

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.362 of 2013

Arising Out of PS. Case No.-253 Year-2009 Thana- NOORSARAI District- Nalanda

Ashok Yadav , son of Krishna Yadav, Resident Of Village- Mathurapur, P.S.-
Noorsarai, District- Nalanda.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

Criminal Appeal (DB) No. 194 of 2013

Arising Out of PS. Case No.-253 Year-2009 Thana- NOORSARAI District- Nalanda

1. Sulo Yadav @ Sulla Yadav, son of Saryug Gope, Resident Of
Village- Milkipar, Police Station- Noorsarai, District- Nalanda
2. Munna Yadav , son of Krishna Yadav
Resident Of Village- Mathurapur, Police Station- Noorsarai,
District- Nalanda

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 362 of 2013)

For the Appellant/s	:	Sri Rajendra Prasad, Senior Advocate Sri Pramod Kumar, Advocate Sri Ritesh Kumar, Advocate Sri Rajeev Kumar, Advocate Sri Rajkishore Prasad, Advocate
---------------------	---	---

For the Respondent/s	:	Sri Ajay Mishra, A.P.P.
----------------------	---	-------------------------

(In Criminal Appeal (DB) No. 194 of 2013)

For the Appellant/s	:	Sri Rajendra Prasad, Senior Advocate Sri Pramod Kumar, Advocate Sri Ritesh Kumar, Advocate Sri Rajeev Kumar, Advocate Sri Rajkishore Prasad, Advocate
---------------------	---	---

For the Respondent/s	:	Sri Ajay Mishra, A.P.P.
----------------------	---	-------------------------

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 11-05-2018



1. In aforesaid both Appeals appellants were tried together and convicted and sentenced by a common judgment passed in Noorsarai P.S. Case No. 253 of 2009 by Sri Ajit Kumar Sinha, learned 1st Additional Sessions Judge –cum- Special Judge, Nalanda at Biharsharif (hereinafter referred to as the “trial judge”) , and as such, both Appeals were heard together and are being disposed of by this common judgment.

2. Appellant / Ashok Yadav in CR. APP (DB) No. 362 of 2013 was convicted on 25.02.2013 for commission of offence under Section 302 of the Indian Penal Code, 1860 (hereinafter referred to as the “I.P.C.”) and Section 27 of the Arms Act, 1959 (hereinafter referred to as the “Arms Act”). He was further convicted for commission of offence under Section 3(1)(x) , 3(ii) (v) of the Scheduled Castes And Scheduled Tribes (Prevention of Atrocities), Act 1989 [hereinafter referred to as the “S.C.S.T. Act”] whereas, two appellants i.e. Sulo Yadav @ Sulla Yadav and Munna Yadav in CR. APP (DB) No. 194 of 2013 were held guilty for commission of offence under Section 302/34 of the I.P.C. and Section 3(i)(x), 3(ii)(v) of the S.C. S.T. Act. By order of sentence dated: 05.03.2013 appellant / Ashok Yadav under Section 302 of the I.P.C. was directed to undergo rigorous imprisonment for life and pay a fine of Rs. 1,000/-. Under Section 27 of the Arms Act,



he was directed to undergo rigorous imprisonment for three years and for commission of offence under Section 3(i)(x) of S.C. S.T. Act he was directed to undergo imprisonment for one year. For offence under Section 3(ii)(v) of S.C. S.T. Act appellant / Ashok Yadav was directed to undergo rigorous imprisonment for life. In default of payment of fine he was directed to further undergo rigorous imprisonment for three months. Two appellants i.e. Sulo Yadav @ Sulla Yadav and Munna Yadav in CR. APP (DB) No. 194 of 2013 by order dated: 05.03.2013 were sentenced to undergo imprisonment for life under Section 302/34 of the I.P.C. and to pay a fine of Rs. 1,000/-. Under Section 3(1)(x) of S.C. S.T. Act they were directed to undergo rigorous imprisonment for one year and under Section 3(ii)(v) of S.C. S.T. Act they were directed to undergo rigorous imprisonment for life and in default of payment of fine they were directed to further undergo rigorous imprisonment for three months. All the sentences were directed to run concurrently.

