IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.1047 of 2013

Arising Out of PS. Case No.-26 Year-2008 Thana- BANMANKHI District- Purnia

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Pappu Yadav @ Binay Yadav @ Pappu @ Binay Kumar Yadav, son of Bal Krishna Yadav, resident of village Radha Nagar, P.S. Banmankhi, District Purnea

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

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with

CRIMINAL APPEAL (DB) No. 929 of 2013

Arising Out of PS. Case No.-26 Year-2008 Thana- BANMANKHI District- Purnia

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Archana Bharti, wife of late Om Prakash Yadav, resident of village Radha Nagar, P.S. Banmankhi, Distt. Purnea

... ... Appellant/s

Versus

The State Of Bihar

... ... Opp. Party

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with

CRIMINAL APPEAL (DB) No. 1042 of 2013

Arising Out of PS. Case No.-26 Year-2008 Thana- BANMANKHI District- Purnia

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Wakil Yadav, son of Suren Yadav, Resident of village- Radha Nagar, Police Station - Banmankhi, District- Purnea

... ... Appellant/s

Versus

The State Of Bihar

... ... Respondent/s

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Appearance :
(In CRIMINAL APPEAL (DB) No. 1047 of 2013)
For the Appellant/s : Sri Vikramdeo Singh, Advocate
Sri Shailendra Kumar Singh, Advocate
For the Respondent/s : Sri Ajay Mishra, A.P.P.
(In CRIMINAL APPEAL (DB) No. 929 of 2013)
For the Appellant/s : Sri Ajit Kumar Singh, Advocate
For the Opp. Party : Sri Ajay Mishra, A.P.P.
(In CRIMINAL APPEAL (DB) No. 1042 of 2013)
For the Appellant/s : Sri Ajay Thakur, Advocate
Sri Ram Pravesh Nath Tiwari, Advocate

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For the Respondent/s : Sri Ajay Mishra, A.P.P.

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CORAM: HONOURABLE MR. JUSTICE RAKESH KUMAR
and
HONOURABLE MR. JUSTICE ANIL KUMAR SINHA

ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAKESH KUMAR)

Date : 07-05-2019

1. All the three appellants in the aforesaid three appeals were tried together and convicted and sentenced in Sessions Trial No. 803 of 2008 and as such all the three appeals were taken up together under the heading "For Hearing" and are being disposed of by this common judgment.

2. Pappu Yadav @ Binay Yadav @ Pappu @ Binay Kumar Yadav [appellant in Cr. Appeal (D.B.) No. 1047 of 2013] and Wakil Yadav [appellant in Cr. Appeal (D.B.) No. 1042 of 2013] by judgment dated 18.09.2013 were held guilty and convicted for the offence under Section 302 & 460 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") whereas Archana Bharti [appellant in Cr. Appeal (D.B.) No. 929 of 2013] was held guilty and convicted by the same judgment i.e. judgment dated 18.09.2013 for the offence under Section 302/ 120B of

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the I.P.C. and by order dated 19.09.2013 Pappu Yadav and Wakil Yadav under Section 302 of the I.P.C. were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5000/- each. In case of default in payment of fine they were directed to further undergo simple imprisonment for one month. Under Section 460 of the I.P.C. both were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5000/- each. In case of default in payment of fine they were directed to further undergo simple imprisonment for one month. Under Section 27 of the Arms Act both have been sentenced to undergo rigorous imprisonment for three years and to pay a fine of Rs. 5000/-. In case of default in payment of fine they were directed to further undergo simple imprisonment for one month. Appellant- Archana Bharti in Cr. Appeal (D.B.) No. 929 of 2013 by order dated 19.09.2013 under Section 302 /120B of the I.P.C. has been sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 5000/-. In case of default in payment of fine she has been directed to further undergo simple imprisonment for one month. The appellants were tried together in Sessions Trial No. 803 of 2008 [arising out of Banmankhi P.S. Case No. 26

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of 2008] and they have been convicted and sentenced by Mr. Hasan Nawaz, learned Adhoc Additional Sessions Judge No. 5, Purnia (hereinafter referred to as the "trial judge").

