

IN THE HIGH COURT OF JUDICATURE AT PATNA
Criminal Appeal (DB) No.421 of 2013

Arising Out of PS. Case No.-106 Year-2011 Thana- LAURIYA District- West Champaran

Fariyad @ Biku @ Md. Fariyad Alam, son of Late Sk. Abdul Rahim ,
Resident of Village- Sikta Deoraj, Police Station- Lauriya, District- West
Champaran

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

Criminal Appeal (DB) No. 439 of 2013

Arising Out of PS. Case No.-106 Year-2011 Thana- LAURIYA District- West Champaran

Nawab Alam @ Md. Nawab Alam, son of Md. Tahir Hussain, resident of
village – Baswaria, Police Station – Lauria, District – West Champaran at
Bettiah

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In Criminal Appeal (DB) No. 421 of 2013)

For the Appellant/s : Sri Pramod Kumar Sinha, Advocate

For the State : Sri Ajay Mishra, A.P.P.

(In Criminal Appeal (DB) No. 439 of 2013)

For the Appellant/s : Sri Kanhaiya Prasad Singh, Senior Advocate

Sri Birendra Kumar Singh, Advocate,

Sri Prateek Mishra, Adv.

For the State : Sri Ajay Mishra, A.P.P.

For the informant : Md. Aslam Ansari, Advocate

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR

and

HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 26-10-2018

1. In both the Appeals appellants were tried together and
convicted in Sessions Trial No. 555 of 2011 and as such both the



Appeals were taken up together and are being disposed of by this common judgment.

2. Appellant / Fariyad in Cr. Appeal (DB) No. 421 of 2013 vide judgment dated – 8.3.2013 was convicted for commission of offence under Section 302/34 of the Indian Penal Code, 1860 [hereinafter referred to as “I.P.C.”] and Section 27(1) of the Arms Act, 1959 [hereinafter referred to as the “Arms Act”]. By order dated – 13.3.2013 the appellant- Fariyad under Section 302/34 of the I.P.C. was sentenced to undergo rigorous imprisonment for life and pay a fine of Rs. 5000/-. In case of default in payment of fine he has been directed to further undergo simple imprisonment for six months. Under Section 27 (1) of the Arms Act appellant / Fariyad has been sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1000/- and in case of default in payment of fine he has been directed to further undergo simple imprisonment for one month. Appellant /Nawab Alam @ Md. Nawab Alam in Cr. Appeal (DB) No. 439 of 2013 by judgment dated : 8.3.2013 was convicted under Section 302 of the I.P.C. and Section 27(1) of the Arms Act and by order dated: 13.3.2013 under Section 302 of the I.P.C. appellant / Nawab Alam has been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5000/-. In case of



default in payment of fine he has been directed to further undergo simple imprisonment for six months. Under Section 27(1) of the Arms Act appellant/ Md. Nawab Alam was sentenced to undergo rigorous imprisonment for three years and pay a fine of Rs. 1000/-. In case of default in payment in fine he was directed to further undergo simple imprisonment for one month. Both the sentences were directed to run concurrently. The judgment of conviction and sentence was passed by Sri Amrit Lal Yadav, learned Adhoc Additional District and Sessions Judge 1st Bettiah, West Champaran [hereinafter referred to as “trial judge”] in Sessions Trial No. 555 of 2011.

3. Short fact of the case is that on 1.7.2011 at 12.15 P.M. Sub Inspector of Police – cum- S.H.O. Lauriya Police Station namely: Sri Sanjiv Kumar / P.W. 9 recorded fardbyan of Nikhat Jahan @ Tara / P.W. 4, aged about 40 years, W/o Late Sarfaraz Ahmad (deceased), resident of village- Basbariya Devraj, Police Station – Lauriya. The fardbyan was recorded at the place of occurrence i.e. Belwa Sareh, village- Basbariya Devraj. In the fardbyan informant disclosed that on the same day i.e. on 1.7.2011 in the morning about 9.00 A.M. she along with her deceased-husband, son / Tausif Ahamad (P.W. 3) , her own brother – Sajjad (P.W. 1) and one labourer namely- Farman (not examined)