3. Short fact of the case is that on 20.12.2009 at about 6.45 A.M. Sub Inspector of Police Sri Shashi Kapoor Paswan (P.W. 12) of Noorsarai Police Station , district- Nalanda recorded 'fardbyan' of Shyampari Devi (P.W. 8) , aged about 40 years, wife of deceased Onkar Paswan of village: Mathurapur, P.S. –



Noorsarai. The 'fardbyan' was recorded at the door of Shyampari Devi. In the 'fardbyan' informant disclosed that ten days prior to the date of occurrence her husband had demanded his wages for doing some agriculture work i.e. uprooting of 'Mori' of appellant /Ashok Yadav, whereupon her husband was abused and chased by appellant / Ashok Yadav. He was abused by way of using his caste name and it was told that being member of 'Paswan' caste how he dared to come to his door demanding wages. Her husband thereafter returned back and told all those facts to the informant. Again, on 15.12.2009 her husband went to the house of Ashok Yadav for his wages, however, family members of Ashok Yadav namely: Munna Yadav [appellant no. 2 in CR. APP (DB) No. 194 of 2013] , Ranjeet Yadav [both sons of Krishna Yadav] , Sulla Yadav [appellant no. 1 in CR. APP. (DB) No. 194 of 2013] son of Saryug Gope, on being demanded wages again abused her husband and threatened that if subsequently he demands wages he would be gunned down. The informant stated that on 20.12.2009 in the morning at about 6.00 her husband Onkar Paswan left his house for attending his natural call and while he sat beneath 'Banyan' tree , which was in the Southern side of her house, Ashok Yadav carrying country made rifle, Munna Yadav carrying in hand country made Katta, Ranjeet Yadav



having Katta , Sulla Yadav having Katta and son of Sulla Yadav aged about nineteen years, Krishna's brother-in-law, son of Rajendra Gope and cousin brother of Ashok and brother –in-law of Ashok Yadav, resident of Lalman Bigha, P.S. Parwalpur and brother-in-law of Munna Yadav all carrying country made rifle in their hand and country made Katta forming unlawful assembly in a pre -planned manner immediately after noticing the deceased started abusing him and said that even being member of 'Paswan' caste how he was daring to come to their house demanding wages. It was ordered to kill him. Thereafter, Ashok Yadav with a view to terrorize opened fire from his country made rifle. On hearing sound of firing villagers and family members of informant arrived near the 'Banyan' tree. The informant requesting Ashok Yadav / appellant touching his feet and asked to spare her husband. She further tried to persuade Ashok Yadav that her husband will never demand any wages, however she was given blow of leg on her back side and thereafter, showing rifle to informant Ashok Yadav gave one shot of firing from his rifle on the left side of the chest of her husband whereby her husband died at the place of occurrence itself. After his murder, the accused persons chased informant and others also by way of firing and threatened that no 'Paswan' would give evidence, otherwise he



will be dealt with in the same manner . The informant claimed that entire occurrence was seen by her other family members and villagers. After committing murder all the accused persons by way of abusing left for their houses. The reason for the occurrence was explained by the informant i.e. demand of wages. The said 'fardbyan' was read over to her and after finding the same as correct she put her R.T.I. on the 'fardbyan'. As a witness Dhananjay Paswan (P.W. 4), son of deceased and informant also put his signature. On the basis of the said 'fardbyan' on 20.12.2009 itself at 12.45 P.M. a formal F.I.R. vide Noorsarai P.S. Case No. 253 of 2009 was registered for the offence under Sections 147, 148, 149, 302 of the I.P.C., Section 27 of the Arms Act and Section 3(ii), X of the S.C. S.T. Act against eight accused persons namely: (1) Ashok Yadav [appellant in CR. APP (DB) No. 362 of 2013, (2) Munna Yadav [appellant no. 2 in CR. APP (DB) No. 194 of 2013], (3) Ranjeet Yadav, (4) Sulla Yadav [appellant no. 1 in CR. APP (DB) No. 194 of 2013], (5) son of Sulla Yadav, (6) brother-in-law of Krishna Yadav, (7) brother-in-law of Ashok Yadav, and (8) brother-in-law of Munna Yadav.