3. Short fact of the case is that on 29.02.2008 at 7.00 A.M. near the Kamat (out house in the field) in the village- Radhanagar (Tatma Toli), Police Station- Banmankhi the *fardbyan* of Vimal Kumar Yadav (P.W. 7), S/o Bihari Yadav (one of the deceased) was recorded by S.I. Arvind Kumar (P.W. 10) -cum -S.H.O., Banmankhi Police Station. In the *fardbyan* the informant (P.W. 7) disclosed in front of the dead body of his son- Jayant Kumar that in the preceding night he, his father (Bihari Yadav) and his son (Jayant Kumar) after taking meal slept in his Kamat. In the night at about 1.30 P.M. Pappu Yadav @ Binay Yadav [appellant in Cr. Appeal (DB) No. 1047 of 2013], Wakil Yadav [appellant in Cr. Appeal (D.B.) No. 1042 of 2013], both resident of Radhanagar , P.S. Banmankhi, District Purnea along with 4-5 unknown young accused persons arrived at his Kamat. At that very time lantern was burning. Immediately after arrival they surrounded son of the informant - Jayant Kumar. Pappu Yadav gave one shot of firing on the head of his son. His father tried

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to apprehend the culprits and ran then Wakil Yadav with the pistol which he was carrying in his hand gave shot of firing on his chest. The informant after raising alarm came out from the Kamat and fled away. After assembling of nearby villagers all the accused persons fled towards Eastern side. The informant stated that all the accused were carrying pistol in their hands. He stated that his father due to shot of firing was seriously injured and he with the help of others was sent to Purnea for his treatment. His son -Jayant Kumar due to fire arm injury died. The reason for the occurrence was explained by the informant as animosity with Pappu Yadav was going on. The *fardbyan* was read over to him and after finding it correct the informant put his signature. On the basis of the said *fardbyan* on the same day i.e. on 29.02.2008 a formal F.I.R. vide Banmankhi P.S. Case No. 26 of 2008 was registered for the offence under Section 452/ 302/ 307/ 34 of the I.P.C. and 27 of the Arms Act, however subsequently on 04.03.2008 Section 120(B) of the I.P.C. was added in the F.I.R. The F.I.R. was lodged initially against:- Pappu Yadav @ Binay Yadav [appellant in Cr. Appeal (D.B.) No. 1047 of 2013] and Wakil Yadav [appellant in Cr. Appeal (D.B.) No. 1042 of 2013],

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however during investigation involvement of appellant -Archana Bharti as one of the main conspirators transpired and as such Police after investigation on 30.05.2008 submitted charge sheet against all the three appellants keeping investigation pending against others. After submission of charge sheet on 09.06.2008 learned Chief Judicial Magistrate, Purnea took cognizance of the offence and the case was committed to the court of Sessions on 30.07.2008 and it was numbered as Sessions Trial No. 803 of 2008. After commitment on 03.12.2008 charge was framed against Pappu Yadav and Wakil Yadav under Section 302, 460 of the I.P.C. and Section 27 (3) of the Arms Act and on the same day separate charge under Section 120B of the I.P.C. was framed against all the three appellants which include Archana Bharti (appellant in Cr. Appeal (D.B.) No. 929 of 2013).

4. To establish its case on behalf of the prosecution altogether ten witnesses were examined. Out of ten witnesses, informant - Vimal Yadav has been examined as P.W. 7, P.W. 2 -Jyoti Kumari (daughter of the informant) and P.W. 3 -Pradip Yadav (nephew of the deceased - Bihari Yadav) have been examined on the point that immediately after the occurrence

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they arrived at the place of occurrence and they are also witness to the extent of oral dying declaration given by Bihari Yadav involving the appellants in the case. P.W. 1 (Mithilesh Kumar Yadav) who is inquest witness has supported the case to the extent of being witness to the inquest report however on the facts of the occurrence he was declared hostile and his attention was drawn to his previous statement recorded under Section 161 of the Cr.P.C. P.W. 8 (Dr. Yogendra Prasad) had conducted post mortem examination on the dead body of both Jayant Kumar as well as Bihari Lal Yadav and P.W. 9 (Dr. Bramhdeo Raman) was Observer in the post mortem examination of both the deceased. Arbind Kumar (P.W. 10) is the Investigating Officer of the case however P.W. 4 (Bishundeo Yadav), P.W. 5 (Rajendra Yadav) and P.W. 6 (Indradeo Yadav) since have not supported the prosecution case were declared hostile and their attention to their previous statement recorded under Section 161 of the Cr.P.C. was drawn. After completion of the prosecution evidence on 03.08.2012 the appellants were questioned with incriminating circumstances and evidences and their statement was recorded under Section 313 of the Cr.P.C. in which they claimed to be

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innocent and also produced defence witnesses namely: D.W. 1 (Gajendra Yadav), D.W. 2 (Srihari Lal Das), D.W. 3 (Sanjay Yadav). All the three defence witnesses were examined to prove that appellant -Archana Bharti had never solemnized marriage with appellant -Wakil Yadav.

