

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.284 of 1994

-
- 1) Sanjay Singh
2) Ajay Singh
Both sons of Rudal Singh, Resident of Village – Pithaghat, Police
Station – Garkha, District – Saran.

... .. Appellants

Versus

STATE OF BIHAR

... .. Respondent

Appearance :

For the Appellant/s : Mr.Aaruni Singh, Adv.
For the Respondent/s : Mr.Ashwani Kumar Sinha

CORAM: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA
and
HONOURABLE MR. JUSTICE S. KUMAR

C.A.V. JUDGMENT

(Per: HONOURABLE MR. JUSTICE VINOD KUMAR SINHA)

Date : -09-2019

1. This appeal is directed against the judgment of conviction dated 22.04.1994 and order of sentence dated 23.04.1994, passed by Sri Jai Kishore Narayan, the then 4th Additional Sessions Judge, Saran at Chapra in Sessions Trial No. 482 of 1993, by which, he has convicted the appellants above named under Section 302 of the Indian Penal Code and sentenced them to rigorous imprisonment for life. The period of sentence already undergone by them in judicial custody was directed to be set off under Section 428 Code of Criminal Procedure (in short “Cr.P.C.).

2. Prosecution case in short is that PW5 Arjun Singh got his



fardbeyan recorded at the residence of doctor at Government Hospital Garkha on 25.12.1992 at 8.30 P.M. stating there in that his co-villager Rudal Singh @ Chandraman Singh and Brij Mohan Singh are full brothers and they are living jointly and about two years ago, there was a complain against the informant's son Jitendra Singh@ Tuntun (deceased) of having illicit relationship with the daughter of Brij Mohan Singh. In that connection, sons of Rudal Singh, namely, Sanjay Singh and Ajay Singh had an altercation with the deceased Jitendra Singh@ Tuntun, in which, Sanjay Singh had threatened the deceased that " TOHRA KE KABHI UTHA LENGE". Again on the eve of Chhath Puja, there was an exchange of hot words between the son of the informant, deceased Jitendra Singh@ Tuntun and Sanjay Singh, in which also, he threatened the deceased " AB TOHAR ANT HI KAR DENA PADEGA". Further case is that on 25.12.1992 at 7 P.M. son of the informant, Jitendra Singh@ Tuntun, aged about 18 years went to attend the call of nature. At that time the informant was at his Bathan. After some time, son of informant Jitendra Singh@ Tuntun cried out in fear " DAURO HO BABU SANJAY AUR AJAY HAMAR JAAN MARLE" on which, the informant rushed to the place of occurrence and saw appellants Sanjay Singh and Ajay Singh fleeing away and his son was lying on the ground and there was bleeding from his neck and chest. It is



also alleged that Jitendra Singh@ Tuntun disclosed the informant that Sanjay Singh and Ajay Singh had assaulted him. Thereafter, on the alarm raised by the informant and his injured son, villagers, namely, Rameshwar Singh (PW1), Tribhuwan Singh, Ajit Singh (PW3), Bimal Prasad Singh and Bachcha Singh (PW2) came there running, who would also disclosed about the occurrence. Further case is that the informant went to the Garkha hospital along with his injured son but his injured son died on the way to hospital.

3. On the basis of the aforesaid fardbeyan, Garkha P.S. Case No. 214/92 was registered against the appellants.

4. Police after investigation of the case submitted charge-sheet. Cognizance of the offence was taken and thereafter, the case was committed to the court of Sessions, which ultimately came in the court of Sri Jai Kishore Narayan, the then 4th Additional Sessions Judge, Saran at Chapra for trial and disposal.

5. To prove the case, prosecution got examined seven witnesses. They are: PW1- Rameshwar Singh, PW2 – Bachcha Singh, PW3 – Ajit Kumar Singh, PW4- Dr. Binod Kumar Sinha, who conducted autopsy on the dead body of the deceased, PW5 – Informant, Arjun Singh, PW6 –Harendra Behari Verma, Investigating Officer and PW7 – Santosh Kumar, Judicial Magistrate, who recorded the statement of some



witnesses under Section 164 Cr.P.C. under the order of Chief Judicial Magistrate, Chapra.

6. Apart from that following documents have been brought on record by the prosecution and they are marked as Ext.1 – postmortem report of the deceased Jitendra Singh@ Tuntun, Ext. 2- Signature of informant on fardbeyan, Ext. 3 – Fardbeyan, Ext. 4 – Formal F.I.R., Ext. 5 – Inquest report, Ext. 6- Seizure list in respect of seizure of shawl, hawai chappal (slipper) and plastic slipper, Ext.7 – Requisition sent by the Dr. Raj Kishor Prasad of Garkha hospital and ; Ext. 8 to 8/2 are the statements of Ajit Kumar Singh (PW3), Rameshwar Singh (PW1) and Bachcha Singh (PW2) recorded before the Magistrate (PW7) under Section 164 Cr.P.C.

