

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.778 of 2013

Arising Out of PS. Case No.-34 Year-2000 Thana- PRATAPGANJ District- Supaul *

1. Laxmi Yadav, son of late Panchu Yadav.
2. Manoj Yadav, son of Laxmi Yadav.
Both residents of Village - Pratapganj Bhawanipur, Gangsar Tola, Police
Station- Pratapganj, District- Supaul.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 593 of 2013

Arising Out of PS. Case No.-34 Year-2000 Thana- PRATAPGANJ District- Supaul *

1. Ram Chandra Yadav, son of Laxmi Yadav.
2. Pramod Yadav, son of Laxman Yadav
All are residents of Village - Pratapganj Bhawanipur, Gangsar Tola, Police
Station -Pratapganj, District Supaul.

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

with

CRIMINAL APPEAL (DB) No. 678 of 2013

Arising Out of PS. Case No.-34 Year-2000 Thana- PRATAPGANJ District- Supaul *

Surya Narain Yadav, son of Laxman Yadav, resident of village- Pratapganj
Bhawanipur Gangsar Tola, P.S.- Pratapganj, District- Supaul

... .. Appellant/s

Versus

The State Of Bihar

... .. Respondent/s

Appearance :

(In CRIMINAL APPEAL (DB) No. 778 of 2013)

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

For the Respondent/s : Sri Dilip Kumar Sinha, A.P.P.

(In CRIMINAL APPEAL (DB) No. 593 of 2013)



For the Appellant/s : Sri Kanhaiya Prasad Singh, Senior Advocate
For the Respondent/s : Sri Dilip Kumar Sinha
(In CRIMINAL APPEAL (DB) No. 678 of 2013)
For the Appellant/s : Sri Rakesh Kumar Jha, Advocate
For the Respondent/s : Sri Dilip Kumar Sinha, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE PRAKASH CHANDRA
JAISWAL
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 14-03-2019

1. All the appellants in aforesaid three appeals were tried together and convicted and sentenced by the common judgment of the trial court, and as such, all the aforesaid three appeals were taken up together under the heading “For Hearing” and are being disposed of by this common judgment.

2. Appellant no. 1 - Laxmi Yadav and appellant no. 2 - Manoj Yadav in Cr. Appeal (D.B.) No. 778 of 2013 by judgment dated: 12.06.2013 have been convicted under Section 302 and 148 of the Indian Penal Code, 1860 (hereinafter referred to as the “I.P.C.”) and both by order dated 17.6.2013 were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- each for the offence under Section 302 of the I.P.C. In default in payment of fine, they were directed to further undergo rigorous imprisonment for six months. Under Section 148 of the I.P.C. both were sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 1000/- each.



3. The sole appellant in Cr. Appeal (D.B.) No. 678 of 2013 – (Surya Narain Yadav Versus The State of Bihar) and two appellants i.e. appellant no. 1 – Ram Chandra Yadav and appellant no. 2 - Pramod Yadav in Cr. Appeal (D.B.) No. 593 of 2013 by judgment dated 12.06.2013 have been convicted under Section 307 and 148 of the I.P.C. All the said three appellants by order dated 17/06/2013 have been sentenced to undergo rigorous imprisonment for seven years for the offence under Section 307 of the I.P.C. and to pay a fine of Rs. 5,000/- each. In case of default in payment of fine they have been directed to further undergo rigorous imprisonment for six months. Under Section 148 of the I.P.C. all the aforesaid three appellants by order dated 17.06.2013 have been sentenced to undergo rigorous imprisonment for three years and a fine of Rs. 1000/- each. All the sentences have been directed to run concurrently. The judgment of conviction and sentence was passed by Sri Krishna Murari Sharan, learned Adhoc Additional Sessions Judge – IV, Supaul (hereinafter referred to as the “trial judge”) in Sessions Trial No. 33 of 2002/ T.R. No. 53 of 2011 (arising out of Pratapganj P.S. Case No. 34 of 2000).