5. Sri Ajay Thakur, learned counsel assisted by Sri Ram Pravesh Nath Tiwari, learned counsel for the appellant in Cr. Appeal (D.B.) No. 1042 of 2013 after placing entire evidence has argued that the learned trial judge has committed serious error in passing judgment of conviction and sentence since prosecution has not been able to establish its case beyond all reasonable doubts. He submits that prosecution has not given any explanation regarding non informing Police immediately after the occurrence. It is case of the prosecution that occurrence had taken place at 1.30 Hours in the night of 28-29 February 2008 and Police Station from the place of occurrence was only about 2 K.M. away, even then the Officer- in- charge of Banmankhi Police Station in his evidence has stated that after getting information he arrived at the place of occurrence and *fardbyan* was recorded at 7.00 A.M. on 29.02.2008. Sri Thakur has highlighted that it is

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difficult to perceive that in such situation why belatedly Police was informed. Sri Thakur has further argued that on the basis of material on record it appears that prosecution has suppressed the first version and subsequently after discussion the appellants were made accused in the present case. He has also argued that the presence of informant who has been examined as P.W. 7 at the place of occurrence appears to be doubtful. By way of referring to the evidence of P.W. 7 at paragraph 3 that after the occurrence the informant came out from the Kamat and fled then villagers, who had gathered in a marriage ceremony in a nearby village, immediately arrived besides the other villagers and only then accused persons fled away. According to informant in paragraph 3 of his evidence the villagers had also seen the accused persons fleeing away. Similarly learned counsel for the appellants has referred to paragraph 16 of P.W. 7 in which the informant has stated that just by the side of the place of occurrence there is Tatwa Toli and in the said village itself marriage ceremony was going on and persons from that village had arrived at the place of occurrence. This witness has not whispered about the presence of P.W. 2 - Jyoti Kumari (daughter of the informant) and P.W.

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3 -Pradip Yadav (cousin of the informant). Similarly Sri Thakur has argued that in the evidence of P.W. 2 and P.W. 3 the presence of informant (P.W. 7) has not come and as such it has been argued that the presence of the informant at the place of occurrence appears to be doubtful and similarly he has raised doubt on the presence of P.W. 2 and P.W. 3 in view of evidence of P.W. 7. He further submits that the story of oral dying declaration has been introduced with a view to secure conviction of the appellants even in a case in which the presence of the informant at the place of occurrence is considered as doubtful. The informant (P.W. 7) has not whispered about the oral dying declaration given by Bihari Lal Yadav (deceased) however, P.W. 2 & P.W. 3 have come out with a case that Bihari Yadav in injured condition had disclosed as to how the son of the informant was killed by Pappu Yadav and thereafter Bihari Yadav was shot at from close range by Wakil Yadav.

6. Sri Thakur has further tried to persuade the court that occurrence had taken place in a different manner than the manner which has been narrated by the prosecution. To support his contention he has taken the court to the evidence

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of P.W. 8 (Dr. Yogendra Prasad) who conducted post mortem examination on the dead body of both the deceased namely: Bihari Lal Yadav as well as Jayant Kumar. Learned counsel for the appellant has referred to the evidence of P.W. 8 in his paragraph 2 and submits that time of death of Bihari Lal Yadav has been mentioned as 24 hours whereas time of death in respect of Jayant Kumar was stated in paragraph 5 as within 24 hours. Sri Thakur tried to persuade the court that it appears that at two different time occurrence had taken place and lastly it has been argued that appellant – Wakil Yadav has been implicated due to animosity since it was alleged by the prosecution witnesses that appellant was having relation or it was alleged that appellant had solemnized marriage with Archana Bharti, who was widow of one of the sons of Bihari Lal Yadav.

7. Sri Bikramdeo Singh, learned counsel assisted by Sri Shailendra Kumar Singh in Cr. Appeal (D.B.) No. 1047 of 2013 i.e. Pappu Yadav vs. The State of Bihar adopting the argument of Sri Ajay Thakur has further argued that the presence of P.W. 2, P.W. 3 and P.W. 7 at the place of occurrence is itself demolished on examination of their

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evidences. He submits that in evidence of P.W. 3 it has not come as to whether P.W. 7 was seen at the place of occurrence or not. Similarly in the evidence of P.W. 7 it has not been stated as to whether P.W. 2 and P.W. 3 arrived at the place of occurrence or not. Sri Singh has further argued that genesis of the case which was alleged in the F.I.R. had been changed subsequently as if the occurrence had taken place since one of the appellants namely- Wakil Yadav was having relation with Archana Bharti whose husband had died in the year 2004. Her husband was the own brother of informant. Accordingly both the learned counsel for the appellants have argued that judgment of conviction and sentence of appellant – Pappu Yadav as well as Wakil Yadav is liable to be interfered with and both appellants deserve to be acquitted.

