

IN THE HIGH COURT OF JUDICATURE AT PATNA**Criminal Appeal (DB) No.532 of 1994**

Sessions trial no. 01/1994/01/1994 arising out of Obra PS.Case No. 122/1993 District-
AURANGABAD

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1. Ashok Upadhyay son of Adbhut Upadhyay

2. Uma Upaddyay son of Adbhut Upadhyay

Both resident of village Pakri P.S. Obra Dist Aurangabad

.... Appellant/s

Versus

State of Bihar

.... Respondent/s

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Appearance :

For the Appellant/s : Mr. Murli Manohar Pd. 2

Mr. Pramod Kumar

For the Respondent/s : Mr. S.C. Mishra

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CORAM: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA
and

HONOURABLE MR. JUSTICE RAJENDRA KUMAR MISHRA

CAV JUDGMENT

(Per: HONOURABLE MR. JUSTICE HEMANT KUMAR SRIVASTAVA)

Date: 01-10-2018

1. This criminal appeal has been preferred against the judgment of conviction dated 03.10.1994 and sentence order dated 05.10.1994 passed by the learned Addl. Sessions Judge I, Aurangabad in Sessions trial no. 01/1994/01/1994 by which and whereunder the learned Addl. Sessions Judge I, Aurangabad convicted appellant no.1, Ashok Upadhyay under section 302 read with section 34 of the Indian Penal Code and 27 of the Arms Act and convicted appellant no.2, Uma



Upadhyay under section 302 of the Indian Penal Code and 27 of the Arms Act and sentenced both the appellants to imprisonment for life for the offences punishable under sections 302 and 302/34 of the Indian Penal Code and to undergo rigorous imprisonment for seven years for the offence punishable under section 27 of the Arms Act. Both sentences were ordered to run concurrently. However, both the appellants were acquitted of the charge framed under section 148 of the IPC and furthermore, learned trial court by the same impugned judgment acquitted co-accused Nandlal Dubey, Dilip Kumar Dubey and Adhbut Dubey of the charge framed against them.

2. PW 10, Baleshwar Singh on 24.8.1993 at about 7.45 P.M along with his brother Bindeshwar Singh (PW2), Hari Narayan Singh (PW3) and his villager Bijendra Pandey (PW8) and Rajendra Dubey (PW4) along with dead body of the deceased -Jhalakdev Singh went to Obra police station and gave his fardbeyan to Ali Hussain, the then officer-in-charge of Obra police station, to this effect that on the same day i.e. 24.8.1993 at about 2 P.M, he was sitting at his door whereas his father Jhalakdev Singh was washing his she-buffalo. In the meantime, appellant Uma Upadhyay armed with pistol,



appellant Ashok Upadhyay armed with licensee gun of his father, accused Adbhut Upadhyay armed with lathi, accused Nandlal armed with lathi and accused Dilip Kumar Dubey @ Chotu armed with lathi came there and started abusing his father. He as well as his father Jhalakdev Singh made protest then accused Adbhut Upadhyay ordered others to kill Jhalakdev Singh and, thereafter, appellant Uma Upadhyay shot fire of his country made pistol on Jhalakdev Singh who sustained firearm injury on his right chest. Thereafter, appellant Ashok Upadhyay also shot fire of his gun as a result of which female members and children of his family sustained injury. He ran towards his father to save him but Nandlal and Dilip Kumar Dubey assaulted him by means of lathi. He further claimed that at the time of alleged occurrence, his brother namely, Bindeshwar Singh (PW2) and Hari Narayan Singh (PW3), villager Bijendra Pandey (PW8) and Rajendra Dubey (PW4) as well as Dilbahar Dubey (PW9) also reached there and saw the occurrence. Appellants and their associates took to their heels when people started arriving on the place of occurrence. PW 10, Baleshwar Singh claimed that his father died then and there after sustaining firearm injury and after occurrence, he came to the police station along with dead



body of his father. He, further, claimed that two months prior to the alleged occurrence, a quarrel had taken place between him and the appellants and other accused on the point of flow of water of drainage. He, further, claimed that in the morning of the alleged occurrence, FIR named accused Nandlal Dubey and Dilip Kumar Dubey had closed lane which was protested by him and his other family members apprehending flow of water towards their door and that is the reason of alleged occurrence.

3. On the basis of the aforesaid fardbeyan, Obra P.S. case no. 122/1993 for the offences punishable under sections 147, 148, 149, 302, 307, 323, 324 of the Indian Penal Code and 27 of the Arms Act was registered against the appellants and three FIR named accused.

4. PW 12 took charge of investigation and after completion of investigation, he submitted charge sheet against the appellants and three others for the above stated offences. The cognizance of the offences was taken and case was committed to the court of sessions, in usual course.

