

**IN THE HIGH COURT OF JUDICATURE AT PATNA**  
**DEATH REFERENCE No.1 of 2020**

Arising Out of PS. Case No.-169 Year-2017 Thana- VIJAYEPUR District- Gopalganj

The State of Bihar

... .. Petitioner

Versus

1. Durgawati Devi, Wife of Saryug Sah, Mauza-Chhitauna, Vijaipur, District-Gopalganj.
2. Sankesia Devi, Wife of Dharmendra Sah, Mauza-Chhitauna, Vijaipur, District-Gopalganj.

... .. Respondents

With  
**CRIMINAL APPEAL (DB) No. 136 of 2021**

Arising Out of PS. Case No.-169 Year-2017 Thana- VIJAYEPUR District- Gopalganj

1. Durgawati Devi, Wife of Sarayu Sah, Resident of Village - Chhitauna, P.S.- Vijaipur, District - Gopalganj.
2. Sankesa Devi, Wife of Dharmendra Sah, Resident of Village - Chhitauna, P.S.- Vijaipur, District - Gopalganj.

... .. Appellants

Versus

The State of Bihar

... .. Respondent

**Appearance:**

(In DEATH REFERENCE No. 1 of 2020)

Ms. Surya Nilambari, *Amicus Curiae*  
(In CRIMINAL APPEAL (DB) No. 136 of 2021)

For the Appellants : Mr. Jitendra Narain Sinha, Advocate

For the Respondent-State: Mr. Ajay Mishra, APP

**CORAM: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH**  
**and**

**HONOURABLE MR. JUSTICE ARVIND SRIVASTAVA**

**ORAL JUDGMENT**

**(Per: HONOURABLE MR. JUSTICE ASHWANI KUMAR SINGH)**

**Date : 10-09-2021**

The appellants have been held guilty in Sessions

Trial No. 104 of 2018 arising out of Vijaipur P.S. Case No. 169



of 2017 dated 6<sup>th</sup> September, 2017 by the learned 4<sup>th</sup> Additional District and Sessions Judge, Gopalganj for the offences punishable under Sections 302, 201 and 120B of the Indian Penal Code (for short 'IPC') vide judgment dated 10<sup>th</sup> July, 2020. The Trial Court, thus, vide its order passed on 17<sup>th</sup> August, 2020 awarded death sentence to the appellants for the offence punishable under Section 302 of the IPC and a fine of Rs. 30,000/-. However, no separate sentence was awarded for the offences punishable under Sections 120B and 201 of the IPC. The death sentence was made subject to confirmation by the High Court.

2. The Reference made by the Trial Court under Section 366 of the Code of Criminal Procedure (for short 'the CrPC') has been registered as Death Reference No.1 of 2020. The appellants have challenged their conviction and sentence imposed by the Trial Court by filing an appeal vide Criminal Appeal (DB) No. 136 of 2021. The appeal and the reference have been heard together and are being disposed of by a common judgement.

3. The First Information Report (for short 'FIR') of Vijaipur P.S. Case No. 169 of 2017 is based on the *fardbeyan* of one Vinod Shah (P.W. 6), which was recorded by



one Ashok Kumar Singh (P.W. 9), a Sub-Inspector of Vijaipur Police Station, on 5<sup>th</sup> September, 2017 at 11:10 PM, in the village-Chhitauna, at the door of one Sukhi Shah.

4. In his *fardbeyan*, the informant Vinod Shah stated that at about 4:00 PM, on 5<sup>th</sup> September, his son, namely, Deo Kumar, aged about four years went out of the house to play but did not return till evening. Then inquiries began to be made of the boy's whereabouts, in course of which, he went to the house of the appellants, but they replied they did not know about his son. At around 8:29 PM, his son's body was found lying in bushes near the house of one Laddu Shah. His son's neck had been slit with a sharp weapon. A broken knife and a bloodstained basket were found at the place where the body of his son was found thrown. The villagers informed the police and their statements were recorded. He further stated that he has a firm belief that the appellants in conspiracy with each other killed his son by slitting his neck by sharp-edged weapon and dumped his body in the bushes by keeping it in a basket. After killing his son, the appellants washed their house. He further stated that blood-stained *saree*, frock and clothes were recovered from the house of the appellants.

5. Based on the aforesaid *fardbeyan* of the



informant Vinod Shah, Vijaipur P.S. Case No. 169 of 2017, was registered under Sections 302 and 120B of the IPC, on 6<sup>th</sup> September, 2017 at 4:00 AM and one Ashok Kumar Singh (P.W. 9), a Sub-Inspector of Police was handed over the investigation of the case.

6. After completion of the investigation, the police submitted a charge-sheet under Sections 302/34, 201 and 120B of the IPC before the court of Jurisdictional Magistrate on 31<sup>st</sup> October, 2017.

7. On receiving the police report submitted under Section 173(2) of the CrPC, the learned Jurisdictional Magistrate took cognizance of the offences and summoned the appellants to face trial.

8. After complying with the mandatory requirements of Section 207 of the CrPC, the case was committed to the Court of Sessions for trial. The Trial Court framed charges against the appellants on 6<sup>th</sup> April, 2018 for the commission of the offences under Sections 302, 201 and 120B of the IPC to which they pleaded not guilty and claimed to be tried.

9. In order to prove its case, the prosecution examined altogether ten witnesses. They are Chandrawati Devi



(P.W. 1), aunt of the deceased; Dina Nath Yadav (P.W. 2), Dwarika Shah (P.W. 3), the father of the informant and grandfather of the deceased; Sukhali Devi (P.W. 4), the maternal grandmother of the deceased; Baliram Kumar (P.W. 5), the uncle of the deceased; Vinod Shah (P.W. 6), the informant and father of the deceased; Dr. Mukesh Kumar (P.W. 7), the doctor, who conducted the autopsy on the body of Deo Kumar; Nitu Devi (P.W. 8), the mother of the deceased; Ashok Kumar Singh (P.W. 9), the Investigating Officer; and, Jainendra Kumar (P.W. 10), a formal witness, who produced the materials seized by the police during the investigation.

10. Besides the oral testimony of the aforesaid witnesses, the prosecution has also proved the following documents:-

| Sl. No. | Exhibit | Description                                                            |
|---------|---------|------------------------------------------------------------------------|
| 1.      | 1       | Signature of Baliram Kumar (P.W. 5) on the first seizure list.         |
| 2.      | 1/1     | Signature of Baliram Kumar (P.W. 5) on the second seizure list.        |
| 3.      | 1/2     | Signature of Baliram Kumar (P.W. 5) on the third seizure list.         |
| 4.      | 2       | Signature of the informant Vinod (P.W. 6) on the <i>fardbeyan</i> .    |
| 5.      | 2/1     | Signature of Dwarika Sah (P.W. 3) on the <i>fardbeyan</i>              |
| 6.      | 3       | Signature of Dr. Mukesh Kumar (P.W. 7) on the postmortem report.       |
| 7.      | 3/1     | Signature of Dr. Sanjay Kumar (not examined) on the postmortem report. |
| 8.      | 4       | Signature of SHO of Vijaipur Police Station on the inquest report.     |



|     |     |                                                                   |
|-----|-----|-------------------------------------------------------------------|
| 9.  | 5   | Signature of Ashok Kumar Singh (P.W. 9) on the <i>fardbeyan</i> . |
| 10. | 6   | Signature of the informant's father on the <i>fardbeyan</i> .     |
| 11. | 7   | Formal FIR                                                        |
| 12. | 8   | First seizure list.                                               |
| 13. | 8/1 | Second seizure list.                                              |
| 14. | 8/2 | Third seizure list.                                               |
| 15. | 9   | The report of Forensic Science Laboratory.                        |

11. The defence did not lead any evidence in support of its case.

12. **Chandrawati Devi (P.W.1)** stated in her examination-in-chief that on the date of occurrence at about 2:00 PM, her nephew Deo Kumar went out of the house to play. When he did not return till 5:00 PM, an enquiry began to be made of the boy's whereabouts. In course of the search, it transpired that the appellant Durgawati Devi had taken Deo Kumar on the pretext of treating him to ice cream. When her brother-in-law Vinod Shah inquired from Durgawati Devi about his missing son, she stated that he had not come to her house. She further stated that in course of the search conducted for the missing boy, his body was found in the bushes near Laddu Shah's house. His neck had been slit by a sharp-edged knife. Thereafter, information in this regard was given to the police. When the police arrived, they first took the statement of Vinod Shah and then of Dwarika Shah. Thereafter, the police inspected



the house of the appellants Durgawati Devi and Sankesa Devi. It was noticed that the house had been washed with water and bloodstains were found on the walls of the *Puja Ghar*. Bloodstains were also found on the clothes like *saree* and *nighty*. She stated that a bloodstained knife and a basket were recovered from the place of occurrence. She further stated that the motive behind the murder was that the appellant Durgawati Devi, the mother-in-law of the appellant Sankesha Devi did not have any grand-children since long and Deo Kumar was sacrificed under the influence of superstition and black magic as someone had told her to sacrifice a child to beget a child.