8. Sri Ajit Kumar Singh , learned counsel appearing on behalf of Archana Bharti [appellant in Cr. Appeal (D.B.) No. 929 of 2013] has firstly argued that the judgment of conviction and sentence in respect of the appellant -Archana Bharti is liable to be set aside primarily on the ground that no charge under Section 302 read with Section 120B of the I.P.C. was framed against her. He has drawn our attention to the

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order of framing of charge which reflects that on 03.12.2008 joint charge was framed against Pappu Yadav and Wakil Yadav for the offence under Section 302 and 460 of the I.P.C. and further under Section 27(3) of the Arms Act and separate charge only under Section 120B of the I.P.C. was framed on the same day i.e. 03.12.2008 against Pappu Yadav, Wakil Yadav and Archana Bharti. It has been argued that in absence of framing of charge against Archana Bharti under Section 302/120B of the I.P.C. the learned trial judge has committed serious error in passing the judgment of conviction under Section 302/120B of the I.P.C. against the appellant- Archana Bharti. He further submits that appellant -Archana Bharti has been framed as accused only with a view to restrain the appellant from enjoying the fruits of the share of her husband which was in joint possession of the informant's side. Sri Ajit Kumar Singh, learned counsel for the appellant- Archana Bharti has argued that the appellant was married with Om Prakash Yadav (younger brother of the informant), however her husband died in a train accident in the year 2004. After death of her husband the informant's side with a view to restrain the appellant from enjoying share of her husband in

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the joint property the informant's side framed her as conspirator in the present case with an allegation as if the appellant had solemnized marriage with one of the co-convicts: Wakil Yadav. He highlights that save and except the evidence of P.W. 3 there is no material on record to suggest that the appellant directly or indirectly was a member of conspiracy in committing the crime in question. He further submits that during the trial there is no independent witness. Only family members have come forward to support the prosecution case, otherwise the independent witnesses since did not support the prosecution case were declared hostile. He further submits that Investigating Officer has not found any blood mark where Bihari Lal Yadav after receiving injury was sitting and thereafter he was forwarded to hospital. He further submits that P.W. 3 was in enemical term with appellants and this is the reason that P.W. 3 has come out with a case as if appellant one day before the occurrence had hatched conspiracy. In view of the aforesaid facts and circumstances he has argued that the judgment of conviction in respect of Archana Bharti is liable to be set aside due to absence of any element of conspiracy besides apparent error in the judgment

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since no charge was framed under Section 302 read with Section 120B of the I.P.C. against the appellant.

9. Sri Ajay Mishra, learned Additional Public Prosecutor refuting the submission of learned counsel for the appellants has argued that prosecution by cogent evidence has been able to establish its case beyond all reasonable doubts. According to Sri Mishra the occurrence was seen by P.W. 7 (informant) of the case who along with the two deceased was sleeping in the Kamat which was after about 8-10 houses of the informant's house. It is case of prosecution that it was moon lit night and in the Kamat a *lantern* was burning. Though in the *fardbyan* the informant had not given detailed picture of the occurrence but in evidence he has categorically depicted about the occurrence. In his evidence P.W. 7 has stated that while he was sleeping he was given *hura* (push) by bamboo stick and thereafter he awoke. The accused persons then moved towards Jayant Kumar and from close range Pappu Yadav gave one shot of firing on the head of Jayant Kumar. In the meanwhile the father of the informant who was grandfather of Jayant Kumar namely: Bihari Lal Yadav ran to apprehend Pappu Yadav. Immediately thereafter from close

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range Wakil Yadav gave one shot of firing which hit on his (Bihari Yadav) chest however the informant anyhow fled away raising alarm. On his alarm nearby villagers arrived there then accused persons fled away. The informant in his evidence further stated that while fleeing away the accused persons were telling that they had done the job of Archana Bharti and now they can enjoy with Archana Bharti without any hurdle. Sri Ajay Mishra, learned A.P.P. has further referred to the evidence of P.W. 2 -Jyoti Kumari (daughter of the informant) and Pradip Yadav (nephew of the deceased -Bihari Yadav). In their evidence they have stated that at the time of occurrence they were sleeping in the house and after hearing *hulla* they woke up and rushed to the place of occurrence and within a few minutes they arrived at the place of occurrence. While they reached there they saw that Bihari Lal Yadav was sitting by holding the cot by one hand and putting another hand on his chest i.e. on injury on his chest. Bihari Lal Yadav in injured condition disclosed that Pappu Yadav had killed Jayant Kumar by giving shot of firing and while he tried to apprehend Pappu Yadav he was shot at by Wakil Yadav. Sri Mishra further submits that the injured- Bihari Lal Yadav was