4. Before proceeding at the very outset we may observe that prosecution as well as learned trial judge have committed serious error while proceeding with the case. Despite the fact that



it was specific case of the prosecution that all the appellants with common object had committed murder of the son of the informant and also assaulted informant and other family inmates, to the reasons best known to the prosecution as well as to learned trial judge charge was not framed under Section 302 read with Section 149 of the I.P.C. Instead against the two appellants charge was framed under Section 302 and 148 of the I.P.C. Again an error was committed by the court below in framing of charge only under Section 307 and 148 of the I.P.C. whereas considering the nature of accusation charge was required to be framed under Section 307 read with Section 149 of the I.P.C. In ordinary course in such situation we would have quashed the judgment of conviction and sentence and remitted back the matter to proceed with the case after framing charge afresh, but considering the fact that occurrence had taken place long back in the year 2000 and on the date of evidence of P.W. 3 (informant) was aged about seventy years, remitting back the matter would be simply a futile exercise by this court. Accordingly, ignoring such apparent error we have proceeded to examine the evidence as available on record on the basis of charge which was already framed.

5. Short fact of the case is that on 23.10.2000 at 10.00 A.M. (morning) a written report under the signature of Badar



Yadav (P.W. 3) was filed before the Officer-in-charge, Pratapganj Police Station disclosing therein that on preceding night his field was got grazed by buffalo men through their buffaloes. On the next day i.e. on 23.10.2000 in the morning at 7.00 informant's son - Ratan Kumar Yadav (deceased), aged about 22 years, was returning after seeing his field. While returning he was using filthy language and uttering that had the persons who had got the field grazed been apprehended he would have shown them consequences. In the meanwhile, Laxman Yadav @ Torhai Yadav (died during the trial) who was coming near the Railway Dhala enquired from the son of the informant as to why he was abusing and threatened that proceed to your house we will decide the issue. Ratan Kumar Yadav thereafter arrived his house and he started to take breakfast. The informant and his third son – Deep Narain Yadav (P.W. 1) sitting on मचान was taking breakfast. In the meanwhile, suddenly:- (1)- Laxmi Yadav [appellant no. 1 in Cr. Appeal (DB.) No. 778 of 2013], (2)- Laxman Yadav @ Torhai (since died), (3)- Surya Narain Yadav [sole appellant in Cr. Appeal (D.B.) No. 678 of 2013], (4)- Pramod Yadav [appellant no. 2 in Cr. Appeal (D.B.) No. 593 of 2013], (5)- Ram Chandra Yadav [appellant no. 1 in Cr. Appeal (D.B.) No. 593 of 2013], (6)- Manoj Yadav [appellant no. 2 in Cr. Appeal (D.B.) No. 778 of 2013], (7)



- Lalit Yadav (whose case was referred to Juvenile Justice Board),
& (8)- Jholia Devi, W/o Laxmi Yadav variously armed intruded inside the courtyard of the informant and thereafter Laxmi Yadav exhorted to kill Ratan Yadav. Thereafter, Laxman Yadav (since dead) by means of दबिया which he was carrying in his hand with intent to kill assaulted on the head of Ratan Kumar Yadav. Thereafter, Laxmi Yadav and Manoj Yadav carrying फरसा in their hands also assaulted Ratan Kumar Yadav whereby he fell down on the ground and started bleeding. The informant further stated that he and his son- Deep Narain Yadav runningly came and tried to lift. In the meanwhile, Surya Narain Yadav by means of कुदाल (spade) which he was carrying in his hand gave blow on his head and Pramod Yadav inflicted छूरा blow on the face and head of Deep Narain Yadav. The informant and his two sons all after getting injury fell down and started squirming. Thereafter Laxmi Yadav again exhorted using filthy language that still he was alive and kill him. In the injured condition, while all the three had fell down, Ram Chandra Yadav, Lalit Yadav and Jholia Devi injured them by means of *lathi* and सटका whereby all of them became unconscious. Jholia Devi (not sent up for trial) thereafter snatched wrist watch from the hand of Deep Narain Yadav. Thereafter, the informant's wife -Fulo Devi arrived there and shouted that they had killed



them whereupon Jholia Devi injured his wife by means of सटका .
On alarm being raised villagers namely:- Arun Yadav (not examined), Phani Lal Yadav (not examined), Arjun Yadav (P.W. 6) , Bhubneshwar Yadav (P.W. 7) and others arrived there and also saw the occurrence. They lifted the injured persons and through rickshaw they carried them to Police Station where the informant gave the written application. On the basis of the said written report on the same day i.e. on 23.10.2000 at 10.00 A.M. a formal F.I.R. vide Pratapganj P.S. Case No. 34 of 2000 was registered for the offence under Section 147/148/149/341/323/324/307/448/379/504 of the I.P.C. against :-

