

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.665 of 2013

Arising Out of PS. Case No.-173 Year-2008 Thana- MAKHDUMPUR District- Jehanabad

Hriday Yadav Aged About 55 Years, S/O Late Jagmohan Yadav, Resident Of
Village Manjrothi Bigha, Police Station Makhdumpur, District Jehanabad.
... .. Appellant/s

Versus

The State of Bihar
... .. Respondent/s

with
Criminal Appeal (DB) No. 711 of 2013

Arising Out of PS. Case No.-173 Year-2008 Thana- MAKHDUMPUR District- Jehanabad

Mohit Yadav, Son Of Late Lalmuni Yadav, Resident of Village Majhrothi
Bigha, P.S.-Makhdumpur, District-Jehanabad.
... .. Appellant/s

Versus

The State of Bihar
... .. Respondent/s

with
Criminal Appeal (DB) No. 706 of 2013

Arising Out of PS. Case No.-173 Year-2008 Thana- MAKHDUMPUR District- Jehanabad

1. Satendra Yadav
2. Baiju Yadav, both sons of Late Rajnath Yadav,
Resident of Village Mathbhagwanpur, Majharoti Bigha P.S.
Makhdumpur, District- Jehanabad.

... .. Appellant/s

Versus

The State of Bihar
... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 665 of 2013)

For the Appellant/s : Mrs. Soni Shrivastava, Advocate
Mr. Ravi Bhardwaj, Advocate
Ms. Madhuri Kumari, Advocate

For the Respondent/s : Ms. S. B. Verma, APP

(In Criminal Appeal (DB) No. 711 and 706 of 2013)

For the Appellant/s : Mr. Vikramdeo Singh, Advocate
Mr. Paras Nath, Advocate

For the Respondent/s : Ms. S. B. Verma, APP

CORAM: HONOURABLE THE CHIEF JUSTICE
and
HONOURABLE MR. JUSTICE ANIL KUMAR UPADHYAY
ORAL JUDGMENT



(Per: HONOURABLE THE CHIEF JUSTICE)

Date : 11-01-2018

All these appeals have been filed challenging convictions ordered vide judgment dated 15.06.2013 and order dated 18.06.2013 in Sessions Trial No.308 of 2009 (DS)/ 258 of 2010 (F.T.C. IInd) by the Adhoc Additional District and Sessions Judge, Jehanabad, by which the appellants herein have been convicted under Section 302/34 of the Indian Penal Code to undergo imprisonment for life and fine of Rs.10,000/- and in Criminal Appeal (DB) No.665 of 2013 and Criminal Appeal (DB) No.711 of 2013, the appellants therein Hirday Yadav and Mohit Yadav have also been convicted under Section 27 of the Arms Act and sentenced to undergo three years RI and fine of Rs.2,000/-. Both sentences to run concurrently.

In fact, against the same judgment and order, four appeals were filed, apart from the aforesaid three appeals, another appeal being Cr. Appeal (DB) No.794 of 2013 was also filed by one Bhera Yadav @ Behrba Yadav, but due to his death on 10th of September, 2015 as reported by the Superintendent of Police, Jehanabad, in the report dated 17.12.2016, the said appeal has been disposed of today by a separate order having been abated.



It is the case of the prosecution that the informant deceased Deepa Yadav was to receive a sum of Rs.15,000/- which was due from the appellant Hriday Yadav and when the informant deceased demanded the same and a *panchayati* was also held, Hriday Yadav refused to clear the dues and on the same day, i.e. on 21.07.2008 at 5:00 P.M., the appellant Hriday Yadav along with appellant Baiju Yadav, Bherwa, appellant Mohit Yadav and appellant Satendra Yadav came to the southern corner of Makdumpur river near the house of the informant and started quarreling with him and in the process, appellants Hriday Yadav and Mohit Yadav are said to have taken out a pistol and fired indiscriminately on the informant deceased Deepa Yadav which caused serious fire arms injuries on him. Immediately, thereafter he was taken to the Referral Hospital, Makdumpur by the persons present there and while admitted in the Referral Hospital, Station House Officer of the Police Station, Makdumpur, Sub-Inspector of Police Ashok Kumar recorded the *ferdbeyan* of the informant deceased Deepa Yadav and registered the case for offences under Sections 406, 307, 326/34 of the Indian Penal Code read with Section 27 of the Arms Act.