7. On behalf of defence neither oral nor documentary evidence has been brought on record rather from cross-examination , it appears that their defence is that no occurrence in the manner as alleged by the prosecution has ever taken place and the deceased was killed in some other manner and appellants have falsely been roped in the case.

8. Learned Trial Court on conclusion of trial convicted the appellants under Section 302 of the Indian Penal Code and sentenced them in the manner aforesaid.

9. Aggrieved, the appellants preferred the present appeal on the ground that prosecution story of oral dying declaration is not



believable in the background of evidence of Doctor (PW4). The evidence of prosecution witnesses suffers from discrepancies and infirmities and prosecution has failed to prove the motive behind the occurrence and on several other grounds also, which will be discussed later on.

10. In the background of above, on scrutinizing the materials available on record, it appears that the F.I.R. has been lodged immediately after the occurrence i.e. within one and half hour of the occurrence, as such, there is no delay in recording fardbeyan, which rules out the possibility of any manipulation or improvement in the prosecution case. It further appears from the fardbeyan (Ext. 3) that on hearing the cry of deceased, informant (PW5) went there and saw the convicts- appellants fleeing away and his son in injured condition bleeding profusely and his son disclosed him, the names of appellants as the persons, who assaulted him. Fardbeyan further disclosed that on the cry of the deceased, other witnesses viz. PW1, PW2 and PW3 also reached there. Learned counsel for the appellants have doubted the genuineness of fardbeyan as though the fardbeyan disclosed that it has been recorded in the hospital at the government quarter of the doctor at Garkha but evidence of PW1 and PW3 in his cross-examination disclosed that the fardbeyan was recorded at the police station. However, PW5 clearly stated in his evidence that fardbeyan was recorded by



Daroga Ji at the hospital, which was read over and explained to him and he identified his signature over there also. Furthermore, the evidence of Investigating Officer (PW6) also disclosed that on information, he reached at the Government quarter of the doctor at Garkha Hospital and found Jitendra Singh dead, thereafter, he recorded the statement of Arjun Singh and read over and explained the same to him, on which, he put his signature and he proved the fardbeyan as Ext. 3. Neither PW5 nor PW6 has been cross-examined specially to controvert the recording of fardbeyan at Hospital, even no suggestion was given to them that the same has not been recorded at the hospital rather at police station, as such, they are precluded from taking benefit of that discrepancy.

11. Much has been argued by learned counsel for the appellants on the recording of statement of PW1, PW2 and PW3 under Section 164 Cr.P.C., on the ground that the same was not recorded at the instance of Investigating Officer rather it was recorded at the instance of informant and other witnesses in order to show themselves as eye witness of the occurrence and to improve the story of identification of appellants, though they had not stated so in their previous statement before the police and the same also does not find mention in fardbeyan (Ext. 3). However PW1, PW2 and PW3 have been named in the fardbeyan as the persons, who also reached there on hulla and



informant (PW5) claimed that they will disclose the fact. Apart from that, evidence of PW2 and PW5 disclosed that they have given an application before the Magistrate for recording their statement under Section 164 Cr.P.C., as they apprehend that the police is not conducting the investigation properly as the police has come only once in the village. Thus, there is an explanation for getting their statement recorded by the Magistrate under Section 164 Cr.P.C. and that appears to be plausible. Furthermore, law does not prohibit recording of statements under Section 164 Cr.P.C. at the instance of informant (PW5). Moreover, the statement under Section 164 Cr.P.C. cannot be used as a substantive piece of evidence and it can only be used for corroborating or contradicting the evidence of witnesses. No doubt, in the F.I.R., there is no story of identification in the torch light but we are aware of settled law that F.I.R. can not contain all the minute details of occurrence especially when the informant reached at the place of occurrence and found his son in injured condition and taken him to the hospital and on the way, he died, in such a situation, if there is no mentioning of identification of appellants in the torch light, that can be understandable, as informant must be in a state of shock and trauma and as such, it cannot be expected that he will disclose all minute details of occurrence. As such, much weightage cannot be given to the above argument of appellants.