4. After registering F.I.R. the case was investigated and on 8.3.2010 first charge- sheet was submitted against: Munna



Yadav and Sulla Yadav, both appellants in CR. APP (DB) No. 194 of 2013 keeping investigation pending against others. After submission of charge- sheet, on 27.4.2010 learned Chief Judicial Magistrate took cognizance of the offences. Thereafter, on 6.7.2010 first supplementary charge-sheet was submitted against Ashok Yadav [appellant in CR. APP (DB) No. 362 of 2013] showing one Pappu Yadav as absconder, whereas other F.I.R. named accused persons were not forwarded to face trial. Subsequently, on 3.7.2010 the case was committed to the court of Sessions. Since the case was also for commission of offence under the S.C. S.T. Act the trial commenced in the Court of Special Judge, Nalanda. On 27.12.2010 charge against appellant / Ashok Yadav was framed for offence under Section 302 of the I.P.C. and Section 27 of the Arms Act and joint charge against all the three appellants were framed under Section 302/34 of the I.P.C. and Section 3(ii)(v), 3(i)(x) of the S.C. S.T. Act.

5. During trial to prove its case on behalf of the prosecution altogether twelve witnesses were examined. Out of twelve witnesses, the informant - Shyampari Devi [wife of deceased] was examined as P.W. 8. P.W. 1 (Shailesh Kumar) is co-villager and examined as eyewitness. Chameli Devi, wife of elder brother of deceased was examined as P.W. 3 claiming to be



eyewitness. Dhananjay Kumar [son of deceased, P.W. 4] and P.W. 9 (Randhir Paswan, nephew of deceased) were examined as eye witnesses. P.W. 11 (Ramashraya Paswan) as a formal witness had proved formal F.I.R., 'fardbyan' and signature of Dhananjay Paswan on 'fardbyan' which were marked as Ext. 2, 3 and 4 respectively. P.W. 10 (Dr. Faisal Arshad) at the relevant time was posted as Civil Assistant Surgeon, Sadar Hospital Biharsharif and conducted post -mortem examination on the dead body of deceased and he proved the post -mortem report, which was marked as Ext. 1. P.W. 12 (Shashi Kapoor Paswan) who had recorded 'fardbyan' is also the Investigating Officer , however, P.W. 2 (Naresh Ram, co-villager) , P.W. 5 (Umesh Ram, co-villager) , P.W. 6 (Sakaldeep Yadav, co-villager) and P.W. 7 (Ballab Yadav, co-villager) have not supported the prosecution case, and as such, they were declared as hostile witnesses. After conclusion of prosecution evidence on 2nd February, 2013 statement of accused /appellants under Section 313 of the Cr.P.C. was recorded in which they claimed to be innocent. In this case during trial no defence witnesses were examined.

6. Sri Rajendra Prasad , learned senior counsel, assisted by Sri Pramod Kumar, learned counsel for the appellants after placing entire evidence has argued that prosecution has not



established its case beyond all reasonable doubt, rather it was a case of no evidence, even then, the learned trial judge has passed judgment of conviction and sentence. At the very outset, it was emphasized that it appears that husband of informant was done to death in the night when none had seen the occurrence and subsequently in the morning when dead body of her husband was found in a field a case was made out as if he was done to death by the appellants conspiring with each other.