5. Accordingly, appellants along with three others were put on trial. Appellants and three acquitted accused stood charged for the offence punishable under section 302



read with section 149 of the Indian Penal Code whereas appellants, separately, charged for the offences punishable under sections 302, 148 of the Indian Penal Code and 27 of the Arms Act whereas acquitted accused, namely, Nandlal Dubey, Dilip Kumar Dubey and Adbhut Dubey jointly stood charged for the offences punishable under sections 323, 147 of the Indian Penal Code and acquitted accused Adbhut Dubey separately stood charged for the offence punishable under section 147 of the Indian Penal Code. The charges were read over and explained to the appellants and others to which they denied and claimed to be tried.

6. In course of trial, prosecution examined, altogether, 12 witnesses and also got exhibited carbon copy of inquest report as exhibit 1, FIR as exhibit 2, three injury reports as exhibit 3 series, post mortem report of the deceased -Jhalakdev Singh as exhibit 4 and requisitions regarding injury as exhibit 5 series. Apart from this, ten pellets got exhibited as material exhibit 1 and Card wed as material exhibit II. The statements of the appellants and others were recorded under section 313 of the Code of Criminal Procedure in which they denied the prosecution story and appellant Ashok Upadhyay, specifically, stated that on the alleged date



of occurrence, he was at village Nowbigaha district Rohtas whereas appellant Uma Upadhyay claimed that on the alleged date of occurrence, he was in Ranchi in connection with his job. Acquitted accused Adbhut Dubey, specifically, stated that he got some lands from his father-in-law and while he was in job, the deceased -Jhalakdev Singh used to look after his above stated lands. He, further, stated that after retirement, he himself started cultivating his lands and on the alleged date of the occurrence, he was at his room and heard the sound of firing and slogan towards north side of his village. He stated that he as well as other villagers went towards north side of the village and at about 250 yards from the village dead body of the deceased -Jhalakdev Singh was lying and thereafter, he returned to his home. He stated that there was terror of extremists in his area.

7. The defence also got examined three witnesses and got exhibited FIR of Obra P.S. case no. 99/1993 as exhibit A, signature of the informant of the aforesaid case as exhibit A/1 and supervision note of Dy.S.P, Daudnagar in Obra P.S. case no. 122/1993 as exhibit B. The learned trial court, after hearing the parties and after scrutinizing the evidences available on record, convicted the appellants



whereas acquitted three accused in the manner as I have stated above.

8. Learned counsel appearing for the appellants challenged the impugned judgment of conviction and sentence order arguing that learned trial court has not appreciated the evidences available on record in its right perspective as a result whereof learned trial court committed error in convicting and sentencing the appellants as prosecution could not succeed to prove its case beyond all shadow of reasonable doubts. He, further, submitted that the learned trial court failed to take note of the fact that not a single independent witness came forward to support the prosecution case, particularly, in the circumstance, when the prosecution claimed that alleged occurrence took place in village. He, further, submitted that all the so-called eye witnesses are interested witnesses as they are family members of the deceased. He, further, submitted that the prosecution also failed to prove the place of occurrence as neither any blood nor any sign of violence was found at the door of the informant nor I.O prepared any sketch map. He, further, submitted that it is a specific case of the defence that the deceased was killed by extremists and his dead body was



found lying at a distance of 250 yards from the village but the prosecution, intentionally, developed this story that there was heavy rain on the alleged date of occurrence and the aforesaid rain wasted away blood from the place of occurrence. He, further, submitted that according to the prosecution case, one Tunni Kumari had also sustained injury but injury report of the aforesaid Tunni Kumari has not been brought on record nor she was examined by the prosecution and so far as other so-called injured persons are concerned, their so-called injuries are superficial in nature but the learned trial court ignored the aforesaid fact. He, further, submitted that there are several contradictions in the depositions of prosecution witnesses and learned trial court disbelieved the story of prosecution in respect of participation of accused Nandlal Dubey, Dilip Kumar Dubey @ Chotu and Adbhut Dubey but on the same evidence, convicted and sentenced the appellants which is not in accordance with law. He, further, submitted that the learned trial court completely ignored the evidence of defence witnesses though it is well settled principle of law that evidence of defence witness can not be discarded only on the ground that said witness has been examined by the defence. He, further, submitted that the impugned judgment of



conviction and sentence order are not in accordance with law and, therefore, the impugned judgment of conviction and sentence order can not sustain in the eye of law.

9. On the other hand, learned Additional Public Prosecutor appearing for the State supported the impugned judgment of conviction and sentence order arguing that not only eye-witnesses but injured witnesses have supported the prosecution case and stated about participation of the appellants in the alleged crime. He, further, submitted that doctor, who did post mortem on the dead body of the deceased, proved antemortem injuries found on the person of the deceased and injuries found on the person of the deceased corroborate the statements of eye-witnesses as well as injured witnesses. He, further, submitted that the Investigating officer proved the place of occurrence and, therefore, there was nothing before the trial court to doubt the credibility of the prosecution witnesses. He, further, submitted that no doubt, three accused had been acquitted by the learned trial court by the impugned judgment but only on the ground that some co-accused have been acquitted, entire prosecution case can not be doubted. He, further, submitted that there is no scope for this court to interfere into the finding of the learned trial court



and this criminal appeal is liable to be dismissed.