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firstly carried to one local doctor i.e. Dr. Rahaman and from there he was referred to Sadar Hospital, Purnea however before his treatment he died. The injured Bihari Lal Yadav had also disclosed that accused persons after committing the offence were saying that they had done the job of Archana Bharti. According to Sri Mishra of- course number of witnesses have not supported the prosecution case at the time of evidence but their attention was drawn to their previous statement recorded under Section 161 of the Cr.P.C. and they were declared hostile but P.W. 1 despite the fact that he had not supported the entire version had supported the preparation of inquest report in respect of inquest report prepared on the body of Jayant Yadav which was marked as Ext. 1. It has been argued that oral evidence has been corroborated by the medical evidence. The entry wound of deceased was having charring mark which corroborates the oral evidence that from close range firing was made. He further submits that the Investigating Officer has also supported the prosecution case. According to Sri Mishra, learned trial judge has committed no error in passing the judgment of conviction and sentence.

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10. Besides hearing learned counsel for the parties, we have minutely examined entire evidence on record. However before recording our finding it is necessary to discuss the evidence which has been brought on record. Firstly it is necessary to discuss the evidence of the informant (P.W. 7) namely Vimal Yadav who is an unfortunate person in whose presence his son was done to death and his father was given shot of injury who within few hours after receiving injury died. In his evidence firstly he identified his signature on the *fardbyan*, which was marked as Ext. 2. In his evidence he stated that occurrence had taken place on 8th February 2008 at about 1.30 in the night. At that very time he was sleeping. Accused persons 6-7 in number arrived there. Amongst them he could identify two namely: Pappu Yadav @ Binay Yadav [appellant in Cr. Appeal (D.B.) No. 1047 of 2013] and Wakil Yadav [appellant in Cr. Appeal (D.B.) No. 1042 of 2013]. He was given *hurra* blow. While this witness enquired he was slapped by the accused persons. Thereafter accused persons surrounded Jayant (his son) and Pappu from a very close range fired on temporal region of his son. While his father tried to catch Pappu Yadav, Wakil Yadav gave one shot

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of firing on the chest of his father. This witness raising alarm fled away. In nearby village marriage ceremony was going on. All the persons thereafter arrived. Other villagers also arrived. All accused persons after noticing the villagers started fleeing away towards the Eastern side. While fleeing away they were telling that they had completed the work of Archana Bharti and now they can enjoy with her. He stated that Archana [appellant in Cr. Appeal (D.B.) No. 929 of 2013] was widow of his younger brother- Om Prakash. After his death she had developed illicit relation with Wakil Yadav and that they had also solemnized marriage. He stated that both i.e. Archana Bharti and Wakil Yadav wanted to live in his house but they were boycotted. His father (Bihari Yadav) and his son (Jayant Kumar) were raising serious opposition against them. On such opposition Archana Bharti had started to live in her paternal house and again she wanted to forcibly live in his house, however his son and father (deceased) did not allow and thereafter Dilip Yadav kept her with him. He further reiterated that Archana Bharti was also telling that so long Jayant is alive there is difficulty for her in entering into the house. In paragraph 5 of his evidence he stated that on the date of

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occurrence in day time at 2.00 P.M. in the house of Dilip Yadav Archana Bharti, Wakil Yadav, Pappu Yadav @ Binay Yadav, Dilip Yadav and 2-3 unknown accused persons were seen discussing something with each other. In paragraph 6 of his evidence he further stated that after 4-5 days from the occurrence in the village there was a talk that in presence of Archana Bharti Dilip Yadav had given some money to Pappu Yadav and Wakil Yadav for eliminating the son and father of the informant. After about two months from the date of occurrence the accused persons were apprehended by the villagers and then they had confessed their guilt and also confessed before the court. Jayant died at the place of occurrence itself whereas his father remained at the house for 2-3 hours and then he was sent to Purnea hospital with the help of villagers, however near the gate, while he was getting down, he died. He further stated that at the place of occurrence Police had found Khokha [fired cartridges] and blood lacerated projectile. This witness was cross examined at length however on going through the same it is evident that nothing has been extracted to raise any doubt on his evidence. In paragraph 21 of his cross examination he stated that Dilip

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Yadav had kept Archana Bharti. It was in bad sense. In paragraph 25 of his cross examination he has stated that distance of his Basa from his house was about after ten houses. In the same paragraph he stated that Jayant, his son, was sleeping on cot. He (informant) was sleeping near the choker bag. The accused persons were 6-7 in number. The lantern was burning and it was moon lit night. All the accused persons were having arms. In paragraph 29 of his cross examination he stated that Police Station was about 2-3 Kilometer away from his Basa and he had not given any information to the Police. Villagers had given such information and Police arrived at 7.00 in the morning. Till that time his father was already carried to hospital. He further stated that till his father was alive Police had not come. He clarified that in sending of his father for treatment Police was not informed and he remained at Basa itself. He clarified that after receiving gun shot injury he (Bihari Yadav) was clearly speaking and he was in well mental state.