7. Sri Rajendra Prasad, learned senior counsel for the appellants submits that in this case the prosecution has miserably failed to establish the genesis of the occurrence. He submits that though it was claimed by the informant or prosecution that occurrence had taken place due to demand of wages by the husband of informant, case which was made out by the prosecution was that ten days prior to the occurrence while the deceased had gone to the house of appellant /Ashok Yadav for demanding his wages he was abused with caste name. It has been argued that it is case of the informant that wage was being demanded by the deceased for doing the work of uprooting 'Mori'. It was argued that in the month of November - December there was no reason for plantation of paddy. It has been argued that during November- December season it was time of



harvesting paddy, not plantation of paddy. He highlights that P.W. 8 (informant) has categorically deposed that deceased about ten days prior to the occurrence had gone for demanding wages. As per learned senior counsel for the appellants since it was not season of plantation of paddy it appears that genesis has not been proved by the prosecution. He further submits that even for the time being if it is assumed that deceased was abused for demanding wages, on such trivial issue, there was no reason for forming an unlawful assembly for killing the husband of informant that too suddenly in the morning while the husband of informant had gone to attend call of nature. Accordingly, it has been argued that trivial nature of accusation may not be termed as a motive for committing such occurrence.

8. Sri Rajendra Prasad, learned senior counsel for the appellants further submits that prosecution case appears to be doubtful from the very inception . He submits that informant in her 'fardbyan' had specifically disclosed as if occurrence was committed by eight F.I.R. named accused persons, however, during investigation accusation against only three accused, who are appellants before this court, have been found true and other accused persons were found innocent. According to Sri Rajendra Prasad , learned senior counsel for the appellants if the very



inception of the case i.e. institution of 'fardbyan' was itself doubtful, certainly in such case there was reason to raise serious doubt on other subsequent events. It has also been argued that the witnesses who have supported the prosecution case are non else but close relatives of the deceased and informant, and as such, their evidence is required to be examined cautiously. It has been argued that being close relatives of the deceased their evidence, without any corroborative evidence, is not required to be relied upon.

9. Learned senior counsel for the appellants has also argued that in the case prosecution has miserably failed to establish the place of occurrence. According to Sri Rajendra Prasad , learned senior counsel for the appellants in the case, as per first version of the informant occurrence had taken place beneath 'Banyan' tree while the husband of informant had sat there for attending call of nature, however, dead body of deceased was found in the field of one Upendra Pandit. It has been argued that on the one hand it was alleged that dead body was found in the field of Upendra Pandey, in cross- examination the Investigating Officer has stated that dead body was found in the field of Subelal Paswan. There is some evidence which suggests that dead body was found near the well of the field. According to learned



senior counsel for the appellants in the case the Investigating Officer has not prepared any seizure list to show as to whether blood soaked soil was found or not. According to learned senior counsel since it was the case of the prosecution that the husband of the informant was done to death by fire arm injury and he died on the spot itself, there was every possibility to find huge quantity of blood at the place of occurrence particularly in a case where immediately after the occurrence Police had arrived at the place of occurrence. However, in the case no seizure list showing seizure of blood soaked soil or blood has been brought on record. Sri Rajendra Prasad, learned senior counsel for the appellants has specifically referred to evidence of P.W. 8. In its paragraph no. 1 as per informant (P.W. 8) occurrence had taken place beneath the 'banyan' tree, whereas P.W. 1 in paragraph no. 4 has deposed that Onkar (deceased) was dragged to the field of Upendra Pandit Ji and thereafter he was gunned down. Similar, evidence has come in paragraph no. 1 of P.W. 3, paragraph 1 of P.W. 4, whereas P.W. 12 (the Investigating Officer) in paragraph no. 5 of his cross-examination has stated that dead body was found in the field of one Subelal. According to learned senior counsel for the appellants on examination of aforesaid evidences it appears that as per evidences dead body was found at three different places



which creates serious doubt on the prosecution case. Learned senior counsel for the appellants has also argued that the prosecution case appears to be doubtful due to the reason that purposely the prosecution has withheld number of witnesses. According to learned senior counsel for the appellants one of the witnesses- Dharmendra, whose name has come in the evidence of P.W. 1 in paragraph no. 10 of cross-examination has stated that Dharmendra had telephonically informed the Police however Dharmendra was not examined as prosecution witness and similarly name of one Pinki has come in the evidence of P.W. 4 in paragraph no. 3 of cross-examination and in paragraph no. 1 of P.W. 8 stating therein that Pinki had followed the dead body to Police Station as well as to the hospital. Subelal Paswan in whose field as per Investigating Officer dead body of husband of informant was found was not examined, whereas, P.W. 9 in paragraph no. 2 has stated that he was also there. Learned senior counsel submits that in this case Chaukidar namely Balgovind was also not examined by the prosecution, whereas P.W. 8 in paragraph no. 5 of her evidence has stated that at the place of occurrence Balgovind (Chaukidar) was also present.

