

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.376 of 1995

1. Kaushal Yadav @ Kaushal Kishore Yadav son of Deep Narayan Yadav
2. Deep Narayan Yadav son of Shivrindan Yadav, both resident of village
Barsam Saur Bazar, District Saharsa
(appeal abated against appellant No.2)

... .. Appellant/s

Versus

State of Bihar

... .. Respondent/s

Appearance :

For the Appellant/s	:	Mr.Krishranjan, Advocate Mr.Suman Kumar Jha, Advocate
For the Respondent/s	:	Mr.Bipin Kumar, APP

CORAM: HONOURABLE MR. JUSTICE SUDHIR SINGH
and
HONOURABLE MR. JUSTICE CHANDRA PRAKASH SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE SUDHIR SINGH)

Date : 05-08-2022

The present appeal has been preferred against the judgment of conviction and order of sentence dated 20.11.1995 passed by the 2nd Additional Sessions Judge, Saharsa in Sessions Trial case No.90 of 1989/37 of 1989 arising out of G.R. case No.287 of 1986, whereby and whereunder the appellants have been convicted under Section 302/34 of the Indian Penal Code and have been sentenced to undergo imprisonment for life.

2. By order dated 28.06.2022, a report was called for from the Superintendent of Police, Saharsa in respect of both the appellants, as to whether they are alive or dead. The



Superintendent of Police, Saharsa vide Letter No.53/Legal Cell dated 20.07.2022 has reported that appellant Deep Narayan Yadav S/o Shivnandan Yadav is dead and appellant Kaushal Yadav @ Kaushal Kishore Yadav is alive. Hence, appeal against appellant No.2 Deep Narayan Yadav S/o Shivnandan Yadav stands abated as he died during pendency of this appeal. This appeal is now confined only to appellant No.1 Kaushal Yadav @ Kaushal Kishore Yadav.

3. Prosecution case, in brief, as made out from the First Information Report (Ext.7) lodged by the informant Bal Kishore Prasad Yadav (P.W.7), is that the deceased Dilip Kumar Yadav, aged about 20 years, was the younger brother of informant. The deceased had developed a habit of taking stroll after taking dinner. Further, the case of prosecution is that on the night of alleged occurrence at about 09:00 P.M. deceased took dinner alongwith the informant and as usual proceeded for stroll, while the informant went to bed at his doorstep. It is further alleged that on the following morning when the informant Bal Kishore Yadav (P.W.7) got up at 06:00 A.M., he learnt that the deceased Dilip had not returned home in the night, then due to his old enmity with local Mukhiya Ganga Yadav he became apprehensive about the life of his brother (deceased) and his meeting with any mishap; that in the



meantime one Narayan Sharma, watchman of local Bahiyar arrived at his doorstep and intimated that the dead body of the deceased was seen thrown in the canal situated at the west of the village; that the informant together with Vinod Yadav (not examined), Nand Kishore Yadav (P.W.9), Yadunandan Yadav (not examined) and others went to the canal, then found the dead body of his brother Dilip lying there and also noticed the presence of injuries on his head from which blood had oozed out. The informant thereafter removed the dead body of his brother from canal and brought it to his doorstep and went to Sour Bazar P.S., wherein first information report (Ext.7) was recorded at about 12:00 noon against unknown, on the basis of the statement made by him (informant) and his signature (Ext.2/2) was obtained in the same. One S.I. Jageshwar Singh (not examined) first of all took up the investigation of the case, he went to the scene village, inspected the scene place, prepared the inquest report (Ext.5). Thereafter, during investigation the name of the appellant alongwith two others cropped up. Some of the witnesses claimed that they had seen the appellant and two more accused persons with the dead body of the deceased. The police submitted charge sheet against the accused persons including the appellant. Thereafter, the jurisdictional Magistrate took cognizance of the



offence and committed the case to the Court of Sessions. Thereafter charges were framed under Sections 302/34 of the Indian Penal Code against the appellant and two others. The appellant pleaded not guilty and claimed to be tried.