Deepa Yadav underwent treatment in the Hospital for about eight days and thereafter it is said that he succumbed to the injuries and died on 29.07.2008. Based on the aforesaid, the offence was



converted to one under Section 302 of the Indian Penal Code. The first information was recorded and the prosecution commenced.

In all, 14 witnesses were named in the charge-sheet as witnesses who would prove the charges, but out of these 14 witnesses, only eight were examined. They were P.W.1 Mahesh Yadav, son-in-law of the deceased, P.W.2 Salfi Devi, widow of the deceased Deepa Yadav, P.W.3 Rajju Yadav, cousin brother of the deceased, P.W.4 Jainandan Yadav, a resident of village and who is said to have been a witness to the entire incident. P.W.5 Jainandan Singh, the first Investigating Officer, P.W.6 Dr. Hidaytullah Palvi, who had treated the informant, i.e. deceased Deepa Yadav at the initial stage, P.W.7 Satya Deo Singh, the second Investigating Officer, and P.W.8 Dr. Anil Kumar, the doctor, who conducted the postmortem examination.

Apart from the above, certain documents were exhibited, namely, the *Ferdbeyan* of the informant Deepa Yadav, the postmortem report, the case diary and certain miscellaneous exhibits. However, the following witnesses whose names were included in the charge-sheet, namely Rabindra Yadav, Nawal Kishore Yadav, Ramesh Yadav, Jagdish Yadav, Krishna Yadav, Chhotelal Yadav were never examined and even though some of them were important eye witnesses were given up and Rabindra



Yadav, who was a witness to the so-called recording of the *ferdbeyan*/dying declaration was also given up. Be that as it may, on the basis of the evidence and the materials that came on record, by the impugned judgment, the appellants having been convicted as indicated hereinabove, these appeals.

Smt. Soni Shrivastava, Sri Vikramdeo Singh and the other assisting advocates argued at length on behalf of the appellants and Ms. S. B. Verma, learned A.P.P. rebutted their contentions.

The first and the foremost submission made by the learned counsel for the parties were that the entire foundation of the case is the *ferdbeyan* or the dying declaration of the informant deceased Deepa Yadav. According to them, the *ferdbeyan* or the dying declaration has not been proved in accordance to the requirement of law. It is argued that the *ferdbeyan*/dying declaration is recorded by Sub-Inspector of Police Ashok Kumar, Station House Officer Incharge of Makdumpur Police Station, but this witness has not been examined. Similarly, the witness to the dying declaration Rabindra Yadav, even though cited as a witness in the charge-sheet, was never examined. It is further argued that the *ferdbeyan* was recorded on 21.07.2008 at 5:30 P.M. in the referral hospital at Makdumpur where treating doctors were available, in spite



thereof, the dying declaration is not recorded in the presence of the doctors, nor any staff members of the Hospital.

It is argued that apart from the fact that the dying declaration has not been recorded in accordance to the requirement of law, its recording has not proved in accordance to the requirement of law and, therefore, the entire foundation of the story put forth by the prosecution has to collapse on this ground itself. In support of the contention, as detailed hereinabove, reliance is placed on a judgment of the Hon'ble Supreme Court in the case of **Chacko Vs State of Kerala, (2003) 1 SCC 112** and another judgment of the Hon'ble Supreme Court in the case of **Ramakant Mishra alias Lalu and others Versus State of Uttar Pradesh, (2015) 8 SCC 299**.