11. P.W. 2 -Jyoti Kumari (daughter of the informant) in her evidence has stated that on the date and time of occurrence his father and the two deceased were on Kamat.

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On hearing *hulla* of villagers she along with others runningly reached the place of occurrence. While she reached, number of villagers had already arrived and she saw that his brother -Jayant was lying dead and her grand father was sitting there. On being asked her grandfather told that Papu Yadav had shot dead Jayant Kumar. While he tried to apprehend him then Wakil Yadav on his chest gave one shot of firing. He further stated that while the accused persons were fleeing away they were speaking that they had accomplished the work of Archana Bharti and they will enjoy now with her. She further clarified that after death of her uncle, Archana had developed illicit relation with Wakil Yadav and both subsequently had solemnized marriage by way of swearing oath. In paragraph 12 of her cross examination she clarified that Kamat i.e. place of occurrence was about after about 10-12 houses from her house. In paragraph 13 of cross examination she further clarified that after hearing *hulla* of the villagers she awoke and within 2-3 minutes she reached Kamat. She reached there runningly. She further clarified that it was moon lit night. Regarding her grandfather in paragraph 14 of cross examination she stated that her grandfather had put his one

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hand on the injury side and by another hand he was holding the cot and he was sitting there. She further clarified that her grandfather was conscious. Subsequently he became unconscious. On examination of her evidence as well as her cross examination we don't find any material to see her evidence with any doubt. Similarly P.W. 3 (Pradip Yadav) is nephew of the deceased -Bihari Lal Yadav. In his evidence he has proved his signature on the inquest report in respect of dead body of Bihari Lal Yadav, which was marked as Ext. 1. He too has deposed almost like P.W. 2. In paragraph 2 he stated that while after the occurrence he reached the place of occurrence he enquired from Bihari Yadav then Bihari Yadav told that Pappu Yadav had killed Jayant Kumar by giving shot of firing and while he wanted to apprehend him then Wakil Yadav shot him and he further stated that Bihari Yadav told that accused persons were saying that work of Archana had already been done and now they can enjoy with Archana. He further stated that Archana is daughter -in- law of Bihari Yadav. Her husband Om Prakash had died in a rail accident. In paragraph 3 he further stated that Archana was having illicit relation with Wakil Yadav which was being opposed by the

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family members. This witness was also cross examined at length however nothing could be extracted to create doubt on his evidence.

12. P.W. 1 (Mithilesh Kumar Yadav) has proved inquest report in respect of Jayant Kumar, which was marked as Ext. 1.

13. Dr. Yogendra Prasad (P.W. 8) on 29.02.2008 was posted as Medical Officer, Sadar Hospital, Purnea. At 2.50 P.M. he conducted post mortem examination on the dead body of Bihari Lal Yadav and he identified the post mortem report of Bihari Lal Yadav which was marked as Ext. 3. On the same day at 1.30 P.M. he conducted post mortem examination on the dead body of Jayant Kumar and he identified the post mortem report as Ext. 4. In his evidence on examination of the dead body of Bihari Lal Yadav he noticed the following facts:-

> "On external examination -rigor mortis present.
>
> (i) **wound of entry, lacerated wound 1"x 3/4" x cavity deep with inverted margin with charring over right side of chest below & lateral to right nipple**.
>
> (ii) Lacerated wound 3" x 2" x cavity deep with everted margin over sternum below angle of sternum slightly on the left side of chest
>
> Injury no. (i) & (ii) communicating with each other.
>
> <u>On dissection</u>
>
> Head & neck – N.A.D.
>
> Chest – Fracture of 2nd, 3rd , 4th & 5th rib of right side of chest and communicated fracture of sternum

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below. Right thoracic cavity contain blood and blood clots. Right lung lacerated. Left lung pale.

Heart – All chamber empty.

Abdomen- Liver, spleen, kidney pale

Stomach contains semi digested food, small & large intestine contains gas and faecal matter.

Urinary bladder – empty

(2) Time elapsed since death – within 24 hours.

(3) Cause of death was due to haemorrhage and shock due to above mentioned chest injury caused by fire arm"

In paragraph 2 of his evidence it appears that he has mentioned that time elapsed since death as 24 hours. Similarly in the post mortem examination on the dead body of Jayant Kumar he noticed the following facts:-

"On external examination- rigor mortis present.

(i) **Wound of entry- lacerated wound 1/2"x1/2" x cavity deep over left side of scalp on temporo perital region above the left ear with inverted margin with charring**

(ii) Wound of exit – lacerated wound 5" x 4" x cavity deep with everted margin over right side of scalp on occipito- temporal region

Blood & blood clot and brain matter present in the wound

Injury no. (i) and (ii) (communicating to each other).