13. In cross-examination, she admitted that Sankesa Devi was married six months before the occurrence. She further admitted that she does not know when the child went missing. She admitted that she came to know about the missing child of the informant after his dead body was recovered. She admitted that she has deposed before the court based on doubts in her mind. She admitted that prior to her deposition before the court, she had not made any statement before the police. She also admitted that she had personally never visited the house of the appellants and her deposition about bloodstains having been found on the walls of the *Puja*



*Ghar* of the appellants' house was based on hearsay. She stated that after the incident took place, the police had arrested several ladies, who believed in superstition and black magic, but they were released later. She denied the defence suggestion that she had falsely deposed before the court.

14. **Dina Nath Yadav (P.W.2)** stated in his deposition that on the date of occurrence at about 3-4 PM when the son of the informant Deo Kumar was playing, he saw that his grand-mother Durgawati Devi took him on the pretext of treating him to an ice-cream. He stated that after that, he did not see Deo Kumar. Later, at 8:00 PM, the informant started searching for his missing son. In course of the search, the dead body of Deo Kumar was found near Laddu Shah's house. He stated that Deo Kumar's neck was slit with a sharp-edged weapon. According to him, nothing, except the dead body, was recovered from the place where the body was found. After the arrival of the police, the house of the appellants was searched. It was found that the house had been washed with water and bloodstains were found on the walls. Blood-stained clothes were also seized.

15. In cross-examination, he admitted that at the place where the body of the deceased was recovered, nearly 10-



15 villagers had assembled. Out of them, he identified Durgawati Devi (appellant no.1). Sankesa Devi (appellant no.2), Guddu (not examined), Ramesh (not examined) Sunil (not examined) Vidur (not examined) and Baliram (P.W.5). He admitted that he met the police a day after the occurrence, but his statement was recorded by the police after three days. He further admitted that he did not disclose the occurrence to his family members. He denied the defence suggestion that his statement was recorded two months after the occurrence on 2<sup>nd</sup> November, 2017. He further denied the defence suggestion that he had not stated before the police that the neck of the deceased was slit by a sharp-edged weapon. He also denied that he had not stated that after the arrival of the police, the house of the appellants was searched and it was found that it had been washed with water and bloodstains were found on the walls as also on clothes, which were seized by the police.

16. **Dwarika Shah (P.W.3)**, father of the informant and grandfather of the deceased stated that on the date of occurrence, his grand-son Deo Kumar went out in the *mohalla* to play. When he did not return to his house, a search for him was made by his family members. His co-villager Dina Nath disclosed that the appellant Durgawati Devi was seen



taking Deo Kumar to her house. He went to the house of Durgawati Devi, but she did not open her door. She opened the window and told him that his grandson was not at her house and that she had not seen him. Subsequently, in the night, the dead body of Deo Kumar was found in the field of Harihar Shah (not examined). He stated that thereafter the police came and took the necessary steps. The police inspected the house of Durgawati Devi and bloodstains were noticed on the walls of the house. He deposed that Durgawati Devi has three sons. Since she did not have any grandchildren, she sacrificed Deo Kumar under the influence of superstition.

17. In cross-examination, he stated that Durgawati Devi has two houses. The courtyard of his house and the house of Durgawati was common on the date of occurrence, but after that, a partition has taken place. He admitted that he did not see the dead body of Dev Kumar. He stated that bloodstains were found on the terrace of Laddu Shah (not examined). He denied the defence suggestion that bloodstained stone chips were recovered from the terrace of Laddu Shah. He stated that he cannot name the boys with whom the deceased was playing on the date of occurrence. He admitted that he inquired about the incident from Dina Nath Yadav (P.W.2),



Sukhali Devi (P.W.4), Nandu (not examined) and wife of Harihar (not examined). They disclosed to him the entire facts. He admitted that his testimony is based on what he heard from Dina Nath Yadav, Sukhali Devi, Nandu and Harihar's wife. He claimed that he had earlier stated that Dina Nath Yadav had told him that Durgawati Devi had taken Deo Kumar and also when he went to Durgawati's house to find his grandson, Durgawati Devi did not let him in but informed that his grandson was not with her and that she had not seen him. Since Durgawati Devi had no grandchildren, Deo Kumar's life was sacrificed. He stated that he came to know about the sacrifice on the next day of the incident. He denied the defence suggestion that he had falsely deposed before the court about the incident for the first time.

18. **Sukhali Devi (P.W.4)** stated in her examination-in-chief that the deceased was her grand-son. He went out to play at about 2:00 PM from his house. At about 4:00 PM, a search for him started. In course of the search, his dead body was found at Harihar Shah's field. Thereafter, the police came to the place of occurrence. They inspected the new and old house of Durgawati Devi. The police also discovered a basket and a knife during the investigation. She stated that Durgawati



Devi and Sankesa Devi killed Deo Kumar, as Durgawati's eldest son, Dharmendra, was married twice, but none of his two wives could beget any child. Sankesa is his second wife. Hence, the appellants sacrificed Deo Kumar.

19. In cross-examination, she stated that Dharmendra Shah (son of Durgawati Devi) had been living abroad for the last one year. Dharmendra Shah's first wife left him and solemnized a second marriage. She denied stating before the police that she had seen the dead body of Deo Kumar in the field of Harihar Shah. She denied stating before police that found blood was found in Durgawati Devi's old and new house. She further denied stating before the police that a knife and a basket had been found during the investigation. She denied telling the police that Durgawati and Sankesa had killed Deo Kumar. She admitted that the body of the deceased was found from the field adjacent to the field of Harihar Shah. The police had recovered bloodstained articles, knife and basket from the place where the dead body of Deo Kumar was lying. She admitted that entry of the house of the appellants and the house of the informant is common.

20. **Baliram Kumar (P.W.5)**, the uncle of the deceased stated in his examination-in-chief that at the time of



occurrence, he was at Gopalganj. At about 4:00 PM, he received a call that his nephew Deo Kumar is missing. On receiving the call, he came back to his house and found that his family members were trying to search for the missing child. In course of the search, the dead body of Deo Kumar was found lying in the field near the house of Laddu Shah. The villagers brought the body of the deceased at the door of Sukhi Shah. Thereafter, the police came and recorded the *fardbeyan* of Vinod Shah, the father of the deceased. Subsequently, the house of the appellant Durgawati Devi was inspected from where a *nighty* was recovered. On 6<sup>th</sup> September, 2017, the police prepared the seizure list on which he put his signature. He identified his signature on the seizure list, which was marked as Exhibit-1. On the same day, another seizure list relating to the recovery of the bloodstained soil and a broken knife in two pieces was prepared, which also contains his signature. He identified his signature on the second seizure list, which was marked as Exhibit-8/1. He further stated that on the same day, a third seizure list regarding recovery of a frock, a *nighty* and a pillow cover from house no. 2 of the appellants was prepared. He identified his signature on the third seizure list, which was marked as Exhibit-8/2. He stated that his nephew was sacrificed, as the daughter-in-law of



the appellant Durgawati Devi was not having any children. According to him, the sacrifice of the child was made as part of the practice of sorcery.

21. In cross-examination, he admitted that the police had inquired about the incident from him on the date of occurrence as well as a day thereafter. He admitted that on the date of occurrence he did not disclose the name of any accused before the police. On that day, his family members were also with him. He put his signature on his statement. He possesses the carbon copy of his statement recorded on 5<sup>th</sup> September, 2017. He disclosed the name of the accused persons the next day when the police inquired from him. He admitted that his signature was taken on the seizure list on 6<sup>th</sup> September, 2017. He stated that he does not recall whether the police had obtained the signature of any other person on the seizure list. He admitted that he did not tell the police that he suspected the hands of the appellants in the killing of his nephew. He admitted that he did not tell the police that the murder was committed under the influence of superstition. He further admitted that he did not say to the police that the bloodstains could be seen on the walls of the appellant's house. He also admitted that he did not tell the police that the accused persons had thrown the dead body



behind their house. He admitted that he had stated to the police that the dead body of Deo Kumar was found from the field situated in the eastern side of the house of Laddu Shah from where the villagers brought it at the door of Sukhi Shah before the arrival of the police.