10. Having heard the contentions of both parties, I went through the record. As I have already stated that prosecution examined, altogether, 12 witnesses, out of them PW1 is Akhilesh Pandey who is a witness on the inquest report and proved carbon copy of inquest report as exhibit 1, PW2 Bindeshwar Singh is son of the deceased -Jhalakdev Singh. This witness claimed himself to be eye-witness of the alleged occurrence, PW3, Hari Narayan Singh is another son of the deceased -Jhalakdev Singh and this witness, too, claimed himself to be eye-witness of the alleged occurrence, PW4, Rajendra Dubey is a hearsay witness. This witness claimed to have seen the deceased -Jhalakdev Singh when he was lying on the place of occurrence having sustained firearm injury. PW5, Sushma Devi and PW6, Kanti Devi claimed themselves as eye-witnesses and they stated that they had sustained firearm injury in the alleged occurrence, PW8, Bijendra Pandey also claimed himself to be eye-witness of the alleged occurrence. PW9 Dilbahar Dubey has been tendered whereas PW10 is the informant of the case. PW7 Dr. Arvind Kumar Singh claimed that he had examined PW 10, Baleshwar Singh, PW5 Sushma Devi and PW6 Kanti Devi on



24.8.1993 and this witness proved injury reports of the aforesaid injured persons as exhibit 3 series. PW11 Dr. Tarkeshwar Prasad did post mortem examination on the dead body of the deceased on 25.8.1993 and proved post mortem report of the deceased as exhibit 4 whereas PW12 Ali Hussain is the Investigating officer.

11. First of all, I would like to take up and discuss the evidences of PW2, PW3, PW5, PW6, PW8 and PW10 as all the aforesaid witnesses claimed themselves to be eye-witnesses of the alleged occurrence.

12. PW2 stated that in the evening of 24.8.1993, he returned from Obra market and reached at his home and he saw appellants and three others who came at his door and started abusing. He, further, stated that at that time, appellant Ashok Upadhyay was armed with licensee gun and appellant Uma Upadhyay was armed with pistol whereas remaining three others were armed with lathi. He, further, stated that his father was washing she-buffalo at his door and forbade the appellants and others and similarly, his brother Baleshwar Singh (PW10) also forbade the appellants and others but accused Adbhut Upadhyay ordered others to kill them and thereafter, appellant Uma Upadhyay fired of his pistol which



hit on left side of chest of his father as a result of which he fell down there. He, further, claimed that that his brother Baleshwar Singh (PW10) ran to save his father but accused Abdhut Upadhyay gave one lathi blow causing injury on the shoulder of Baleshwar Singh. Similarly, accused Nandlal Dubey and Chotu Dubey also gave lathi blow to him. He, further, stated that appellant Ashok Upadhyay opened fire of his licensee gun as a result whereof women and children sustained injury. However, in the meantime, villagers reached there and having seen the villagers, aforesaid persons fled away towards north east of the village. He, further, stated that his father died on the place of occurrence. He, further, stated that PW5 and PW6 and one Tunni Kumari sustained firearm injury. This witness also stated that a dispute was going on between the parties since last two months on account of flow of water of drainage from lane. He, further, claimed that in the morning of the alleged date of occurrence, appellants and their associates had stopped flow of water in lane as a result whereof water was likely to be accumulated in front of his door and for the aforesaid reason, hot exchange of words had taken place in the morning but subsequently, matter was pacified.



13. He, further, states that flow of water of lane comes from south side and goes towards north side and turns towards east side. He further states that after occurrence, he along with others went to Obra police station where his brother Baleshwar Singh (PW10) gave his statement. This witness proved fardbeyan as exhibit 2. This witness further states that he had made statement before the police that at the time of alleged occurrence his father was washing she buffalo at the door and Adhbhut Upadhyay had given one lathi blow on the shoulder of his brother whereas Nandlal and Chotu, too, assaulted him by lathi. This witness denies this fact that he had not made statement before police that water comes from south side and goes towards north side and thereafter, turns towards east side. This witness further states that house of Nandlal is situated towards east of his house. This witness further states that in front of his house, there is Sahan and the house of Gopal Dubey is towards east side of his Sahan. He states that the aforesaid house of Gopal was constructed one year before the alleged occurrence. He further states that towards north side of his Sahan and the house of Gopal, there was land of one Devnandan Dubey and there was ridge between his Sahan land and land of Devnandan and the said