Thereafter, it was argued that the statement of witnesses recorded and from the story as narrated by the deceased in the *ferdbeyan*, it is clear that he was subjected to indiscriminate firing by appellants Hriday Yadav and Mohit Yadav, but on going through the postmortem report and the statement of Dr. Anil Kumar, P.W.8, it is clear that the deceased had sustained eight injuries on his persons and injury no.(2) is the only fire arm injury as indicated in the postmortem report apart from stitched injury being injury no.(1). Referring to the description of the injuries as



are detailed in the postmortem report and the opinion of the doctor, it is seen that the stitched wound, i.e. injury no.(1) and (2) and other injuries do not indicate as to whether they were caused by any fire arm, there is no exit point of the injury, entry point of the injury and even recovery of pellets and bullets is not indicated in the postmortem report, on the contrary, in the postmortem report, the doctor says that for stitched wound, the opinion of the treating surgeon should be obtained, who would be in a better position to say that if any pellet and bullet was found in the injury. That apart, in the postmortem report, it is indicated that most of the injuries were caused by hard and blunt object. If that be so, the informant deceased would have stated about these in his dying declaration or *ferdbeyan*, that apart from indiscriminate firing, he was subjected to assault by any hard and blunt object. There is no whisper about such an assault in the dying declaration. It is, therefore, stated that the injuries reported in the postmortem report and the *ferbeyan*/dying declaration do not tally with each other and, therefore, the entire case of the prosecution is false. Attention in this regard is also invited to the statement of the P.W.6 Dr. Hidaytullah Palvi and the injuries found by him. This doctor speaks about seven lacerated injuries being caused on the person of the deceased. Injury Nos. (1) to (6) are all lacerated



wound on various parts of the body and according to doctor, these six injuries were caused by hard and blunt substance. Only injury No.(7), a completely irregular lacerated wound on the lumbar region is said to have been caused by a fire arm. Even for this injury, the doctor does not say anything about entry point of the injury, exit point of the injury. Even no recovery of pellet and bullet is recovered, the size of the injury, the colour of the injury in the entry point and exit point. Therefore, it is argued that based on such evidence which does not support the case of the prosecution as made in the *ferdbeyan*, the conviction is unsustainable.

Learned counsel for the appellants thereafter took us through the statement of various witnesses and argued that P.W.1 Mahesh Yadav is a relative of the informant. There was enmity between the informant and the accused persons and pointing out various contradiction in the statement of the witnesses, namely P.W.1 Mahesh Yadav, P.W.2 Salfi Devi and P.W.3 Raju Yadav, it is argued that they are all relatives, not the independent witness and they have not seen the incident at all. It is argued that their statement is a hearsay statement. The only independent witness examined is P.W.4 Jainandan Yadav and if his statement is taken note of, he speaks about incident taking place, but specifically says



that he did not know or identify any of the persons who were involved in the incident. He does not identify the accused persons, but admits in para 36 of his cross-examination that the appellant Mohit Yadav was known to him from before, but still he does not name him as a person present at the place of the incident. This witness is not declared hostile and his evidence, if analyzed, would go to show that he as a witness has not implicated any of the accused persons.

Accordingly, reading the statement of the witnesses in its totality and evaluating it in the backdrop of various discrepancies, as are detailed hereinabove, learned counsel for the appellants argued that it is a case where the prosecution has miserably failed to bring home the guilt of the appellants and, therefore, conviction based on such evidence is unsustainable.

Finally, learned counsel invites our attention to the law laid down by the Hon'ble Supreme Court in the case of **Tara Singh v State** [AIR 1951 SC 441]; **Ranvir Yadav v. State of Bihar** [(2009) 6 SCC 595]; and **Sukhjit Singh v State of Punjab** [(2014) 10 SCC 270] contemplating the requirement of fulfilling the statutory mandate of Section 313 of the Code of Criminal Procedure, take us through the statement of the accused persons recorded under Section 313 of the Code of Criminal Procedure and



point out that none of the incriminating circumstances or the materials were put to them, they were never confronted with the same and were not granted any opportunity to explain the same, therefore, there being violation of the statutory provision of Section 313 of the Code of Criminal Procedure, grave prejudice has been caused to the accused persons and this itself is sufficient enough to hold that the entire trial stands vitiated and the appellants entitled to the benefit of the same. Accordingly, it is the contention of the appellants that the appellants should be allowed and the conviction set aside.

Refuting the aforesaid, Ms. S. B. Verma, learned APP took us through the *ferdbeyan*, statement of witnesses, particularly the statement of P.W.1 Mahesh Yadav and P.W.2 Salfi Devi and argued that both these witnesses had seen the incident, the incident took place as narrated by the deceased in his *ferdbeyan*/dying declaration and as the postmortem report confirms presence of fire arm injury, it is argued that the conviction in the facts and circumstances of the case is proper and no indulgence into the matter is called for.