22. **Vinod Shah (P.W.6)**, the informant and the father of the deceased corroborated his statement made in the *fardbeyan* in examination-in-chief. He stated that he was informed by his family members that Deo Kumar was missing. He went to Durgawati Devi's house, but she denied any knowledge about him. In course of looking for the missing boy, bloodstains were found on Laddu Shah's house. The local boys informed the police. He proved his signature as also the signature of his father on the *fardbeyan*, which were marked as Exhibits 2 and 2/1, respectively. He stated that the motive behind the murder was that Durgawati Devi's son Dharmendra Shah was firstly married ten years ago, but no child was born out of wedlock. Hence, he abandoned his first wife, who entered into marriage with another person. Thereafter, he married appellant no. 2 Sankesa Devi about 2-2 ½ years back and was yet not to have any child. He stated that Deo Kumar was sacrificed as part of the practice of sorcery and occult. He



disclosed that in presence of police and some villagers, the house of the appellants was inspected. The old house had recently been washed with water and the bloodstained red frock was recovered. Another house of the appellants was also inspected. There were blood-stains on the stairs and blood-stained stone chips were found on the terrace of the house. He stated that an inquest report was prepared and the body of the deceased was sent for postmortem examination. After the postmortem examination, the body of the deceased was cremated.

23. In cross-examination, the informant Vinod Shah admitted that he did not witness the occurrence. He stated that the seizure list was prepared on the date of occurrence itself at about 8-9 AM and the *Daroga* had taken the seized articles on the same day. He admitted that Baliram Kumar (P.W. 5) had made his statement in the police station on the date of occurrence itself. The said *fardbeyan* was recorded by the police, on which he had put his signature in presence of the family members. He admitted that in the *fardbeyan* of Baliram Kumar, the name of any of the accused involved in the offence was not mentioned. He affirmed that in his previous statement, he had disclosed the motive for commission of the offence that



since Durgawati Devi's son had no grandchildren, Deo Kumar was sacrificed under the influence of black magic and superstition. He asserted that he previously mentioned that the house of the accused persons had been searched, which led to the discovery of blood-stained soil and blood-stained frock from the first house and blood on the stairs and stone chips were found on the terrace of the second house.

24. **Dr. Mukesh Kumar (P.W.7)** stated in his deposition that on 6<sup>th</sup> September, 2017, he was posted at Sadar Hospital, Gopalganj as Medical Officer. On that day, he had conducted a postmortem examination on the body of the deceased Deo Kumar at noon. He found an incised antemortem wound over the middle-lower part of the neck measuring 6x½". He stated that the cartilage artery was ruptured and the hyoid bone was fractured. According to him, the time elapsed since death was within six to twelve hours and the cause of death was hemorrhage and shock caused by the aforesaid antemortem injuries. He proved his writing on the postmortem report, which was marked as Exhibit-3. He also proved the signature of Dr. Surya Kumar Singh on the postmortem report, which was marked as Exhibit-3/1.

25. **Nitu Devi (P.W.8)**, the mother of the



deceased is not a witness to the occurrence. She stated in her examination-in-chief that while she and others were looking for Deo Kumar, she learnt that Durgawati Devi had taken her son. At around 8.00 PM, an alarm was raised that the body of his son had been thrown in the field near Laddu Shah's house. After the arrival of the police, she came to know that Durgawati Devi's house had been cleaned, bloodstains had been found at her house and bloodstained clothes had been discovered.

26. In cross-examination, she stated that she does not know why her son was killed. However, immediately thereafter she stated that since Durgawati Devi did not have any grandchildren, his son was sacrificed under the influence of superstition and black magic. She expressed her ignorance about who called the police. She stated that her statement was recorded by the police while she was semi-conscious. She denied the defence suggestion that she had falsely deposed before the court.

27. **Ashok Kumar Singh (P.W.9)**, the investigating officer of the case stated in the examination-in-chief that on 5<sup>th</sup> September, 2017 he was posted as a Sub-Inspector of Police at Vijaipur Police Station. On receiving information about the occurrence, he along with the Station



House Officer (for short “SHO”) Mukesh Kumar and other police personnel went to the place of occurrence where several persons had assembled. He saw that a four-year-old child Deo Kumar, son of Vinod Shah was brutally killed by slitting his neck. His body was found at the place of occurrence. The SHO Mukesh Kumar prepared the seizure list. He identified the signature of Mukesh Kumar on the inquest report, which was marked as Exhibit-5. He also identified the signature of Parsuram Singh (not examined) and Rajesh Prasad (not examined) on the inquest report. He stated that he recorded the *fardbeyan* of Vinod Shah. He identified his writing and signature over the *fardbeyan*, which was marked as Exhibit-6. He also identified the signature of Vinod Shah on the *fardbeyan*, which was marked as Exhibit-7. He stated that based on the said *fardbeyan*, Vijaipur P.S. Case No. 169 of 2017 dated 6<sup>th</sup> September, 2017 was registered under Sections 302 and 120B of the IPC. He identified signature of the SHO Mukesh Kumar on the formal FIR, which was marked as Exhibit-8. He also identified his signature on the three seizure lists, which were marked as Exhibits-9, 9/1 and 9/2 respectively. He stated that the seizure lists were prepared by him. According to him, Baliram Kumar (P.W.5) and Ramakant Prasad (not examined)



are the witnesses to the seizure list. He described the boundary of the place from where the body was found. According to him, the body of the deceased was found from Harihar's field. He also described the two-storey concrete house of the appellants. He stated that he recorded the statement of witnesses, inspected the place of occurrence, received the postmortem examination and on completion of the investigation, submitted the charge-sheet against the appellants for the commission of the murder of the deceased Deo Kumar.

28. In cross-examination, he stated that the inquest was prepared at 9:00 PM on 5<sup>th</sup> September, 2017. He admitted that the three seizure lists were prepared at 3:00 PM, 3:15 PM and 3:30 PM respectively, on 6<sup>th</sup> September, 2017. He stated that the time mentioned in the case diary for recording the *beyan* of the informant Vinod Shah is 4:00 AM. He was handed over the case at 4:10 AM on 6<sup>th</sup> September, 2017. He stated that the *fardbeyan* was recorded at 11:00 PM on 5<sup>th</sup> September, 2017. He further denied that the investigation conducted on the *fardbeyan* of Baliram Kumar was mischievously replaced and a forged and fabricated *fardbeyan* was prepared in collusion with the prosecution. He stated that he does not recall as to whether he had proceeded to the place of occurrence after making entry



into the station diary. He admitted that none of the three seizure lists was ever sent to the court during the investigation of the case. He admitted that the seizure lists do not contain the signature of the appellants or the family members. He admitted that it is not mentioned in the diary that during the investigation, the blood-stained soil, broken knife and the blood-stained clothes were ever sent to the Forensic Science Laboratory, Muzaffarpur. He admitted that the material exhibits are not in his custody. He admitted that before the inspection of the house of the appellants, the witnesses did not disclose that Deo Kumar was killed by the appellants in the *Puja* room by a sharp-edged weapon. He admitted that he has not mentioned the time when the statements of Nitu Devi (P.W.8), Dwarika Sah (P.W.3), Baliram Kumar (P.W.5) and Chandrawati Devi (P.W.1) were recorded. He stated that after taking over the investigation of the case, he went to the place of occurrence on 6<sup>th</sup> September, 2017. However, he has not mentioned the date in the case diary when he went to the place of occurrence. He contradicted Dina Nath Yadav (P.W.2) by admitting that he had not stated in his previous statement that when the house of the appellants was searched, bloodstains were found on the walls and blood-stained clothes were seized. He also admitted that he had not stated that



he learnt that the house of the appellants had been washed. He further admitted that Dina Nath Yadav had not stated that the neck of the deceased was slit with a sharp-edged weapon. He contradicted him by saying that his statement was recorded on 2<sup>nd</sup> November, 2017. He contradicted Dwarika Shah (P.W.3) by admitting that he had not stated before him in his previous statement that his grandson was taken by Durgawati Devi and when he went to her house, she did not open the door and informed him after opening her window that neither Deo Kumar had come to her house nor she had seen him. He contradicted Baliram Kumar (P.W.5) by admitting that he had not stated in his previous statement that during a search made in the house of the appellants, a *nighty* was recovered. He also contradicted him by admitting that Baliram Kumar had not stated before him in his previous statement that the accused persons had dumped the dead body of the deceased behind their house in the field of Laddu Shah's house. He further contradicted him by saying that Baliram Yadav had also not stated that the villagers brought the body of the deceased to Sukhi Shah's house. He contradicted Vinod Shah (P.W.6) by admitting that he had not stated in his previous statement that he was told by his family members that Deo Kumar went out of his house to play at 4:00 PM and did



not return to his house. He contradicted him by saying that he had not stated that the husband of the appellant Sankesa Devi, Dharmendra Shah was married first about ten years ago. He had not stated that since his first wife was not having any children, he abandoned her and married Sankesa Devi about 2 and ½ years back and when she was also not having any children, the appellants sacrificed his son Deo Kumar under influence of superstition and black magic. He further contradicted that he had not stated that when the house of the appellants was inspected, it was found that it had recently been washed with water and there were bloodstains on the walls or that a red frock was recovered, which was having bloodstains. He had also not stated that there was blood on the stairs and blood-stained stone chips were found on the terrace of the house.