ridge was one feet in height. This witness further states that towards west side of his house there is open land and after that there was a canal at a distance of 200 yards. This witness further states that his house has three doors i.e. towards east side, west side and north side. He further admits that house of accused Adbhut Upadhyay is towards east side of accused Nandlal and Gopal Dubey. He further states that water of the house of accused Adbhut Upadhyay flows towards north side and accused Adbhut Upadhyay had constructed the said house one year prior to the alleged occurrence. He further states that old house of Adbhut Upadhyay is towards south side of his new house and between two houses, there is a lane. He further states that two months prior to the alleged occurrence, a proceedings under section 107 of the Cr. P. C was initiated between the parties. He further states that when the appellants and other accused reached at his door, he was towards west side of his house. He further states that there was hand pipe at a distance of eight feet from western door of his house. He further states that when he reached towards west side of his house, he saw his brother Hari Narayan Singh standing near hand pipe. This witness states that when the appellants and other accused reached at his door, his father was alone



washing she buffalo. He states that his father sustained firearm injury from the distance of one Gaj and at that time his father's face was towards north side whereas person who shot fire on his father was facing towards south side. He further states that appellants and accused did not assault him. He further admits that except proceeding under section 107 of the Cr. P. C, there was no any other litigation between accused Adbhut Upadhyay and his family. He further admits that water of his house goes towards west side of his house.

14. PW 3, Hari Narayan Singh, is another son of the deceased and full brother of PW 2 and PW 10. This witness states that at the time of alleged occurrence, he was in courtyard of his house and having heard noise, he came out of his house and reached near hand pipe. He further claims that he saw the appellants and other accused reaching at his door and at that time appellant Ashok Upadhaya was carrying licensee gun whereas appellant Uma Upadhaya was carrying country made pistol and remaining persons were carrying lathi. This witness further claims that accused Adbhut Upadhyay ordered others to shoot and thereafter, appellant Uma Upadhaya shot fire which hit his father and appellant Ashok Upadhaya shot fire of his licensee gun which hit



women and one child. He further claims that other accused assaulted his brother by means of lathi. He states that having sustained firearm injury, his father fell down and died then and there. This witness claims that genesis of the occurrence was dispute of flow of water. This witness further states that on the alleged date of the occurrence, appellants had blocked the flow of water in front of the house of Gopal Upadhaya and Nandlal resulting accumulation of water in front of his door. This witness claims that his father and brother had made protest and that is the reason, in the evening of the alleged occurrence, appellants and other accused committed the above stated occurrence. This witness states that in front of his house there is Baithka and towards north side of Baithaka there is a Verandah and adjacent south to the aforesaid Baithaka, there is Jananikita and there are two courtyards in Jananikita. He further states that in south courtyard, female members of his family reside whereas in north courtyard male members of his family reside and they also keep grains and straw in north courtyard. He further states that there is a wall between the aforesaid courtyards and the aforesaid wall has one door. He further states that at the time of alleged occurrence, he was in north courtyard and his other family members such as women



and children were also in the same courtyard. He further states that his north courtyard has exit towards west side whereas his south courtyard has exit towards east side. This witness denies this fact that he had made statement before the police that when firing was made, he entered into his house. This witness further states that towards west side of his Baithika there was Nadh, Kutha etc. and towards south side of the aforesaid Nadh, there was bundle of straw. This witness further states that towards east side of his Baithika, there was a cemented Chobachcha. This witness further states that his father fell towards north side of his Baithika. This witness further states that his Chobachcha was at a distance of 4 to 5 hands from new house of Gopal and between Chobachcha and new house of Gopal, there was vacant land. This witness further states that door of the house of Gopal was towards east side of his house. This witness further states that his Baithika is one feet high from his Sahan and his Sahan is one hand high from drainage. He further states that appellants and other accused wanted to turn the flow of water towards west side of his Sahan and that was the reason proceeding under section 107 of the Cr. P. C was initiated. He further states that appellants and accused wanted to turn flow of water on the



land which was situated between house of Gopal and his cemented Chobachcha. This witness further states that appellants and other accused wanted to flow the water towards west side of new house of Gopal.

