 and as a matter of fact, they had not seen the alleged occurrence but subsequently, they were made witness in the present case. He submitted that non examination of material witnesses by the prosecution was fatal to the prosecution case as the prosecution party tried to suppress the real facts by not producing the witnesses whose names were disclosed by the PW-5 in his ferdbeyan recorded in the police station.

11. Learned counsel appearing for the appellants, further, submitted that there were several infirmities in the prosecution case but even then, the learned trial court convicted the appellants. He submitted that witnesses claimed that blood and soil were seized from the place of occurrence but no chemical examination



report was brought on record and, therefore, the aforesaid laches of the prosecution case create doubt about the claim of the prosecution witnesses.

12. Learned counsel appearing for the appellants, further, submitted that prosecution also failed to prove the manner of occurrence beyond all shadow of reasonable doubts as the prosecution witnesses made contradictory statements in respect of the manner of occurrence. He submitted that some prosecution witnesses stated that deceased Bihari Singh Yadav was assaulted by the lathi also but no lathi injury was found on the person of the deceased Bihari Singh Yadav and, therefore, the aforesaid fact goes to show that either prosecution witnesses had not seen the alleged occurrence or they have made attempt to suppress the real facts. Learned counsel appearing for the appellants highlighted the statement of PW-1 by referring paragraphs no. 1 and 4 of his deposition and submitted that PW-1 claimed that he along with deceased Bihari Singh Yadav had gone to the place of occurrence when the appellants were constructing ridge and forbade them from making ridge on his field. He further submitted that PW-1 further claimed that other witnesses were working in another field at the time of alleged occurrence whereas PW-2 stated a different story.

13. Learned counsel appearing for the appellants further



submitted that some of the appellants, too, sustained injury but the prosecution party failed to explain the injuries sustained by the appellants and, therefore, the aforesaid fact also suggests that prosecution party has suppressed the real facts and has not come before the court with clean hands.

14. Learned counsel appearing for the appellants, further, submitted that PW-5 claimed that he picked up the gun which had been used in the alleged crime and handed over the same to chowkidar of the village but the aforesaid gun was not produced before the court in course of trial nor any report of ballistic expert was placed before the trial court to show that so-called gun was used in the alleged crime. He further submitted that DW-2 Raj Bali Singh, chowkidar of the village, was examined by the defence and the said chowkidar, specifically, stated that no gun was handed over to him. He, further, submitted that according to prosecution case itself, the alleged occurrence took place on account of land dispute when the prosecution party stopped the appellants from making ridge in a field and after that hot exchange of words took place between the parties followed by firing as a result of which two persons sustained injury and died and, therefore, the aforesaid fact clearly suggests that present occurrence took place on account of sudden provocation. Therefore, even if for the sake of argument, prosecution story assumed to be true,



then also, no case under Section 302 of the Indian Penal Code is made out and, at best, Section 304 Part II of the Indian Penal Code is applicable in the present case but the learned trial court failed to take notice of above stated circumstances and committed error in convicting and sentencing the appellants.

15. On the other hand, learned Additional Public Prosecutor assisted by learned counsel of the informant supported the impugned judgment of conviction and sentence order arguing that almost all the eye witnesses have supported the prosecution case and, specifically, stated that appellants have committed the alleged crime. Learned Additional Public Prosecutor, further, submitted that the appellants have admitted in their counter case that occurrence took place while they were making ridge and, therefore, the place of occurrence has been admitted by the appellants. He, further, submitted that only controversy between the parties is who committed the murder of deceased Bihari Singh Yadav and Shamhut Singh Yadav and the aforesaid fact has been proved by the evidence of eye witnesses. He, further, submitted that even if the Ext. 7 (case diary) is excluded from the evidence of prosecution, then also, there was sufficient material before the trial court to convict the appellants. He also submitted that no doubt, some minor contradictions have occurred in the evidence of prosecution witnesses but the aforesaid