- (1)- Laxmi Yadav [appellant no. 1 in Cr. Appeal (D.B.) No. 778 of 2013]
- (2) Laxman Yadav (died on 03.01.2005 and his case was dropped vide order dated 28.02.2005)
- (3) Surya Narain Yadav (sole appellant in Cr. Appeal (D.B.) No. 678 of 2013)
- (4) Pramod Yadav (appellant no. 2 in Cr. Appeal (D.B.) No. 593 of 2013)
- (5) Ram Chandra Yadav (appellant no. 1 in Cr. Appeal (D.B.) No. 593 of 2013)
- (6) Manoj Yadav (appellant no. 2 in Cr. Appeal (D.B.) No. 778 of 2013)
- (7)- Lalit Yadav (on 06.01.2011 his case was referred to Juvenile Justice Board)
- (8) Jholia Devi (who was not charge sheeted and exonerated by the Police).

It is clarified that after the death of the injured – Ratan Kumar Yadav, by order dated 06.11.2000 Section 302 of the I.P.C. was added.



6. After investigation and finding the case true on 21.01.2001 charge sheet was submitted under Section 147/148/149/323/324/341/307/379/452/504 of I.P.C. against all the F.I.R. named accused persons except Jholia Devi, who was not sent up for trial. On 22.08.2001 learned Chief Judicial Magistrate, Supaul took cognizance of the offence. Thereafter the case was committed to the court of Sessions and it was numbered as S.T. No. 33 of 2002. Despite the fact that charge sheet was submitted besides other Sections, under Section 149 of the I.P.C. and under same provision cognizance order was passed, to the reasons best known to the prosecution or the learned trial judge charge was not framed under Section 149 of the I.P.C. rather charge under Section 147/148, 452 of the I.P.C. was framed against all the seven F.I.R. named accused persons. Thereafter, on 05.07.2002 charge under Section 147/148/452 of the I.P.C. against all the seven charge sheeted accused persons was framed. On 05.07.2002 separate charge under Section 148 of the I.P.C. was framed against: Laxman Yadav, Pramod Yadav, Surya Narain Yadav, Laxmi Yadav and Manoj Yadav whereas charge under Section 149/ 307 of the I.P.C. was framed against Ram Chandra Yadav, Lalit Yadav, Surya Narain Yadav and Pramod Yadav. Again on the same day separate charge under Section 307 of the I.P.C. was framed against Surya



Narain Yadav and Pramod Yadav. Again on the same day charge under Section 302 of the I.P.C. was framed against Laxman Yadav, Manoj Yadav and Laxmi Yadav. The accused persons denied the charges and claimed to be tried.

7. During the trial to establish its case on behalf of the prosecution altogether ten witnesses were examined. Out of ten witnesses, P.W. 1 – Deep Narain Yadav (brother of the deceased), P.W. 3 - Badri Yadav @ Badar Yadav (informant and father of the deceased) and P.W. 4 - Phuleshwari Devi @ Fulo Devi (mother of the deceased) are injured and eye witnesses to the occurrence whereas P.W. 2 - Upendra Yadav (another brother of the deceased) and P.W. 5 - Budhni Devi (wife of P.W. 2) though had claimed to be eye witnesses but they are not injured witnesses. P.W. 8 - Dr. Rajeshwar Prasad Yadav on 24.10.2000 was posted as Deputy Superintendent Sadar Hospital, Saharsa and on the same day at 11.00 A.M. he conducted post mortem examination on the dead body of the deceased. P.W. 9 – Shivendra Kumar Verma is Homeguard and he proved certain documents. P.W. 10 – Dr. Krishna Murari Prasad Singh has proved injury report of injured witnesses. P.W. 8 - Dr. Rajeshwar Prasad Yadav besides proving the post mortem examination report has also proved injury report in respect of injuries examined before the death of Ratan Kumar



Yadav, injury report of Badri Yadav (P.W. 3), Fulo Devi and Deep Narain Yadav, however, P.W. 6 (Arjun Yadav) and P.W. 7 (Bhubneshwar Yadav), who were co-villagers, since did not support the prosecution case they were declared hostile.

8. After completion of prosecution evidence the accused persons on 07.01.2012 were questioned on incriminating circumstances and evidence and their statement under Section 313 of the Code Of Criminal Procedure, 1973 (hereinafter referred to as the “Cr.P.C.”) was recorded in which they simply claimed to be innocent however, in defence no witness was adduced.