We have heard learned counsel for the parties at length and we have perused the material and the documents available on record. At the very outset, we may point out that in the charge-



sheet filed as detailed while discussing the facts indicated hereinabove, 14 witnesses were cited as prosecution witnesses and out of these witnesses, some of the witnesses, like Rabindra Yadav, Nawal Kishore Yadav, Ramesh Yadav were actually eye witnesses to the incident, but surprisingly, when the trial took place, they had been given up and no reason is indicated as to why they have not been examined. One of these witnesses Rabindra Yadav is an important witness. It is this person before whom so-called dying declaration or *ferdbeyan* recorded. It is surprising that he has not been examined and was given up during the trial. It is the case of the defence that they were given up because their names were included in the charge-sheet fraudulently to somehow implicate the appellants and as the prosecution knew that these witnesses if they enter the witness box will speak truth and the prosecution case will crumble. We have taken note of the aforesaid aspect of the matter.

One of the basic ingredients and material that was used for convicting the appellants is the *ferdbeyan* of the deceased Deepa Yadav, i.e. his dying declaration and it forms the foundation for the entire case and if we examine the *ferdbeyan*/dying declaration in detail, it is indicated that it is recorded by Deepa Yadav, the deceased, his name and addresses are given and he



further states that appellant Hriday Yadav owed Rs.15,000/- to him, when he demanded the same, he did not give, panchayati was also held wherein he refused and, thereafter on 21.07.2008 at 5:00 P.M. while he was sitting in his house in the southern bank of river Makdumpur, all the five appellants, including the deceased accused Bhera Yadav are said to have quarrelled with him and thereafter Hriday Yadav and Mohit Yadav are said to have opened indiscriminate firing upon him due to which he received injury. This *ferdbeyan*/dying declaration is recorded by the S.I. Ashok Kumar, Station House Officer of Makhdumpur Police Station, and surprisingly, he has not been examined. Recording of his *ferdbeyan*/statement is in the presence of one Rabindra Yadav, he cited as witness No.1 in the charge-sheet, but surprisingly he has not been examined. There is no justification or explanation given by the prosecution as to why these two important witnesses were never examined. On the contrary, the Investigating Officer simply says that the signature in the *ferdbeyan* is of Sub-Inspector Ashok Kumar.

Apart from the aforesaid serious lacuna in the recording of *ferdbeyan* and its legal tendering and proving in the trial, the *ferdbeyan*/dying declaration is recorded as is evident from the recital of the same on 21.07.2008 at 5:30 P.M., i.e. within 30



minutes of occurring of the offence and it is recorded in Referral Hospital, Makhdumpur. Surprisingly, the doctor present and who was treating the deceased was not present when this is recorded. It is the doctor who also does not say anything about the deceased being in a fit state of mind to give the statement. No independent employee or person working in the hospital has attested or testified to recording of *ferdbeyan* or dying declaration and none is examined to prove the same. In our considered view, the recording of the so-called *ferdbeyan*/dying declaration is not in accordance to the requirement of law and it does not meet the requirement of law as laid down by the Hon'ble Supreme Court in various cases. If the law laid down in this regard in the case of **Chacko** (supra) is taken note of, the Hon'ble Supreme Court says that in the absence of certificate by a competent doctor with regard to mental and physical condition of the deceased to make such a statement, in the facts and circumstances of a given case, depending on the evidence that has come on record, the Court may think it not safe to rely upon the same. Similar is the principle laid down by the Supreme Court in the case of **Ramakant Mishra alias Lalu** (supra), wherein after taking note of the principles of law laid down in the various cases, the meaning and import of the words, 'dying declarations' as described in the Black's Law Dictionary, is



analyzed and from para 9 onward, the learned Supreme Court deals with the matter in the following manner:-

“9. Definition of this legal concept found in Black's Law Dictionary (5th Edition) justifies reproduction:

“Dying Declarations - Statements made by a person who is lying at the point of death, and is conscious of his approaching death, in reference to the manner in which he received the injuries of which he is dying, or other immediate cause of his death, and in reference to the person who inflicted such injuries or the connection with such injuries of a person who is charged or suspected of having committed them; which statements are admissible in evidence in a trial for homicide (and occasionally, at least in some jurisdictions, in other cases) where the killing of the declarant is the crime charged to the defendant. *Shepard v. U.S., Kan.*, 78 L.Ed. 196: 54 S.Ct. 22: 290 U.S. 96 (1933). Generally, the admissibility of such declarations is limited to use in prosecutions for homicide; but is admissible on behalf of accused as well as for prosecution. In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that his death was imminent, concerning the cause or circumstances of what he believed to be his impending death is not excluded by the hearsay rule. [Federal Rules of Evidence, Rule 804(b)(2): “Statement under the Belief of imminent Death”].

10. When a person makes a statement while being aware of the prospect that his death is imminent and proximate, such a statement assumes a probative value which is almost unassailable, unlike other statements which he may have made earlier, when death was not lurking around, indicating the cause of his death. That is to say that a person might be quite willing to implicate an innocent person but would not do so when death is knocking at his



door. That is why a Dying Declaration, to conform to this unique specie, should have been made when death was in the contemplation of the person making the statement/declaration. In the case before us, the statement, if made by the deceased, would qualify to be treated as a Dying Declaration because she was admitted in the hospital, having sustained 90-95 per cent burn injuries, and because of this grave burn injuries, she would be expecting to shortly breathe her last.

11. The central question, however, remains as to whether the alleged Dying Declaration attracts authenticity. Since the prosecution has succeeded in showing/proving by preponderance of probability that a dowry death has occurred, the burden of proving innocence has shifted to the accused. It appears to us to be unexceptionable that whenever a person is brought to a hospital in an injured state which indicates foul-play, the hospital authorities are enjoined to treat it as a medico-legal case and inform the police. If the doctor, who has attended the injured, is of the opinion that death is likely to ensue, it is essential for him to immediately report the case to the police; any delay in doing so will almost never be brooked. The police in turn should be alive to the need to record a declaration/statement of the injured person, by pursuing a procedure which would make the recording of it beyond the pale of doubt. This is why an investigating officer (I.O.) is expected to alert the jurisdictional Magistrate of the occurrence, who in turn should immediately examine the injured. When this procedure is adopted, conditional on the certification of a doctor that the injured is in a fit state to make a statement, a Dying Declaration assumes incontrovertible evidentiary value. We cannot conceive of a more important duty cast on the Magistrate, since the life & death of a human being is of paramount importance. We think that only if it is impossible for the Magistrate to personally perform this duty, should he depute another senior official. Non-adherence to this



procedure would needlessly and avoidably cast a shadow on the recording of a Dying Declaration. The prosecution, therefore, would be expected to prove that every step was diligently complied with. The prosecution would have to produce the doctor or the medical authority to establish that on the examination of the injured/deceased, the police had been immediately informed. The I.O. who was so informed would then have to testify that he alerted the Magistrate, on whose non-availability, some responsible person was deputed for the purpose of recording the Dying Declaration. We are not in any manner of doubt that where medical opinion is to the effect that a person is facing death as a consequence of unnatural events, the responsibility of the Magistrate to record the statement far outweighs any other responsibility. There may be instances where there was no time to follow this procedure, but that does not seem to be what has transpired in the case in hand. In cases where some other person is stated to be recipient of a Dying Declaration, doubts may reasonably arise.”

If we analyze the case in the backdrop of the aforesaid principle, we have no hesitation in holding that the prosecution has not proved the dying declaration in the manner as is required in law, recording of the dying declaration does not meet the requirement of law and in this case, it is not safe enough to record the conviction on the basis of the same. In our considered view, where apart from the fact that the manner in which the dying declaration has been recorded does not inspire confidence in our mind, we are doubtful as to whether any such statement was recorded at the time and place as is indicated in the document.



The aforesaid findings of ours get more confirmed if we analyze the facts narrated by the deceased in the dying declaration and compare it with the medical evidence that has come on record. In the *ferdbeyan* or the dying declaration, the deceased only says that after some quarrel and argument, appellants Hriday Yadav and Mohit Yadav took out pistol and indiscriminately fired at him. There is no whisper in the dying declaration about any other injury caused upon him or any of the appellants assaulting, beating or acting in a manner which could cause injury to him or use of any other blunt or hard object to cause injury on him. He only speaks about indiscriminate firing by Hriday Yadav and Mohit Yadav.