4. During trial, the prosecution examined altogether ten witnesses. P.W.1 Keshav Sharma, P.W.2 Tilak Sharma and P.W.5 Jhakhiya Devi are the witnesses, who have claimed to have seen the accused persons together with dead body of deceased Dilip Kumar at about mid night on the date of alleged occurrence, while P.W.6 Bauku Tanti has claimed to have seen the deceased in the company of accused Kaushal. P.W.3 Dr. Arun Kumar Mandal is the Surgeon, who had held autopsy on the dead body of the deceased. P.W.4 Ramjee Thakur is a witness on the seizure of letters, photograph and sweater from the house of appellant, while P.W.8 Daburuddin is a witness on the inquest report of the deceased. P.W.7 Bal Kishore Prasad Yadav is the informant himself, while P.W.9 Nand Kishore Yadav is the brother-in-law (Bahnoi) of the informant as well as the deceased. P.W.10 Deo Narayan Oraon is the Investigating Officer of the case. The prosecution has also brought on record documents like the postmortem report (Ext-1), inquest report (Ext-5), seizure list (Ext-6) and letters (Ext.3 and 3/1). Two witnesses have been examined



on behalf of the defence. D.W.1 is Kuar Kishore Yadav and D.W.2 is Narayan Yadav. The defence has also brought on record the F.S.L. report (Ext-A).

5. Learned counsel for the appellant submits that the judgment of conviction and order of sentence suffer from several illegalities and infirmities. It has been argued that the learned trial court has convicted the appellant, whereas on the basis of same piece of evidence available on record, acquitted two similarly situated co-accused persons, who were tried together with the appellant. Further, the learned trial court has failed to appreciate that the prosecution has materially improved its case during trial; and has assigned motive which was not alleged at the time of registering of F.I.R. or during investigation. The prosecution has not examined Narayan Sharma, who had intimated the informant (P.W.7) regarding the presence of the dead body of the deceased at the canal. Moreover, it has been submitted that the place of occurrence has not been proved by the prosecution. The witnesses, who have claimed that they had seen the accused persons with the dead body, have not disclosed the source of identification in which they have identified the accused persons. Therefore, the same cannot be relied upon. The seizure of letters, allegedly in the handwriting of the deceased, has not been proved nor has the



handwriting been duly proved to be of the deceased. Lastly, it has been submitted that the prosecution has also failed in its attempt to prove that the brick, which was seized from the house of the appellant, was used in course of occurrence.

6. Learned A.P.P., on the other hand, submitted that the prosecution has been able to prove its case beyond all reasonable doubts. The witnesses have been consistent in their depositions and there is sufficient evidence to prove the guilt of the appellant. Therefore, the judgment and order under challenge requires no interference.

7. After hearing the arguments advanced by both the sides and from perusal of material available on record, the following issues arise for consideration: -

- (I) Whether the prosecution has been able to prove the place of occurrence?
- (II) Whether the trial court has failed to appreciate that the prosecution has materially improved its case in course of trial?
- (III) Whether the non-examination of Narayan Sharma would weigh in favour of the appellant?
- (IV) Whether the prosecution has duly proved the motive as alleged during the trial?



(V) Whether the prosecution has been able to establish and prove the manner of occurrence?

(VI) Whether the identification of the appellant and other accused persons made by the prosecution witnesses is reliable and trustworthy?

(VII) Whether the trial court can convict the appellant and acquit the other co-accused persons, who were tried together, by relying upon the same piece of evidence?

8. In order to deal with the first issue, from perusal of record it appears that the informant was informed by one Narayan Sharma that the dead body of the deceased was lying in the canal. Thereupon, the informant alongwith others went to the canal and brought the dead body of the deceased from the canal to his house. However, P.W.1 and P.W.2 in their deposition have stated that they had seen the dead body of deceased in the field of one Barmi. In the entire gamut of evidence brought on record by the prosecution, nowhere it has been explained as to how the dead body reached from the field of Barmi to the canal where Narayan Sharma claims to have seen the dead body. Whether the dead body was dragged or it was lifted on hands or it was carried on a cart is a question which remains unanswered. Further, from perusal of record it also



appears that there is no statement by any of the witnesses to show that there was mark of violence in the field. There is also no seizure of any blood stained soil from the field of Barmi in order to show that the occurrence had taken place in the field of Barmi. The Investigating Officer (P.W.10) has also not recovered any blood stained soil from Barmi's field which is evident from the cross-examination of the Investigating Officer. Therefore, the prosecution could not establish as to where the occurrence actually took place. In such view of the matter, there is no doubt that the prosecution has failed to establish and prove the place of occurrence in the present case.