9. Sri Kanhaiya Prasad Singh, learned senior counsel assisted by Sri Pratik Mishra, learned counsel for both the appellants in Cr. Appeal (D.B.) No. 778 of 2013 and appellant no. 1- Ram Chandra Yadav in Cr. Appeal (D.B.) No. 593 of 2013 after placing entire evidence has argued that prosecution has not established its case beyond all reasonable doubts. At the very outset he has argued that the genuineness of the *fardbyan* was itself doubtful and as such, the very initiation of prosecution case appears to be doubtful. He submits that though informant (P.W. 3) in paragraph no. 4 of his evidence had stated that while he was in Police Station the Police asked for stating the fact relating to the occurrence in writing. Thereafter, on being told by the informant



his son – P.W. 2 (Upendra Yadav) prepared written report and in the bottom the informant signed however, as per evidence of P.W. 1 (Deep Narain Yadav) and P.W. 2 (Upendra Yadav) in paragraph nos. 3 and 2 respectively it is evident that the Police itself had recorded the *fardbyan*. Sri Singh, learned senior counsel tried to persuade the court that in view of such evidence the genesis of the written report comes into cloud of doubt and as such the prosecution case appears to be doubtful. He further submits that in the F.I.R. four witnesses were cited as eye witnesses however, out of four eye witnesses Arun Yadav and Phani Lal Yadav without any plausible explanation were not examined, whereas P.W. 6 (Arjun Yadav) and P.W. 7 (Bhubneshwar Yadav) did not support the prosecution case and they were declared hostile. According to Sri Singh there is no independent witness in the case and almost all the witnesses were close relatives of the informant and deceased, and as such, no reliance can be placed on such evidence. He further submits that main accusation was made against accused - Laxman (who died during the trial). Against Laxman Yadav there was evidence that he gave first assault by *दबिया* on the deceased. Of- course the deceased had received altogether four incised injuries on his head but almost all the injuries were found of same dimension and as such, there was every possibility that all the four



assaults were given by Laxman Yadav by दबिया and as such, both the appellants in Cr. Appeal (D.B.) No. 778 of 2013 were incorrectly held guilty for commission of offence under Section 302 of the I.P.C. He has also argued that during the trial the Investigating Officer was not examined. His non-examination has seriously prejudiced the case of prosecution. In absence of Investigating Officer the defence was prevented to put any question as to whether the written report which is the basis of the F.I.R. was in the writing of the Police Officer or in the writing of P.W. 2. Besides this, due to non-examination of the Investigating Officer the defence were prevented to ask any question regarding the place of occurrence. On aforesaid grounds it has been argued that the judgment of conviction and sentence is liable to be set aside.

10. Sri Rakesh Kumar Jha, learned counsel appearing on behalf of the sole appellant – Surya Narain Yadav in Cr. Appeal (D.B.) No. 678 of 2013 adopting the argument advanced by Sri Kanhaiya Prasad Singh, learned senior counsel for the appellant has further argued that there was only evidence against the appellant – Surya Narain Yadav that he assaulted P.W. 3 by कुदाल (spade) but during his examination by the doctor no incised wound was found on the head of P.W. 3, rather the injury was lacerated



and it was simple in nature. Besides this, the said injury was caused by hard and blunt substance. Accordingly, he submits that no case under Section 307 of the I.P.C. is made out against the sole appellant -Surya Narain Yadav in Cr. Appeal (D.B.) No. 678 of 2013. He further submits that P.W. 3 (informant) has not stated as to which of the appellants had assaulted whom and on which part or portion. Who assaulted whom? He further submits that P.W. 4 in paragraph no. 2 of his evidence had developed the story which creates doubt on the prosecution case.