12. On scrutiny of the evidence, it appears that PW5 is the informant and father of the deceased, he has stated that on 25.12.1992 at 7 P.M., the deceased had gone to attend the call of nature and after some time, PW5 (informant) heard the cry of his son “ DAURO HO BABU SANJAY AUR AJAY HAMAR JAAN MARLE” then the informant went there with three cell torch and found his son in injured condition and seen the appellants fleeing away with knife. His son disclosed him that the appellants assaulted him. Evidence of this witness in chief also disclosed that PW1, PW2 and PW3 had also seen the occurrence, thereafter, they took the injured to hospital, however, on the way to hospital, the deceased died. This witness has been examined at length on the point of motive and also on the point of place of occurrence and even in his cross-examination, he has stated that his son disclosed about the assault by the appellants. He found injury on his neck and on scapular region and even in spite of his cross-examination, there is nothing to doubt the veracity of evidence of this witness and his evidence found corroboration from the evidence of PW1, PW2 and PW3 also as their evidence also disclosed that they reached at the place of occurrence and deceased disclosed them that appellants assaulted him. No doubt, this witness has also stated about identification in torch light and even in his cross-examination, he has stated so and also stated that as the torch



fell somewhere, he could not produce the same before the Daroga Ji. Fardbeyan (Ext.3) does not disclose about identification in torchlight but to our opinion, that appears to be a minor contradiction and that is not so vital to make his whole evidence incredible specially when in spite of rigors of cross-examination, he withstood the test of cross-examination and there is no vital discrepancy or inconsistency in his evidence.

13. Evidence of PW1 disclosed that the occurrence is of 25.12.1992 at 7 P.M. and at that time, he was at his Bathan and heard the sound “ BAAP RE BAAP JAAN GAYA”, on which, he went towards the place of occurrence and in torch light, he saw the appellants assaulting the deceased by knife and in the mean time, Arjun Singh (PW5), Bachcha Singh (PW2) and Ajit Kumar Singh (PW3) also came, thereafter, the deceased disclosed that Sanjay and Ajay (appellants) have assaulted him. He has been cross- examined in order to show that it is not possible for this witness to watch the place of occurrence from the “bathan”, however, his evidence disclosed that he proceeded towards the place of occurrence and saw the occurrence and it is not so that he watched the occurrence from “Bathan”. He has been cross-examined at length to show the discrepancies between his evidence in the court and his earlier statement made before the police, to which, he has also stated before the police that he had seen the appellants assaulting the deceased by



dagger and he has not stated that he came to know from the Arjun Singh that appellants stabbed the deceased and fled away and also stated that he had gone with torch and in torch light, he had identified the appellants. He has also stated before the police that deceased disclosed the names of the appellants, who had assaulted him and he has also not stated that he reached there and saw the deceased fallen on the ground and crying in pain. The Investigating Officer (PW6) has also been confronted with the above evidence of PW1 in para -5 of his cross-examination and on perusal of the same, it appears that the above statement has not been made by this witness in his earlier statement. However, they appear to be omissions only and defence has not tried to confront him from his earlier statements made before the police so as to show his impeaching character.

14. PW2 Bachcha Singh is the son of the informant and his evidence in chief disclosed that on 25.12.1992 at 7.00 P.M., he was at his bathan and he heard a cry “ Baap Ho Jaan Gail”, he identified the said voice of his brother Jitendra, thereafter, he ran towards the place and in the torch light, he found the deceased fallen on the ground and the appellants were assaulting him by knife and, thereafter, his father PW5- Arjun Singh, PW1- Rameshwar Singh and PW3- Ajit Singh also reached there and the appellants fled away. Thereafter, they lifted the deceased, who told that “ Baabu Ho Sanjay Aur Ajay Hamko Chaku Maar



Diya". The deceased was taken to hospital but he was declared dead. This witness was cross-examined in order to show some discrepancies in his evidence from his earlier statement made before the police. This witness in his further cross-examination, had stated that he was ten steps away from the deceased, when the appellant started fleeing away but he did not chase anybody, thereafter, 40 to 50 persons assembled at the place of occurrence. His evidence in cross-examination also disclosed that his statement as well as statement of other witnesses were recorded by the Magistrate under Section 164 Cr.P.C., as they apprehend that the police would not conduct the investigation properly, as police had come to the village only once. Attention of Investigating Officer (PW6) has been drawn towards the discrepancy in his evidence and the Investigating Officer in para -6 of his cross-examination stated that Bachcha Singh told him that while he was returning from the house of Vikramaditya Singh, he heard hulla and ran towards the bathan and saw the occurrence and he had not stated before him that he had seen the appellants stabbing the deceased. Evidence of Investigating Officer also disclosed that PW2 had told him that Ajay was carrying dagger and Sanjay was carrying pistol, while fleeing away. Cross-examination of the Investigating Officer further disclosed that PW2 has not stated before him that he had gone with torch and in the torch light, he identified the appellants.