15. PW-5, Sushma Devi, is daughter of the deceased and claims herself to be injured and eye-witness of the alleged occurrence. This witness claims that at the time of alleged occurrence, her father was washing she buffalo whereas she was providing water to him from hand pipe and her brother Baleshwar Singh (PW-10) was sitting at his Veranda whereas her another brother Hari Narayan Singh (PW-3) was in the courtyard of his house. She further claims that appellants and other accused came there abusing her father and at that time appellant Ashok Upadhaya was carrying licensee gun and appellant Uma Upadhaya was carrying pistol whereas remaining accused were carrying lathi. This witness further claims that on the order of accused Adbhut Upadhyay, appellant Uma Upadhaya shot fire on her father as a result whereof, her father sustained firearm injury and fell down there. She further claims after that Nandlal and Chotu assaulted his brother Baleshwar Singh (PW-10) by means of lathi. She further states that appellant Ashok opened fire of his



gun which hit Kanti Devi (PW-6) and Tunni Kumari (not examined). She further states that appellant Ashok Upadhaya assaulted her by butt of the gun as a result of which, she sustained injury on her forehead. She further states that in the morning of the alleged occurrence, a dispute had taken place due to flow of drainage as appellants and other accused wanted to flow their water from her land which was opposed by her father. On being cross-examined by the defence, this witness denied this fact that she had not made statement before the police in the manner as she stated before the court. The defence, specifically, asked from this witness that she had made statement before police that when her father came out of the house after washing she buffalo, he started quarreling with the appellant Uma Upadhaya and in the meantime, accused Adbhut Upadhyay and Nandlal as well as Chotu came there and started assaulting his brother Baleshwar Singh and she as well as her father went to save Baleshwar Singh but in the meantime, appellant Uma Upadhaya opened fire as a result whereof, pellet hit her father and thereafter, appellant Ashok Upadhaya shot fire of his licensee gun which hit her father who having sustained firearm injury fell down on the ground and died then and there but she denied the aforesaid



statement. This witness further states that when her father sustained injury, she was also there but she did not try to flee from there nor her brother Baleshwar tried to flee from the place of occurrence. She further states that after occurrence, dead body of her father was taken to the police station and she went to the hospital. She further states that she got admitted in the hospital and remained there for whole night. She further states that in the next morning she went to the police station where she saw dead body of her father and thereafter, she again returned to the hospital. She further states that on the next day of the occurrence, she came to her home from hospital. She further states that dispute of flow of water was going on since last two months. She further states that Nandlal and Gopal Dubey wanted to flow the water forcibly through her land.

16. PW 6 Kanti Devi is daughter-in-law of the deceased and injured of this case. She also claims herself to be eye-witness to be alleged occurrence. This witness states that at the time of alleged occurrence, she was in courtyard of her house and having heard noise, she came out of her house and saw the occurrence. She narrated entire occurrence as stated by other eye-witnesses. This witness further states that



appellant Ashok Upadhaya opened fire to shoot her Bhaisur but pellet hit her and Tunni Kumari who was aged about two and half year at the time of alleged occurrence. This witness claims that accused Nandlal, Chotu and Adbhut Upadhyay assaulted her Bhaisur Baleshwar Singh (PW 10) by means of lathi. This witness states that she as well as Sushma Devi and Tunni Kumari sustained injury and they were got treated after occurrence. She further states that her statement was recorded at hospital. She also states that cause of occurrence was dispute of drainage. The defence drew her attention towards this fact that she had not made statement before police in course of investigation in the manner as she has stated before the court but she denied and stated that she had made statement before the police in course of investigation and narrated the manner in which occurrence had taken place. She further states that when she heard noise, she was in the north courtyard of her house. She further states that when she was in north courtyard of her house, she heard sound of firing twice. She further states that Hari Narayan Singh (PW 3) and Tunni were also present in the same courtyard. She further states that she as well as Hari Narayan Singh and other came out of the house after hearing noise and reached near hand



pipe. She further states that her father-in-law was lying at the door of the house. She further states when she reached near her father-in-law, her father-in-law was alive but within five minutes, he was taken from there. She further states that she went to hospital and reached hospital at about 7.00 P.M on the same day but when she reached at the hospital, she did not find her father-in-law. She further states that she got admitted in hospital along with Sushma Devi and Tunni and remained in the hospital till mid-day of the next day and thereafter, she along with injured Tunni and Sushma Devi returned to their home. She further states that doctor had taken out pellet from her nose. She further states that Sushma Devi had not sustained pellet injury but Tunni had sustained pellet injury and pellet was taken out from her cheek. She further states that Sushma Devi sustained injury by butt of the gun and she had disclosed the aforesaid fact to the police. She further states that there is a lane between the house of Nandlal and Gopal and there is a ridge in front of the aforesaid Gali for going towards canal and towards north side of aforesaid ridge, there is kitchen garden of Devanand Dubey.