minor contradictions do not go to the root of the prosecution case and, moreover, the presence of eye witnesses is an admitted fact by both the parties. He, further, submitted that prosecution has not only proved the place of occurrence but has also proved the manner of occurrence and so far as so-called injuries of some of the appellants are concerned, the aforesaid injuries were not visible and, therefore, even if the prosecution witnesses have not explained the injuries of some of the appellants, then also, the prosecution case cannot be doubted. He, further, submitted that admittedly, the appellant Binder Singh Yadav @ Rabindra Singh Yadav filed complaint case for the same occurrence after 3 to 4 days of the alleged occurrence and the aforesaid delay in filing the complaint case is sufficient to show that appellant Binder Singh Yadav @ Rabindra Singh Yadav brought the complaint case with concocted story to save the skin of appellants from the present case and, therefore, the learned trial court rightly disbelieved the defence of the appellants.

16. Having heard the contentions of both the parties, I went through the record along with lower court's record. As I have already stated that in course of trial, prosecution examined, altogether, six witnesses and out of the aforesaid six witnesses, PW-1 Shri Bhagwan Singh, PW-2 Daroga Singh, PW-4 Birendra Kumar Singh and PW-5 Akchhaya Kumar Singh Yadav claimed themselves to be



eye witness of the alleged occurrence. PW-3 Dr. Ashok Kumar Chaudhary claimed that he had held post mortem examination on the dead bodies of Bihari Singh Yadav and Shamhut Yadav whereas PW-6 Harish Chandra Singh is a police official who claimed to have recorded the ferdbeyan of PW-5, got prepared formal F.I.R. on 28.07.1991 as well as prepared inquest report of Bihari Singh Yadav on 28.07.1991.

17. The death of Bihari Singh Yadav and Shamhut Yadav is not in dispute. However, PW-3 claimed that on 29.07.1991 at about 9:40 A.M. he did post mortem examination on the dead body of the deceased Shamhut Yadav and found following ante mortem injuries:-

(1) *About six lacerated wound on left arm upper part medial aspect and about eight lacerated wound on left side of the chest upper part with inverted margin and each size about 1/8"X 1/8" and few injuries of the left arm were found skin deep wound. He further claimed that on dissection of chest he found laceration of chest muscles on left side upper part, pleura left lung and pulmonary vessels with lacerated and ruptured with blood and blood clots in the chest cavity. He also claimed that one pellet was taken out from the chest cavity and the same was handed over to concern constable who had brought dead body for post mortem examination. This witness claimed that the injuries found on the dead body of the deceased Shamhut Yadav were ante mortem in nature and caused by firearms. This witness opined that deceased died of aforesaid injuries.*

This witness further claimed that on the same day at 9:50 A.M. he held post mortem examination on the dead body of



Bihari Singh Yadav and found following external injuries:-

(1) *One incised wound on head middle part, size 3"X 1/2"X periostum cut of which size was 2"X 1/6"*

(2) *About 20 in number lacerated wounds oval with surface black and margins black in colour and inverted on the right shoulder and right side of the upper part of the chest and size of aforesaid injuries were 1/6"X 1/6" into chest cavity and one large size lacerated wound oval with margin black inverted size 1/2" in diameter into chest cavity deep on front of the chest.*

This witness further claimed that on dissection of the skull periostum under the wound was found cut about size 2"X 1/6". On further dissection nothing abnormal was detected and on dissection of chest cavity and shoulder, muscles of the chest wall upper part lacerated and perforated at the sight of injury and pleura and lungs substance right side were also perforated and lacerated with blood clots and blood was present in chest cavity. This witness claimed that one pellet and wads three in numbers were taken out from the lungs substance and handed over to the police. He also claimed that on dissection of right shoulder, blood clot and blood were present and muscles were lacerated on medial aspect of the right shoulder. He further claimed that on dissection of abdominal cavity nothing abnormal was detected. This witness claimed that all the aforesaid injuries were ante mortem in nature and injury no.1 was caused by sharp weapon and injury no.2 was caused by fire arms. This witness further claimed that deceased died due to injury no.2.