was present in her 6 Katha field in Belwa Sareh. For the purposes of cropping paddy the field was being prepared. At about 10.00 the labourer was preparing ridge in the field and informant with her son and brother- Sajjad was sitting on the Northern ridge. Her husband [deceased] was on Eastern side. All of them were waiting for *bichra* (seeds). In the meanwhile cousin brother of her father-in-law /Md. Tahir arrived from Southern side in the field and started abusing and asked to leave the field. Then her husband stated that it was his purchased land and he was cultivating the same since last ten years and the land was in his possession and he said that he would not leave the field. Thereafter, the cousin brother of her father- in- law by uttering threatening word left the place and after ten minutes Tahir Hussain, his son Md. Nawab Alam [appellant in Cr. Appeal (DB) No. 439 of 2013], cousin brother of Nawab namely: Fariyad @ Bikau [appellant in Cr. Appeal (DB) No. 421 of 2013] with two unknown persons reached the field of the informant and thereafter Tahir Hussain exhorted to kill. The informant thereafter saw that Nawab Alam (appellant) was carrying a weapon of long barrel and Bikau @ Fariyad and two unknown accused persons were carrying small weapons. Nawab by means of weapon he was carrying gave shot of firing on her husband, then her husband tried to flee away



towards Northern side. Two unknown accused persons proceeded towards the informant then raising alarm she started fleeing away. In the meanwhile her cousin brother namely : Md. Akhtar Hussain (P.W. 2) and Md. Badrul [not examined] arrived with the seeds. The informant claimed that in their presence her husband after receiving gun shot injury fell down in the field. Then Nawab Alam and Fariyad (appellants) went nearer to her husband and both simultaneously gave one shot of firing each on her husband. In the meanwhile number of persons after hearing *hulla* reached to the place of occurrence by running. Then four accused persons carrying weapons in their hands ran to the river side and Tahir Hussain ran towards Belwa side. Thereafter the informant and others reached nearer to her husband and saw that on his chest there were three holes and on right elbow also there was thorough injury and her husband had already died. After some time Police arrived there. The informant stated that reason for the occurrence was land dispute which was continuing since last twenty four years. She further stated that her *bhaisur* [elder brother of her husband] was also earlier killed by giving gun shot injury. The informant claimed that the aforesaid three named accused persons with two unknown accused persons conspiring with each other had killed her husband by giving gun shot injury. The said fardbyan



was read over to her in presence of her other family members and after finding it correct she put her R.T.I. The said fardbyan was also got signed as a witness by P.W. 1 / Sajjad, P.W. 3 - Tausif Ahamad, Md. Badrul Hoda [not examined], Shabbir [not examined], Md. Wais [P.W. 5] and Akhtar Hussain (P.W. 2).

4. On the basis of the said fardbyan on the same day i.e. on 1.7.2011 at 2.15 P.M. a formal FIR vide Lauriya P.S. Case No. 106 of 2011 was registered under Section 302/ 34/120B of the I.P.C. and Section 27 of the Arms Act against: (1) Md. Tahir Hussain [died during pendency of his Appeal i.e. Cr. Appeal (DB) No. 418 of 2013], (2) Md. Nawab Alam [appellant in Cr. Appeal (DB) No. 439 of 2013], (3) Fariyad [appellant in Cr. Appeal (D.B.) No. 421 of 2013] and two unknown accused persons. After investigation finding the case true charge- sheet was submitted against all the three F.I.R. named accused persons on 26.9.2011 and on 18.10.2011 learned Chief Judicial Magistrate, Bettiah, West Champaran took cognizance of the offence. After completion of formalities under Section 207 of the Cr.P.C., on 24.10.2011 the case was committed to the court of Sessions. On 1.12.2011 charge was jointly framed under Section 302/34/120B of the I.P.C. against all the charge- sheeted accused whereas charge under Section 302



of the I.P.C. and 27 of the Arms Act was separately framed against both appellants namely Nawab and Fariyad.

5. During the trial all the three accused were held guilty, convicted and sentenced by the trial court in Sessions Trial No. 555 of 2011. Thereafter all the three convicts had preferred Appeal. One of the convicts namely: Md. Tahir Hussain had filed an Appeal vide Cr. Appeal (D.B.) No. 418 of 2013 and during pendency of the Appeal since he died by order dated: 25.10.2018 his Appeal stood abated.