15. Evidence of the PW3 in chief also disclosed that on 25.12.1992 at about 5.00 P.M., while he was feeding his cattle, deceased and appellant Sanjay Singh was there, again stated that Sanjay Singh came later. His evidence in chief further disclosed that appellant Sanjay Singh and the deceased Jitendra Singh both left the place at 7.00 P.M., while he was going to his boring with torch and when he took few steps towards the boring, he heard a cry from the western side “ Baap Re Baap Jaan Gail”, he identified the said voice of the deceased and ran towards that place with torch and saw the appellants stabbing the deceased. His evidence in chief further disclosed that Arjun Singh (PW5), Bachcha Singh (PW2), Rameshwar Singh (PW1) also reached there and appellants fled away. His evidence also disclosed that while they were lifting the Jitendra Singh (deceased), he told that “ Baabu Ho Sanjay Aur Ajay Hamko Chaku Maar Diya” and Jitendra Singh died. He has been confronted with his earlier statement made before the police and he has stated that he has not stated before the police that after Jitendra Singh and Sanjay Singh left the place, he left for market and while returning, he saw Rudal Singh and Sanjay Singh fleeing away with sword and dagger in their hands respectively and when he proceeded further, he came to know about the occurrence and he had also not stated before the police that when he reached at the place of occurrence, he saw Jitendra



Singh in injured condition and it is not true that he has not taken the name of Ajay Singh. He had also told the police that he was going with torch at 7.00 P.M. towards boring and he heard cry 'Baap Re Baap Jaan Gail'. He has also stated before the police that he saw the appellants stabbing the deceased with knife and also stated before the police that Jitendra Singh (deceased) told Arjun Singh (PW5) that appellants assaulted him.

16. PW4 is the doctor, who has conducted the postmortem examination on the dead body of the deceased on 26.12.1992 at 11.45 A.M. and found the following ante mortem injuries.

1. One incised wound in front of upper part of neck, 2" x 1/2" cavity deep.
2. Incised wound left side of the chest about 2" below left nipple, size 1" x 1/2" cavity deep.
3. Two bruises over left side of the face, size 1" x 1" just below one another.

On dissection of neck, showed collection of clotted blood with laceration of underlying muscles, cutting of blood vessels nerve of trachea.

On dissection of chest cavity, showed collection of clotted blood with punctured wound of left ventricle of heart size 1/2" x 1/2". Heart chambers were empty. In his opinion, the cause of death was shock and hemorrhage caused by above mentioned injuries no. 1 and no. 2. The injuries nos. 1 and 2 were caused



by sharp cutting weapon, such as Chaku. Injury no. 3 caused by hard and blunt substance possibly due to fall on hard and blunt surface. This witness has been further cross-examined and in cross-examination, he has stated that in case of cutting of blood vessels, nerve of trachea, a man if alive, can speak for few minutes or few seconds and if the trachea is fully cut, then and then only the man will be speechless.

17. PW6 is the Investigating Officer, who has stated about recording of fardbeyan at the hospital and he has taken over the investigation and got the inquest report prepared and also got the signature of the witnesses on the inquest report. Send the dead body for postmortem, thereafter, he came to place of occurrence and recorded the statement of the informant and inspected the place of occurrence and seized the Chekdar Suti Taulia (towel), one chappal, which is said to be of appellant Sanjay Singh and one plastic chappal said to be of deceased. Seized the blood stained earth and also seized the shawl having border, which is said to be of appellant Sanjay Singh and also found some blood spot at some distance at the field of one Bhagwan Singh. His evidence also disclosed that Bathan of the informant is 2.30 yards away from the place of occurrence and he has also received the postmortem report. His cross – examination disclosed that Dilip Kumar Singh and Tej Narayan Singh are the inquest witnesses.



18. PW7 is the Judicial Magistrate, who recorded the statement of PW1, PW2 and PW3 under Section 164 Cr.P.C.

19. From the discussions made above, it appears that there are discrepancies in the evidence of PW1 to PW3 and also some discrepancies in the evidence of PW5 from their earlier statement made before the police but it is well settled that all the discrepancies cannot be termed as contradictions and on that ground alone their whole evidence cannot be disbelieved, as it occurs due to several circumstances and further there is tendency of the illiterate witness to exaggerate the actual occurrence and the court has to consider the same, while appreciating the evidence.

20. Hon'ble Apex Court, while considering the discrepancies in the evidence of witnesses, in the case of **Appabhai and Anr. v. State of Gujarat [AIR 1988 SC 696]**, has held in para 13 of its judgment, as follows:

“12.....The Court while appreciating the evidence must not attach undue importance to minor discrepancies. The discrepancies which do not shake the basic version of the prosecution case may be discarded. The discrepancies which are due to normal errors of perception or observation should not be given importance. The errors due to lapse of memory may be given due allowance. The Court by calling into aid its vast experience of men and matters in different cases must evaluate the entire material on record by excluding the exaggerated version given by any



witness. When a doubt arises in respect of certain facts alleged by such witness, the proper course is to ignore that fact only unless it goes into the root of the matter so as to demolish the entire prosecution story. The witnesses nowadays go on adding embellishments to their version perhaps for the fear of their testimony being rejected by the court. The courts, however, should not disbelieve the evidence of such witnesses altogether if they are otherwise trustworthy. Jagamohan Reddy, J., speaking for this Court in [Sohrab and Anr. v. the State of Madhya Pradesh](#) 1972 CrL. L.J. 1302 at 1396 observed :

“This Court has held that falsus in no falsus in omnibus is not a found rule for the reason that hardly one comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggeration, embroideries or embellishments. In most cases, the witnesses when asked about details venture to give some answer, not necessarily true or relevant for fear that their evidence may not be accepted in respect of the main incident which they have witnessed but that is not to say that their evidence as to the salient features of the case after cautious scrutiny cannot be considered.