18. The testimony of PW-3 establishes this fact that deceased Shamhut Yadav and deceased Bihari Singh Yadav had got firearm injury and furthermore, deceased Bihari Singh Yadav had sustained one incised wound which was caused by sharp cutting weapon. It is also obvious from the post mortem report of deceased



Bihari Singh Yadav that no injury caused by hard and blunt substance was found on his person.

19. As I have already stated that death of both the aforesaid deceaseds is not a disputed fact rather it is an admitted position of the parties that both the deceaseds sustained firearm injury and subsequently, died on account of aforesaid injury. The difference between both the parties is in respect of manner of the occurrence. The prosecution claimed that it were appellants who caused death of both the deceased whereas the claim of the appellants is that it were prosecution party who committed the murder of both the above stated deceaseds. It is well settled principle of law that it is incumbent duty of the prosecution to prove its case beyond all shadow of reasonable doubts and, therefore, now, it has to be seen as to whether prosecution has succeeded to prove its case beyond all shadow of reasonable doubt or not.

20. PW-1 Shri Bhagwan Singh claimed that on 28.07.1991 at about 5:00 P.M. he along with deceased Bihari Singh Yadav had gone in Sahejni Badhar to see his field and when he reached near his field, he saw appellants Sipahi Singh Yadav (Since deceased), Bhuti Singh Yadav and Ram Kishun Singh Yadav who were making ridge in his field and seeing them he forbade them to do so which resulted into exchange of hot words between them and



thereafter, appellant Ram Kishun Singh Yadav went running to his house and immediately returned along with appellants Devendra Singh, Umesh Singh Yadav, Binder Singh Yadav @ Rabindra Singh Yadav and Narmdeshwar Singh and at that time appellants Ram Kishun Singh Yadav, Devendra Singh Yadav and Umesh Singh Yadav were holding guns whereas Narmdeshwar Singh Yadav and Binder Singh Yadav @ Rabindra Singh Yadav were holding lathi fitted with sharp iron such as Baisakhi. He, further, claimed that appellant Ram Kishun Singh Yadav ordered to kill and thereafter, appellant Devendra Singh Yadav opened fire on deceased Bihari Singh Yadav which hit on his right scapular region as a result whereof he fell down on the ground and in the meantime, appellant Narmdeshwar Singh Yadav and Binder Singh Yadav @ Rabindra Singh Yadav assaulted him with Baisakhi as a result whereof he sustained injury on his head. He, further, claimed that appellant Ram Kishun Singh Yadav and Umesh Singh Yadav opened fire which hit Shamhut Singh Yadav. It is pertinent to note here that name of PW-1 does not find place in the ferdbeyan of PW-5 as PW-5 claimed in his ferdbeyan that while the appellants were making ridge in his field, he along with PW-2 Daroga Singh, Kapil Singh Yadav (not examined) and Bihari Singh Yadav (deceased) went there and forbade them to do so. Furthermore, PW-5 claimed in his ferdbeyan that appellant



Narmdeshwar Singh Yadav and Binder Singh Yadav @ Rabindra Singh Yadav assaulted the deceased Bihari Singh Yadav by lathi causing head injury to him. PW-5 has, nowhere, stated in his ferdbeyan that aforesaid lathi was fitted with sharp iron. However, PW-1 further claimed that when the deceased Bihari Singh Yadav raised alarm, his father (PW-5) ran towards deceased Bihari Singh Yadav but in the meantime, appellants Sipahi Singh Yadav (Since deceased) and Bhuti Singh Yadav assaulted his father by lathi whereas appellant Umesh Singh Yadav aimed his gun towards PW-5 who having got opportunity gave lathi blow as a result whereof the gun of Umesh Singh Yadav slipped from his hand and his father picked up aforesaid gun and after that appellants fled away from there. PW-1, further, admitted in his examination in chief that deceased Bihari Singh Yadav was being taken to Piro Hospital by him and his other family members but he died on his way whereas deceased Shamhut Singh Yadav was being taken to Hasan Bazar by his family members but deceased Shamhut Singh Yadav, too, died on his way. The aforesaid statement of PW-1 clearly goes to show that both the deceased persons were taken to separate hospitals by their respective family members. PW-1 has admitted in his cross examination that appellants are his close agnates whereas deceased Shamhut Singh Yadav was not his agnate. This witness also admitted in his cross