6. During the trial to prove its case on behalf of the prosecution altogether nine witnesses were examined. Out of nine witnesses, P.W. 1 / Sajjad [brother of the informant and brother-in-law of the deceased], P.W. 2 - Akhtar Hussain [another brother of the informant and brother-in-law of the deceased] and P.W. 3 / Tausif Ahamad [son of the deceased], P.W. 4 / Nikahat Jahan [informant and wife of the deceased] and P.W. 5 – Md. Wais @ Lal Babu [cousin brother of the informant] were examined as eye witnesses to the occurrence, P.W. 7 - Masood Zamal @ Sonu and P.W. 8 / Md. Sazzad are formal witnesses and they have put their signature on inquest report and their signature was marked as Ext. 3 and Ext. 3/1 respectively. P.W. 6 – Dr. Ashok Kumar Choudhary on 1.7.2011 was posted as Civil Assistant Surgeon at M.J.K.



Hospital, Bettiah and on the same day at 3.50 P.M. he conducted post -mortem examination on the dead body of the deceased and he proved the post- mortem report which was marked as Ext. 2. P.W. 9 / Sanjeev Kumar is the Investigating Officer of the case.

7. After completion of the prosecution evidence, on 12.4.2012 evidences and circumstances brought on record during the trial were explained to the appellants and their statement under Section 313 of the Cr.P.C. was recorded in which they denied the charges and claimed regarding their false implication.

8. To demolish the prosecution case from the defence side also five witnesses were examined , namely: D.W. 1 - Md. Jamal Asaraf, S/o Md. Fariyad [appellant in Cr. Appeal (DB) No. 421 of 2013], D.W. 2 / Md. Fariyad @ Bikau who is appellant in Cr. Appeal (D.B.) No. 421 of 2013 , D.W. 3- Md. Badrul Alam, D.W. 4 -Gopal Jee Das and D.W. 5 / Md. Hasim. They were examined as formal witnesses and they had proved deed of gift as Ext. A, Malguzari rent receipt marked as Ext. B, B/1 and B/2 to B/21.

9. Sri Kanhaiya Prasad Singh, learned senior counsel assisted by Sri Birendra Kumar Singh, learned counsel for the appellant in Cr. Appeal (DB) No. 439 of 2013 after placing entire evidences has argued that the appellant in the present case was



falsely implicated due to old animosity. It was claimed that since appellant was close relative of the informant and land dispute in between the parties was going on since long, in a case of no evidence the appellant was fixed as accused and without any cogent material the learned trial judge has held him guilty and passed judgment of conviction and sentence. Sri Singh has argued that it was the case of the prosecution that at the time of occurrence in the field there were number of persons but during the trial none of the independent witnesses have come forward to support the prosecution case. He has argued that the prosecution case comes under the cloud due to the reason that purposely only one independent witness who was a labourer namely: Md. Farman was withheld by the prosecution. He submits that had the prosecution examined Md. Farman, the labourer, who was present in the field at the time of occurrence, he would have stated the true fact that the crime was not committed by the appellants and appellants were falsely implicated. He further submits that prosecution has purposely withheld other two witnesses namely: Badrul and Shabbir whose names were mentioned in the evidence of P.W. 2. He submits that P.W. 2 /Akhtar Hussain in paragraph- 1 of his examination- in- chief has categorically stated that he on a tractor carrying seeds was coming to the place of occurrence along



with Badrul, Shabbir and others and while they were about 5 katha behind the field where occurrence had taken place, he heard the sound of firing and seen the occurrence but to the reasons best known to the prosecution, witnesses namely: Badrul and Shabbir were not examined as prosecution witnesses which creates serious doubt on the prosecution case.

10. Sri Singh has further argued that the fardbyan and F.I.R. also appears to be ante -dated and ante timing. He submits that the Investigating Officer / P.W. 9 in his evidence has categorically stated that he received information on rumour regarding the occurrence at about 10.45 A.M. and thereafter he rushed to the place of occurrence. The Investigating Officer / P.W. 9 reached the place of occurrence at 11.30 A.M. but no reason has been assigned as to why fardbyan of P.W. 4 was recorded at 12.15 P.M. He submits that had it been a case that informant or other so-called eye witnesses had seen the occurrence, immediately after arrival of the Investigating Officer the fardbyan would have been recorded but purposely in the present case fardbyan was shown to be recorded at 12.15 P.M. i.e. after about more than 45 minutes from the arrival of P.W. 9 at the place of occurrence. Sri Kanhaiya Prasad Singh, learned senior counsel for the appellant in Cr. Appeal (D.B.) No. 439 of 2013 to corroborate his submission that



the fardbyan or F.I.R. was ante- dated and ante- timed has argued by way of referring to the inquest report i.e. Ext. 3/2 that though inquest report was shown to be prepared at about 11.30 on 1.7.2011 in the inquest report in column no. 1 case no. i.e. Lauriya P.S. Case No. 106 of 2011 was mentioned whereas formal F.I.R. i.e. Lauriya P.S. Case No. 106 of 2011 was drawn at 2.15 on 1.7.2011. He submits that those facts categorically suggest that the fardbyan was not recorded in the manner in which it has been projected during the trial rather it was done by ante- dating and anti -timing.

