

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.449 of 2013

Arising Out of PS. Case No.-119 Year-1997 Thana- KUMAR KHAND District- Madhepura

Pramod Yadav, son of Nirdhan Prasad Yadav, resident of Village- Rahta,
Police Station- Kumarkhand, District- Madhepura

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

with
CRIMINAL APPEAL (DB) No. 367 of 2013

Arising Out of PS. Case No.-119 Year-1997 Thana- KUMAR KHAND District- Madhepura

1. Nageshwar Yadav
2. Bijendra Yadav
3. Arun Yadav
All sons of late Madan Yadav
4. Anmol Yadav son of Nirdhan Prasad Yadav,
All residents of Village - Rahta, Police Station - Kumarkhand, District -
Madhepura

... .. Appellants

Versus

The State Of Bihar

... .. Respondent

with
CRIMINAL APPEAL (DB) No. 454 of 2013

Arising Out of PS. Case No.-119 Year-1997 Thana- KUMAR KHAND District- Madhepura

Karun Yadav, son of Late Madan Yadav, resident of Village - Rahta, Police
Station - Kumarkhand, District - Madhepura

... .. Appellant

Versus

The State Of Bihar

... .. Respondent

Appearance :
(In CRIMINAL APPEAL (DB) No. 449 of 2013)
For the Appellant/s : Shri Amarnath Jha, Advocate
For the Respondent/s : Shri Ajay Mishra, A.P.P.
(In CRIMINAL APPEAL (DB) No. 367 of 2013)



For the Appellant/s : Shri Shailendra Kumar Singh, Advocate
For the Respondent/s : Sri Ajay Mishra, A.P.P.
(In CRIMINAL APPEAL (DB) No. 454 of 2013)
For the Appellant/s : Shri Shailendra Kumar Singh
For the Respondent/s : Sri Ajay Mishra, A.P.P.

CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ANJANI KUMAR SHARAN
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 25-07-2019

1. In aforesaid all the three appeals total six appellants were convicted and sentenced by the common judgment of the trial judge, 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 -Pramod Yadav [Cr. Appeal (D.B) No. 449 of 2013] and appellant- Karun Yadav [Cr. Appeal (D.B.) No. 454 of 2013] by judgment dated 08.04.2013 were convicted for the offence under Section 302/34 of the Indian Penal Code, 1860 [hereinafter referred to as the “I.P.C.”] and Section 27 of the Arms Act, 1959 [hereinafter referred to as the “Arms Act”], however, four appellants in Cr. Appeal (D.B.) No. 367 of 2013 were convicted by judgment dated 08.04.2013 under Section 302/149 of the I.P.C. Appellants- Pramod Yadav and Karun Yadav, by order dated 12.04.2013



under Section 302/34 of the I.P.C. were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 2,000/- each. Under Section 27 of the Arms Act by the same order they were sentenced to undergo imprisonment for three years and to pay a fine of Rs. 1,000/- each. Both the sentences were directed to run concurrently. Other four appellants in Cr. Appeal (D.B.) No. 367 of 2013 by the same order i.e. order dated: 12.04.2013 under Section 302/149 of the I.P.C. were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 2,000/-. In case of default in payment of fine, the appellants were directed to additionally undergo imprisonment for three months. The judgment of conviction and sentence was passed by Shri Ashok Kumar Shrivastava, learned Additional District & Sessions Judge, Adhoc Court No. 1, Madhepura [hereinafter referred to as the 'trial judge'] in Sessions Trial No. 260 of 1997 { arising out of Kumarkhand P.S. Case No. 119 of 1997}.

3. The case has been initiated on the basis of *fardbyan* of Mithilesh Prasad Yadav (P.W. 8), S/o Saryug Prasad Yadav (P.W. 2), resident of village- Rahta, P.S. - Kumarkhand, District -Madhepura. The *fardbyan* was



recorded by Shri Ram Singh (P.W. 9), S.I. - cum- Officer in charge, Kumarkhand Police Station on 12.08.1997 at 7.30 A.M. in the Police Station Campus. In the *fardbyan* the informant disclosed that in the preceding night at 9.00 P.M. his younger brother : Suresh Yadav (deceased) was going to the *Kamat* situated in Eastern Tola, village- Rahta carrying food for his father and elder brother: Jai Krishna Yadav (P.W. 3). The informant disclosed that he was following his brother- Suresh Yadav and in that context when his younger brother- Suresh Yadav reached about 50 yards Northern side near the bridge of canal, suddenly:- (1) Karun Yadav [sole appellant in Cr. Appeal (D.B.) No. 454 of 2013], S/o Late Madan Yadav, (2) Pramod Yadav [sole appellant in Cr. Appeal (D.B.) No. 449 of 2013], S/o Nirdhan Prasad Yadav, (3) Anmol Yadav, S/o Nirdhan Prasad Yadav [appellant no. 4 in Cr. Appeal (D.B.) No. 367 of 2013], (4) Arun Yadav [appellant no. 3 in Cr. Appeal (D.B.) No. 367 of 2013], S/o late Madan Yadav, (5) Bijendra Yadav [appellant no. 2 in Cr. Appeal (D.B.) No. 367 of 2013], S/o late Madan Yadav, (6) Nageshwar Yadav [appellant no. 1 in Cr. Appeal (D.B.) No. 367 of 2013], S/o late Madan Yadav, all residents of village- Rahta, P.S.:



Kumarkhand, District - Madhepura, surrounded his brother from his front side. Thereafter, Karun Yadav putting his pistol on the chest of Suresh Yadav fired. In the meanwhile, Pramod Yadav also putting pistol on temporal region of his brother gave one shot of firing whereupon his brother fell down. The informant stated that after getting some chance he, raising *hulla*, started fleeing away. He stated that on hearing sound of his *hulla*, his elder brother - Jai Krishna Yadav (P.W. 3), co-villager : Suren Yadav (P.W. 5), Visho Yadav (P.W. 7), Indradeo Yadav [not examined], Birendra Yadav (P.W. 1) and others reached there and they saw the occurrence. He claimed that he identified aforesaid accused persons in the moon light. The reason for the occurrence was disclosed by the informant that about 7-8 days earlier cattle of Karun Yadav had grazed the field of the informant whereupon there was an altercation in between deceased- Suresh Yadav and accused persons and deceased was threatened for dire consequences. The another reason for the occurrence was explained by the informant that his brother -Suresh Yadav was favouring Kamleshwari Yadav in dispute of Kamleshwari Yadav with Nirdhan Prasad Yadav. He claimed that due to old animosity the aforesaid accused



persons with common intention and common object had committed the crime and killed his brother -Suresh Yadav. His *fardbyan* was read over to him and after finding it correct he put his signature on the bottom of *fardbyan*. As a witness to *fardbyan* Birendra Prasad Yadav (P.W. 1) also put his signature.

4. On the basis of the said *fardbyan* on the same day i.e. at 12.08.1997 a formal F.I.R. vide Kumarkhand P.S. Case No. 119 of 1997 was registered for the offence under Section 302 /34 of the I.P.C. and 27 of the Arms Act against all the aforesaid six appellants. It is pertinent to note that despite the fact that F.I.R. was shown to be registered on 12.08.1997, it was received in the Court of learned Chief Judicial Magistrate, Madhepura on 14.08.1997. Police after registering F.I.R. investigated the case. Inquest report was prepared in the Police Station itself and dead body was sent for post mortem examination. After collecting post mortem examination report and examining witnesses charge sheet was submitted against all the appellants on 23.09.1997 whereupon learned C.J.M., Madhepura on 24.11.1997 took cognizance of the offence. The case was committed to the court of Sessions on



18.12.1997 and it was numbered as Sessions Trial No. 260 of 1997. On 18.03.2004 charge under Section 302/34 of the I.P.C. and Section 27 of the Arms Act was framed against appellants: Karun Yadav and Pramod Yadav. However, on the same day charge under Section 302 /149 of the I.P.C. was jointly framed against all the six appellants. The appellants denied charge and claimed to be tried.

5. Accordingly, during the trial to establish its case on behalf of the prosecution altogether ten witnesses were examined. Out of ten witnesses, P.W. 1 -Birendra Yadav [cousin brother of the deceased and informant], P.W. 2- Saryug Yadav [father of the informant and deceased], P.W. 3 - Jai Krishna Yadav [elder brother of informant and deceased], P.W. 4 -Umesh Yadav [cousin brother of the deceased and informant], P.W. 8 -Mithilesh Prasad Yadav [brother of the deceased and informant of the case] have claimed that immediately after the occurrence they reached the place of occurrence and they have also claimed that they saw accused persons fleeing away. P.W. 5- Suren Yadav is another cousin brother of the deceased who has also claimed to identify accused persons while fleeing away after the occurrence. P.W.



7 - Visho Yadav is the only independent witness but he is a hearsay witness and said nothing save and except that he heard from Mithilesh Prasad Yadav regarding the occurrence. P.W. 10 / Dr. Anand Kumar Bhagat on 12.08.1997 was posted as Medical Officer, Sadar Hospital, Madhepura and on the same day at 4.00 P.M. he conducted post mortem examination on the dead body of deceased whereas Shri Ram Singh [P.W. 9], Sub Inspector- cum- Officer -in- Charge of Kumarkhand Police Station is the scribe of the *fardbyan*. Meaning thereby that he recorded *fardbyan*, investigated the case and submitted charge-sheet. So in the case everything has been done by the same Officer.