21. Furthermore, so far discrepancies in the evidence of witnesses from their earlier statement before the police is concerned, the same cannot be said to be contradiction rather only those part of the evidence, which are irreconcilable from the statement of the witnesses before the police, can be



considered as contradictions.

22. Moreover, there are procedure for bringing out contradictions in the evidence of evidence of witnesses from their earlier statement made before the police that has been discussed in the case of **Tahsildar Singh And Another vs The State Of Uttar Pradesh** reported in AIR 1959 SC 1012 and again has been discussed in the case of **V.K. Mishra and Another vs. State of Uttarakhand and Anr** reported in (2015) 9 SCC 588 in para 18 and 19, which reads as follows:-

18. Section 145 of the Evidence Act reads as under:

145. Cross-examination as to previous statements in writing.- A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

19. Under Section 145 of the Evidence Act when it is intended to contradict the witness by his previous statement reduced into writing, the attention of such witness must be called to those parts of it which are to be used for the purpose of contradicting him, before the writing can be used. While recording the deposition of a witness, it becomes the duty of the trial court to ensure that the part of the police statement with which it is intended to contradict the witness is brought to the notice of the witness in his cross-



examination. The attention of witness is drawn to that part and this must reflect in his cross-examination by reproducing it. If the witness admits the part intended to contradict him, it stands proved and there is no need to further proof of contradiction and it will be read while appreciating the evidence. If he denies having made that part of the statement, his attention must be drawn to that statement and must be mentioned in the deposition. By this process the contradiction is merely brought on record, but it is yet to be proved. Thereafter when investigating officer is examined in the court, his attention should be drawn to the passage marked for the purpose of contradiction, it will then be proved in the deposition of the investigating officer who again by referring to the police statement will depose about the witness having made that statement. The process again involves referring to the police statement and culling out that part with which the maker of the statement was intended to be contradicted. If the witness was not confronted with that part of the statement with which the defence wanted to contradict him, then the court cannot suo moto make use of statements to police not proved in compliance with Section 145 of Evidence Act that is, by drawing attention to the parts intended for contradiction.

23. In the present case, PW1 to PW3 have not been confronted with their earlier statement made before the police except for discrepancies in their evidence in order to show that the same has not been stated by the witnesses before the Investigating Officer. In such view of the matter, most of them at best can be said to be an omission in the evidence. Recently, Hon'ble Apex Court in the case of **Smt. Shamim vs. State**



(GNCT of Delhi) reported in **2018 (4) PLJR 160 (SC)**, has held in para -12, as follows:-

12. While appreciating the evidence of a witness, the approach must be whether the evidence of the witness read as a whole inspires confidence. Once that impression is formed, it is undoubtedly necessary for the court to scrutinise the evidence more particularly keeping in view the deficiencies, drawbacks and infirmities pointed out in the evidence as a whole and evaluate them to find out whether it is against the general tenor of the evidence and whether the earlier evaluation of the evidence is shaken as to render it unworthy of belief. Minor discrepancies on trivial matters not touching the core of the case, hypertechnical approach by taking sentences torn out of context here or there from the evidence, attaching importance to some technical error without going to the root of the matter would not ordinarily permit rejection of the evidence as a whole. Minor omissions in the police statements are never considered to be fatal.

The statements given by the witnesses before the police are meant to be brief statements and could not take place of evidence in the court. Small/Trivial omissions would not justify a finding by court that the witnesses concerned are liars. The prosecution evidence may suffer from inconsistencies here and discrepancies there, but that is a shortcoming from which no criminal case is free. The main thing to be seen is whether those inconsistencies go to the root of the matter or pertain to insignificant aspects thereof. In the former case, the defence may be justified in seeking advantage of incongruities obtaining in the evidence. In the latter, however, no such benefit may be available to it.

24. Apart from that it is also settled that it is the duty of the court to separate the grain from the chaff and merely because there have been some discrepancies and contradictions in the evidence of some or all the witnesses, the same does not mean that entire evidence of prosecution has to be discarded. It is only



after exercising caution and care shifting the evidence to separate the truth from untruth, exaggeration, embellishment and improvement and it would be open to the court to convict an accuse as the maxim falsus in uno falsus in omnibus' has no application in our country. The Hon'ble Apex Court in the cases **Smt. Shamim (supra)** has further held in para -15, which is as follows:-

“ 16. Each criminal trial is but a quest for search of the truth. The duty of a judge presiding over a criminal trial is not merely to see that no innocent person is punished, but also to see that a guilty person does not escape. One is as important as the other. Both are public duties which the Judge has to perform. The trial court had erred and misappreciated the evidence to arrive at an erroneous conclusion”.