29. **Jainendra Kumar (P.W.10)** is a formal witness, who came to produce the materials seized by the police during investigation that has been marked as Material Exhibits Nos. 1 to 1/10. He stated that he brought the articles that were kept at Vijaipur Police Station *Malkhana* to the court on the instructions of Sanjit Kumar, the SHO of Vijaipur Police Station. He opened the box in the presence of the parties. The box contained 11 sealed packets, which were found as per the



list of the documents. They have marked material exhibits as Exhibits 1 to 1/10.

30. In cross-examination, he stated that he does not have any personal knowledge of the items in the packets. He further admitted that the packets were not sealed in his presence. He admitted that he was not present during the investigation. He enumerated the eleven items contained in the packets.

31. After the closure of the prosecution evidence, to enable the appellants personally to explain the circumstances appearing in the evidence against them, the Trial Court on 16<sup>th</sup> December, 2019 examined them under Section 313(1)(b) of the CrPC. In reply to the questions put forth by the Trial Court, the appellants categorically stated that they are not involved in any manner in the commission of the murder of the son of the informant and nothing incriminating was recovered from their house. They further contended that the informant is their agnates. Therefore, they have been falsely implicated in this case.

32. From the Trial Court's record, it would be evident that the Forensic Science Laboratory (for short 'FSL') report was produced by the investigating officer before the court of Additional Chief Judicial Magistrate-IV, Gopalganj on 25<sup>th</sup>



January, 2018. The learned Additional Chief Judicial Magistrate-IV, Gopalganj, vide order passed on the same day, directed the FSL report to be kept on record. Accordingly, the FSL report was kept in a sealed cover on the record of the case. Subsequently, the prosecution moved an application on 25<sup>th</sup> July, 2019 that the FSL report received from Muzaffarpur should be exhibited in the interest of justice. The prosecution also prayed that to prove the document, summons should be issued to Dr. Sunil Kumar, Assistant Director, FSL, Muzaffarpur; and, Suresh Paswan, Deputy Director, FSL, Muzaffarpur, Government of Bihar. The Trial Court allowed the said prayer of the prosecution, vide order dated 6<sup>th</sup> August, 2019 and summons was directed to be issued to the two officers posted in the FSL, Muzaffarpur.

33. Despite the service of summons, when the Assistant Director and the Deputy Director of the FSL, Muzaffarpur failed to appear before the court, the prosecution made a prayer for taking the FSL report into evidence. The said application of the prosecution was allowed by the Trial Court, vide order dated 9<sup>th</sup> December, 2019 and the FSL report was marked as Exhibit-9.

34. After having taken the FSL report into



evidence, the Trial Court proceeded with the hearing of the arguments advanced on behalf of the parties and, on conclusion of arguments, convicted the appellants for the offences punishable under Sections 302, 201 and 120B of the IPC and sentenced them in the manner discussed hereinabove.

35. We have heard Ms. Surya Nilambari, learned *amicus curiae* in Death Reference No.1 of 2020, Mr. Jitendra Narayan Sinha, learned advocate for the appellants in Criminal Appeal (DB) No.136 of 2021 and Mr. Ajay Mishra, learned Additional Public Prosecutor for the State being assisted by Mr. Ranjeet Kumar Pandey, learned advocate for the informant.

36. Ms. Surya Nilambari, learned *amicus curiae*, submitted that there is no eyewitness to the actual commission of the murder of the deceased. She submitted that the case is based upon circumstantial evidence. She urged that the factual circumstances led into evidence during the trial were not sufficient to conclude that the guilt of the appellants has been established. According to her, the chain of events is not complete. She submitted that in a desperate mode the prosecution has tried to introduce a new story during the trial that the deceased Deo Kumar was last seen in the company of the appellant Durgawati Devi. The last seen theory, which the



prosecution has tried to build up could not be substantiated by leading cogent evidence. She further contended that mere invocation of the last seen theory by the prosecution is not sufficient to shift the onus on behalf of the appellants under Section 106 of the Indian Evidence Act in the absence of a *prima facie* case.

37. The next submission made by the learned *amicus curiae* is that the prosecution has failed to prove the motive attributed against the appellants for the commission of the offence. She urged that the absence of motive in a case of circumstantial evidence is a factor that can be raised in favour of the accused. She contended that the evidence would further suggest that the theory of sacrificial killing of the victim was developed later by the prosecution in the court. Learned *amicus curiae* further urged that from the evidence of the witnesses examined on behalf of the prosecution during the trial, it would be manifest that the initial *fardbeyan* and the seizure list were withheld by the prosecution and an ante-dated *fardbeyan* was introduced to implicate the appellants. She contended that the investigating officer has not corroborated the prosecution case, as narrated by the witnesses. He has also contradicted the witnesses in a material particular.



38. Ms. Surya Nalambari, learned *amicus curiae*, contended that the FSL report marked as Exhibit-9 by the Trial Court was taken into evidence after the evidence for the prosecution and the defence was closed and the defence had partly advanced its final arguments before the Trial Court. She contended that it is true that Section 293 of the CrPC makes provision for accepting in evidence reports made by certain government scientific experts as enumerated under Sub-section (4) without calling the expert in the court to prove the report, but the report cannot be led in evidence unless it is tendered in evidence. In support of her submissions, she has placed reliance on a judgement of the High Court of Delhi in ***Chhotu Kumar @ Chote Fauji vs. State (Government of NCT of Delhi)*** reported in **277 (2021) BLT 333**. She further contended that even otherwise Section 293 (2) of the CrPC confers upon the court power to summon and examine the officer whose report has been used as evidence and sub-section (3) further lays down that where any such officer is summoned by a court and he is unable to attend personally, he may, unless the Court has expressly directed him to appear personally, depute any responsible officer working with him to attend the Court, if such officer is conversant with the facts of the case and can satisfactorily



depose in court on his behalf. She urged that in the instant case, the summons was issued by the Trial Court to the signatories of the FSL report at the behest of the prosecution itself, but neither of them turned up. Under such circumstance, though the FSL report was per se admissible under Section 293 of the CrPC, the Trial Court ought not to have relied upon the same. She urged further that the reliance placed by the trial court on the FSL report for concluding guilt against the appellants is also bad for the reason that the contents of the report were not brought to the notice of the appellants while they were being examined under Section 313 of the CrPC.

39. Based on the aforesaid submissions, learned *amicus curiae* submitted that the circumstantial evidence in the case did not meet the parameters laid down by the Supreme Court in ***Sharad Bridhichand Sharda vs. State of Maharashtra*** reported in ***(1984) 4 SCC 116*** which has been followed subsequently by several other judgements rendered by the Supreme Court.

40. Mr. Jitendra Narayan Sinha, learned advocate for the appellants reiterated that there is no eyewitness in the present case. He contended that Dina Nath Yadav (P.W. 2) introduced a new story of last seen of the deceased in the



company of the appellant no.1 for the first time in court for which when the investigating officer was cross-examined, he stated that Dina Nath Yadav had not disclosed such fact in his previous statement made before him. He contended that from the evidence adduced, the chain of circumstances is missing, as none has said about the place from where the deceased was taken away by the appellant Durgawati Devi. He contended that the witnesses examined, except P.W.2, are all closely related to each other, except. According to him, they are all interested and partisan witnesses. He urged that from the evidence, it would transpire that there is a common courtyard of the parties. Hence, taking away the deceased and killing him in the house was highly improbable. He argued that from the evidence, it would transpire that the seizure list prepared on 5<sup>th</sup> September, 2017 has been withheld. Further, the seizure list prepared on 6<sup>th</sup> September, 2017 would demonstrate that the same was prepared before the institution of the case. He contended that the seizure lists that have been replaced would also be borne from the evidence of the investigating officer, who has admitted that certain pages of the case diary are missing. Furthermore, the investigating officer has admitted that the copies of the seizure lists were not handed over to the appellants.