On dissection –

Fracture of skull bone above mentioned wound area. Brain matter lacerated, blood and blood clot present in cranial cavity.

Neck- N.A.D.

Chest – heart, all chamber empty, lungs pale.

Abdomen – liver , spleen kidney pale.

Stomach contains semi solid foods, small & large intestine contains gas and faecal matters. Urinary bladder empty.

Time elapsed since death – within 24 hours.

Cause of death – Due to haemorrhage & shock due to above mentioned head injury caused by fire arm.

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In respect of death of Jayant Kumar it has been indicated that time elapsed since death -within 24 hours. Entry wound found on the person of both the deceased was having “inverted margin with charring area”. Charring mark injury supports the case of oral evidence that firing was made from very close range. This is the evidence of P.W. 7 (informant) who is eye witness to the occurrence as well as it has come in the oral dying declaration of Bihari Lal Yadav which was given before P.W. 2 and P.W. 3 which has been corroborated in the evidence of P.W. 2 and P.W. 3.

14. Of course number of witnesses i.e. P.W. 4 (Bishundeo Yadav), P.W. 5 (Rajendra Yadav) and P.W. 6 (Indradeo Yadav) were declared hostile. Since they did not support the prosecution case their attention to their previous statement recorded under Section 161 of the Cr.P.C. was drawn however since they have been declared hostile there is no need to discuss any part of their evidence but fact remains that they had not stated what they had stated during investigation.

15. P.W. 9 (Dr. Bramhdeo Raman) he too on 29.02.2008 was posted as Medical Officer, Sadar Hospital

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Purnea and he accompanied as an Observer in respect of post mortem examination conducted on both the deceased. In his evidence he proved his signature on the post mortem reports of Bihari Lal Yadav and Jayant Kumar which were marked as Ext. 3/1 and 4/1 respectively.

16. P.W. 10 (Arbind Kumar) on 29.02.2008 was Officer-in-charge, Banmankhi Police Station. In his evidence he proved the *fardbyan* which he had recorded which was marked as Ext. 5. He also proved endorsement on the said fardbyan made by one A.S.I. and it was marked as Ext. 5/1. He at the place of occurrence found fired cartridge and blood lacerated projectile regarding which seizure list was prepared and the said seizure list has been marked as Ext. 6. He also identified the inquest report of Jayant Kumar and Bihari Lal Yadav which were marked as Ext. 7 and 8 respectively. In paragraph 4 of his evidence he stated that he recorded re-statement of the informant and also recorded statement of Pradip Yadav (P.W. 3), Mithilesh Kumar Yadav (P.W. 1) and Jyoti Kumari (P.W. 2) and thereafter he inspected the place of occurrence. Meaning thereby that statement under Section 161 of the Cr.P.C. in respect of three witnesses P.W. 1, P.W. 2 and

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P.W. 3 was recorded immediately after *fardbyan* was recorded at the place of occurrence itself. In paragraph 5 he has described about the place of occurrence. Then in paragraph 6 he stated that he got an information that injured -Bihari Yadav had died in Sadar Hospital, Purnea then he sent one A.S.I. R.P. Chaudhary who also prepared inquest report however on examination of his evidence it appears that he has not taken any sincere effort to conduct investigation in its right perspective. It is true that onus lies on the prosecution to establish its case beyond all reasonable doubts and error committed by the Investigating Officer may go against the prosecution, but if the case is otherwise credible merely on the ground of defective investigation the prosecution case can not be ignored nor accused can be allowed to go scott free.

17. On examination of entire evidence on record there is no reason to raise any suspicion regarding involvement of appellant -Pappu Yadav and Wakil Yadav who have been convicted separately under Section 302 of the I.P.C. and also under Section 460 of the I.P.C. as well as Section 27(3) of the Arms Act. So far argument advanced by Sri Ajay Thakur, learned counsel for the appellant that Police was

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informed belatedly, in view of the facts and circumstances of the present case such delay can not be a ground for over looking the prosecution case. It is true that occurrence had taken place as per prosecution case at 1.30 hours in the night and Police arrived in the morning at 7.00. In the case informant's son was done to death in his presence and his father was also given gun shot injury and he was in injured condition. In such situation delay regarding non informing the Police for few hours may not be sufficient to ignore the prosecution case. Obviously if father of the informant was alive and he was in injured condition, the attention of entire family was fixed to get him medically examined immediately and this is the reason that P.W. 7 in categorical term has stated that Police arrived only after the injured was sent to hospital for his treatment. The court may not be oblivious of the fact that dead body of his son was also lying there. In such situation the argument which has been advanced by learned counsel for the appellant that none of the family members went along with the injured to the hospital hardly matters. In the evidence it has come that number of villagers had carried the injured to hospital. Accordingly delay what ever may be

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which has been argued by learned counsel for the appellants has got no relevance for adjudication of the present case.