25. In the background of above settled principle, on scrutiny of evidence of witnesses, it appears that so far evidence of PW 5, who is informant and father of the deceased is concerned, he claimed that he reached the place of occurrence after hearing the cry of his son and saw the accused person fleeing away with Chaku and the deceased told him that appellants have assaulted him and in spite of rigorous cross-examination, there is no discrepancy in his evidence except the discrepancy that he has not stated earlier before the police that he had seen the appellants in the torch light and it has been argued on behalf of



the appellant that as per the prosecution story, the occurrence is of 7.00 P.M. in the month of December and it is not possible to identify the accused persons but this witness has not been cross-examined as to from how much distance, he saw the accused persons fleeing away rather his cross-examination disclosed that he saw the accused when he was five steps away and further the accused persons were known to him from before, as such, even we leave that part of the evidence, evidence of PW5 appears to be trustworthy and creditworthy. He has categorically stated that deceased disclosed him the names of appellants as the persons, who assaulted him. No suggestion has been given to this witness either on the point of identification or disclosure of name of appellants by the deceased. Accordingly, the evidence of this witness appears to be unimpeachable and he appears to be a credible and trustworthy witness.

26. So far other witnesses i.e. PW1 to PW3 are concerned, they tried to show themselves as the eye-witness of the occurrence and also claimed themselves to be the persons, who have seen the appellants fleeing away and at the same time, the evidence of all the witnesses disclosed that it is the deceased, who disclosed the names of appellants and no doubt, there are some discrepancies in their evidence as discussed above so far their claim of being eye witness of the occurrence and identification of the appellants in the torch light but so far their



remaining evidence i.e they came on hulla, saw the accused persons fleeing and the deceased disclosed them the names of appellants as the persons, who assaulted him is concerned, that appears to be consistent and of unimpeachable character.

27. The defence has doubted the disclosure made by the deceased on the ground that witnesses have narrated differently what deceased disclosed them and also PW5 who is informant of the case, as such that part of the evidence cannot be accepted. However, it is also a fact that the power of observation differs from person to person and the accuracy to recall the conversation and reproduce the same words, which were used by the deceased also differs from person to person and as such, if there are some variation regarding the narration of the disclosure made by the deceased, the same cannot make their evidence untrustworthy rather there is consistent evidence of PW1, PW2, PW3 and PW5 that the deceased had disclosed them the names of appellants as the persons, who assaulted him and further their evidence that they had seen the accused persons fleeing from the place of occurrence appears to be a reliable piece of evidence. The same has also got corroboration from the earlier version i.e. fardbeyan ext. 3 which has been recorded just after an hour of the occurrence and the doctor has also found sharp cutting weapon injuries on the person of the deceased. In the present case, PW1 is the brother of informant



and uncle of deceased, PW2 is the brother of the deceased and PW3 is the cousin of the deceased and the credibility of these witnesses have also been doubted by learned counsel appearing on behalf of the appellants on the ground that they are close relatives and further on the ground that no independent witness has been examined in this case, though two inquest witnesses are the independent witnesses. So far the plea of the appellant that they are close relatives, we must point out here that there is difference between the related and interested witnesses. A related witness at least would not spare the real culprit . Furthermore, no evidence has been brought on record to show that PW1 to PW3 or PW5 were at inimical terms with the appellants or they had any reason to falsely implicate the appellants. Only evidence, which the defence wanted to take advantage of, is that earlier, there was some dispute between the appellants and deceased as the deceased had illicit relationship with daughter of Brijmohan Singh, who was related to the appellants, for which, appellant Sanjay Singh had abused the deceased and except that nothing has been brought on record to show that the accused – appellants had any enmity with the PW1, PW2, PW3 and PW5. **The Hon'ble Apex Court in the case of Ganpati vs. State of Tamilnadu along with Muthulaxmi vs. State of Tamilnadu**, in which in para 13 and 14, the Hon'ble Apex Court has held that:-



“13 'Related' is not equivalent to 'interested'. A witness may be called 'interested' only when he or she derives some benefit from the result of a litigation; in the decree in a civil case, or in seeing an accused person punished. A witness who is a natural one and is the only possible eye witness in the circumstances of a case cannot be said to be 'interested' [See: State of Rajasthan Vs. Smt. Kalki and Anr. (1981) 2 SCC 752].

14. Merely because the eye-witnesses are family members their evidence cannot per se be discarded. When there is allegation of interestedness, the same has to be established. Mere statement that being relatives of the deceased they are likely to falsely implicate the accused cannot be a ground to discard the evidence which is otherwise cogent and credible. Relationship is not a factor to affect credibility of a witness. It is more often than not that a relation would not conceal actual culprit and make allegations against an innocent person. Foundation has to be laid if plea of false implication is made [See : Maranadu and Anr. Vs. State by Inspector of Police, Tamil Nadu (2008) 16 SCC 529]”.