examination that one Chandrama, Lalmuni, Purnamasi Yadav and Ramlal are agnates of deceased Shamhut Singh Yadav. This witness also admitted that his village is about one and half kilometers from the place of occurrence. Furthermore, this witness admitted that 4 to 5 years ago he had purchased the land in which ridge was being made by the appellants and adjacent west to the aforesaid land, there was land of appellant Ram Kishun Singh Yadav who had also purchased the said land. This witness admitted that one Lalmuni and some others had come on the place of occurrence. Furthermore, this witness admitted that when he reached near his field, he saw that his father (PW-5) and PW-2 as well as Kapil Singh were working in another field and the aforesaid field was at the distance of 500 yards from the field on which the alleged occurrence took place. The attention of this witness was drawn towards his previous statement and this witness claimed that before the investigating officer he had stated that he had gone to Badhar to see his field and saw that appellants Ram Kishun Singh Yadav, Sipahi Singh Yadav (Since deceased) and Bhuti Singh Yadav were forcibly making ridge in his field and he forbade them to do so but appellant Ram Kishun Singh Yadav went to his home and within 5 to 7 minutes returned and after that he as well as other appellants committed the alleged crime. The defence, specifically, asked to this witness that he had not made statement before the



investigating officer regarding the manner of occurrence in such way as he stated before the trial court. This witness admitted that at the time of occurrence, deceased Shamhut Singh Yadav was grazing his buffalo at the distance of 20 to 25 yards from the place of occurrence but when hot exchange of words took place, he came over the place of occurrence. This witness also claimed that he had made statement before the police that appellants Narmdeshwar Singh Yadav and Binder Singh Yadav @ Rabindra Singh Yadav were carrying lathi fitted with sharp iron. This witness, further, stated that firing on deceased Shamhut Singh Yadav was made from the distance of 5 to 7 steps and furthermore, this witness stated that appellant Devendra Singh Yadav was carrying licensee double barrel gun. He also stated that he had not seen any injury on the person of the appellants. This witness, further, admitted that gun of appellant Umesh Singh Yadav was handed over to chowkidar. This witness, further, stated that occurrence took place in his field as well as in the field adjacent east to his field. This witness also admitted that appellant Binder Singh Yadav @ Rabindra Singh Yadav had filed complaint case in court against them but he expressed his inability to say as to whether the aforesaid case was registered or not. This witness, further, claimed that PW-5 had also sustained injury on his hand. Furthermore, at para 5 of his cross examination, this witness admitted that his statement



was recorded by the police after 3 to 4 days of the occurrence at Hasan Bazar police chowki and on the same day, the statement of PW-5 Akchhaya Kumar Singh, PW-2 Daroga Singh and PW-4 Birendra Kumar Singh were recorded by the police at Hasan Bazar police chowki.

21. Perusal of evidence of this witness goes to show that his statement under Section 161 of the Cr.P.C. was recorded after 3 to 4 days of the alleged occurrence and furthermore, as I have already discussed that name of PW-1 does not find place in the ferdbeyan of PW-5. Furthermore, the defence has drawn attention of this witness to his previous statement with a view to show the improvement and embellishment in the statement of this witness. Admittedly, the investigating officer has not been examined and, therefore, the defence could not get an opportunity to prove the improvement and embellishment in the statement of this witness and, therefore, in my view, in the aforesaid circumstance, it is unsafe to place reliance upon the testimony of PW-1.