11. Sri Dilip Kumar Sinha, learned Additional Public Prosecutor submits that after going through the entire evidence it is established that the learned trial judge has rightly passed the judgment of conviction and sentence. He submits that in the case there were three injured eye witnesses to the occurrence, who are;- P.W. 1 (Deep Narain Yadav), P.W. 3 (Badri Yadav @ Badar Yadav-informant); and P.W. 4 (Phuleshwari Devi @ Fulo Devi). P.W. 3 and P.W. 4 (father and mother of the deceased – Ratan Kumar Yadav) who were also assaulted by all the accused persons including the appellants. P.W. 1 (brother of the deceased) in the occurrence was also assaulted. He submits that since three witnesses who received injuries in the occurrence, their evidence as eye witness cannot be considered as doubtful. Regarding non



-examination of independent witnesses as well as the fact that two independent witnesses turned hostile, he submits that it was case of prosecution that while deceased along with his family members was inside his house in inner courtyard all the accused persons due to previous occurrence had suddenly intruded into the आंगन (courtyard) and started assaulting deceased as well as all inmates. Target was deceased – Ratan Kumar Yadav regarding whom it has come that just prior to the occurrence at about 7.00 in the morning after witnessing that his field was grazed through buffalo he while returning was using filthy language, one of the appellants had threatened and told him that after his arrival to his house he will take revenge. Thereafter, all the accused persons intruded and assaulted them. Sri Sinha, learned A.P.P. submits that besides three injured eye witnesses there is one more ocular witness, who is P.W. 5 - Budhni Devi (Wife of P.W. 2). Budhni Devi (P.W. 5) has also corroborated regarding the occurrence and the role played by all the accused persons. It has been argued by learned A.P.P. that since accused persons had arrived with a view to eliminate Ratan Kumar Yadav (son of P.W. 3 and P.W. 4 and own brother of P.W. 1) all the three witnesses tried to save them. In course of saving they too were brutally assaulted, however, P.W. 5 only witnessed the occurrence. In the occurrence her husband was not



being assaulted and it appears that this was the reason that she did not prefer to take any step to put resistance and this was the reason that she was not assaulted. According to learned A.P.P. in such situation it was difficult to get evidence of independent or outsider witnesses and the witnesses who have been examined during the trial are truthful witness and on the basis of those evidence the learned trial judge has rightly passed judgment of conviction and sentence which requires no interference.

12. Besides hearing learned counsel for the parties, we have minutely examined entire evidence on record and after going through entire evidence and also examining the judgment impugned *prima facie* we are of opinion that the learned trial judge has committed no error in passing judgment of conviction, save and except committing an error that instead of framing charge under Section 302/149 IPC all the appellants and holding them guilty under Section 302 read with Section 149 of the I.P.C. However during initial period at the stage of charge itself such blatant error was committed both by prosecution as well as learned trial judge. Despite the fact that it was specific case that with common object all the accused persons had intruded into the courtyard of informant and committed the crime in which son of the informant was done to death charge was not framed under



Section 302 read with Section 149 of the I.P.C. Such error could have been cured by this court by way of setting aside the judgment and remitting back the matter to the trial court for framing charge afresh but in view of the fact that occurrence had taken place long back in the year 2000 after about nineteen years it would not be just and proper to do the same, and as such, we are confining our judgment to the extent what has been incorporated in the judgment impugned and evidence brought on record.

13. Before proceeding further, it would be necessary to first examine the evidence of informant (the father of the deceased) who was examined as P.W. 3 namely Badri Yadav @ Badar Yadav. This witness in paragraph no. 1 of his evidence has stated that occurrence had taken place on 23.10.2000 at about 9.00 in the morning. At that very time he was inside in his आँगन (courtyard). In the said angan आँगन beside him his son - Ratan Yadav (deceased), Deep Narain Yadav (P.W. 1), his wife (P.W. 4) and his daughter-in-law (P.W. 5) were present. At that very time in the courtyard of his house Laxmi Yadav, Laxman Yadav, Surya Narain Yadav, Pramod Yadav, Ram Chandra Yadav, Lal Kumar Yadav (Lalit Yadav), Manoj Yadav and Jholia Devi intruded. He further clarified that Lal Kumar was also known as Lalit and Lal Mohan. All the accused persons were carrying दबिया , फरसा, कोदाल