Now, if we take note of the statement of the treating doctor P.W.6 Dr. Hidaytullah Palvi, who examined the deceased immediately after the incident, we find that he was posted in the referral hospital, Makhdumpur on 21.07.2008 and he admits of his having examined Deepa Yadav, son of late Lohari Yadav at 5:15 P.M. i.e. within an hour of the incident, and he indicates that the following seven injuries were found in the person of Deepa Yadav:-

“(1) Lacerated wound 2”x 1/6”x deep up to the bone on parietal region.

(2) Lacerated wound 5” x 1/6” x deeper to the bone on parietal region.



(3) Lacerated wound on the left parietal immense 1/2" x 1/2" x deep to the bone.

(4) Lacerated wound on the occipital regions 1/5" x 1/6" x deep to the bone.

(5) lacerated wound on the right temporal region 1/6" x deep to the bone.

(6) Lacerated wound on the right eyebrow 1.5"x1/8"x1/8".

(7) Completely irregularly irregular lacerated wound (wound of entrance) on the lumbar region measuring 1" x 1/2" x deep to the peritoneal cavity. Wound of exit not found."

Thereafter, he says that injury No.7 was grievous and danger to life and was caused by fire arm. As far as injury nos.1 to 6 are concerned, he speaks about they being simple injuries caused by hard and blunt substance. If injury no.7 is caused by a fire arm, there is nothing to indicate that the fire arm injury has a point of entry and point of exit, what is the characteristics of the entry point and if there is no exit point of the injury, whether any pellets or bullets were recovered from this injury. After this medical report is given on 21.07.2008 and after death of Deepa Yadav, his postmortem is conducted by Dr. Anil Kumar, P.W.8 and in the postmortem report, again the same seven injuries are indicated and the injuries are so indicated in the postmortem report:-

(1) Stitched wound of 5 1/2" length on the back of chest & abdomen in mid vertebral line 6 1/2" above sacrum.



(2) Stitched wound of 1 1/2" length on the back of chest 1" right to the injury no.(1). Tattooing (old) was found. Surrounding the both above noted wound in area of 6" x 4". On dissection after removing the stitches bone vertebra T 10, T 11, T 12 was fractured, muscle lacerated, blood vessels and spinal cord was lacerated. In both above noted wound, no fire arm material (bullet or pellet) was found embedded. May be it was recovered and preserved by treating surgeon.

(3) Stitched wound of 1/2" length on forehead on left side 1/2" above the left eyebrow.

(4) Stitched wound of 1/2" length on forehead vertically near medial end of right eyebrow.

(5) Stitched wound of 1/2" length on forehead on right side 1 1/2" above right eyebrow.

(6) Stitched wound of 3/4" length on right maxilla.

(7) Bruise around right pinna in area of 5"x 4".

(8) Multiple healed L. W. (unstitched) of various size ranging from 1"x 1/6" x skin deep to 3"x 1/6" x skin deep found in whole area of skull."

The lacerated wounds are now indicated as stitched wound and with respect to injury no. (2) as indicated in the postmortem report, this is injury no.(7) in the earlier report of P.W.6, it is shown that there is an old tattooing and it is clearly indicated that in both injuries, no fire arm material, like pellet or bullet, was found embedded and opinion is given that may be it is removed by the treating surgeon and in the opinion finally given, the following statements are made:-



“(1) cause of injuries- For stitched wound, opinion of treating surgeon may be asked and he should be asked for whether any bullet/pellet were present. Other injuries caused by hard and blunt object.

(2) cause of death- Head injuries and spinal injuries as described in Injury No. (1) and (2).