6. After completion of prosecution evidence, on 14.12.2010 in a mechanical manner statement of accused persons under Section 313 of the Code Of Criminal Procedure, 1973 [hereinafter referred to as the “Cr.P.C.”] was recorded in which they claimed to be innocent. After recording of statement under Section 313 of the Cr.P.C. from defence side four witnesses were examined, namely: Santosh Kumar (D.W. 1), Dinesh Yadav (D.W. 2), Upendra Sah (D.W. 3) and Afzal Hussain (D.W. 4). In sum and substance defence



witnesses have asserted that though after the occurrence they were present at the place of occurrence but none had disclosed name of any of the assailants and subsequently they came to know that appellants were falsely implicated in the present case. The learned trial judge on the basis of aforesaid material has passed impugned judgment of conviction and sentence which has been assailed in the aforesaid appeals.

7. Sri Amarnath Jha, learned counsel appearing on behalf of the sole appellant i.e. Pramod Yadav in Cr. Appeal (D.B.) No. 449 of 2013 has argued that prosecution has not been able to establish its case beyond all reasonable doubts rather, he submits that it was a case of false implication in a case in which none had seen the occurrence. He further submits that there are serious material contradictions in the evidences of witnesses. He further submits that none of the independent witnesses have come forward to support the prosecution case and all the witnesses who supported the prosecution case are either own brother, father or cousin brother of deceased, and as such, they were interested witnesses.



8. Shri Shailendra Kumar Singh, learned counsel has appeared on behalf of four appellants in Cr. Appeal (D.B.) No. 367 of 2013 and also sole appellant -Karun Yadav in Cr. Appeal (D.B.) No. 454 of 2013. He adopting the submission of Shri Jha, learned counsel for the appellant- Pramod Yadav has further argued that in the case there is no witness to the actual occurrence. He submits that whoever has come as prosecution witness has come to depose to the extent that he saw the accused persons fleeing away after the occurrence however it has been argued that though witnesses in their statement recorded under Section 161 of the Cr.P.C. had not disclosed such fact but during the trial they have come out with a developed story that they too had seen the appellants fleeing away after the occurrence. He further submits that evidence of prosecution witnesses appears to be unreliable due to the reason that almost all the prosecution witnesses who had claimed for their arrival at the place of occurrence had stated that after hearing sound of firing they came out and then they saw that deceased was caught by accused persons and from close range two firings were made. It has been argued that it is not a case of prosecution that in the



occurrence more than two firings were shot. He submits that once it was a case of prosecution witnesses that they came to the place of occurrence after hearing sound of firing then in that event there was no reason for them to claim that they saw firing in their presence that too has been stated only by the informant. Learned counsel for the appellants have argued that falsity of the case is evident from the fact that the witnesses have come out with two different stories. One set of witnesses have stated that after arrival at the place of occurrence the injured was carried directly to hospital and some of the witnesses are saying that firstly injured was carried to Kumarkhand Police Station, in Police Station their statement was recorded and thereafter, the injured was sent to Kumarkhand Sadar hospital. It has been argued that prosecution has withheld the initial version of the case. He submits that it appears that in initial version name of none of the accused persons were mentioned and this is the reason that all the witnesses are silent regarding their statement made immediately after the occurrence in the Police Station while the injured was firstly carried to Police Station. Besides this, it has been argued that prosecution has miserably failed to



establish the place of occurrence. He also submits that orally the witnesses have stated that brother of informant was lying in injured condition near the bridge of canal but Investigating Officer in his evidence has not whispered regarding finding any material evidence at the place of occurrence. Even the Investigating Officer has not indicated that he noticed any blood mark at the place of occurrence, what to talk about recovery of fired cartridges and other materials. In sum and substance it has been argued that due to village politics and old rivalry in between father of some of the appellants, namely: Nirdhan Prasad Yadav and Kamleshwari Yadav in a case in which none had seen the occurrence, the appellants were fabricated as accused and the learned trial judge, in a mechanical manner, ignoring those evidences, passed judgment of conviction and sentence, which is required to be interfered with.

9. Sri Ajay Mishra, learned Additional Public Prosecutor has opposed all the three appeals and he argued that informant, who is P.W. 8, in his evidence has categorically stated as to how Karun Yadav and Pramod Yadav from close range had shot firing on the deceased. He further



submits that oral evidence has been corroborated by medical evidence since in the post -mortem examination report it has come that firing was made from a very close range.

10. Besides hearing learned counsel for the parties, we have examined entire evidence on record and after going through the same *prima facie* we are of opinion that prosecution has not been able to establish its case beyond all reasonable doubts. However, before proceeding it is necessary to deal with the evidence which has been brought on record.