(spade), छुड़ा (knife) and *lathi*. Immediately after intruding inside his आंगन (courtyard) Laxmi enquired about Ratan and by using filthy language exhorted to kill. Thereafter, Laxman Yadav by means of दबिया assaulted Ratan Yadav on his head. Subsequently, by means of फरसा Laxmi Yadav and Lalit Yadav also assaulted him. While his another son -Deep Narain Yadav (P.W. 1) with a view to save his brother proceeded he was inflicted छुड़ा (knife) blow by Pramod whereby he received injury on his leap and other parts of his head. This witness was assaulted by means of कुदाली on his head. After being assaulted all of them fell down. Thereafter, Laxmi Yadav again exhorted to kill. Thereafter, Ram Chandra and others assaulted by *lathi* and Jholia Devi snatched wrist watch from the hand of Deep Narain. The informant's wife (P.W. 4) thereafter started raising *hulla*. Then Jholia Devi assaulted on her hand causing fracture injury in her hand. He claimed that the entire occurrence was witnessed by witnesses namely- Arun Yadav (not examined), Bhebneswar Yadav (hostile) and Arjun Yadav (hostile). In paragraph no. 3 of his examination in chief he described about the reason for the occurrence and stated that his son -Ratan Kumar (deceased) had gone to see the field and he saw that paddy crop was grazed. Thereafter, he started using filthy language. Laxman thereafter had told that why he was using



abusive language. Subsequently, all injured including deceased on rickshaw were carried to Pratapganj Police Station where a written report was prepared however in paragraph no. 4 he stated that he dictated his *fardbyan* to his son who after writing down read over the contents of the *fardbyan* and informant put his signature. Entire *fardbyan* was marked as Ext. 3. This witness was cross examined at length however no serious fact could be extracted to create doubt on his evidence. Sri Kanhaiya Prasad Singh, learned senior counsel for the appellant has taken clue from paragraph no. 4 of his evidence that this witness disclosed that written report was prepared by P.W. 2 whereas, P.W. 2 in his evidence has not corroborated the fact and P.W. 2 stated as if daroga ji had recorded statement. It is true that to some extent there is inconsistency on preparation of the *fardbyan* but fact remains that while *fardbyan* was got exhibited no objection was raised and without any protest the *fardbyan* was got exhibited. Moreover, only on the ground that there is some doubt regarding writing of the *fardbyan* oral evidence, which has been brought on record, if otherwise credible, the prosecution case cannot be termed as doubtful.

14. P.W. 4 (mother of the deceased and wife of P.W. 3 - informant) is yet another injured witness. She too has deposed in similar manner like P.W. 3. Similarly, P.W. 1 (brother of the



deceased and son of the informant) has consistently deposed like P.W. 3 and P.W. 4. This witness was also assaulted by accused persons at the time of occurrence. P.W. 4 too is injured witness. P.W. 4 (Phuleshwari Devi @ Fulo Devi) in paragraph no. 1 of her examination -in-chief has stated that on the date and time of occurrence she along with her daughter -in-law (Budhni Devi -P.W. 5), her son - Deep Narain (P.W. 1), husband -Badar Yadav (P.W. 3) and deceased son- Ratan Yadav were inside आंगन . Her son -Ratan Yadav had just returned after witnessing his field thereafter Laxmi Yadav, Dhorai @ Laxman Yadav, Surya Narain Yadav, Pramod Yadav, Ram Chandra Yadav, Lalit Yadav, Manoj Yadav and Jholia Devi total eight accused persons arrived there. The accused persons were carrying in their hands दबिया, फरसा, कोदाली , छुड़ा and *lathi* etc. Laxmi exhorted to kill Ratan. Thereafter, Laxman Yadav by means to दबिया gave blow on his head whereby Ratan Yadav fell down. Then Laxmi and Manoj by means of फरसा assaulted him. While father of Ratan (informant -P.W. 3) arrived there to save his son then Surya Narain Yadav assaulted on his head by means of कोदाल (spade). Pramod inflicted छुरा blow on the father of the deceased- Ratan. While Deep Narain Yadav (P.W. 1) came to save his father all the accused persons assaulted him by फरसा , दबिया and कुदाल . All fell down. While this



witness went there to save she was inflicted blow by *lathi* by Jholia whereby her hand became fractured. Jholia Devi had taken wrist watch from the hand of Deep Narain. She was also inflicted knife blow by Pramod. After alarm being raised witnesses arrived there. In paragraph - 11 of her cross examination she stated that early in the morning her deceased son (Ratan) had gone to see the field and after witnessing the field he had returned at 7.00. In her cross examination also nothing could be extracted to create doubt on her evidence.

15. P.W. 5 - Budhni Devi (daughter-in-law of P.W. 3 and P.W. 4) described as to how all the eight accused persons suddenly intruded in the आंगन of the house and how the accused persons had injured the witnesses and killed Ratan Kumar Yadav. In paragraph -4 of her cross examination she clarified that she was not aware about the reason for the said assault but she said that after *hulla* she could gather regarding the subject of the dispute.