10. Sri Rajendra Prasad, learned senior counsel for the appellants has further argued that the post-mortem examination



report itself establishes that the time of occurrence as has been alleged by the prosecution is not correct. It has been argued that it is case of the prosecution that occurrence had taken place early in the morning i.e. at 6 A.M. in the winter season i.e. 20.12.2009 that too while deceased had sat beneath 'Banyan' tree for attending his natural call. During post-mortem examination in the stomach of deceased about three ounce of semi digested food was found. As per evidence in cross-examination of P.W. 10 (Dr. Faisal Arshad) it is evident that semi digested food can be found if within 3-4 hours prior to death deceased had taken food. Since in the case alleged occurrence had taken place at 6.00 A.M. in the morning, in the winter season there was no possibility that deceased would had taken food in early morning i.e. in between 2-3 A.M. This evidence has further been corroborated from the fact that during post-mortem examination 'rigor mortis' on whole limb of the deceased was noticed by the doctor conducting autopsy. Sri Rajendra Prasad, learned senior counsel for the appellants by way of referring to page no. 125 of Modi's Medical Jurisprudence and Toxicology 20th edition submits that normally complete rigor mortis appears on the dead body after about twelve hours from the death, however in the present case autopsy was conducted at 1.45 P.M. and alleged occurrence had taken place at 6.00 A.M. and



at the time of autopsy rigor mortis on whole limb of the deceased was found which suggests that occurrence had not taken place at 6.00 A.M. rather it had taken place much prior to the time alleged by the prosecution. On aforesaid grounds it has been argued that prosecution has not been able to establish its case beyond all reasonable doubt rather it was a case of complete false implication.

11. Sri Rajendra Prasad , learned senior counsel for the appellants by way of referring to the statement of appellants recorded under Section 313 of the Cr.P.C. has argued that even this provision was not truly complied. According to him after conclusion of prosecution evidence it is mandatorily required that prosecution will place entire circumstances and evidences to the accused only thereafter his statement under Section 313 of the Cr.P.C. was required to be recorded, however, in the present case, in casual manner, succinctly it was stated as if all the appellants with common intention had killed husband of informant without explaining specific circumstances and evidences. Accordingly, in view of the judgment of the Hon'ble Supreme Court reported in **AIR 1984 SUPREME COURT 1622 Shard Birdhichand Sarda v. State of Maharashtra** entire trial has been vitiated.



12. Sri Ajay Mishra, learned Additional Public Prosecutor has opposed the Appeal, however, he was not in a position to satisfy the Court as to under what circumstances when in the case alleged occurrence had taken place at 6.00 A.M. early in the morning in stomach of the deceased semi digested food to the tune of three ounce was found. Moreover, he was also not in a position to satisfy the Court regarding appearing of rigor mortis on whole limb of the deceased at the time of autopsy which was done much before 12 hours from the time of death .

13. Besides hearing learned counsel for the parties, we have minutely examined entire evidences i.e. both oral and documentary evidence and after examining the same *prima facie* we are satisfied that prosecution has not been able to establish its case beyond all reasonable doubt. However, before proceeding it is necessary to examine what the informant has deposed during trial. The informant was examined as P.W. 8 and in her evidence she deposed that occurrence had taken place at 6.00 in the morning. At the time of occurrence her husband was sitting beneath 'banyan' tree which was near her house. At that very time she was in her house and after hearing sound of firing she came out and noticed that appellant / Ashok Yadav had given shot of firing on her husband. With Ashok Yadav accused -Munna Yadav, Ranjeet