11. Sri Pramod Kumar Sinha, learned counsel appearing on behalf of appellant / Fariyad in Cr. Appeal (DB) No. 421 of 2013 adopting the argument advanced by learned senior counsel Sri Kanhaiya Prasad Singh has further argued that prosecution evidence is not believable on the point that the prosecution witnesses in their evidence are consistent that firing was made on the deceased from very close range i.e. from a distance of 2-3 hands but injuries found on the person of the deceased in the post-mortem examination report suggests that the firing was not done from close range. This fact has also been corroborated by the evidence of P.W. 6, the doctor who conducted post -mortem examination on the dead body. In cross -examination P.W. 6 he



has specifically stated that firing was not made from close range. Sri Sinha has argued that none of the injuries found on the person of the deceased was indicative of the fact that the injury was having any blackening or burn mark whereas in case of firing from close range it was necessary to notice such mark on the entry point. However in the present case on the person of the deceased there is no mark to substantiate that firing was made from close range. Sri Sinha has argued that this suggests that none had seen the occurrence and after finding dead body in the field the witnesses have come out with a case that occurrence had taken place in their presence. He submits that the oral evidence has not been corroborated by medical evidence and as such it creates serious doubt on the prosecution case. Sri Sinha has also argued that so far as his client namely : Fariyad is concerned there is evidence that he gave shot of firing on the chest of the deceased but on the chest of deceased doctor has noticed injury no. 5 which was superficial in nature. He submits that at the time of examination of the doctor who conducted post- mortem examination i.e. P.W. 6 he deposed that such injury can be self made also. Sri Sinha has emphasized that in any event injury given by the appellant was not cause of death of the deceased. He has also argued that in the present case none of the independent



witness was examined on behalf of the prosecution which creates serious doubt on the prosecution case. Accordingly it has been argued that the appellant is entitled to get order of acquittal.

12. Sri Ajay Mishra, learned Additional Public Prosecutor has vehemently opposed both the Appeals. He submits that in the case number of witnesses who were examined as eye witness to the occurrence are consistent on the point of occurrence. He submits that all the witnesses consistently have said as to how the deceased was attacked by the aforesaid two appellants and other accused persons by giving gun shot injury and injuries which were stated by the witnesses were found by the doctor during post- mortem examination. He submits that ocular evidence has been corroborated by the medical evidence. He further, by way of referring to the evidence of informant i.e. P.W. 4, submits that this witness has categorically stated that while she was sitting on the ridge of the field and labourer was ploughing the field father of the appellant – Nawab namely: Md. Tahir came to the field of the husband of the informant and threatened to leave the field. Thereafter he left the field. Within ten minutes he arrived with other accused persons including both the appellants. Sri Mishra, by way of referring to the aforesaid evidence, submits that this fact corroborates that there was pre- meeting of minds amongst the



accused persons and thereafter occurrence had taken place in which husband of the informant was brutally murdered by giving multiple gun shot injuries. Similarly Mr. Aslam Ansari, learned counsel for the informant has opposed the Appeal. He has referred to the defence evidence to strengthen the fact that the accused persons at the time while informant and deceased were in field were not far away rather from the evidence of defence witnesses it is evident that the appellants were nearer to the field where occurrence had taken place. He has specifically referred to the evidence of D.W. 1/ Md. Jamal Asaraf, son of appellant / Fariyad. He has also argued by taking aid from the facts disclosed by D.W. 1 that the land over which occurrence had taken place was actually purchased land of the deceased - Md. Sarfaraz and there was no reason for the appellants' side to prevent the deceased from working on the field in question. Similarly he has referred to the evidence of D.W. 2 who is non else but one of the appellants in the present Appeal i.e. Md. Fariyad @ Bikau. In his evidence at defence stage also stated that he was in his field in Belwa Sareh. According to Mr. Ansari, learned counsel for the informant the appellants had actively participated in the occurrence and there is direct evidence against them of giving shot of firing on the deceased.