22. PW-2 Daroga Singh is uncle of deceased Bihari Singh Yadav. This witness claimed that at the time of alleged occurrence he was working at his field which was situated at the distance of 300 to 400 yards from the place of occurrence and at that time, PW-5 and Kapil Singh (not examined) were also working with



him. This witness, further, claimed that appellants Sipahi Singh Yadav (Since deceased), Bhuti Singh Yadav and Ram Kishun Singh Yadav having encroached his field were making ridge and seeing the above stated act of above stated appellants, Bihari Singh Yadav (deceased) and Shri Bhagwan Singh (PW-1) forbade them to do so but the aforesaid appellants did not pay any heed. This witness, further, claimed that having heard the noise he as well as PW-5 and Kapil Singh went there and hot exchange of words took place and after that the alleged occurrence took place. The above stated statement of this witness is contradictory to ferdbeyan of PW-5 who has stated in his ferdbeyan that he along with PW-2, Kapil Singh and Bihari Singh Yadav (deceased) went near the place of occurrence and forbade the appellants while they were making ridge in the field. It is true that averments of ferdbeyan of PW-5 cannot be contradicted by taking the help of statement of PW-2 but at least, the contradiction of averments of ferdbeyan of a prosecution witness can be noticed to see the manner of occurrence. The PW-2 states a different story. PW-5 has, nowhere, stated in his ferdbeyan that at the time of alleged occurrence, he along with PW-2 and Kapildeo Singh were working in another field and it were PW-1 Shri Bhagwan Singh and deceased Bihari Singh Yadav who went near the place of occurrence and forbade the appellants from making ridge in their field whereas this



witness claims that at the time of alleged occurrence, he alongwith PW-5 and others was working in another field. This witness narrates the prosecution story in his deposition as stated by PW-1 and other prosecution witnesses but attention of this witness was drawn towards his statement recorded under Section 161 of the Cr.P.C. and by drawing the attention of this witness towards the previous statement of this witness, the defence claimed that he had not stated the manner of occurrence in the way as he claimed before the court in course of trial. Again, I would like to say that non examination of investigating officer deprived the defence from proving this fact that PW-2 developed and improved his statement in course of trial as he had not made the statement before the police in such a way as he claimed before the court in course of trial. This witness claimed in his cross examination that the appellants had making ridge in his field encroaching 13 to 14 hands of his land. This witness also claimed that house of the appellant Ram Kishun Singh Yadav was at the distance of 400 yards from the place of occurrence but he admitted that entire occurrence took place within 2- 2 ½ -3 minutes. This witness, further, admitted that when deceased Bihari Singh Yadav having sustained fire arm injury fell down on the ground, appellant Narmdeshwar Singh Yadav gave one baisakhi blow and similarly, Binder Singh Yadav @ Rabindra Singh Yadav, too, gave one baisakhi blow on the



head of deceased Bihari Singh Yadav. This witness, further, admitted that prosecution party was not armed with any weapon at the time of alleged occurrence, except PW-5 who was carrying a small stick at the time of alleged occurrence. This witness also admitted that deceased Shamhut Singh Yadav was grazing his buffalo at the distance of 5 to 7 steps from the place of occurrence. This witness also admitted that he snatched gun from the appellants and handed over the aforesaid gun to Chowkidar. This witness, further, admitted that he did not give any written statement before the police and on the alleged date of occurrence, no one had given written statement to police and further admitted that statements of all the witnesses were recorded at the place of occurrence on the alleged date of occurrence. He, further, admitted that his statement was not recorded by the police at Hasan Bazar. This witness admitted that appellants had filed case for the occurrence of the same day in court after 5 to 7 days of the alleged occurrence. The statement of this witness goes to show that he narrated a different story as he claimed that he along with others was working in another field at the time of alleged occurrence whereas PW-5 has, nowhere, mentioned the aforesaid fact in his ferdbeyan. Moreover, as I have already stated that non examination of the investigating officer deprived the appellants to prove the embellishment and improvement made by this witness in course of



trial and, therefore, in my view, the aforesaid failure of the prosecution has caused serious prejudice to the appellants and it is unsafe to place reliance upon the statement of this witness.