17. PW 8, Bijendra Pandey, claims that on the alleged date of occurrence, he was returning from Obra



market along with PW 2 and reached towards west side of house of PW 2, he saw the appellants and other accused who were carrying pistol, gun and lathi. He further claims that deceased was washing his she-buffalo towards north of his Verandah. This witness further states that the appellants and other accused started abusing the deceased upon which deceased proceeded towards appellants and forbade them but on the order of accused Adbhut Upadhyay, appellant Uma Upadhyay shot fire of country made pistol which hit deceased and having sustained injury, deceased fell down. This witness further states that appellant Ashok Upadhyay, too, opened fire of his gun which hit female members of the family of the deceased and thereafter when Baleshwar Singh (PW 10) went near the deceased, Adbhut Upadhyay, Nandlal and Chotu assaulted him by means of lathi. He further states that appellant Ashok Upadhyay assaulted Sushma Devi by butt of the gun as result of which she sustained injury on her forehead. He further states that deceased died within five to ten minutes. This witness states that cause of occurrence was flow of water of drainage. This witness states that his statement was recorded by the police at about 8.00 PM on the date of alleged occurrence. This witness denies this fact that



he had not made statement before the police to this effect that at the time of alleged occurrence he was returning from Obra market along with PW 2 and reached towards west side of the house of PW 2 and witnessed the alleged occurrence. This witness also denies this fact that he had not claimed himself as eye-witness before the police rather he had made statement before the police that having heard sound of firing, he reached near the place of occurrence and saw the appellants Ashok Upadhyay and Uma Upadhyay as well as other accused fleeing from the place of occurrence having gun, pistol and lathi in their respective hands. This witness in his cross-examination states that appellants and other accused came from north side and when they reached near the deceased, they started abusing the deceased and at that time deceased was washing his she-buffalo and proceeded towards appellants but in the meantime, firing was made. This witness, further, states that at that time women and children of the family of the deceased were at Verandah of their house.

18. PW 10 (Baleshwar Singh) is the informant. This witness supports the prosecution case and claims that at the time of alleged occurrence, he was sitting at his Verandah on a Chowki whereas his father was washing she-buffalo in front



of the door. This witness further claims that on the order of co-accused Adbhut Upadhyay, Uma Upadhyay shot fire of his pistol which hit at the chest of his father and thereafter, appellant Ashok Upadhyay opened fire which hit women and one child. This witness further claims that co-accused Nandlal and Dilip Kumar assaulted him by means of lathi. This witness further claims that PW 2 Bindeshwar Singh and PW 4 Rajendra Dubey and PW 3 Hari Narayan Singh had witnessed the occurrence. This witness further claims that after the occurrence, he along with others with dead body of his father went to the police station where he made his statement. This witness also states that alleged occurrence took place due to flow of water of drainage. This witness also claims that inquest report of the deceased was prepared by the police in his presence and requisitions of injuries were issued by the police and he was, too, sent to hospital for treatment. He further claims that his treatment was done at the hospital and thereafter he took police to the place of occurrence. On being cross-examined this witness claims that appellants and other accused had put ridge in lane in his presence. This witness denies that his village as well as surroundings area of his village were Naxal affected. This witness also denies that his



father was in the hit list of nexalites and his father was killed by the nexalites when he had gone to see his field. This witness further states that when his father sustained firearm injury, appellants and other accused were towards south side of his father. This witness further states that he had shown the place of occurrence to the investigating officer. This witness denies this fact that he had not made statement before the police to this effect that it was Uma Upadhyay who shot fire upon his father and furthermore, he denies this fact that he had not made statement before the police that it was Ashok Upadhyay who fired causing injury to women and one child.

19. Death of the deceased is not in dispute but the appellants and other accused claimed before trial court that the deceased was killed on the same night at about 8.00 P.M by nexallites when the deceased had gone to see his field.

20. PW 11 Dr. Tarkeshwar Prasad claims that on 25.08.1993, at about 9.15 A.M he did post mortem examination on the dead body of the deceased Jhalakdeo Singh and found following injuries:-

- (i) One abrasion over right maxillary area 2 ½" x ½"
- (ii) One lacerated wound in the left hypochondria size of injury 1" X ¼" depth in abdominal cavity.

This witness proved postmortem report of the



deceased. The deposition of this witness goes to show that two injuries were found on the person of the deceased and according to this witness injury no. 2 was caused by pistol from very close range whereas injury no. 1 might be caused by fall. The testimony of the aforesaid witness supports this fact that the deceased sustained firearm injury and died due to the aforesaid firearm injury.

21. PW-2, PW-3, PW-5, PW-6, PW-8 and PW-10 claimed themselves to be eye witnesses of the occurrence and out of the aforesaid prosecution witnesses, PW-5, PW-6 and the informant PW-10 also claimed themselves to be injured of the present occurrence.

22. PW-7 Dr. Arvind Kumar Singh claims in his deposition that on 24.08.1993 at about 10 P.M., he examined PW-10 and found following injuries:-

(i) One radish swelling abrasion left elbow point measuring 2"X1".

(ii) One abrasion above the left shoulder measuring 2"X1".

(iii) One radish swelling above the right elbow joint measuring 2"X1".