13. Besides hearing learned counsel for the parties we have minutely examined the entire evidence on record. Before proceeding it would be necessary to firstly discuss evidence of all those witnesses who were present in the field itself. Those witnesses are P.W. 1, Sajjad, P.W. 3 / Tausif Ahamad and P.W. 4 - Nikahat Jhahan. P.W. 3 / Tausif Ahamad is the son of the deceased and P.W. 4 / Nikahat Jahan is the wife of the deceased as well as informant of the case.

14. The informant / P.W. 4 in her evidence has stated that on the date of occurrence at 9.00 A.M. she was in her field with her brother – Sajjad / P.W. 1, son - Tausif / P.W. 3 and husband – Sarfaraj [deceased] with one labourer namely: Farman [not examined]. Her labour was ploughing the field by spade since in the said field they were to plant paddy. About 10.00 A.M. Tahir [father of appellant / Nawab Alam] arrived in the field and asked as to why he was using the field and thereafter her husband told that he was the owner of the field which was in his possession since last ten years and it was his purchased land. Thereafter Tahir with threatening returned back and after ten minutes he along with four accused persons again came to the place of occurrence. Amongst them she could identify Nawab [appellant in Cr. Appeal (DB) No. 439 of 2013], Bikau [appellant in Cr. Appeal (DB) No.



421 of 2013] and Tahir but she could not identify other two accused persons. Immediately after arrival Tahir exhorted to kill by using filthy language and thereafter Nawab [appellant in Cr. Appeal (DB) No. 439 of 2013] gave one shot of firing on her husband – Sarfaraj which hit the right elbow of her husband. Thereafter her husband started to flee away. Subsequently Nawab and Bikau surrounded her husband and again Nawab gave one shot of firing which hit on the left side of ribs and came out from the right side. Thereafter her husband fell down. Then Bikau from a distance of about 3 hands gave one shot of firing from his rifle on his chest. Her brother – Akhtar, Sajjad, Wais and others arrived there and those accused persons fled away. She claimed that she rushed to her husband and saw that her husband had already died and lying in pool of blood. At the same place subsequently daroga ji arrived and recorded her fardbyan on which she put her R.T.I. In dock she identified appellant / Nawab and Bikau whereas she claimed to identify Tahir who was not present in court. In cross examination in para – 5 she categorically stated that her bhaisur (elder brother of her husband) was earlier killed. He was killed by his *pattidar* however she was not in a position to disclose the name of accused persons. In paragraph – 7 of her cross examination she further stated that Sheikh Abdullah was her father -in-law who was



having two sons. One was her husband and second was Sheikh Ejaj @ Bhola. She denied the suggestion that in case of murder of Sheikh Ejaj compromise had taken place. In para 8 of her cross examination she further stated the name of brothers of her father-in-law namely: (1) Sheikh Kashim; (2) Sheikh Haroon; (3) Sheikh Kahir, (4) Sheikh Shabir and (5) Sheikh Tahir [one of the convicts who died during pendency of the Appeal]. She further clarified that Sheikh Ejaj was her Bhaisur [elder brother of her husband] who was earlier killed. In paragraph 9 of her cross – examination she has further stated that members of her parents family were helping in doing cultivation. At the time of cropping all those persons were using to come. She further stated that in Belwa Sareh she was having six katha of land. This witness was cross examined at length but on going through her entire evidence we don't find any material to see her evidence with any doubt. Of-course her attention was drawn to her previous statement recorded during investigation under Section 161 of the Cr.P.C. in paragraph 19 and 20 of her cross examination which was contradicted while examination of Investigating Officer i.e. P.W. 9 in paragraph 41. It appears that though there were some inconsistencies but those inconsistencies were not enough to over look entire evidence of P.W. 4 which is otherwise credible.



15. P.W. 1 / Sajjad was also present with informant in the field at the time of occurrence and this witness has also deposited almost in similar manner like P.W. 4.