28. Considering the same, the evidence of PW1, PW2, PW3 and PW5 cannot be doubted only on the ground that they are related witnesses at best their evidence may be subjected to scrutiny and only where they are found to be reliable, the same can be accepted.

29. So far non examination of independent witnesses is concerned, nowadays, no independent witness / local person is ready to become a witness in any case, due to several reasons, may be due to harassment caused to them at the police station



and also to run to the Court days after days. This point has also been considered by Hon'ble Apex Court in the case of **Appabhai and another (supra)**, and it has been observed in para -36 that “ *It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties*”. As such, we cannot shut our eyes to the present situation prevailing in our society.

30. In view of the discussions made above, we cannot disbelieve the evidence of PW1, PW2, PW3 and PW5 in toto on the ground that they are related witness and their evidence suffers from inconsistency and discrepancy, when there are no vital discrepancy in the evidence of PW5 and the evidence of



PW1 to PW3 to the extent that they reached immediately after the occurrence, saw the accused persons fleeing are also consistent and does not suffer from any discrepancy. Furthermore, they are named in the F.I.R also, which has been lodged immediately after the occurrence. As such, the learned Trial Court has rightly believed the evidence of these witnesses while convicting the appellants.

31. Another aspect of the matter is that the evidence of PW1, PW2, PW3 and PW5 disclosed that deceased told them immediately after the occurrence that appellants have stabbed him and after some time, he died. As such, the disclosure made by the deceased just before his death, which appears to be oral dying declaration admissible under Section 32 of Indian Evidence Act. However, learned counsel for the appellants have doubted above oral dying declaration made by the deceased, drawing the attention of this Court towards the evidence of PW4 in order to show that evidence of PW4 in para – 2 discloses that trachea was cut and evidence of PW4 also discloses that in such a situation, it was not possible for the deceased to speak.

32. On close scrutiny of evidence of doctor (PW4), it appears that one incised wound in front part of upper part of neck, 2” x1/2” cavity deep along with other injuries were found on the person of the deceased and the doctor has been cross-examined in para -2 and his cross-examination disclosed that in case of



cutting of blood vessels, nerve of trachea, a man if alive, can speak for few minutes or few seconds and if the trachea is fully cut, then and then only the man will be speechless. There is no positive finding of the doctor that the above injury had made the deceased speechless, whereas, his evidence shows that in case of cutting of blood vessels, nerve of trachea, a man if alive, can speak for few minutes or few seconds and it appears that that no suggestion has been given to this witness nor cross-examined that the deceased could not speak with the injury he had sustained or he would have become speechless. Furthermore, from the oral evidence of PW1, PW2, PW3 and PW5, it appears that there is consistent evidence that the deceased disclosed them the names of the appellants. As such, the argument advanced on behalf of the appellants does not find favour with this court to discard the above evidence of prosecution. The Hon'ble Apex Court in almost similar situation in the case of **Pothakamuri Srinivasulu alias Mooga Subhaiah v. State of Andhra Pradesh** reported in [AIR 2002 SC 2780] has held in para 8 of its judgment, which reads as follows:-

“8 It was submitted by Ms. Nanita Sharma, the learned counsel for the appellant that for several reasons the dying declaration cannot be believed. She submitted that looking to the nature of the injuries suffered by the deceased possibly she could not have spoken and must have become unconscious instantaneously. However, no such



suggestion has been made to any of the witnesses including the two doctors who respectively conducted the medico-legal examination and post-mortem examination of the victim. On the contrary the three eye-witnesses have positively stated that the deceased was speaking when they had met her soon after the incident. The victim had died two days after the incident. We cannot in the face of this positive evidence just assume that the injured must have become unconscious and speechless because of the injuries and discard on such assumption the dying declaration deposed to by independent witnesses corroborated by the promptly lodged FIR.

33. Another argument, which has been advanced on behalf of learned counsel for the appellants is that prosecution has failed to prove the motive in this case as PW5 has admitted in his evidence in cross-examination that villagers have spread the rumour about illicit relationship and he could not disclose the name of person, who disclosed the same and the learned Trial Court has also observed that PW5 is trying to skip the direct answer to that question and as such, prosecution has failed to establish the motive in the case and on that ground itself, the whole prosecution case appears to be doubtful. So far motive is concerned, on perusal of the record, it appears that in fardbeyan informant (PW5) had come with a case that Rudal Singh@ Chandraman Singh and Brij Mohan Singh are the own brothers and two years prior his son had illicit relationship with the daughter of Brij Mohan singh and there was complain about that