23. PW-4 Birendra Kumar Singh also claimed himself to be eye witness of the alleged occurrence but admittedly, the name of this witness also does not find place in the ferdbeyan of PW-5. This witness claimed that he was working in a field situated in Sahejni Katiyayi Badhar along with PW-5 and Kapil Singh. This witness has, nowhere, stated that PW-2 Daroga Singh was also working with him whereas PW-2 claimed that he along with PW-5 and Kapil Singh were working in the field and PW-2 has, nowhere, stated that PW-4 was also working with them. This witness, further, claimed that he along with above stated persons went to the field on which the appellants were forcibly making ridge and forbade the appellants but neither PW-1 nor PW-2 as well as PW-5 claimed about the presence of this witness on the field in which they were working as well as on the place of occurrence. The attention of this witness was also drawn towards his previous statement recorded under Section 161 of the Cr.P.C. but the appellants could not get an opportunity to show the improvement and embellishment in the statement of this witness due to non examination of the investigating officer. This witness admitted that after the occurrence, 2 to 3 family members of deceased Shamhut



Singh Yadav had come at the place of occurrence. This witness expressed his inability to say as to whether the appellants had filed any case against the prosecution party for the occurrence of the same day or not. As I have already stated that neither the name of PW-4 finds place in the ferdbeyan of informant nor in the deposition of PW-1, PW-2 and PW-5. Therefore, it is very difficult to believe the statement of this witness and it appears that this witness is not an eye witness of the alleged occurrence.

24. PW-5 Akchhaya Kumar Singh Yadav is informant of this case. This witness stated that on the alleged date of occurrence he was working in his field along with PW-2 and Kapildeo Yadav. In the meantime, PW-1 as well as deceased Bihari Singh Yadav came to see another field on which the appellants were forcibly making ridge which was opposed by the PW-1 and deceased Bihari Singh Yadav. Here, I would like to mention that PW-5 has, nowhere, mentioned in his ferdbeyan that at the time of alleged occurrence, he along with PW-2 and Kapil were working in another field and it were PW-1 and deceased Bihari Singh Yadav who forbade the appellants from making ridge in the field. This witness narrates the prosecution story as stated by other witnesses and this witness also claimed that appellant Narmdeshwar Singh and some others were carrying lathi fitted with sharp iron such as baisakhi. Here, again I would like to say



that this witness has, nowhere, mentioned in his ferdbeyan that some of the appellants were carrying lathi fitted with sharp iron such as baisakhi and the above stated statement is an improvement in course of trial. This witness, further, admitted that when Bihari Singh Yadav having sustained injury fell down on the ground, appellant Narmdeshwar Singh Yadav assaulted him with baisakhi which caused injury on the head of deceased Bihari Singh Yadav and, thereafter, appellant Binder Singh @ Rabindra also assaulted him by means of baisakhi as a result of which deceased Bihari Singh Yadav sustained head injury. This witness also claimed that appellant Ram Kishun Singh Yadav and Umesh Singh Yadav opened fire which hit Shamhut Singh Yadav. This witness also claimed that he, too, sustained injury on his head and in course of occurrence, he gave one danda blow to appellant Umesh Singh Yadav as a result of which his gun was slipped from his hand and fallen on the ground and thereafter, he picked up the aforesaid gun and after the occurrence he handed over the aforesaid gun to Raj Bali Singh Chowkidar. The aforesaid Raj Bali Singh chowkidar has been examined as DW-2 and DW-2 has stated that none had given any gun to him after the occurrence. This witness claimed that after the occurrence, he went to Piro police station where his statement was recorded by the police. This witness also stated that inquest report of dead body of the deceased Bihari