11. P.W. 8 - Mithilesh Prasad Yadav is the informant and brother of the deceased. He in his evidence stated that occurrence had taken place on the date of occurrence at about 9.00 P.M. in night. At that very time, he along with his younger brother -Suresh Yadav was going to *Kamat* carrying meal for his elder bother- Jai Krishna Yadav [P.W. 3] and his father. While they reached near the Canal, all the six appellants caught hold of Suresh Yadav. Karun Yadav [appellant in Cr. Appeal (D.B.) No. 454 of 2013] by putting pistol on the chest of his brother - Suresh Yadav gave one shot of firing. Thereafter, on the order of Nirdhan Prasad Yadav, Pramod Yadav [appellant in Cr. Appeal (D.B.) No. 449 of



2013] putting pistol on temporal region of Suresh Yadav gave one shot of firing, whereupon, his brother Suresh Yadav fell down. After getting some chance, this witness raising *hulla* fled away. He further stated that on his *hulla*, Naresh Yadav (not examined) arrived there. Thereafter, this witness returned to the place of occurrence and saw that his brother, injured -Suresh Yadav, was squirming. He stated that he lifted injured -Suresh Yadav and carried him to Kumarkhand hospital where the doctor of hospital declared his brother dead. Thereafter, in paragraph 2 of his evidence he stated that from Kumarkhand Government hospital carrying Suresh Yadav they went to Kumarkhand Police Station. Whole night they remained in Kumarkhand Police Station and in morning at 6.30 A.M. his *fardbyan* was recorded by Police. He identified his signature on the *fardbyan*, which was marked as Ext. 1. In paragraph 3 of his evidence he stated that earlier there was some dispute in between Karun Yadav and deceased: Suresh Yadav due to grazing of field in which Suresh Yadav was threatened for dire consequences. In paragraph 13 of his cross examination his attention was drawn to his previous statement in which he had stated before the



Police that on the order of Nirdhan Yadav, Pramod Yadav by putting pistol on Suresh Yadav's temporal region had fired however, on examination of the evidence of P.W. 9- Investigating Officer it is evident that he had not made such statement. Even in the *fardbyan* he had not indicated regarding the order given by Nirdhan Yadav to Pramod Yadav. In paragraph 20 of his cross examination this witness himself has stated that after the occurrence before reaching to Kumarkhand hospital they had gone to Kumarkhand Police Station carrying the injured where he met with Daroga Ji and this witness stated about the occurrence to the Police. From there while they went to hospital one Police personnel of Kumarkhand Police Station had also accompanied them. One Constable was sent from Kumarkhand Police Station along with them to the Kumarkhand hospital. He further clarified that while he had informed the Police of Kumarkhand Police Station it was 12.30 [night], however, Police had not recorded his *fardbyan*. He further clarified that at that very time Police had not recorded statement of any other person(s). In paragraph 21 of his cross examination he further replied that the Constable who had gone along with them from Police



Station to Kumarkhand hospital had not carried any paper with him. On examination of aforesaid fact, the court is in agreement with the submission of learned counsel for the appellants that prosecution has withheld the initial version of the case. In paragraph 24 of his cross examination he further accepted that Kamleshwari Yadav in relation was his grandfather and there was dispute in between Kamleshwari Yadav and Nirdhan Yadav [father of appellants -Pramod Yadav and Anmol Yadav]. In paragraph 25 of his cross examination he further stated that in the night when Suresh Yadav died, Kamleshwari Yadav was present in his house, *Kamat*, Kumarkhand hospital as well as Kumarkhand Police Station however, no explanation has been given by the prosecution regarding non -examination of Kamleshwari Yadav. It is also evident that there was animosity in between Kamleshwari Yadav and father of some of the appellants- Nirdhan Yadav. It appears that purposely this witness was withheld by prosecution to suppress the real story. In paragraph 28 of his cross examination this witness denied the suggestion that Suresh Yadav was a veteran criminal. He further, in paragraph 30 of his cross examination, denied the



suggestion that as per instigation of Kamleshwari Yadav he had falsely implicated the appellants. On examination of the evidence of informant / P.W. 8 it is vividly clear that prosecution has suppressed the initial version and this was the reason that though *fardbyan* was shown to be recorded in the next morning at 7.30 A.M. and again on the same day and time formal F.I.R. was lodged, the receipt of the F.I.R. in the court of learned Chief Judicial Magistrate, Madhepura on 14th August, 1997 again creates some doubt regarding the conduct of prosecution. Of -course the Investigating Officer was not asked any question regarding delayed sending of F.I.R. to the Court, but if such fact is noticed by the appellate court, the appellate court certainly may not shut its eyes. The receipt/ belated sending of F.I.R. to the court of Chief Judicial Magistrate, Madhepura in the facts and circumstances of the present case creates serious doubt on the prosecution case.