in which, sons of Rudal Singh i.e. the appellants had altercation with the deceased and Sanjay Singh had threatened the deceased to lift him and he has also come with a case that during Chhath Puja also there was exchange of hot words between the Sanjay Singh and the deceased and there also he had threatened him to kill. PW5 in his evidence in chief has stated that there was rumour in the village that his son had illicit relationship with the daughter of the Brij Mohan Singh and there was exchange of hot words between the appellants and deceased and they had abused and threatened the deceased for dire consequences and on last Chhath Puja and both the appellants abused the deceased and threatened to kill him. He has been cross-examined but he could not say as to from whom, he heard the rumour of illicit relationship. His evidence in cross-examination disclosed that the threatening was given one month prior to the occurrence during Chhath Puja. No doubt, this witness has stated that he had not lodged any sanha before the police with regard to the threatening given by the appellants to his son (deceased) but that cannot be a reason for disbelieving the story of threatening given by the appellants just one month prior to the occurrence, as he might not have expected the seriousness of the same. PW2 has also stated in his evidence that there was rumour in village that deceased Jitendra Singh had illicit relationship with cousin sister of the appellants and prior to the occurrence during



Chhath Puja, the appellants have assaulted the deceased with fists. Again in his cross-examination, he had stated that there was tension between the deceased and family members of the accused persons since Chhath Puja. His evidence also disclosed that the family of Rudal Singh and Brij Mohan Singh are joint.

34. From the discussions made above, it appears that prosecution evidence is consistent to the extent that the appellants had threatened the deceased at the time of Chhath Puja i.e one month prior to the occurrence due to the illicit relationship of the deceased with their cousin sister and that can not be discarded on the basis of some minor discrepancy. As such, to our opinion, prosecution has also been able to establish the motive behind the occurrence and in that view of the matter, we do not find any force in the argument of learned counsel for the appellants that prosecution has failed to establish the motive behind the occurrence.

35. In this case, the appellants have also argued that the blood stained earth, check towel, red green towel, pair of big size hawai chappal as well as multi colour shawl has also been seized by the Investigating Officer but none of those articles had been sent for chemical examination and as such, this has also caused serious prejudice to the defence and they are entitled for the benefit of the same. However, as discussed above, evidence of PW5 disclosed that he had filed protest petition and evidence



of PW2 and PW3 disclosed that they apprehend that Investigating Officer is not conducting the investigation properly and he had come to the village only once and as such prosecution is apprehending that investigation not being properly conducted by Investigating Officer and that apprehension of prosecution is being fortified by action of Investigating Officer of not sending those articles for examination by Forensic Science Laboratory, as had any report was brought on those articles or had T.I.P. of those articles been conducted, they would have certainly throw some light in this case but at the same time, in our view, for the laches on the part of the Investigating Officer, allowing the prosecution to fall, shall tantamount to playing in the hands of Investigating Officer. If the investigation is designedly defective and on that ground the prosecution case cannot be thrown out specially where there are evidences to show that accused persons were seen fleeing from the place of occurrence immediately after the occurrence. The deceased was found in injured condition, who disclosed the names of appellants as the assailants, while taking to hospital.

36. In view of the discussions made above even though evidences of PW1 to PW3 suffers from some discrepancies but on close scrutiny and on separating truthfulness from his whole evidence, we find that there evidences to the extent that on cry



of the deceased, PW1 to PW3 reached at the place of occurrence, saw the appellants fleeing and found the deceased fallen on the ground in injured condition and deceased had disclosed the names of appellants to PW5 and PW1 to PW3, as the assailants and the doctor has found the injuries over the person of the deceased and cause of death was due to shock and hemorrhage caused by injury nos. 1 and 2. Hence, there is oral dying declaration, which is admissible under Section 32 of the Indian Evidence Act and the evidence of PW1 to PW3 and PW5 are also admissible under Section 6 of the Indian Evidence Act, as it relates to same transaction. Prosecution has also been able to establish motive behind the occurrence, as the appellants Sanjay Singh has threatened the deceased during 'Chhath Puja' one month prior to the occurrence. On the other hand, defence had not brought any evidence on record to show any reason for false implication of the appellants. As noticed earlier, duty of a judge is not merely to see that a guilty person does not escape.

37. In view of the entire discussions made above, we find no infirmity or inconsistency in the impugned judgment and order and the same appears to be just and proper.

38. Accordingly, the appeal is dismissed. Judgment of conviction dated 22.04.1994 and order of sentence dated 23.04.1994, passed by Sri Jai Kishore Narayan, the then 4th Additional Sessions Judge, Saran at Chapra in Sessions Trial



No. 482 of 1993 is hereby affirmed.

39. As the appellants are on bail, their bail bonds are cancelled and they are directed to surrender in the court below forthwith.

(Vinod Kumar Sinha, J)

I Agree (S. Kumar, J)

sunilkumar/-

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