Singh Yadav was prepared and he put his signature on the inquest report of deceased Bihari Singh Yadav. This witness, further stated that on the same day, Daroga Yamuna Ram went to the place of occurrence and inspected the place of occurrence and seized blood stained soil, clothes etc. and prepared seizure list. On being cross examined by the defence, this witness admitted that at the time of making ridge in the field, the appellants were carrying lathi in their hands. The attention of this witness was also drawn towards his previous statement and the defence tried to highlight the contradictions and improvements made by this witness in course of trial but due to non examination of investigating officer the appellants deprived of proving the improvements, embellishments and contradictions in the statement of this witness. This witness has also admitted that land of the appellants was adjacent west to the land of this witness and the appellants had purchased the aforesaid lands prior to purchase of this witness. This witness denied the suggestion of defence that the appellants were making ridge in their field as per measurement and it was prosecution party who attempted to stop the appellants from making ridge and when the appellants did not agree to stop their work, it was prosecution party who assaulted them and made firing which hit deceased Bihari Singh Yadav and deceased Shamhut Singh Yadav. This witness, further, admitted that while he



was going to work in his another field, he had seen the appellants making ridge in the field but he reached on the above stated field when altercation took place between appellants and his family members. This witness, further, admitted that at the time of assault he was on his field whereas appellants were towards east side from him. This witness also admitted that family members of deceased Shamhut Singh Yadav had come after the occurrence. This witness also admitted that appellant Binder Singh Yadav @ Rabindra Singh Yadav filed case against him and others. The testimony of this witness goes to show that he reached over the place of occurrence when altercation started. This witness claimed that he was working in another field prior to the alleged occurrence but he has not disclosed the aforesaid fact in his ferdbeyan. Although, this witness claimed that appellants were making ridge forcibly in his field but he has admitted in his statement that the field of the appellants is adjacent west to his field and there was only one ridge between field of appellants as well as his field. In this case, the investigating officer has not been examined and, therefore, there is nothing on the record to show as to which place the ridge was being made by the appellants. The examination of the investigating officer in the present case was essential because the genesis of occurrence was of making of ridge in a field and it was the duty of the prosecution to prove that ridge was being made in the field



of prosecution party but due to non examination of the investigating officer prosecution could not succeed to prove that appellants were making ridge forcibly in the field of PW-5.

25. The appellants in their defence got exhibited certain documents as Exhibits-A, B and E and the aforesaid documents go to show that appellant Binder Singh Yadav @ Rabindra Singh Yadav filed complaint case bearing Complaint Case No. 347 C of 1991 on 09.10.1991 against PW-5 and others and in the aforesaid complaint case, appellant Binder Singh Yadav @ Rabindra Singh Yadav claimed that while he as well as his family members were making ridge in their field as per measurement, the prosecution party being armed with double barrel gun, farsa, lathi etc. came there and started assaulting them and in that course, PW-5 fired of his gun which hit Bihari Singh Yadav and PW-2 Daroga Singh fired of his gun which hit deceased Shamhut Singh Yadav. Furthermore, the aforesaid documents go to show that on the basis of Complaint Case No. 347 C of 1991, Piro P.S. Case No. 83 of 1992 was registered against the prosecution party after great persuasion of the court but police after investigation submitted final form. The appellant Binder Singh Yadav @ Rabindra filed protest petition which was converted into complaint case and having found prima facie case against the prosecution party the court proceeded against them for the same occurrence. It is



obvious that appellant Binder Singh Yadav @ Rabindra Singh Yadav claimed in his case that it were prosecution party who was aggressor. Therefore, it is obvious from the aforesaid documents that the appellants claimed that while they were making ridge in their field, the prosecution party came there and assaulted them and in that course firing was made which hit to deceased Bihari Singh Yadav and Shamhut Singh Yadav. Again, I would like to say that non examination of the investigating officer is fatal to the prosecution case because due to non examination of the investigating officer the actual picture of place of occurrence could not come on the record and in absence of testimony of investigating officer it is difficult to say as to under which field ridge was being made and as to which of the parties was aggressor and, therefore, in my view, the appellants are entitled to get benefit of doubt of above stated lacuna of the prosecution case.