12. P.W. 1 -Birendra Yadav [cousin brother of the deceased and informant] in his evidence has stated that while he was at his door, he heard sound of firing which was coming from Canal side. Thereafter, he also heard *hulla* of Mithilesh Yadav and runningly he went towards the Canal side and saw



Suresh Yadav, who was injured, due to fire arm injury was bleeding. He further stated that there was shivering in the body of Suresh Yadav. Suresh Yadav thereafter was carried to Kumarkhand hospital where doctor declared him dead. In his examination- in- chief he has not whispered regarding involvement of either of the appellants, however, he identified appellant- Karun Yadav and Pramod Yadav in the dock itself. In paragraph 4 of his cross examination he has stated that Mithilesh Yadav and deceased: Suresh Yadav were his cousin brother. In paragraph 7 of his cross- examination he further stated that after his arrival at the place of occurrence Mithilesh Yadav and other 15-20 persons arrived amongst them he named, Jai Krishna Yadav (P.W. 3) , Saryug Yadav [P.W. 2] , Umesh Yadav (P.W. 4), Suren Yadav (P.W. 5), Mahendra Yadav (P.W. 6), Visho Yadav (P.W. 7) and others. Meaning thereby, that before arrival of aforesaid witnesses at the place of occurrence this witness had already reached the place of occurrence, however, he had not claimed regarding identification of any of the appellants. Only he stated that he saw Suresh Yadav in injured condition. On the basis of



evidence of this witness claim of other witnesses regarding witnessing accused persons fleeing away may not be believed.

13. P.W. 2 -Saryug Yadav [father of the deceased] too in his evidence has stated nothing. He stated that at the time of occurrence he was in his *Kamat* of his *bahiyar*. At that very time he heard sound of firing. Sound of firing was coming from the Canal side and thereafter, he rushed to the Canal side and he saw that his son- Suresh Yadav was lying dead. His son died due to gun shot injury. He further stated that he saw appellants fleeing away from the said place of occurrence. The reason for the occurrence is claimed that his son- Suresh Yadav was having dispute with the accused persons. It has come in evidence that the place of occurrence from *Kamat* was about $\frac{1}{2}$ K.M. away. In paragraph 14 of his cross examination he stated that while he was present at *Kamat* he heard two shots of firing. After hearing shots of firing he left the *Kamat* and while carrying deceased to Kumarkhand hospital he saw number of persons but due to darkness he could not identify anyone. On the one hand the informant /P.W. 8 in his evidence has claimed that he identified all accused persons in moon light, on the other hand



his father (P.W. 2) states that it was dark and due to darkness he was not in a position to identify persons who were carrying the deceased to Kumarkhand hospital. He further stated in paragraph 15 of his cross examination that immediately after their arrival in Kumarkhand hospital Daroga Ji of Kumarkhand Police Station arrived in hospital and recorded his *fardbyan* in hospital itself. He clarified that for the first time his statement was recorded and after recording his statement Police had not recorded statement of any other witness. On examination of his evidence two points are clear: That he came out from his *Kamat* after hearing two shots of firing. It is case of prosecution that in the occurrence only two shots were fired and both hit the deceased. While this witness speaks that while he was in *Kamat* he heard two shots of firing, there was no reason for him to identify the accused persons after arrival at the place of occurrence which was about ½ K.M. from his *Kamat*. Secondly, his evidence speaks that in the night itself Police had recorded his *fardbyan* however , prosecution is silent as to what he had disclosed in his *fardbyan*. This suggests that prosecution has purposely withheld the initial version which has been argued by learned



counsel for the appellants. In paragraph 17 of his cross examination he stated that he was not aware as to how many cases were pending against deceased -Suresh Yadav. This answer suggests that the deceased was also having some criminal antecedent otherwise on such question flat answer was required to be given that deceased was not accused.

14. P.W. 3 - Jai Krishna Yadav (elder brother of the deceased and informant) in his evidence stated that at the time of occurrence he was the in his *Kamat*. He stated that he heard *hulla* of his brother - Mithilesh Yadav. After hearing *hulla* he runningly went to Canal. It was moonlit night. He stated that near the Canal he identified all the aforesaid appellants while they were fleeing away. When he reached near the place of occurrence he saw his brother Suresh Yadav was lying and squirming and there he also saw Mithilesh Yadav. However, in the evidence of P.W. 1 it has come that after he arrived place of occurrence other witnesses had reached there. This witness further stated that on being asked Mithilesh Yadav stated that Karun Yadav and Pramod Yadav had given shot of fire on Suresh Yadav. He stated that Suresh Yadav was having injuries on his chest and temporal region.