PW-7 opined that all the above stated injuries were simple in nature and caused by hard and blunt substance. This



witness further claims that on the same day at about 7.30 P.M, he examined Sushma Devi (PW-5) and found following injuries :-

- (i) One incised wound on the frontal region of the scalp of the left side measuring $1\frac{1}{2}$ "X $\frac{1}{6}$ " into skin deep.
- (ii) One radish swelling on the right side back in lower portion measuring 1 "X $\frac{1}{2}$ ".

He opined that both injuries were simple in nature but injury no. 1 was caused by sharp cutting weapon and injury no. 2 was caused by hard and blunt substance. This witness further states that injury no. 1 might be caused by butt of the gun, if it is blending with metal. This witness further states that on the same day at about 7.40 P.M., he examined PW-6 Kanti Devi and found following injuries:-

- (i) One abrasion with black and blister margin on the left side of the nose measuring normalized seed size.

This witness opined that aforesaid injury was simple in nature caused by gun. This witness on being cross-examined by the defence stated that the above stated injured were referred by the police and on the reference of the police, he examined the aforesaid witnesses.

23. PW-12 has admitted in his evidence that he had issued requisitions of the injury of the injured on 25.08.1993



whereas PW-5 and PW-6 were examined by PW-7 on 24.08.1993.

24. The learned trial court has doubted about genuineness of the injury reports of PW-5, PW-6 and PW-10 on account of aforesaid laches of the prosecution case as well as on account of minor contradictions of the prosecution witnesses but, in my view, the aforesaid laches are not sufficient to doubt the injury reports of PW-6, PW-7 and PW-10 because PW-6 and PW-7 very clearly stated in their testimonies that they went to hospital and got admitted themselves in the hospital in the night of 24.08.1993 and therefore, it is quite natural that PW-5 and PW-6 were examined by PW-7 on 24.08.1993. Furthermore, PW-10 states that after recording his fardbeyan, he was referred to hospital where he was examined by the doctor.

25. PW-12 states that he visited the place of occurrence in the night of alleged occurrence and later on, in the next morning, he went to the hospital where recorded the statements of the witnesses and, therefore, it is obvious that PW-12 issued requisitions on 25.08.1993 and prior to issuance of the requisitions, witnesses had already been examined by PW-7 and therefore, even if the date of the



requisitions issued by PW-12 creates any doubt, then also, the aforesaid minor laches of the prosecution case does not go to the root of the case and the injury reports of PW-5, PW-6 and PW-10 establish beyond all reasonable doubt that aforesaid prosecution witnesses had sustained injuries in the alleged occurrence and furthermore, it is also established by the testimonies of the aforesaid witnesses that they were present on the place of occurrence and had seen the alleged occurrence.

26. The case of the prosecution witnesses is that the alleged occurrence took place in open land situated in front of the house of the deceased. The injury of PW-5, PW-6 and PW-10 establish their presence in their house at the time of alleged occurrence and, therefore, it is quite natural that they came out of the house after having heard the noise and, therefore, in my view, the prosecution has successfully established this fact that PW-5, PW-6 and PW-10 had not only sustained injury in the aforesaid occurrence rather they had seen the appellants killing the deceased and, hence, I feel no hesitation to hold that the learned trial court rightly came to the conclusion that the aforesaid witnesses were present at the place of occurrence and witnessed the occurrence.



27. PW-2 has also claimed that he along with PW-8 had gone to Obra market and while they were returning and reached near the house of PW-2, they saw the appellants and other accused, standing near the house of PW-2. PW-2 and PW-8 both above stated witnesses claimed themselves to be eye witnesses of the alleged occurrence and except some minor contradictions as well as improvements in their statements, there is nothing in their deposition on the basis of which statements of aforesaid witnesses could be discarded.

28. Learned counsel for the appellants submitted that PW-2 is son of the deceased and it is surprisingly enough that he was spared by the appellants, particularly, in the circumstance when he was also present on the place of occurrence and, therefore, the aforesaid circumstance shows that PW-2 is not eye witness of the alleged occurrence. He further submitted that so far as PW-8 is concerned, witnesses admitted that PW-8 had inimical term with the appellants and, therefore, no reliance can safely be placed upon the deposition of PW-2 and PW-8 but I am unable to accept the aforesaid submission because there is nothing in the evidence of the aforesaid witnesses to disbelieve their testimonies.

29. Prosecution claims that the alleged occurrence



took place in front of the house of the deceased and the aforesaid fact has been proved by PW-12 who has described the place of occurrence in his deposition. The prosecution witnesses also described the place of occurrence which tallies with the description given by PW-12 in respect of place of occurrence and, therefore, it can not be said that the prosecution could not succeed to prove the place of occurrence.

30. No doubt, PW-12 did not find any blood on the place of occurrence but PW-12 in his examination clearly stated that in the night of the alleged date of occurrence, there was heavy rain in the area and PW-12 has stated that when he visited the place of occurrence, there was heavy rain and, therefore, sign of blood might be washed away from the place of occurrence. Therefore, in my view, on account of non-finding of blood on the place of occurrence, entire prosecution case can not be thrown out.