16. Similarly, P.W. 1 - Deep Narain Yadav (brother of the deceased and son of P.W. 3 and P.W. 4) has deposed. His evidence is also consistent with the evidence of P.Ws. 3, 4 & 5. He is also injured witness. Since P.Ws. 1, 3 & 4 all had received injuries in the same transaction i.e. same occurrence, there is no reason to doubt on their evidence regarding participation by the



accused persons. So far P.W. 2 (Upendra Yadav) is concerned, informant (P.W. 3) in the fardbyan i.e. Ext. 3 has disclosed the fact that when this witness reached Police Station informant dictated him regarding the occurrence and written report was prepared, which is the basis of the F.I.R. Of course, P.W. 2 in clear term has not stated that he is the author of the written report but in absence of any plausible contradictory evidence inference can be drawn that he was the person who had prepared written report since P.W. 3 in specific term has stated like this. He is also witness to the inquest report and he proved his signature on the inquest report, which was marked as Ext.1/1. He also proved signature of one Shiv Narain Yadav on inquest report, which was marked as Ext. 1/2. Signature of A.S.I. Bisheshwar Thakur on inquest report which was marked as Ext. 1/3 and this witness also proved the inquest report, which was marked as Ext. 2. So far claim as eyewitness to the occurrence is concerned, there is some doubt. P.Ws. 1, 3 and 4 in their evidence have not stated regarding presence of P.W. 2 at the time and place of occurrence.

17. P.W. 5 - Budhni Devi (wife of P.W. 2) in her evidence has stated that at the time of occurrence P.W. 2 was inside house. Accordingly, regarding his claim of being eye witness, it would be difficult to come to a final inference that he



was eye witness to the occurrence. However, in the case presence of other eye witnesses cannot be ruled out. Similarly, the credence of their evidence cannot be doubted. It is enough for persuading the court that they are real witness to the occurrence. Evidence of P.Ws. 1, 3 & 4 who are injured witnesses is further corroborated by the evidence of P.W. 8 (Dr. Rajeshwar Prasad Yadav) who has proved the injury report in respect of Badri Yadav (P.W. 3) i.e. Ext. 5/A , injury report of Fulo Devi (P.W. 4) which was marked as Ext. 5/B and injury report in respect of Deep Narain Yadav (P.W. 1) marked as Ext. 5/C. Same thing has been reiterated by another doctor namely Dr. Krishna Murari Prasad Singh who has been examined as P.W. 10. P.W. 8 has further proved the injury report in respect of the deceased showing that before his death he was medically examined. It is true that on the same day he succumbed to the injuries. After his death on 24.10.2000 his dead body was received in mortuary at 10.00 A.M. where P.W. 8 (Dr. Rajeshwar Prasad Yadav) who was Deputy Superintendent, Sadar Hospital Saharsa had conducted post-mortem examination. He proved post-mortem examination report which was marked as Ext. 4. In the post mortem examination report four incised wound were noticed on the head of the deceased. P.W. 8 (Dr. Rajeshwar Prasad



Yadav) in the post -mortem examination has noticed the following facts:-

“(A). External Examination

I. Incised wound 4 in numbers. On the top of the head two anteriorly and two posteriorly all about 3” x 1/4” x bone deep.

II. Three bruises on the right should about 3”x1”, 2 ½” x 1/2” and 1 ½” x1” in diameter.

III. One bruise on the outer side of the left upper arm 3”x 1 ½ ”

IV. Multiple bruises on the back of the trunk and chest of various sizes.

(B) On dissection of the head-

I. Skin and skull extra cranial hemorrhage present.

II. Chest- heart empty, lungs slightly congested

III. Abdomen – Liver and spleen and kidney slightly pale otherwise not anything detected. Urinary bladder – empty.

In my opinion the cause of death was shock and heamorrhage due to injury no. AI and BI which was caused by sharp cutting weapon such as ‘Farsa’ and ‘Dabia’. Other injuries were by hard blunt substance. Time lapse since death about 12.00 to 18.00 hours. I had examined on 24.10.2000 at 11.00 A.M.”

Besides proving post mortem examination report, which was marked as Ext. 4 he has proved injury report of all the injured witness and also injury report of deceased which was marked as Ext. 5.