16. P.W. 3 - Tausif Ahamad is the minor son of the deceased and on the date of evidence his age was recorded as 14 years. P.W. 3 / Tausif Ahamad in his evidence has stated that on 1.7.2011 at 9.00 A.M. he was present in his field situated in Belwa Sareh with him his Mama [maternal uncle] -Sajjad / P.W. 1 , his mother – Nikahat Jahan/ P.W. 4 and his father -Sarfaraz [deceased] and one labourer were there. He disclosed the name of labourer as Farman. This witness at time of occurrence was sitting on the Northern ridge of the field. Besides him, his Mama - Sajjad and mother were also sitting. His father [deceased] was sitting on the Eastern ridge and labourer was preparing ridge. On the same day at 10.00 A.M. Tahir arrived and asked his father that it was not his field and don't plough the same, whereas his father told that it was his purchased field and he would plough the field. Then Tahir by way of threatening returned back to the Southern side and within 10 -12 minutes he came back with his four associates. Amongst them he could identify Nawab and Bikau [appellants] and Tahir however he could not identify other two accused persons. Immediately after arrival Tahir gave order to Nawab to



kill Sarfaraj. Thereafter Nawab by means of his rifle fired on his father which hit on his right hand. Thereafter his father pressing his right hand ran towards Northern field who was chased by Nawab [appellant in Cr. Appeal (DB) No. 439 of 2013] from Western side and Bikau [appellant in Cr. Appeal (DB) No. 421 of 2013] from Eastern side and Nawab gave second shot of firing which hit on the ribs of his father and bullet came out from the right side. Thereafter his father immediately fell down. Subsequently Bikau (appellant) from a distance of 2-3 hands fired from his rifle on the chest of his father. After firing Nawab and Bikau and other two accused persons ran towards Northern side. Tahir fled towards Belwa Sareh. His father died at the place of occurrence. In the meanwhile his another maternal uncle -Akhtar / P.W. 2 , Badrul [not examined], Wais / P.W. 5 , Shabbir [not examined] and his cousin brother- Masood Zamal / P.W. 7 had already arrived with seeds. This witness further claimed that the field in which they were ploughing was his own field which was being cultivated by them since much prior to the date of occurrence. This witness identified appellant - Nawab and Bikau who were present in dock. In para – 6 of his cross examination he stated that on the date of occurrence he had gone to the field for planting. His attention was drawn to his previous statement



recorded during investigation in paragraph 19 of his cross-examination and thereafter it was contradicted by the Investigating Officer / P.W. 9 in paragraph 40 of his cross-examination. We have minutely examined the deposition of P.W. 3 and also attention and contradiction but we find that those contradictions are immaterial since the evidence of this witness is otherwise credible.

17. P.W. 2 & 5 /brother and cousin brother of the informant in their evidence have stated that for the purposes of cropping they had come to the field of the deceased carrying seeds. They had come on a tractor and while they were just to arrive in the field of deceased they heard sound of firing and in their presence the deceased was gunned down by the accused persons. Those witnesses were cross -examined at length but nothing could be extracted to create doubt on their evidence. The presence of those witnesses have already been established in the evidence of P.W. 1, P.W. 3 and P.W. 4 and as such there is no reason to raise doubt regarding their presence at the place of occurrence and seeing the occurrence by them.

18. P.W. 7 / Masood Zamal @ Sonu and P.W. 8- Md. Sazzad are witnesses to the inquest report and they had proved



their signature on the inquest report which were marked as Ext. 3 and 3 /1 respectively.

19. P.W. 6 / Dr. Ashok Kumar Choudhary on 1.7.2011 was posted as Civil Assistant Surgeon at M.J.K. Hospital, Bettiah and on the same day at 3.50 P.M. he conducted post -mortem examination on the dead body of the deceased- Sheikh Sarferaz and he deposed the following facts:-

“ On external examination following ante mortem injuries were found :

(i) one lacerated circular wound over left side of chest near nipple, size 1/2" in diameter with inverted margin- wound of **entry**.

(ii) one lacerated wound over right side of the chest on upper part lateral side circular in shape with everted margin size 1 ½ ” in diameter - wound of **exit**.

(iii) one lacerated wound over right arm middle part with inverted margin size oval in shape size 1” x 3/4” at medial aspect of right arm -wound of **entry**

(iv) one lacerated wound over right arm posterior lateral aspect with everted margin size 3”x2” -wound of **exit**.

(v) one lacerated wound over middle of the chest upper part with inverted margin up to bone only- wound of **entry**.

(3) On dissection - above injuries were confirmed. Injury no. I and II were communicating each other. Chest cavity full of blood. Laceration of lung tissue and vessels were found.