In paragraph 5 of his cross examination he stated that from his house to *Kamat* it is distance of 800 yards. The place where his brother was lying in injured condition was about 50 yards away from his house and there were altogether 50 houses in between the place of occurrence and his house. He admitted that from amongst 50 houses none is witness in the present case. In paragraph 10 of his cross examination he accepted that from the place of occurrence firstly he carried the injured to Kumarkhand Police Station. They reached Kumarkhand Police Station at 12.00 in the night and stayed in Kumarkhand Police Station for the whole night. He further stated that in the same night Police had recorded statement of his mother [not examined], father [P.W. 2] and Mithilesh Yadav. Police had recorded their statement in his presence. He further stated that after recording *fardbyan* Police had explained the same to them on which they put their signature. In paragraph 12 of his cross examination he further reiterated that statement which he had given in Kumarkhand Police Station in the night thereafter Police had never recorded his statement. The evidence of this witness makes it clear that immediately after the occurrence the injured was firstly carried to Kumarkhand



Police Station and in Kumarkhand Police Station statement / *fardbyan* was recorded. Without disclosing those facts prosecution has come out with a case that *fardbyan* was recorded on the next day morning at 7.30 A.M. This creates serious doubt regarding the conduct of prosecution. Though in examination -in-chief he had stated regarding identification of accused persons while they were fleeing away, his attention was drawn to his previous statement recorded during investigation. In paragraph 13 of his cross examination his attention was drawn to his previous statement in which he stated that he had stated before the Police that at 9.00 in the night of the occurrence he was at his *Kamat* where he heard *hulla* of his brother -Mithilesh and thereafter, he rushed towards Canal and it was moonlit night and he identified the aforesaid six appellants while they were fleeing away. To this extent contradiction was taken from the Investigating Officer / P.W. 9 and in Paragraph 12 & 13 of the evidence of Investigating Officer [P.W. 9] it has come that this witness had not made such statement before the Police. Meaning thereby that the story of identifying the appellants while fleeing away from the place of occurrence was subsequently



developed by this witness, and as such, it is difficult to place reliance on his evidence.

15. P.W. 4 - Umesh Yadav is another cousin brother of the deceased and he too has claimed to be eye witness to the occurrence. In paragraph 1 of his examination -in-chief he stated that after hearing sound of firing he reached the place of occurrence and he saw the appellants fleeing away. However, to this extent his attention was drawn in paragraph 11 , 12, 13, 14 and 15 of his cross examination. Subsequently, contradiction was taken from the Investigating Officer (P.W. 9) and in paragraph 14 of the evidence of Investigating Officer (P.W. 9) it has come that this witness had not made such statement during investigation before the Police regarding identification of either of the accused persons. In paragraph 9 of his cross examination he too has stated that from the place of occurrence they firstly went to the Kumarkhand Police Station and reached Kumarkhand Police Station at 12.00 in the night with injured and witnesses. He further stated that Police recorded statement of Jai Krishna Yadav [P.W. 3] , Mithilesh Yadav [P.W. 8] and Saryug Yadav [P.W. 2]. Meaning thereby, that even before recording



fardbyan which has been got exhibited in the present case as Ext. 2, statement / *fardbyan* of aforesaid witnesses was already recorded however, those facts have not been brought on record by prosecution which indicates that initial version was different than the version which has been disclosed in the *fardbyan*.

16. P.W. 5- Suren Yadav is another cousin brother of the informant and deceased. This witness too has stated in his examination -in-chief that on the date of occurrence after hearing sound of firing when he rushed towards his *bathan* then near Canal he saw all the appellants. He further stated in paragraph 2 of his evidence that he saw that Suresh Yadav was caught by Pramod Yadav and he fired and thereafter he went to *bathan*. In paragraph 1 of his evidence he admits that after hearing sound of firing he rushed towards the place of occurrence and thereafter, he is deposing as a witness to the main occurrence as if in his presence Suresh Yadav was shot fired by Pramod Yadav. In the entire prosecution case nothing has been stated by either of the witnesses regarding 3rd firing. Once he heard the sound of firing while he was not at the place of occurrence then subsequently there was no occasion



for him to witness that in his presence the deceased was fired by one of the appellants. Besides this, he too has stated that from the place of occurrence they went to Kumarkhand Police Station. His attention was drawn to his previous statement in paragraph 12 of his cross examination in which he admitted that he had not made statement before the Police that on the date and time of occurrence he was going to his *bathan* carrying meal and after hearing sound of firing he went near the Canal and saw the accused persons. He further accepted that he had not made any statement before the Police that Suresh Yadav was caught and fired by Pramod Yadav. In paragraph 15 of his cross examination he further stated that in the present case for the first time he was making statement in the Court. Meaning thereby that in examination -in- chief what he had stated that he saw the appellants fleeing away was incorrect since no such statement was made by him to the Police.