18. P.W. 9 (Shivendra Kumar Verma) was Homeguard and in his evidence he stated that the Investigating Officer had already left for his heavenly abode. Accordingly, this witness proved the signature of Officer -in-charge of Pratapganj Police Station on the formal F.I.R., which was marked as Ext. ¼, inquest report which was prepared by Sri Bideshwar Thakur, Sub



Inspector of Police which was marked as Ext. 7. He also proved requisition regarding obtaining injury report in respect of deceased and injured which was marked as Ext. 8 to 8C. Of -course in the evidence there is no requirement of getting case diary exhibited but in the present case case diary from paragraph no. 1 to 117 was got proved and marked as Ext. 6. Normally such action is required to be deprecated but considering the fact that in evidence it has come that Investigating Officer died, instead of examining case diary treating it as exhibit we thought it proper to personally examine the case diary. We were persuaded to examine the case diary in view of submission made by learned senior counsel for the appellant that in absence of Investigating Officer case of defence was prejudiced. It is evident that during investigation while inspecting the place of occurrence it was established that the place of occurrence was the courtyard (inside house) of the informant and blood mark was also noticed by the Investigating Officer. Even oral evidence is consistent on the point that occurrence had taken place in the courtyard (inside house) of the informant and deceased. There is no contradictory evidence on record nor any suggestion was given to any of the prosecution witnesses questioning the place of occurrence and as such, even if we ignore the fact disclosed in the case diary regarding the place of



occurrence, the place of occurrence is not in dispute. Even in the statement recorded under Section 313 of the Cr.P.C. none of the appellants have questioned on the point of place of occurrence and as such the submission advanced by Sri Kanhaiya Prasad Singh, learned senior counsel for the appellant that in absence of Investigating Officer defence was prejudiced particularly on the point of place of occurrence has got no substance. Regarding submission made by Sri Singh on the point of doubt on the written report, we are of opinion that considering the consistent oral evidence such submissions are required to be noticed only for its rejection. Sri Rakesh Kumar Jha, learned counsel for the appellant - Surya Narain Yadav has argued that injury caused by the appellant- Surya Narain Yadav on the head of P.W. 3 was noticed as simple in nature and as such there is no application of Section 307 of the I.P.C., we are of opinion that merely on the ground that injury was simple in nature application of Section 307 of the I.P.C. can not be separated. Once it was case of prosecution that this appellant gave blow of spade on head which is a vital portion one can draw an inference that the said injury was caused with intent to kill him and as such there is no scope of escape from Section 307 of the I.P.C. Though Sri Jha has argued that P.W. 4 to some extent had developed the story, we are of opinion that in a



criminal trial it is improbable to get evidence of all the witnesses completely consistent otherwise such evidence can be termed as parrot type evidence as if evidence was given as per dictate. In normal course there is possibility of some inconsistency. Inconsistency, unless leads to serious contradiction showing improbability, only then such inconsistency can be looked into for overlooking the prosecution case.

19. On going through the entire evidence we do not find any such inconsistency warranting interference with the judgment impugned. It is reiterated that judgment of conviction and sentence was required to be interfered with in view of the fact that in the present case there was specific evidence that with common object all the accused persons had intruded into the inner house (courtyard) of the informant with an object to kill the son of the informant in which they succeeded and also assaulted others but in absence of framing of charge under Section 302 read with Section 149 of the I.P.C. it would be difficult for this court to pass such order save and except remitting back the matter to the court below for proceeding with the case after framing fresh charges. In practicality it would be difficult to do the same at this belated stage. In the case occurrence had taken place long back in the year 2000 and we are deciding the appeal in the year 2019. This court



may not be oblivious of the fact that on the date of recording of evidence of informant (P.W. 3) i.e. on 23.07.2002 he was aged about 70 years. Accordingly, we are refraining to pass such order instead we are approving the judgment of conviction and sentence. Accordingly judgment of conviction and sentence is hereby approved and all the aforesaid three appeals are dismissed.

20. Only one appellant- Manoj Yadav is in custody otherwise all other appellants are on bail. The accused persons who are on bail, their bail bond stands canceled with direction to surrender before the court below forthwith for serving the sentence, failing which, the learned trial judge will take steps for securing their attendance.

(Rakesh Kumar, J)

(Prakash Chandra Jaiswal, J)

praful/-

AFR/NAFR	AFR
CAV DATE	NA
Uploading Date	28-03-2019
Transmission Date	28-03-2019