31. It has also been argued on behalf of the appellants that the prosecution could not succeed to prove motive of the occurrence as flow of water of the lane was not towards the house of the appellants and, therefore, there was no question of accumulation of water in front of the house of



the appellant but I am not at all convinced with the aforesaid submissions because on the basis of description of place of occurrence given by the prosecution witnesses, it is clear that due to blockage of flow of water in lane by the appellants and other accused, there was apprehension of accumulation of water in front of the house of the deceased. In this regard, PW-2 has stated that house of the accused Nandlal is situated towards east side of his house and he further stated that Sahan is situated towards north side of his house and towards east side of aforesaid Sahan, there is house of Gopal Dubey and the house of Gopal Dubey had been constructed one year prior to the alleged occurrence and prior to construction of house Gopal Dubey, water of the village was flowing through the land on which the house of Gopal Dubey was constructed. This witness further stated at para 17 of his deposition that house of accused Adbhut Upadhaya is situated towards east side of house of Nandlal and Gopal Dubey and water of accused Adbhut Upadhaya flows towards north side. PW-3 at para 22 of his cross-examination states that appellants and other accused wanted to flow water through his land which is situated in front of his house.

32. PW-12 has admitted at para 8 of his deposition



that there is a lane adjacent to the house of PW-10 and water of the aforesaid lane goes from south side to north side and aforesaid lane in north side turns towards east side near the house of Gopal Dubey. PW-12 further states that he found ridge of soil near the aforesaid turning point of the lane. Therefore, the aforesaid statement of the prosecution witness clearly establishes that due to stoppage of flow of water at turning point of lane situated east of the house of PW-10, there was every possibility of accumulation of water and in my view, it can not be said that prosecution failed to prove genesis of the occurrence rather, in my view, prosecution has not only proved genesis of the occurrence but also place of occurrence.

33. No doubt, there are some minor contradictions in the deposition of the prosecution witnesses but the aforesaid contradictions do not go to the root of the prosecution case and only on the ground of minor contradictions in the statements of prosecution witnesses, entire prosecution case can not be thrown out.

34. As I have already stated that PW-2, PW-3, PW-5, PW-6 and PW-10 are family members of the deceased whereas PW-4 and PW-8 are neighbours of the appellants and



the deceased. In their depositions, PW-4 and PW-8 admitted previous litigations with the appellants and other accused but only on the ground that PW-4 and PW-8 had litigating term with appellants and other convicts and PW-2, PW-3, PW-5, PW-6 and PW-10 are family members of the deceased, the testimonies of the aforesaid prosecution witnesses can not be doubted and rejected unless something alarming is noted in the testimonies of the aforesaid prosecution witnesses. As I have already stated that the aforesaid prosecution witnesses have fully supported the prosecution case and there is nothing in the testimonies of the aforesaid prosecution witnesses to disbelieve their statements and therefore, in my view, statements of the aforesaid prosecution witnesses can not be rejected.

35. No doubt, DW-1 claims to have seen dead body of the deceased lying in a field, situated at a distance of 250 yards from the house of the deceased but admittedly, DW-1 is not co-villager of the deceased and appellants and the learned trial court doubted the statement of DW-1 on various grounds. In my view, the learned trial court rightly discarded testimony of DW-1. Furthermore, I find that DW-2 and DW-3 have proved certain documents to show this fact that prior to the



alleged occurrence, some persons were killed by nexalites but that is not sufficient to establish this fact that the deceased was, too, killed by the nexalites and moreover, except dispute of flow of water as well as one litigation in respect of aforesaid dispute of flow of water, there was no any other litigation or enmity between the appellants and the deceased and, therefore, it is mere a hypothesis that the deceased was killed by nexalites and the appellants and others were implicated by the informant due to enmity.

36. Learned trial court has convicted the appellants under section 302/34 of the Indian Penal Code and 27 of the Arms Act and I do not find any ground to interfere into the impugned judgment of conviction and sentence order and, accordingly, I feel no hesitation to dismiss this appeal.

37. On the basis of the aforesaid discussions, this appeal is dismissed and the impugned judgment of conviction and sentence order are, hereby, confirmed. Appellants are on bail. Their bail bonds stand cancelled and they are directed to surrender before the trial court within six weeks from the date of receipt of copy of the judgment to the trial court and if appellants fail to do so, the learned trial court shall take appropriate steps to procure the remand of the appellants so



that they could serve their sentence.

(Hemant Kumar Srivastava, J)

I agree

(Rajendra Kumar Mishra, J)

AFR/NAFR	NAFR
CAV DATE	09.04.2018
Uploading Date	01.10.2018
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Shahid