17. P.W. 6 [Mahendra Yadav] is another cousin brother of the deceased. This witness in his evidence has stated that after hearing sound of firing he went to the place of occurrence and saw that Suresh Yadav was lying dead. He



stated that Suresh Yadav was having gun shot injury on his chest and temporal region. He stated that he had not seen anything. He also stated in paragraph 2 of his examination-in-chief that he was not knowing any reason for the murder of Suresh Yadav. Even in paragraph 8 of his cross-examination he stated that till the date of evidence he was not aware as to who was the killer of Suresh Yadav. Accordingly, evidence of this witness has got no relevance for the prosecution case.

18. P.W. 7 -Visho Yadav is only independent witness who is co-villager of appellants and deceased. He only stated that after hearing sound of firing he went to the place of occurrence where he saw injured -Suresh Yadav who had received gun shot injury and he was already lying dead. He in paragraph 3 of his evidence stated that near the Canal itself Mithilesh Yadav was saying that firing was made by appellants -Karun Yadav and Pramod Yadav. This witness is not eye witness, rather he has claimed to be hearsay witness from the mouth of Mithilesh Yadav, however, Mithilesh Yadav in his evidence has not stated that he disclosed such fact to this witness or not, and as such, his evidence may not be considered for adjudication of the present case.



19. Dr. Anand Kumar Bhagat (P.W. 10) on 12.08.1997 was posted as Medical Officer, Sadar hospital, Madhepura and on the same day at 4.00 P.M. he conducted post mortem examination on the dead body of deceased and noticed the following facts:-

“External examination

(1) lacerated entry wound of merely $\frac{2}{3}$ ” x $\frac{2}{3}$ ” with margin inverted with charring surrounding the wound on right side chick.

(2) lacerated exit wound of merely $1\frac{1}{4}$ ” x $1\frac{1}{4}$ ” on left side temporal region. Margins everted.

(3) lacerated entry wound of $\frac{1}{3}$ ” x $\frac{1}{3}$ ” on left side chest. $1\frac{1}{2}$ ” away from sternum and 5” away from sterna clavicular joints left side. Margin everted. Charring present

4- Lacerated exit wound of $\frac{1}{2}$ x $\frac{1}{2}$ ” mid of left side back merely 2” away from verticalaleral column. Margin everted.

Internal examination-

On opening face – A hole of merely $\frac{2}{3}$ ” x $\frac{2}{3}$ ” diameter x maxillary bone with irregular margin fracture of base of skull. Left side fracture of left side temporal bone. Haemotoma present. Brain material coming from above wound only entry

direction of wound from right to left

on opening scalp and skull: Scalp N.A.D. brain - pale

on opening thorax -right lungs pale, left lung lacerated and pale. Heart -pale and empty

On opening abdomen -stomach pale with semi solid meal (rice, pulse and others) merely 3 to 4”. lever, spleen, kidney, intestine well pale.

cause of death was shock and haemorrhage due to above injuries which were caused by fire arms (pistol)”

He identified the post mortem examination report which was marked as Ext. 5. On examination of the evidence of P.W. 10 and post mortem examination report it is evident that 2nd entry wound was on chick and exit was temporal



region besides one another injury. Some of the witnesses during evidence has stated that they saw that appellant -Pramod Yadav putting pistol on Suresh Yadav's temporal region had fired however post motem examination report gives a different picture. As per post mortem examination report and evidence of P.W 10 entry wound was chick and temporal region was having exit injury. This also suggests that the witnesses who have claimed to be eye witness are not giving correct picture before the court.

20. P.W. 9 [Shri Ram Singh] on the relevant time was posted as Sub Inspector -cum- Officer-in-charge of Kumarkhand Police Station. In this case he is the person who recorded *fardbyan* and he himself took up investigation of the case, recorded statement of witnesses and finally submitted charge- sheet. In normal course, the court is of opinion that such method should be avoided. This witness himself has recorded *fardbyan*. Thereafter, he was required to avoid from taking up investigation himself but still he had investigated the case. In his evidence he identified the *fardbyan*, which was marked as Ext. 2. He also identified his signature on formal F.I.R., which was marked as Ext. 3 and he identified the



inquest report, which was prepared by him and it was marked as Ext. 4. On examination of his evidence it appears that he is supporting the fact that in the morning he recorded *fardbyan* of the informant- P.W. 8, however, in his evidence it has not come as to whether prior to lodging *fardbyan* he had recorded statement of any of the witnesses or not, whereas, number of witnesses in categorical term have stated that after the occurrence the injured was carried to Police Station. They reached in the Police Station in night at 12.00 O' Clock and in Kumarkhand Police Station *fardbyan* / statement of witnesses was recorded but no such fact has been stated by this witness. Of-course at the time of examination of Investigating Officer from defence side no question has been asked as to why the F.I.R. was received in the court of learned Chief Judicial Magistrate, Madhepura on 14th August, 1997 whereas, formal F.I.R. was registered on 12th August, 1997. We have examined the record which suggests that F.I.R. was received in the court of learned Chief Judicial Magistrate, Madhepura on 14th August, 1997. In a case where number of witnesses have come out with a stand that in the night itself Police had recorded *fardbyan* and statement of witnesses, showing recording of