(3) Time elapsed since death- 6 to 24 hours (Approx).”

which goes to show that existence of pellet and bullet in the injury has to be confirmed by the surgeon. Here again, in the opinion given and in the report, this doctor also speaks about certain injuries being caused by hard and blunt object. Now, if according to the informant, Deepa Yadav, he was subjected to indiscriminate firing, it is surprising that only one fire injury is found by the doctor that also without any point of entry or exit being indicated or without any pellet or bullet being found in the injury. This belies the story of the prosecution and further in the dying declaration recorded, there is not a whisper about any other injury being caused by use of a hard and blunt object, on the contrary, more than six injuries are found to have been caused by hard and blunt object. Therefore, it is a case where the story of injuries being caused and the attack made on Deepa Yadav, as narrated by him in the so-called *ferdbeyan* or the dying declaration is not corroborated or established from the medical evidence that has come on record.



This again is a serious lacuna or defect in the case of prosecution, benefit of which has to go to the accused persons.

Apart from the aforesaid, if we now analyze the statement of the witnesses recorded, it would be seen that the witnesses, who testified with regard to the incident are P.W.1 Mahesh Yadav who is the brother of the deceased. In his statement under Section 161 Cr. P.C. before the Investigating Officer, he speaks about being in his house making fish and thereafter coming to the place on hearing commotion. However, all of a sudden in the Court, he becomes an eye witness and testifies about his seeing the incident and deceased being assaulted by bricks and bats and firing. The testimony of this witness who is an interested witness becomes doubtful. Apart from the fact that he is an interested witness, the story given by him in the Court and the story narrated in the statement under Section 161 of the Code of Criminal Procedure are contradictory in nature and is not in conformity with the *ferdbeyan* or dying declaration. He admits that his village is away from the place of occurrence and he is brother-in-law of the deceased.

The second witness is P.W.2 Salfi Devi, the wife of the deceased. She is said to be present in the house, but surprisingly, she was never examined. Her statement was not recorded under



Section 161 Cr. P.C. She claims in the Court that she had recorded her statement before the Police Officer at Makhdumpur Police Station and then at Patna Police Station and her left thumb impression was taken on record, but no such statement was brought on record, nor was any such statement put to her and proved, nor does the Investigating Officer say anything as to why her statement was not available. That apart, in the *ferdbeyan* or the dying declaration, the deceased does not say that his wife Sanju Devi and his brother-in-law Mahesh Yadav were present when the incident took place. The statement of this witness in the circumstances becomes doubtful.

The next witness examined is P.W.3 Rajju Yadav who was again cousin brother of the deceased, is not an eye witness to the incident. He says that he heard about the incident and came to the hospital at the time of recording the statement of the deceased. The statement of this witness does not help the prosecution, it is hearsay in nature.

If the statement of these three important witnesses are discarded then the only evidence with regard to occurrence of the incident is that of the P.W.4 Jainandan Yadav. He is an independent witness claims to be an eye witness and saw the incident. He says that he was carrying fertilizer on his cycle. He was coming from



Makhdumpur when he heard the sounds of firing and saw some unknown persons fleeing. He speaks about certain outsiders firing on the deceased. He says that he does not know who were the persons whom he saw firing and fleeing and neither he identifies Hriday Yadav as the person who caused the firing nor does he identify Mohit Yadav as the person whom he saw firing. On the contrary, in para 36 of his evidence, he says that he knew Mohit Yadav much before the happening of the incident. It is surprising that the only independent eye witness to the incident who was produced by the prosecution on account of the fact that he had seen the incident does not name any of the accused persons. He only speaks about having seen fleeing and certain unknown persons firing on the deceased.

P.W.5 is Jainandan Singh, the first investigating officer, and he says that he never examined P.W.2 Salfi Devi, wife of the deceased. He does not speak anything about the manner in which the *ferdbeyan* and the dying declaration is recorded. However, he says that he was told that the deceased was alone when he was killed and there was no witness to the incident. From the statement of this witness, there was no eye witness to the incident, but surprisingly, three eye witnesses are introduced later as P.W.s 1, 2 and 4.



Similarly, P.W.7 Satyadeo Singh is the second Investigating Officer and he says that when he took over the investigation, he found the *ferdbeyan* and the dying declaration at para 64 of the case diary, he admits about having not examined the wife of the deceased and he does not know whether she is the wife of the deceased or not. If that is the state of affair and the evidence that have come on record and when the same is analyzed in the backdrop of various facts and lacunas in the case of the prosecution as is detailed hereinabove, we have no hesitation in holding that the prosecution has failed to prove the guilt of the appellants beyond reasonable doubt and it is a fit case where benefit of all these lacunae in the prosecution case should be given to the accused persons, namely the appellants herein.