(4) Injury no. III and IV communicating to each other with fracture of humerus. All viscera were found pale. Heart - both side empty. Stomach contained only mucoid secretion. urinary bladder -empty.

(5) Time elapsed since death- within six hours.

(6) All injuries were ante mortem caused by fire arm.

(7) In my opinion cause of death was due to shock and haemorrhage due to above injuries caused by fire arm.

(8) Injury no. 1 in itself was sufficient in ordinary course of nature to cause the death. Rigor



mortis present in neck. Slightly appeared in upper limb but not in lower limb.”

This witness proved the post- mortem examination report which was in his pen and signature and the same was marked as Ext. 2 . In his cross -examination he has stated that on the person of the deceased there was no mark of blackening and as such he stated that firing was not made from very close range. He further deposed that injury no. 5 was caused by bullet which bullet had not entered the body. The same was taken out from the body.

20. On examination of evidence of this witness i.e. P.W. 6, it appears that ocular evidence has been corroborated by medical evidence. Of- course the doctor in post -mortem examination had not noticed any blackening mark which was possible in case of firing made from very close range but at the same time consistent evidence of the witnesses may not be ignored. It is settled that if there is some inconsistency in between oral evidence and medical evidence in that event preference is to be given to the oral evidence. Moreover the witnesses in categorical term have stated that from some distance they had seen the occurrence in which the deceased was given first shot of firing on his elbow and thereafter he started fleeing away then another firing was shot on him. When he fell down again he was shot at. In



such such situation it would be difficult to come to conclusion that witnesses who had deposed that firing was made from a distance of 2-3 hands was actually within the same distance. There is possibility that witnesses might had failed to assess or explain the exact distance of giving shot of firing on the deceased. Once there is specific evidence of the witnesses who are eye witnesses to the occurrence that deceased was given gun shot injuries then only on the point that on the injuries there was no blackening mark entire ocular evidence can not be ignored.

21. The Investigating Officer in the present case namely Sri Sanjeev Kumar was examined as P.W. 9. On 1.7.2011 this witness was posted as Officer- in -charge in Lauriya Police Station. On the same day at 10.45 A.M. he received information on rumour that in Belwa Sareh in land dispute firing was made in which death had occurred. Thereafter he recorded Station Diary Entry No. 11 dated 1/7/2011 and with other Police personnels he proceeded to the place of occurrence and at 11.30 A.M. he reached the place of occurrence. This witness saw that dead body of deceased- Sheikh Sarfaraj was lying in the field of one Anwar Miyan. The dead body was in pool of blood. On the right side of the chest , in the middle of the chest and left side of the chest he noticed gun shot injuries and on right hand elbow also he noticed



the gun shot injury. At the place of occurrence in presence of independent witnesses he prepared inquest report in respect of the dead body and he proved the inquest report which was marked as Ext. 3/2. At the place of occurrence he recorded fardbyan of the Nikahat Jahan / P.W. 4 [wife of deceased - Sarfaraj]. The fardbyan was marked as Ext. 1/1. He also proved endorsement on the fardbyan and same was marked as Ext. 1/2. At the place of occurrence he found one khokha [fired cartridge] of 8 MM and one pillet and prepared seizure list, which was marked as Ext. 4. The khokha [fired cartridge] and pillet were marked as Material Ext. I and II. In paragraph 6 of his evidence he described about the place of occurrence which was within the jurisdiction of Police Station – Lauriya on the Northern side of village – Belwa which was field of Sheikh Anwar. In the said field itself he had found dead body of Sarfaraj with blood mark on the soil. Near the dead body he had noticed one .315 bore fired cartridge [Khokha] and one pillet from the chest of the deceased was taken out. He clarified that .315 bore correspond to 8 MM. He had also noticed gun shot injury on the person of the deceased and on the Earth he noticed huge blood which had fallen. On the chest of the deceased he noticed three injuries and on right hand elbow also there was injury. He further proved the formal F.I.R. which was



marked as Ext. 5. In paragraph 13 of his cross- examination he has given the reason for delay in recording fardbyan since the victim i.e. wife of deceased was crying and as such in recording her fardbyan some delay had occurred of -course this fact was not mentioned in the case diary. In para – 30 of his cross examination he stated that he had prepared inquest report and he had mentioned Police Case No. on it after telephonically inquiring from the Police Station. He clarified that when inquest report was prepared formal F.I.R. was not drawn. Meaning thereby that this witness has clarified the reason for mentioning Case No. in the inquest report and he stated that he had enquired telephonically from the Police Station.