Yadav, Sulla Yadav, son of Sulla Yadav, brother- in- law of Munna Yadav ('shala'), maternal uncle of Munna ('mamu') were there. She raised 'hulla' on which villagers assembled there. Amongst them Ramashish (not examined), Yogendra (not examined) were also there. She stated that she herself went to Police Station and informed the Police. Thereafter, she returned back with Daroga Ji and dead body was shown to him which was sent for post -mortem examination. Police recorded statement of Pinki Devi (not examined), Chameli Devi (P.W. 3) and Dhananjay (P.W. 4). She also identified accused persons in court. In cross-examination in paragraph no. 4 of her cross-examination she reiterated that she herself had given information. In paragraph no. 5 of cross-examination she states that she heard sound of firing while she was inside house. Her attention was also drawn to her previous statement recorded under Section 161 of the Cr.P.C. As per her evidence occurrence had taken place beneath 'banyan' tree and at the time of occurrence she was inside house and after hearing sound of firing she came out and she claimed that in her presence entire occurrence had taken place. P.W. 1 (Shailesh Kumar) who had initially claimed to be co-villager in his evidence stated that on 20.12.2009 at about 6.45 A.M. occurrence had taken place. He stated that at that very time Onkar Paswan (deceased) was moving



for attending call of nature 14-15 steps away of Southern side of his village beneath banyan tree and as he sat. Immediately thereafter accused persons by firing indiscriminately arrived there. Ashok Yadav , Munna Yadav, Ranjeet Yadav, Sulla Yadav, son of Sulla Yadav, brother –in-law of Ashok Yadav of village Balvanbiga, brother – in law of Krishna Yadav (‘bahnoi’) from Prahladnagar, brother –in- law of Munna Yadav arrived there. Ashok Yadav abused by using ‘caste’ name and said that he (informant’s husband) was demanding wages. Subsequently, they caught arm of Onkar Paswan (deceased) and tried to move. Ashok Yadav was carrying country made rifle in his hand. Munna, Ranjeet Yadav and others were carrying pistol. In paragraph no. 4 he further deposed that accused persons dragged deceased (Onkar) to the field of Upendra Pandit Ji and thereafter , Ashok gave shot of firing on the chest of Onkar whereby he immediately fell down and died. On hearing sound of firing he and Shyampari Devi (wife of deceased) came. Again he stated that Shyampari Devi was already there. Dhananjay (P.W. 4) arrived. He stated that Shyampari was requesting for leaving her husband and also assuring that no wages will be demanded. After his arrival Police too arrived there. In paragraph no. 9 of his cross-examination he stated that deceased was killed in the field of Pandit Ji. In



paragraph no. 10 of cross- examination he stated that Onkar (deceased) in relation was his uncle. In paragraph no. 10 of his cross- examination he further stated that Police arrived on telephone call, however , he stated that he was not aware as to whether Dharmendra (not examined) had telephone or not. He denied the suggestion that he had falsely deposed and whatever he deposed that was deposed as instructed by wife of the deceased. P.W. 3 (Chameli Devi) has also claimed to be eye witness as if in her presence the deceased was done to death. P.W. 3 (Chameli Devi) is non-else but wife of elder brother of deceased and 'gotni' of P.W. 8. Though she claimed that in her presence occurrence had taken place, the informant (P.W. 8) in her 'fardbyan' had not whispered as to whether this witness was there or not. Similarly, P.W.4 (Dhananjay Kumar , son of deceased) has also claimed to be eye witness regarding whose presence also no indication was given in the 'fardbyan' as an eye witness. Of -course, in 'fardbyan' this witness has put signature as witness to 'fardbyan'. P.W. 9 (Randhir Paswan, nephew of deceased) was introduced as if he had seen accused persons immediately after the occurrence while they were fleeing away. P.W. 11 (Ramashraya Paswan) was an Advocate Clerk, however, has claimed to prove formal F.I.R., which was marked as Ext. 2, 'fardbyan' (Ext. 3) and also



signature of Dhananjay Paswan (P.W. 4) on the 'farbdyan' which was marked as Ext. 4. P.W. 10 (Dr. Faisal Arshad) on 20.12.2009 was posted as Civil Assistant Surgeon at Sadar Hospital, Bihar Sharif and on the same day at 1.45 P.M. he conducted post-mortem examination on the dead body of deceased and found the following facts:-

“On external examination- A lacerated wound of size 1 ½” x 1 ¼” x chest cavity deep with margin inverted with charring over surrounding the wound and also charring over cloth at the site of wound. This is wound of entry. It was below the left clavicle mid area in position obliquely placed.