41. Mr. Sinha, learned advocate for the appellants argued next that none of the witnesses has assigned any role against Sankesa Devi (appellant no.2). He contended that the weapon allegedly used in the crime was not recovered from the house of appellants. Besides, the dead body was also recovered far away from the house of the appellants. He urged that from the evidence, it would be manifest that the initial *fardbeyan* has been withheld by the prosecution. He submitted that the appellants were present along with others at the place from where the dead body was found. He further urged that the presence of the appellants at the place from where the dead body was found would make it manifest that they were not having any guilt in the crime. With regard to the FSL report taken into evidence, he contended that the same is of no use for the prosecution, as nowhere it is mentioned that the bloodstains found on the different articles were matched with the blood sample of the deceased rather it is simply mentioned in the report that human blood was found. Lastly, Mr. Sinha submitted that the burden of proof would not lie upon the appellants in terms of Section 106 of the Indian Evidence Act with regard to the recovery of blood-stained clothes.

42. On the other hand, Mr. Ajay Mishra, learned



Additional Public Prosecutor for the State submitted that the absence of any eyewitness to the actual commission of murder would not come in the way of conviction and even sentence of death may be passed in such cases where the crime has been inferred from the surrounding and relevant circumstances. He submitted that the factual circumstances have been established by the prosecution and the trial court has rightly arrived at the conclusion of guilt against the appellants. He contended that Dina Nath Yadav (P.W. 2) has withstood the test of the trial. He deposed that he saw Deo Kumar with Durgawati Devi on the fateful afternoon and, thereafter, he went missing. The evidence of P.W. 2 has been fully corroborated by Dwarika Shah (P.W.3). He contended that it was Durgawati Devi, who took the victim boy inside the house and, thereafter, killed him by slitting his neck with a sharp-edged weapon and threw his body outside the house, which was found lying in the bushes near Laddu Shah's house. He contended that there is evidence on record to suggest that the appellants washed their house with water and blood-stained clothes (*saree* and frock) were recovered from their house. There is also evidence that bloodstains were found on the stairs of the house of the appellants as also on the stone chips kept on the terrace of the house. He argued that the motive for



the commission of the crime was that Durgawati did not have any grandchildren and the victim Deo Kumar was sacrificed under the influence of superstition and black magic.

43. Mr. Mishra, learned counsel for the State submitted that the chain of circumstance was complete. According to him, the cumulative result of all the circumstances would show that it was the appellants, who were responsible for the commission of the murder. He argued next that the opinion of the third person is relevant in accordance with the provisions contained under the Indian Evidence Act. He contended that Section 293 of the CrPC is an exception to the general rule that all evidence taken in course of the trial or other proceedings shall be taken in presence of the accused. According to him, Section 293 CrPC makes the report of certain government scientific experts mentioned under sub-section (4) of this section admissible in evidence without calling him as a witness. He contended that the said section 293 of the CrPC is intended to save time and avoid examination of experts unless the court finds it necessary to examine them. He submitted that since no prejudice has been caused to the appellants because of the expert opinion having been taken into evidence at a belated stage, the appellants cannot raise any grievance in this regard.



44. We have given our anxious consideration to the rival submissions made on behalf of the parties and carefully perused the record.

45. Before proceeding with the case to analyze whether there is sufficient circumstantial evidence in the case at hand which meets the parameters laid down by the Hon'ble Supreme Court, let us first examine whether the police have suppressed the initial version regarding the incident.

46. In this context, when we look at the deposition of the Investigating Officer, we find that the SHO of Vijaipur Police Station, namely, Mukesh Kumar along with the Investigating Officer and the police party reached the place of occurrence on the information received regarding the incident by some person, the identity of whom has not been disclosed. The Investigating Officer stated in his cross-examination that he does not remember whether the station diary entry of the information received regarding the incident was made or not. The SHO, who prepared the inquest report of the deceased, has not been examined by the prosecution. The prosecution has not explained his non-examination. Thus, it is a mystery as per whose information the police reached at the place of occurrence.

47. A perusal of the inquest report would make it



clear that the same was prepared at 9:00 PM on 5<sup>th</sup> September, 2017 at the door of Sukhi Shah where the body of the deceased was lying. One Parsuram Singh and one Rajesh Prasad were the two witnesses to the inquest report. They have not been examined by the prosecution.

48. In the inquest report, neither the name of the accused nor the name of the informant nor the name of any other prosecution witness examined during the trial nor the details about the occurrence has been mentioned.

49. The object of the inquest report is merely to ascertain whether a person has died under unnatural circumstances or an unnatural death and, if so, what is the cause of the death. The inquest report cannot be termed to be a piece of substantive evidence. Hence, any discrepancy occurring therein, cannot be termed to be fatal. It can be used to contradict the witness to the inquest examined during the trial.

50. Now, let us examine whether or not the FIR is the first version of the occurrence.

51. In this context, when we look at the FIR, we find that the formal FIR was drawn at 4:00 PM on 6<sup>th</sup> September, 2017 by the SHO, Vijaipur Police Station, namely, Mukesh Kumar on the basis of the *fardbeyan* of Vinod Shah



(P.W.6), which was recorded by Ashok Kumar Singh (P.W.9), the Investigating Officer of the case at 11:10 PM on 5<sup>th</sup> September, 2017 at the door of Sukhi Singh in village-Chhitauna, the same place where the inquest report was prepared about two hours and ten minutes before the recording of the *fardbeyan*. The preparation of inquest is a part of the investigation within the meaning of CrPC. When the SHO and the Investigating Officer had reached the place of occurrence at the same time on the information received at the police station, there is no reason as to why the *fardbeyan* was recorded more than two hours after the preparation of the inquest report especially, when the evidence on record suggests that a large number of villagers had assembled at the place of occurrence. The author of the inquest report namely, Mukesh Kumar, the SHO of Vijaipur Police Station and its witnesses were the material witnesses, who could have thrown some light on the circumstances under which the inquest was prepared first and the *fardbeyan* was recorded thereafter belatedly.

52. Unfortunately, all of them have been withheld by the prosecution without any reasonable explanation in this regard. The non-examination of the aforesaid witnesses has certainly caused prejudice to the defence. The conduct of the



prosecution in withholding important witnesses from the court would lead to an adverse inference that if produced, the evidence would operate against them.

53. At the stage, it is interesting to note that the informant has alluded to the washing of the house with water and seizure of the bloodstained *saree*, frock and other clothes from the house of the appellants in the *fardbeyan* recorded at 11.10 PM on 5<sup>th</sup> September, 2017. However, the revelation of washing of house with water and the recovery of bloodstained *saree* and frock was illuminated only during inspection of the house of the appellants by the police, as admittedly, none of the witnesses had been allowed to enter the appellants' house before that.

54. According to the seizure lists (Exhibits 8/1 and 8/2), which were prepared at the appellants' house, the time of seizure was 3:15 and 3:30 PM on 6<sup>th</sup> September, 2017, i.e., a day after the *fardbeyan* was recorded. This raises an obvious question as to how the fact of washing of the house was included in the *fardbeyan* when inspection of the house was made on the next day and, if indeed, the inspection was conducted earlier, why were the seizures not made then and there?



55. In this regard, when we look at the evidence of P.W.5, we find that in cross-examination, he admitted that the police had inquired from him about the incident on the date of occurrence itself. He admitted that in his statement he did not disclose the name of any accused before the police. He admitted that on that day, his family members were also with him. He admitted that the police recorded his statement on 5<sup>th</sup> September, 2017 on which he put his signature and he possesses a carbon copy of the same. If the evidence of P.W. 5 is read together with the other evidence, it would be amply clear that the *fardbeyan* on which the FIR was registered is not the first version of the occurrence. The first version of the occurrence has been intentionally suppressed. The present FIR has been manufactured and has been made after due deliberation and consultation on 6<sup>th</sup> September, 2017 after the second and third seizure lists were prepared.

56. The seizure lists contain the signature of two witnesses, namely, Baliram Kumar (P.W.5) and Ramakant Prasad. Ramakant Prasad has not been examined during the trial. The second and third seizure lists (Exhibits 8/1 and 8/2) relate to the seizures made from the two houses of the appellants. They do not contain the endorsement that a copy of



the same was delivered to the appellants or their family members. They do not contain the signature of the appellants.

57. The Investigating Officer admitted in cross-examination that he did not send the seizure lists to the court during the investigation. The Investigating Officer conducted the alleged seizure of the materials from the house of the appellants in contravention of Clause (6) of Section 100 of the CrPC, which mandates that the occupant of the place searched, or some person in his behalf, shall, in the instance, be permitted to attend during the search and a copy of the list of the seized materials prepared and signed by the witnesses, shall be delivered to such occupant or person.