22. We have also examined the statement of accused -appellants recorded under Section 313 of the Cr.P.C. which suggests that almost all the circumstances and evidences which were collected during the trial were explained to them then their statement under Section 313 of the Cr.P.C. was recorded.

23. During the trial from the defence side also altogether five witnesses were examined. As per the evidence of D.W. 1/ Md. Jamal Asaraf, S/o Fariyad [appellant] it is evident that this witness has accepted that occurrence had taken place in the field of Sarfaraj which was purchased by Sarfaraz about ten



years back from one Sheikh Haroon. He also gave plot number of the said field. Meaning thereby that appellants were aggressor and without any authority father of appellant - Md Nawab namely Tahir who was also tried together and convicted had tried to disturb the deceased from doing work in the field. Similarly appellant/ Md. Fariyad @ Bikau who was also examined as D.W. 2 accepted that at the time of occurrence he was in his filed in Belwa Sareh where occurrence had taken place.

24. On examination of entire evidence we are of the opinion that learned trial judge has rightly passed the judgment of conviction and sentence. So far submission advanced by Sri Kanhaiya Prasad Singh, learned senior counsel that prosecution case may be considered as doubtful since none of the independent witnesses were examined, in view of direct evidence which has come during the trial appears to be insignificant. Now- a -days it is difficult to obtain evidence of any outsider and in such situation only on the ground that none of the independent witnesses were examined the case of prosecution if otherwise credible can not be ignored. So far submission of Sri Singh that there is no explanation for delay in recording fardbyan is concerned it also appears to be insignificant. The Investigating Officer in his evidence is very much categorical that he reached the place of occurrence at 11.30



A.M. and thereafter firstly he prepared inquest report. In the present case post-mortem was conducted on the dead body at 3.50 P.M. on the same day i.e. the date of occurrence 1.7.2011. Once the Investigating Officer had firstly prepared inquest report he was also required to take steps for sending the dead body to hospital for post-mortem examination and as such only delay of 45 minutes in recording fardbyan may not be a ground for ignoring the prosecution case. The Investigating Officer in his evidence has also explained some delay in recording fardbyan which had occurred due to the reason that the informant /wife of the deceased was crying which suggests that she was not in a position to make immediate statement and as such whatever delay has occurred that has already been explained by the prosecution in recording fardbyan. The Investigating Officer has also clarified the reason for mentioning the Case No. on the inquest report since from the place of occurrence, where inquest report was prepared, he enquired telephonically from the Police Station then he had incorporated the Case No. in the inquest report. Moreover such point has got no much relevance for over-looking evidence which is otherwise credible. Similarly the submission of Sri Pramod Kumar Sinha , learned counsel who has appeared in Cr. Appeal (DB) No. 421 of 2013 that prosecution case may not be believed



on the ground that on the person of the deceased injuries were not having any blackening mark appears to be not tenable in view of the fact that number of witnesses had seen the occurrence from some distance and as such it would be difficult to come to conclusion as to exactly what was the distance of firing. Of course witnesses have stated that firing was made from a distance of 2-3 hands, since the ocular evidence is consistent non- finding of such blackening mark may not be a ground to over look the entire prosecution case. The submission of Sri Pramod Kumar Sinha that in any event death of deceased had not occurred due to injury no. 5 has got no relevance since appellant /Fariyad has been convicted under Section 302 of the I.P.C. with the aid of Section 34 of the I.P.C.

25. In view of the facts and circumstances we do not find any ground to interfere with the judgment of conviction and sentence. In view of aforesaid evidences which we have discussed hereinabove we are of the opinion that the learned trial judge has committed no error in passing the judgment of conviction and sentence and as such there is no need to interfere with the impugned judgment. Accordingly judgment of conviction dated- 8.3.2013 and sentence dated: 13.3.2013 passed by Sri Amrit Lal Yadav, learned Adhoc Ist Additional District and Sessions Judge,



Bettiah (West Champaran) in Session Trial No. 555 of 2011
[arising out of Lauriya P.S. Case No. 106 of 2011] is approved
and both the Appeals are dismissed.

(Rakesh Kumar, J)

(Arvind Srivastava, J)

praful/-

AFR/NAFR	AFR
CAV DATE	N/A
Uploading Date	03-11-2018
Transmission Date	03-11-2018