2. A lacerated wound of size ½” circular with margin everted over 5th intercostal space along the post axillary line of right side of chest. This is wound of exit. Both injuries were communicating to each other.

On dissection:-All cranial bones intact. Brain and its meninges intact and pale. Chest – Thoracic cavity filled with blood. Heart – All chambers empty. Lungs – left lung collapsed, punctured with laceration. Injuries No. 1 and 2 communicating with each other. Fracture of 2nd rib of left side of chest. Abdomen – Stomach contains semidigested food stuffs about 3 ounces. Urinary bladder – empty. All other abdominal viscera was intact and pale. In my opinion cause of death is due to haemorrhage and shock produced by above mentioned injuries over chest by fire arm. Time elapsed since death within 6 to 24 hour.”

14. He also stated that the post-mortem report was in his writing and signature and proved it, which was marked as Ext.1. On his cross-examination he stated that semi digested food was found. It means that deceased took food prior to 3-4 hours. Meaning thereby, that he suggests that in case of finding of semi digested food it was necessary that prior to death the deceased



must had taken food 3-4 hours prior to death. On the point of rigor mortis, he stated that it starts after 2 - 4 hours and also it depends on the climate. It remains for 30-36 hours. In this case other co-villagers, namely: Naresh Ram (P.W. 2), Umesh Ram (P.W. 5), Sakaldeep Yadav (P.W. 6) and Ballab Yadav (P.W. 7) did not support the prosecution case and as such, they were declared hostile. The Investigating Officer namely, Shashi Kapoor Paswan, who was examined as P.W. 12 on 20.12.2009 was posted as Sub Inspector of Police in Noorsarai Police Station and he had recorded 'fardbyan' of the informant. He states that, he on 20.12.2009 recorded 'fardbyan' of Shyampari Devi. On the basis of said 'fardbyan' formal F.I.R. was drawn. In paragraph no. 1 itself he stated regarding the place of occurrence. Of- course in his evidence he stated that he noticed blood mark where dead body was found but nothing has been indicated regarding preparation of seizure list. In his evidence he stated that save and except noticing blood mark, he did not notice any other relevant fact at the place of occurrence, however, it is case of the prosecution that in the occurrence of-course deceased was given only one shot of firing by country made rifle, but indiscriminate firing was made at the time of occurrence, however, no fired cartridges or any 'khokha' was noticed at the place of occurrence.



In normal course, had it been a case of indiscriminate firing certainly there was possibility of noticing such fact at the place of occurrence, which has not been noticed by the Investigating Officer. The Investigating Officer knowing well that confessional statement of an accused before Police, without leading to recovery, has got no evidentiary value, he proved confessional statement of appellant /Ashok Yadav, which was marked as Ext. 5 and he proved endorsement on the 'fardbyan', which was marked as Ext. 6.

15. On examination of entire evidence, it is difficult to perceive as to how from the stomach of dead body of deceased in a case in which occurrence had taken place at 6 A.M. in post-mortem examination about three ounce of semi digested food was found in the stomach of the deceased. Besides this, noticing rigor mortis on whole limbs of deceased at the time of autopsy, which was conducted within eight hours from the time of occurrence, also creates serious doubt on the prosecution case. Sri Rajendra Prasad, learned senior counsel for the appellants has rightly relied upon Modi's Medical Jurisprudence. It would be proper to quote relevant portion at page no. 125 of Modi's Medical Jurisprudence and Toxicology 20th Edition, which is as follows:-

**“In general , rigor mortis sets in 1
to 2 hours after death, is well**



developed from head to foot in about 12 hours, is maintained for about 12 hours and passes off in about 12 hours.”