58. From the evidence on record, it emerges that admittedly this case is based upon circumstantial evidence. There is no eye witness to the actual murder of the four years old victim Deo Kumar at the hands of the appellants Durgawati Devi and her daughter-in-law Sankesa Devi.

59. It is not in dispute that the absence of any eye witness to the homicide cannot come in the way of the conviction of the accused persons and even a sentence of death may be passed in such cases where the crime has to be inferred from the surroundings and relevant circumstances.



60. However, the parameters and principles within which circumstantial evidence is to be assessed by the court to conclude guilt or otherwise has been time and again deliberated upon by the Hon'ble Supreme Court and judgments in this regard are galore. Precisely, to sustain a conviction on circumstantial evidence, the factual circumstances should be so established that the only inference to said circumstances allow must be that of the guilt of the accused, incompatible with any other hypothesis. The circumstances on record should form a complete and consistent chain of events, which rule out every other hypothesis except the guilt of the accused.

61. In *Hanumant son of Govind Nargundkar vs. State of M.P.* reported in *AIR 1952 SC 343*, the Supreme Court held:

*“10. ... It is well to remember that in cases where the evidence is of a circumstantial nature, the circumstances from which the conclusion of guilt is to be drawn should in the first instance be fully established, and all the facts so established should be consistent only with the hypothesis of the guilt of the accused. Again, the circumstances should be of a conclusive nature and tendency and they should be such as to exclude every hypothesis but the one proposed to be proved. In other words,*



*there must be a chain of evidence so far complete as not to leave any reasonable ground for a conclusion consistent with the innocence of the accused and it must be such as to show that within all human probability the act must have been done by the accused.”*

62. In ***Bhagat Ram vs. State of Punjab*** reported in ***AIR 1954 SC 621***, it was held: “*where the case depends upon the conclusions drawn from the circumstances, the cumulative effect of the circumstances must be such as to negative the innocence of the accused and to bring home the offences beyond any reasonable doubt. It has been consistently held by this Court that where a case rests squarely on circumstantial evidence, the inference of guilt can be justified only when all the incriminating facts and circumstances are found to be incompatible with the innocence of the accused or the guilt of any other person”*.

63. In ***Sharad Bridhichand Sharda vs. State of Maharashtra*** (supra), the Supreme Court in paras 153 and 154 held:

*“153. A close analysis of this decision would show that the following conditions must be fulfilled before a case against an accused can be said to be fully established:*



*(1) the circumstances from which the conclusion of guilt is to be drawn should be fully established.*

*It may be noted here that this Court indicated that the circumstances concerned “must or should” and not “may be” established. There is not only a grammatical but a legal distinction between “may be proved” and “must be or should be proved” as was held by this Court in Shivaji Sahabrao Bobade v. State of Maharashtra [(1973) 2 SCC 793 : 1973 SCC (Cri) 1033 : 1973 CrL LJ 1783] where the observations were made:*

*“Certainly, it is a primary principle that the accused must be and not merely may be guilty before a court can convict and the mental distance between ‘may be’ and ‘must be’ is long and divides vague conjectures from sure conclusions.”*

*(2) the facts so established should be consistent only with the hypothesis of the guilt of the accused, that is to say, they should not be explainable on any other hypothesis except that the accused is guilty,*

*(3) the circumstances should be of a conclusive nature and tendency,*

*(4) they should exclude every possible hypothesis except the one to be proved, and*



*(5) there must be a chain of evidence so complete as not to leave any reasonable ground for the conclusion consistent with the innocence of the accused and must show that in all human probability the act must have been done by the accused.*

*154. These five golden principles, if we may say so, constitute the panchsheel of the proof of a case based on circumstantial evidence.”*

64. In ***Padala Veera Reddy vs. State of Andhra Pradesh and Ors.*** reported in ***1989 Supp (2) SCC 706***, the Supreme Court laid down that in a case of circumstantial evidence, the evidence must satisfy the following test:

*“(1) the circumstances from which an inference of guilt is sought to be drawn, must be cogently and firmly established;*

*(2) those circumstances should be of a definite tendency unerringly pointing towards guilt of the accused;*

*(3) the circumstances, taken cumulatively, should form a chain so complete that there is no escape from the conclusion that within all human probability the crime was committed by the accused and none else; and*

*(4) the circumstantial evidence in order to sustain conviction must be complete and incapable of explanation of any other hypothesis than that of the guilt of the accused*



*and such evidence should not only be consistent with the guilt of the accused but should be inconsistent with his innocence.”*

65. The prosecution, in the matter at hand, in support of its case that the appellants murdered the informant's son has relied upon the following circumstances:

(a) That the informant's son Deo Kumar was last seen in the company of Durgawati Devi, just before he went missing.

(b) Durgawati Devi and Sankesa Devi had a very strong reason to commit the murder. They were saddened by the fact that Dharmendra Shah (Durgawati's son and Sankesa's husband) did not have any children despite his second marriage to Sankesa Devi came under the influence of black magic and superstition and sacrificed Deo Kumar's life.

(c) The police recovered pillow cover, frock and nighty from the house of the appellants, which were sent for forensic test and regarding which the FSL report was received in the court showing stains of blood on those articles.

(d) On inspection of the house of the appellants, it



was noticed that the Puja room had been washed, which still carried stains of blood on the floor and walls.

66. Now, it is to be seen whether these circumstances have been substantiated by the prosecution forming a link of circumstances so thorough as to lead to the singular conclusion that the guilt of the appellants accused to the exclusion of any other hypothesis.

67. Insofar as the last seen theory, which the prosecution has tried to conjure us, the only witness, who has stated in his testimony that he actually saw the victim Deo Kumar with the appellant Durgawati Devi on the fateful afternoon is Dina Nath Yadav (P.W.2). The other witnesses have not claimed to be direct witnesses to Deo Kumar being lastly seen in the company of the appellant Durgawati Devi before he went missing and his eventual murder.

68. Apart from Dina Nath Yadav (P.W. 2), others have only hearsay evidence in this regard that they learnt that Deo Kumar was seen with Durgawati Devi, which evidence would not be admissible under Section 60 of the Indian Evidence Act. Dwarika Shah (P.W. 3) has stated in his examination-in-chief that he learnt from Dina Nath Yadav that



Durgawati was seen taking Deo Kumar, but Dina Nath Yadav himself did not make any such assertion of communicating the said circumstance to Dwarika Shah, the grandfather of the victim. Moreover, Dwarika Shah's testimony in court improves on the version he gave the police as before he had not revealed that Deo Kumar was seen in the company of Durgawati Devi before his murder.

69. Furthermore, Dina Nath Yadav (P.W. 2) was himself examined by the police on 02.11.2017, i.e., almost two months after the date of occurrence.

70. Insofar as the murder of the victim Deo Kumar is concerned, a specific motive has been ascribed for its commission. The prosecution has tried to establish that the killing of Deo Kumar was like sacrificial killing committed by the appellants under the influence of black magic, superstition and exorcists. It has been stated by the witnesses that Durgawati Devi's son Dharmendra Kumar was unable to have children despite his second marriage to Sankesa. He is said to have abandoned his first wife, who had also contracted another marriage.

71. The *fardbeyan* given by the father of the victim incorporates the allegation of the murder being



committed in pursuance of a conspiracy hatched by the two appellants and also that their house was later washed with water, but the same does not contain any whisper of motive. Certainly, the FIR is not expected to be an encyclopedia of fact, but what is worthy is that theory of sacrificial killing was developed later by the prosecution witnesses in the court. The Investigating Officer has elucidated in his testimony that the informant (P.W. 6) had not made any revelation about what had motivated the two appellants to kill his son. The informant's testimony in the court concerning the motive is an improvement over his statement made under Section 161(3) of the CrPC. The ascribed motive has also been testified by other witnesses, namely, Chandrawati Devi (P.W. 1), Dwarika Shah (P.W.3), Sukhali Devi (P.W. 4), Baliram Kumar (P.W.5) and Nitu Devi (P.W.8).

72. However, when we scrutinize the evidence, we find that Chandrawati Devi (P.W.5) in her cross-examination stated that she has deposed only on suspicion. She admitted that she was only repeating what she was told. Her deposition about a motive was based on suspicion and belief. Dwarika Shah (P.W.1) had not made the motive underlying the murder known to the police as has been admitted by the Investigating Officer in his deposition. Sukhali Devi (P.W.4) in her cross-examination



virtually denied making any statement inculcating the appellants. She denies stating to the police that the appellants had killed the deceased. The prosecution did not request the court to declare her hostile. Her evidence, thus, would be binding upon the prosecution. Baliram Kumar (P.W.5) also denies making any statement to the police pertaining to the specific motive behind the murder and Nitu Devi (P.W.8), the mother of the deceased, denied any knowledge about when Sankesa was married. The evidence of the Investigating Officer is indicative of a belated development and attribution of motive by the prosecution witnesses to the appellants for the first time in the court probably to strengthen the prosecution case in an attempt to supply a link in the chain of circumstantial evidence. In fact, Sukhali Devi (P.W.4) and Baliram Kumar (P.W.5), in their cross-examination, categorically denied making any claims to the police about the possible motive which could lead the appellants to commit murder. In their evidence, they did not lend any support to the motive which the prosecution has brought forth as the reason behind the killing.