18. So far submission advanced by Sri Ajay Thakur, learned counsel for the appellant that prosecution has suppressed the first version is concerned, we are of opinion that in absence of any such evidence on record such submission is required to be noticed only for its rejection. It has also been highlighted regarding doubt on the presence of P.W. 7/ informant taking a plea that two witnesses i.e. P.W. 2 and P.W. 3 in their evidence have not whispered regarding presence of informant at the place of occurrence while they reached there. Similarly it has been argued that informant also has not stated about the presence of P.W. 2 and P.W. 3 at the place of occurrence. On minute examination of the evidence it is evident that immediately after the occurrence the informant fled away to save his life raising alarm then number of villagers arrived there. In the case his son was shot at in his presence and his father was given shot of firing. So the court can perceive the mental state of the informant and in such situation if he had not referred about the presence of P.W. 2 and P.W. 3 it can not be said that he was not eye witness to the

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occurrence whereas in the oral dying declaration also case has already been proved. Similarly P.W. 2 and P.W. 3 are witnesses on the point that while they reached at the place of occurrence they had noticed that number of villagers had gathered there and grandfather of P.W. 2 in injured condition was sitting beside the cot and on enquiry made by P.W. 3 the grand father -Bihari Lal Yadav (deceased) explained about the entire occurrence. In such situation neither the presence of P.W. 3 and P.W. 2 at the place of occurrence after occurrence can be questioned nor the presence of informant can be considered as doubtful. The evidence of P.W. 2, P.W. 3 and P.W. 7 are itself sufficient to establish the involvement of appellant -Pappu Yadav and Wakil Yadav and as such we do not find any error in the judgment of their conviction and sentence. Accordingly appeal i.e. Cr. Appeal (DB) No. 1047 of 2013 and Cr. Appeal (DB) No. 1042 of 2013 are dismissed.

19. So far case of appellant / Archana Bharti is concerned, on going through the record it is evident that she was charged only for offence under Section 120B of the I.P.C. along with Pappu Yadav and Wakil Yadav and as such the learned trial judge had committed serious error at the stage of

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framing of charge. If the learned trial judge was proposing to associate the appellant - Archana Bharti as one of the conspirators in the murder it was mandatorily required on the part of the learned trial judge to frame charge under Section 302 read with Section 120B of the I.P.C. however only on technicality it may not be possible to interfere with the judgment.

20. On going through the evidence on record it is evident that prosecution side was having grudge with appellant Archana Bharti since after becoming widow she had developed relation with one of the co-convicts namely: Wakil Yadav. In entire evidence it appears that Archana Bharti was made accused only due to the reason that she was having relation with appellant- Wakil Yadav. Of- course it has come in oral dying declaration that after committing the occurrence while fleeing away the accused persons were saying that they had done the job of Archana Bharti and now they can enjoy with Archana Bharti. Merely on such ground it is difficult to come to conclusion that Archana Bharti was also a member of the conspiracy. From such statement it can be inferred that accused persons after killing two persons might had stated that

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now they can enjoy with Archana Bharti but merely on those facts it would not be appropriate to fix her as one of the conspirators in the murder. One of the witnesses has also stated that on the date of occurrence it was seen that Archana Bharti with some person was hatching conspiracy but on such material it would be difficult for us to accept the proposition of hatching conspiracy on the part of Archana Bharti.

21. In that view of the matter we are feeling difficulty in approving the judgment of conviction and sentence in respect of Archana Bharti. Accordingly judgment of conviction dated 18th September 2013 and sentence dated 19.09.2013 in respect of Archana Bharti in Sessions Trial No. 803 of 2008 (arising out of Banmankhi P.S. Case No. 26 of 2008) is hereby set aside and Cr. Appeal (D.B.) No. 929 of 2013 stands allowed.

22. Appellant -Archana Bharti is on bail and since her conviction has been set aside she is discharged from liability of bail bond.

23. Accordingly, while dismissing Cr. Appeal (D.B.) No. 1047 of 2013 (Pappu Yadav @ Binay Yadav @ Pappu @ Binay Kumar Yadav Vs. The State of Bihar) and Cr. Appeal

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(D.B.) No. 1042 of 2013 (Wakil Yadav Vs. The State of Bihar), we allow Cr. Appeal (D.B.) No. 929 of 2013.

(Rakesh Kumar, J)

(Anil Kumar Sinha, J)

praful/-

AFR/NAFR	AFR
CAV DATE	NA
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