16. Two circumstances i.e. finding of semi digested food and rigor mortis on whole limbs of the dead body certainly creates serious doubt regarding the alleged time of occurrence. Moreover, the evidence of P.W. 8, who has claimed to be eye witness also appears to be doubtful particularly in a situation where medical evidence categorically contradicts the prosecution case. It is true that in case of conflict in between oral evidence and medical evidence much reliance is required to be placed on oral evidence, but entire circumstances are required to be noticed. In the present case on examination of the evidences it appears that prosecution has not been able to establish the place of occurrence since there is serious contradiction in the evidence of witnesses. There are some evidence which suggests that occurrence had taken place beneath ‘banyan’ tree, there are some evidence which suggests that dead body was found in the field of Upendra Pandit whereas, though the Investigating Officer in his examination –in-chief has stated that dead body was found in the field of Upendra Pandit , however in paragraph no. 5 of his cross -examination he stated that it was found in the field of Subelal Paswan. Even non finding of any fired cartridges at the place of occurrence in a case



in which it was alleged that indiscriminate firing was made and also non production of seizure list relating to finding of blood soaked soil also creates doubt on the prosecution case. So far first plea which was taken by learned senior counsel for the appellants that genesis has not been proved is concerned, the Court is not in agreement with the submission of learned senior counsel for the appellants. In the evidence it has never been stated that wage was being claimed by the deceased for his work done prior to ten days of the occurrence, rather, it was the case of the prosecution that ten days prior to the occurrence the deceased had gone to the house of the appellant /Ashok Yadav demanding his wages. It has not been indicated that wages was due since when. So the submission of learned senior counsel for the appellants regarding non - proof of genesis appears to be not plausible, however, motive appears to be doubtful. If it was the case of prosecution that occurrence had taken place due to demand of wages, in the present case the deceased early in the morning had come out from his house for attending call of nature at 6.00 A.M. and as per informant he sat beneath 'banyan' tree, as such, in such a situation it is difficult to perceive as to how number of accused persons hailing from different villages suddenly assembled there and committed the crime. This creates serious doubt on the prosecution case. The



prosecution case also appears to be doubtful considering the fact that in the 'fardbyan' the informant has alleged that about eight named accused had committed the crime, however, during investigation except three appellants none other accused persons were found involved in the present case, and as such, they were not forwarded as accused by the Investigating Officer. This also creates doubt on the prosecution case. There is also no explanation by the prosecution regarding non-examination of certain witnesses, whose name has come in the evidence of witnesses without any plausible explanation. Even the evidence of 'Chaukidar' was withheld by the prosecution.

17. In view of entire facts and circumstances, we are of the considered opinion that prosecution has not been able to establish its case beyond all reasonable doubt, and as such, by way of extending benefit of doubt it is desirable to interfere with the judgment of conviction and sentence. Accordingly, judgment of conviction dated: 25.02.2013 and sentence dated 05.03.2013 passed by Sri Ajit Kumar Sinha, Ist Additional Sessions Judge – cum- Spl. Judge, Nalanda at Biharsharif in connection with Noorsarai P.S. Case No. 253 of 2009, G.R. No. 3260 of 2009 is hereby set aside and both Appeals are allowed. Since judgment of conviction and sentence has been set aside, two appellants in CR.



APP (DB) No. 194 of 2013 namely Sulo Yadav @ Sulla Yadav and Munna Yadav, who were earlier granted bail are discharged from liability of their bail bounds. The appellant /Ashok Yadav in CR. APP (DB) No. 362 of 2013 is still inside jail and since judgment of his conviction and sentence has been set aside, he is directed to be released forthwith, if not wanted in any other case.

18. Both Appeals are allowed.

(Rakesh Kumar, J)

(Arvind Srivastava, J)

praful/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	18 -05-2018
Transmission Date	18 -05-2018