73. Based on the above discussions, we are of the opinion that the prosecution has failed to establish the motive ascribed to the appellants.



74. Coming to the next circumstances, which is said to have been discovered in course of inspection of the place of occurrence by the police, i.e., the house of the appellants, both old and new, the prosecution has pointed that on such inspection it could be seen that the house of the appellants had been washed with water as the floor was still wet and that bloodstains were noticeable on walls and floor of the house. It gives an impression that an attempt has been made to clean the house of the bloodstains caused by the murder of the victim in the *Puja* room of the house.

75. The informant has mentioned about the washing of the house in the *fardbeyan* recorded at 11:10 PM on 5<sup>th</sup> September, 2017. However, the revelation about the bloodstained walls of the appellants' house and its washing had illuminated only in course of inspection by the police, as admittedly, none of the witnesses had been allowed to enter the appellants' house prior to that. According to seizure list nos. 2 and 3, which were prepared at the appellants' house, old and new, the time of seizure was 3:00-3:20 PM on 6<sup>th</sup> May, 2017, the day after the *fardbeyan* was recorded. This raises an obvious question as to how the fact of washing of the house was included in the *fardbeyan* when the inspection was made.



76. In this regard, the examination-in-chief of P.Ws. 1, 2, 3, 4, 6 and 8 have stated that only after the house of the appellants was inspected by the police, the bloodstained wet floor/wall was discovered. It is not their case that any of them was physically present in the appellants' house when the search and inspection were made, except P.Ws. 5 and 6. It is also not their case that any time before the inspection of the house of the appellants by the police, they entered into the house of the appellants or saw the bloodstained walls/floor of their house. Baliram Kumar (P.W.5) is a seizure list witness and has proved his signature on the seizure lists. Despite being the seizure list witness, he has not corroborated in his testimony the aforementioned circumstance. The same is conspicuously lacking in his deposition.

77. Apart from the statement about the recovery of a *nighty* from the appellants' house, P.W.5 has made no averment or suggestion that the walls/floor could be seen to be tainted with blood. He has denied stating before the police that bloodstains could be seen on the walls of the house.

78. Similarly, Sukhali Devi (P.W.4) stated clearly that she had not averred before the police that blood had been seen at the appellants' old and new house. Chandrawati Devi



(P.W.1) admitted in her cross-examination that she had never visited the appellants' house. She further answered about the bloodstains in the *puja* room that she had only repeated what she was told. Dwarika Shah (P.W.3) and Nitu Devi (P.W.8) are admittedly hearsay witnesses regarding the circumstance of the discovery of bloodstained walls/floor of the appellants' house. They have stated that the said discovery was made by the police. Vinod Shah (P.W. 6) in his examination-in-chief claimed that he was present during the inspection of the appellants' house along with the police and local boys of the village.

79. However, the Investigating Officer in his cross-examination contradicted P.W. 6 by admitting that in his previous statement made under Section 161(3) of the CrPC, he had not stated that during inspection of the house of the appellants' bloodstained walls/floor had been seen. The Investigating Officer has also contradicted Dina Nath Yadav (P.W.2), Dwarika Shah (P.W.3) and Baliram Kumar (P.W.5) in material particular. Although, Vinod Shah (P.W.6) had mentioned in his *fardbeyan* that the appellants' house had been washed and bloodstained clothes were recovered from there, the Investigating Officer has contradicted him on both the points. The Investigating Officer also contradicted him by saying that



he had not stated in his previous statement that bloodstains were found on the stairs and bloodstained stone chips were seen on the terrace of the old house of the appellants.

80. The evidence of the Investigating Officer (P.W.9) about the circumstance under consideration is of immense importance. It was he, who had inspected the appellants' house. The Investigating Officer in his deposition described the three places of occurrence. Firstly, the place from where the boy was treated an ice cream and Laddu Shah's house from where the body was thrown; secondly, the concrete two-storied house of the appellants, which is adjacent to the house of the informant; and, thirdly, Harihar Shah's field from where the body was recovered. The Investigating Officer has not stated in his deposition that blood was found on the walls of the house inspected or that it had been washed with water.

81. Thus, the evidence on record suggests that the discovery of blood on the walls of the appellant's house has not been corroborated by the Investigating Officer, Baliram Kumar (P.W.5), the seizure list witness and Sukhali Devi (P.W. 4). It further suggests that the entire evidence in this regard by Dina Nath Yadav (P.W.2) and Vinod Shah (P.W.6) was developed by them in the court and they had not made any



reference about the same before the Investigating Officer. Their statements were recorded by the Investigating Officer under Section 161(3) of the CrPC. The omission of such a vital circumstance in the statements before the police by Dina Nath Yadav (P.W.2) and Vinod Shah (P.W.6) creates doubt about the veracity of their evidence. The remaining witnesses, namely, Chandrawati Devi (P.W.1), Dwarika Shah (P.W.3) and Nitu Devi (P.W.8) are hearsay witnesses.

82. Hence, we are of the opinion that the prosecution has not been able to prove the circumstance that on inspection of the house of the appellants, it was noticed that the *puja* room had been washed with water and the walls and the floor were having bloodstains.

83. Now, coming to the next significant circumstance, that of recovery of items from the house of the appellants including pillow cover, frock and *nighty* seized by the police and cotton swabs/gauze pieces of blood collected by the FSL team, three seizure lists were prepared by the Investigating Officer in this case. The first seizure was of bloodstained soil of the deceased and a broken knife in two pieces from the Harihar Shah's field. From the seizure list itself, it is obvious that these recoveries were not made from the appellants' house.



84. Insofar as the second seizure is concerned, the same was prepared at the appellant Durgawati Devi's house no.1 on 6<sup>th</sup> September, 2017 at 3:15 PM. According to the seizure list, a black *nighty*, marked 3/A, was recovered from that house. As per the FSL report, the *nighty* wore brownish stains only and blood could not be detected on it. Insofar as the third seizure is concerned, a red frock, blue-orange *nighty* and a pillow cover were recovered from house no.2 of the appellant Durgawati Devi. According to the FSL report, the red frock marked 3/B, bore reddish browns stains, 'over small area'. The blue-orange *nighty* marked 3/C bore brownish stains. The pillow cover marked 3/D, bore a dot of reddish-brown stains. The result of the forensic examination of the aforesaid articles would demonstrate that blood could not be detected in the articles marked '3/A' and '3/C'. Similarly, blood detected in the article marked '3/D' was too small for serological test and the article marked '3/B' contained blood over a small area. The results of the serological analysis would further reveal that the blood detected on the article marked '3/B' was of human origin.

85. The Trial Court has placed reliance on the seizure lists and the FSL report in inferring the guilt of the appellants.



86. The record would reveal that the FSL report was submitted in the court of ACJM-4, Gopalganj on 25<sup>th</sup> January, 2018. On the same day, the Investigating Officer gave a written application to the learned ACJM-4, Gopalganj about the production of the sealed report of FSL, which was allowed. From the order sheet dated 6<sup>th</sup> of August, 2019, it would be evident that the prosecution had moved an application dated 25<sup>th</sup> July, 2019 that the forensic report from Muzaffarpur FSL should, in the interest of justice, be exhibited, for which purpose summons should be issued to Dr. Sunil Kumar and his Deputy Suresh Paswan. Accordingly, the summons was issued. However, neither Dr. Sunil Kumar nor Suresh Paswan responded to the summons issued by the court. The record would further reveal that on 9<sup>th</sup> December, 2019 when the prosecution applied for exhibiting the FSL report, the Trial Court allowed the same. It would also appear from the record that the Investigating Officer (P.W.9) and Jainendra Kumar (P.W.10) were examined before the date on which the FSL report was taken into evidence and marked as an Exhibit. Jainendra Kumar (P.W.10) has exhibited the articles seized by the police and the FSL team, Muzaffarpur, which were examined and described in the FSL report but, apparently, not



the report itself.