fardbyan in the next morning on 12th August, 1997 at 7.30 A.M. speaks as if something had happened before recording of the so-called *fardbyan* and this is the reason that despite drawing up of formal F.I.R. on the same day i.e. on 12th August, 1997 F.I.R. was belatedly received in the Court of C.J.M., Madhepura on 14th August, 1997. This also creates some serious doubt on the conduct of prosecution. The Investigating Officer in his evidence has stated that after recording *fardbyan* he prepared inquest report and dead body was sent for post mortem examination but in post mortem examination in the column meant for giving case no., it was left vacant however the post -mortem examination report, which has been brought on record is not original but is photo copy and on top of the photo copy of post mortem examination report on the right hand side case no. has been mentioned. This also raises suspicion regarding the conduct of prosecution particularly in view of the fact that prosecution has withheld the initial version and without any reason the F.I.R. was received in the Court of C.J.M., Madhepura two days belatedly after recording of the F.I.R. The Investigating Officer (P.W. 9) in paragraph 5 of his evidence has given



description of the place of occurrence but he has not mentioned regarding finding any material evidence at the place of occurrence. He has not mentioned even as to whether he noticed any blood mark at the place of occurrence or not. Whether he noticed any fired cartridges or not ? This also goes against prosecution. In a criminal trial it is prime duty on the part of prosecution to establish the place of occurrence. Of-course regarding place of occurrence some description has been given but no material evidence has been collected by the Investigating Officer.

21. On examination of entire evidence it is evident that prosecution has withheld the initial version. During evidence it has come that there was some animosity in between informant's side as well as appellants' side and as such possibility of false implication of appellants may not be ruled out. It is also evident that despite the fact that occurrence had taken place in the village surrounded by number of houses, to the reasons best known to prosecution none of the independent witnesses has come forward to support the prosecution case. Of-course, it is not necessary that in each case independent witness may come, but nature of evidence



which has been brought on record certainly goes to suggest that independent witnesses have not come forward to support the prosecution case due to the reason that prosecution has not come out with clean hand. After recording statement under Section 313 of the Cr.P.C. of all the appellants, four co-villagers were examined as defence witnesses. D.W. 1 – Santosh Kumar in his evidence has stated that after hearing sound of firing he along with some other firstly reached the place of occurrence and only thereafter, other witnesses had arrived. Similar is the evidence of D.W. 2 (Dinesh Yadav). The defence witnesses have also stated that on arrival they saw the family members of the deceased who were crying / weeping but at the place of occurrence none had disclosed the name of either of the assailants. Of -course in a criminal trial there is no necessity to place much reliance on defence evidence, but in the facts and circumstances of the present case, particularly quality of the prosecution witnesses there appears to be some substance in the defence version also. Moreover, on examination of statement of all the appellants which was recorded under Section 313 of the Cr.P.C. it is



evident that only formality was done, otherwise, no specific evidences or circumstances were explained to them.

22. On examination of entire evidence on record, which we have discussed hereinabove, we feel difficult to approve the judgment of conviction and sentence. It is evident that prosecution has not been able to establish its case beyond all reasonable doubt. Accordingly, there is no reason to allow the judgment of conviction and sentence to be approved, and as such, judgment of conviction dated- 08.04.2013 and sentence dated: 12.04.2013 passed by Shri Ashok Kumar Shrivastava, learned Additional District & Sessions Judge, Adhoc Court No. 1, Madhepura in Sessions Trial No. 260 of 1997 {arising out of Kumarkhand P.S. Case No. 119 of 1997 } is hereby set aside and all three appeals are allowed. Appellants -Pramod Yadav [Cr. Appeal (D.B.) No. 449 of 2013] and Karun Yadav [Cr. Appeal (D.B.) No. 454 of 2013] are in jail and consequent to setting aside of the judgment of conviction and sentence, they are hereby directed to be released forthwith, if not wanted in any other case. Four appellants namely: Nageshwar Yadav, Bijendra Yadav, Arun Yadav and Anmol Yadav in Cr. Appeal (D.B.) No. 367 of



2013 who are on bail, are hereby discharged from liability of their bail bonds.

23. All the three appeals are allowed.

(Rakesh Kumar, J)

(Anjani Kumar Sharan, J)

praful/-

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CAV DATE	NA
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