26. The prosecution got exhibited entire case diary as Ext. 7 and the learned trial court having perused the entries made in the case diary came to the conclusion that prosecution has succeeded to prove the place of occurrence and also came to conclusion that there was no contradiction and improvement in the statements of prosecution witnesses but in my view, the learned trial court committed error in using the contents of case diary without examination of investigating officer. In this regard, Section 162 of the



Cr.P.C. is relevant which says that “statement made by any person to a police officer in the course of an investigation cannot be used for any purpose at any inquiry or trial in respect of any offence under investigation at the time when such statement was made except when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid and if duly proved, may be used by the accused, and with permission of the court, by the prosecution, to contradict such witness in the manner provided by Section 145 of the Indian Evidence Act.” The above stated Section 162 of the Cr.P.C. clearly prohibits the use of statement of a prosecution witness recorded under Section 161 of the Cr.P.C. in course of investigation except the circumstances mentioned in Section 162 of the Cr.P.C. In the present case, admittedly, the learned trial court used the contents of case diary to establish the place of occurrence as well as to show that there was no improvement and embellishment in the statement of prosecution witnesses. In my view, the learned trial court adopted a new procedure which is foreign to the criminal jurisprudence.

27. The appellants brought the injury reports of Bhuti Singh Yadav, Devendra Yadav, Sipahi Singh Yadav (Since deceased) and Umesh Singh on record by exhibiting the injury report as Ext. C but from perusal of injuries of Bhuti Singh Yadav, Devendra Yadav



and Sipahi Singh Yadav (Since deceased), I find that no apparent and visible injury was found on their person and so far as appellant Umesh Singh is concerned, no injury was found on his person. Therefore, even if the prosecution failed to explain the injuries found on the person of appellants Bhuti Singh Yadav, Devendra Singh Yadav and Sipahi Singh Yadav (Since deceased), it cannot be said that prosecution intentionally suppressed the injuries of above stated appellants. However, as I have discussed above that there are several infirmities in the impugned judgment of conviction and, therefore, in my view, the impugned judgment of conviction and sentence order cannot sustain in the eye of law and the appellants are entitled to get the benefit of doubt.

28. Appellant no. 4, namely, Binder Singh Yadav @ Rabindra Singh Yadav of Criminal Appeal (DB) No. 191 of 1995 as well as appellant no. 2, namely, Umesh Singh Yadav of Criminal Appeal (DB) No. 209 of 1995 have been declared juvenile by the Juvenile Justice Board, Bhojpur, Ara during pendency of these criminal appeals. It is well settled law that even if a juvenile is tried by a competent court and not by Juvenile Justice Board, the trial and conviction of juvenile cannot be vitiated on the ground that the trial has not been conducted and judgment of conviction has not been pronounced by Juvenile Justice Board. However, in the present case,



since the prosecution could not succeed to prove its case beyond all shadow of reasonable doubts, there is no need to send the case of above stated appellants before the Juvenile Justice Board, Bhojpur, Ara for fresh trial.

29. On the basis of aforesaid discussions, all the above stated appeals are allowed and the impugned judgment of conviction and sentence order are, hereby, set aside. All the appellants are acquitted of the charges giving benefit of doubt. All the appellants are on bail. They are discharged from the liabilities of their bail bonds.

(Hemant Kumar Srivastava, J)

Rajendra Kumar Mishra, J :- I agree

(Rajendra Kumar Mishra, J)

SHAHZAD/-

AFR/NAFR	A.F.R.
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