87. Generally, the opinion of an expert though relevant, requires the expert to be examined as a witness in court otherwise his report cannot be admitted in evidence. Section 273 of the CrPC lays down a general rule that all evidence taken in the course of a trial or other proceeding shall be taken in the presence of the accused. However, Sections 292 and 293 CrPC are exceptions to the general rule as laid down in Section 273 CrPC. Both these sections also depart from the elementary rule of law that unless the evidence is given on oath and is tested by cross-examination, it is not legally admissible against the party affected. Section 293 CrPC make the report of the certain Government Scientific Experts mentioned in sub-section (4) of this section, admissible in evidence without calling him as a witness.

88. Section 293 CrPC corresponds to Section 510 of the old Code of Criminal Procedure, 1898 and Section 510 of the old code was bifurcated into two sections-292 and 293. Section 292 deals with the evidence of officers of Mint, Controller of Stamps whereas Section 293 deals with evidence of certain scientific experts.

89. The legislative intention behind the framing



of Section 510 vis-a-vis section 292 and 293 CrPC can be well-judged from the observation recorded by The Law Commission's 41<sup>st</sup> Report. It was observed therein:

*“41.1 The framers of the Code were aware that the evidence of certain experts in the service of Government would be frequently required in Criminal Courts, and if these experts were to be treated as ordinary witnesses whose sworn statement in court alone could be legal evidence, they would be spending most of their time giving evidence. Also the number of such experts was so small that they could not be always conveniently spared for attending the court. Special rules of evidence were therefore framed for them. They are placed in Chapter XLI of the Code.”*

90. Thus, the report of any of expert specified under said Section, on any matter duly submitted to him for examination or analysis was recommended by the Law Commission to be considered as good evidence.

91. It was further observed that section 510(2) makes it obligatory for the court to summon the Chemical Examiner or other officer mentioned in sub-section (1) if either party so desires. The provision was considered unsatisfactory and the Law Commission recommended an amendment to the section to the extent that summoning any such expert should be



left to the discretion of the Court. The recommendations of the Law Commission were eventually accepted and the provision was amended accordingly. The provision as laid down under section 293 CrPC, was further amended through Criminal Law (Amendment) Act, (45 of 1978) and Criminal Law (Amendment) Act 2005 (2 of 2006) and reports of some more Government Scientific Experts were included under sub-section (4) of section 293 CrPC.

92. Section 293 CrPC makes a report of the certain Government Scientific Experts mentioned under sub-section (4) of this Section admissible in evidence without calling him as a witness.

93. Although it is not required to examine the expert as a witness to prove his report under Section 293 CrPC, the report cannot be read in evidence unless it is tendered in evidence.

94. In *Wali Muhammad vs. Emperor* reported in *AIR 1924 All 193*, the Allahabad High Court held: “Under Section 510 of the Code of Criminal Procedure any document purporting to be a report under the hand of a Chemical Examiner upon any matter duly submitted to him for examination and report may be used as evidence in any enquiry,



*trial or other proceeding. This, however, does not imply that without tendering it in evidence it can be made use of for the first time in appeal. It is a piece of evidence that does not require any formal proof, but at the same time it must be tendered as evidence and used as such, so that the accused may have a chance of questioning the identity of the packets”.*

95. Similar view was expressed by the Delhi High Court in **Chhotu Kumar** (supra), wherein it has been held that: *“Although the said report may be admissible under Section 293 of the Cr.P.C. without the author testifying to the contents thereof, however, the said report was required to be tendered and could not be taken note of without the same being tendered and exhibited”.*

96. In **Chhotu Kumar** (supra), the Court referred a Division Bench judgment of Delhi High Court in **Dharampal and Anr. vs. State** reported in (2011) 525 DRL 417 wherein it was held: *“It is true that in view of Section 293 of the Criminal Procedure Code, the report in question need not have been proved by summoning the author thereof, but that does not mean, that during trial nobody had to tender the same in evidence and have the same exhibited by deposing that either he himself went to the FSL Laboratory and collected the report in*



*question or deposing that during investigation he obtained the report in question and that the same pertains to the investigation conducted in the case which was being tried. It must be deposed that the report in question pertains to the case at hand”.*

97. In the light of the statutory provisions as laid down under Section 293 of the CrPC, we are in complete agreement with the views expressed by the Allahabad High Court in *Wali Muhammad* (supra), and the Delhi High Court in *Chhotu Kumar* (supra) and *Dharampal* (supra). We are also of the view that the FSL report and its contents would be admissible in evidence even without examining the author and calling for its formal proof. However, the report falling under the ambit of Section 293 of the CrPC need to be tendered in evidence by some witness so that the same is exhibited and connected with the case in hand. If it is not tendered in evidence by any witness, the same cannot be used in evidence.

98. In the instant case, neither P.W. 9 nor P.W. 10 tendered the FSL report in evidence.

99. Further, it is not in dispute in the case at hand that the FSL report was not supplied to the appellants at any stage. The same was taken into evidence after the



prosecution was closed. Though, in the appropriate case, there may be an occasion to allow tendering report of an expert at a belated stage, if when tendering of the report of expert or examining the report under Section 293 CrPC, at any stage, after the closure of prosecution of evidence is allowed, a duty is cast upon the court to ensure that no prejudice is caused to the accused. While allowing the expert report to be taken into evidence, it must be ensured that a copy of the report is supplied to the accused well in advance and he is allowed to cross-examine the relevant witness. Section 313 CrPC casts a duty on the court to put in an inquiry or trial questions to the accused to enable him to explain any of the circumstances appearing in the evidence against him.

100. In the peculiar facts of the case, at hand, it has been seen that the summons was issued by the Trial Court to the signatories of the FSL report at the behest of the prosecution itself, but neither of them turned up. Neither of the appellants was confronted with the contents of the FSL report in their examination under Section 313 CrPC. The examination under Section 313 CrPC pertain to the seizures made by the police and the FSL team, but no question specifically dwelt on what the FSL report contains about the results of the articles seized from



the appellants' house.

101. Thus, in view of all the circumstances discussed above, we are of the opinion that no reliance can be placed on the FSL report, which was taken into evidence by the Trial Court without being tendered by any witness and, that too, at a belated stage after the closure of the prosecution case.

102. To conclude the evidence adduced by the prosecution to prove the guilt of the appellants is beset with contradictions, embellishments and insufficiencies to form a complete link of damaging circumstances, which could unequivocally be demonstrative of the guilt of the appellants. The dead body and knife, which bore bloodstains were not recovered from the appellant's house, but from Harihar Shah's field. No evidence was adduced by the prosecution that either of the appellants was seen throwing the body or going to or coming back from Laddu Shah's house from which the body and knife were thrown. No credible evidence has emerged that the deceased Deo Kumar was last seen in the company of the appellants. The prosecution has failed to establish the motive it had attributed to the appellants. Even the place of occurrence, where Deo Kumar was done to death, the house of the appellants (*puja* room), was not corroborated by the



Investigating Officer. The FSL report does not contain incriminating evidence. The author of the FSL report did not respond to the summons issued by the court. Moreover, the FSL report was taken into evidence without being tendered by any witness. Furthermore, the report was not supplied to the accused appellants at any stage and was taken into evidence after the closure of the prosecution case. The incriminating circumstance, if any, in the FSL report was not explained to the appellants while they were being examined under Section 313 CrPC. There is no evidence to suggest that the appellants hatched up any conspiracy.

103. Thus, on consideration of the entire evidence, we are of the opinion that the prosecution has miserably failed to prove the links in the chain of circumstances beyond reasonable doubt against the appellants.

104. For all the reasons, the appeal is allowed. The impugned judgment of conviction dated 10<sup>th</sup> July, 2020 and the consequent order of sentence dated 17<sup>th</sup> August, 2020 passed by the learned 4<sup>th</sup> Additional District and Sessions Judge, Gopalganj in Sessions Trial No.104 of 2018 arising out of Vijaipur P.S. Case No.169 of 2017 are, accordingly, set aside.

105. The appellants, namely, Durgawati Devi and



Sankesa Devi are acquitted of the charges levelled against them. They shall be released from the jail forthwith unless required in any other case.

106. Since we have allowed the appeal and set aside the impugned judgment of conviction and the consequent order of sentence passed by the Trial Court, the reference made by the Trial Court for confirmation of death sentence vide Death Reference No.1 of 2020 is, hereby, rejected.

107. Before parting with the Death Reference and the appeal, we record our appreciation for the able assistance rendered by the learned *amicus curiae*.

108. The Patna High Court, Legal Service Committee is, hereby, directed to pay Rs.10,000/- (Rupees Ten Thousand) to Ms. Suraya Nilambari, learned *amicus curiae* in Death Reference No.1 of 2020 as a consolidated fee for the services rendered by her.

**(Ashwani Kumar Singh, J.)**

**(Arvind Srivastava, J.)**

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