Apart from the aforesaid, as stated by learned counsel for the appellants, we find that there is another serious lacunae in the case of the prosecution in the matter of complying with the mandatory requirement of Section 313 of the Code of Criminal Procedure. If the statement of the accused persons recorded under Section 313 of the Code of Criminal Procedure are analyzed, it would be seen that three identical questions are put to each of the accused persons. The first is, “have you heard the statement of witnesses and what you have to say”. The accused says, “yes”, he has heard.



Thereafter, it is stated that the allegation against him is that on 21.07.2008 at 5 P.M. near Makhdumpur Referral Hospital on the southern side you went inside the house of Deepa Yadav and caused injury upon him who died during the course of treatment. What have you to say? And the third question is what you have to say in your defence?

From the aforesaid it is clear that neither any incriminating circumstances or material that came on record is put to the accused nor are they cautioned about the evidence that has come on record and given an opportunity to explain the circumstances existing against them.

The law with regard to recording of statement of accused under Section 313 Cr. P.C. are laid down in the following case:

- (1) **Ranvir Yadav v. State of Bihar** [(2009) 6 SCC 595];
- (2) **Tara Singh v State** [AIR 1951 SC 441]; and
- (3) **Sukhjit Singh v State of Punjab** [(2014) 10 SCC 270].

In the case of **Ranvir Yadav** (supra), it has been laid down by the Hon'ble Supreme Court that the purpose of Section 313 Cr.P.C. if scrutinized in its entirety would establish that it contemplates bringing to the notice of the accused incriminating materials available against him and thereafter putting questions to



him based on these materials, it is held by the Hon'ble Supreme Court that the requirement of Section 313 Cr. P. C. is not an empty formality. It is held in the said case that the incriminating material, if not brought to the notice to the accused and is not given an opportunity to explain the same, tantamounts to a serious lapse on the part of the trial Court making the entire conviction based on such a trial vitiated in law.

In the case of **Tara Singh** (supra), the provision as is existed in the year 1951, i.e. Section 342 Cr.P.C. was taken note of and it has been held that it is not proper compliance of this statutory provision by merely reading out questions and putting them to the accused and directing him to answer. It is held that the whole object of the Section is to afford to the accused a fair and proper opportunity to explain the circumstances which appear against him and it is held that if the requirement of this Section is not properly complied with, the error is so gross that it causes grave prejudice to the accused.

Both the aforesaid cases and two more cases of the Hon'ble Supreme Court on the issue in question, namely **Hate Singh Bhagat Singh v. State of Madhya Bharat** [AIR 1953 SC 468] and **Ajay Singh v. State of Maharashtra** [(2007) 12 SCC 341] have been considered by the Hon'ble Supreme Court in the case of



Sukhjit Singh (supra) and the Hon'ble Supreme Court after evaluating the legal principle has held that the whole object of Section of 313 Cr.P.C. is to afford to the accused a fair and proper opportunity of explaining the circumstances which appear against him and, therefore, the questions put to him must be fair and must be couched in a form that he is able to appreciate and understand them and explain them. The purpose of this section is to draw an attention of the accused to the specific point in the charge and in the evidence which has come against him and he should be granted an opportunity to explain the same. The Hon'ble Supreme Court holds that if this requirement of law is not met, the entire trial stands vitiated and conviction unsustainable.

Taking note of the totality of the facts and circumstances of the case, the evidence and the materials available on record, we allow all these three appeals, set aside the conviction and sentence as indicated hereinabove and acquit all the appellants of the charges levelled against them.

The appellant Hriday Yadav in Criminal Appeal (DB) No.665 of 2013 and the appellant Mohit Yadav in Criminal Appeal (DB) No.711 of 2013 are in jail. They be released forthwith, if not required in any other case.



The appellants Satendra Yadav and Baiju Yadav in Cr. Appeal (DB) No.706 of 2013 are on bail. Now, they are discharged from the liabilities of their bail bonds.

(Rajendra Menon, CJ)

(Anil Kumar Upadhyay, J)

Sunil/-

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