9. So far the second issue is concerned, from perusal of the F.I.R. it appears that the informant had raised suspicion against one Ganga Mukhiya and his family. However, the F.I.R. was lodged against unknown persons. It is important to mention here that neither any suspicion was raised against the appellant nor any motive was divulged by the informant, at the time of registration of the F.I.R. It further appears from the record that during trial the prosecution has tried to develop a new story by assigning motive against the appellant and alleged that there was an illicit relation between the deceased and the married sister of the appellant namely Sarita Devi. Moreover, in the fardbeyan of



the informant it has not been stated that the deceased left the house after having dinner with the appellant but during trial in his deposition he has brought this fact for the first time. These material improvements which have been made during trial is also evident from the deposition of the Investigating Officer (P.W.10), who in his cross-examination has categorically stated that neither the informant nor P.W.9 had disclosed anything regarding the alleged motive before him during investigation. Therefore, we are of the view that, it is apparent that the prosecution has tried to materially improve its case from time to time.

10. While adverting to the third issue it is important to mention here that Narayan Sharma was the first person who had informed the informant regarding the dead body of the deceased lying in the canal. It is on the intimation of Narayan Sharma that the informant had gone with three persons to the canal. The prosecution has not examined Narayan Sharma and not even disclosed the reason as to why he has not been examined. The appellant has not got the opportunity to elicit from him regarding the details of the condition in which the dead body was seen by Narayan Sharma. Even the Inquest Report has been prepared when the dead body was brought from the canal to the door of the Informant. Therefore, we are of the opinion that the non-



examination of Narayan Sharma by the prosecution would also weigh in favour of the appellant.

11. Now, in order to deal with the fourth issue, we would first like to mention here that, as discussed in the second issue, the motive has been alleged by the prosecution during the trial. It is alleged by the prosecution that the deceased and the married sister of the appellant namely Sarita Devi were into an illicit relation. In order to support this allegation, the prosecution has brought on record two letters marked as Ext.3 and Ext. 3/1 allegedly written by the deceased to said Sarita Devi. These letters are said to have been recovered from the house of appellant. Further, the prosecution has also intended to support the allegation of motive by the evidence adduced by P.W.9. However, the prosecution has examined only one seizure witness, who is P.W.4, who in his deposition has stated that he does not remember as to whether any letter was recovered from the house of the appellant or not. Further, from scrutinizing the deposition of the Investigating Officer, it is apparent that the Investigating Officer has not made any attempt to obtain the opinion of any expert in order to prove that handwriting, in which letters has been written was that of the deceased. Therefore, the handwriting in which the seized letters marked as Ext. 3 and Ext. 3/1 are written has also not



been duly proved to be that of the deceased. It has also transpired from the cross-examination of the Investigating Officer (P.W.10) that neither P.W.9 nor the informant has whispered a word regarding the motive before him during investigation. Therefore, in the said circumstances we reach to the conclusion that the prosecution has miserably failed to prove the motive as alleged against the appellant.

12. So far the fifth issue is concerned, the prosecution has made an attempt to establish that the murder of the deceased has been committed by a brick. For this purpose, in course of investigation a brick was seized from the house of the appellant, which was purported to be used as a weapon for causing the occurrence. It also appears that the said brick was sent for FSL examination for ascertaining the presence of human blood on it. However, the learned trial court in its judgment has categorically mentioned that the report of the FSL has negative the presence of human blood on the brick, which was seized from the house of the appellant. The human blood was found only in the soil which has been collected and seized from the place from where the dead body of the deceased has been recovered i.e., the canal. Therefore, in our view the prosecution has failed in its attempt to prove the manner of occurrence, as no human blood was found on the brick



recovered from the house of the appellant, which would be evident from the report of the FSL marked as (Ext.A).

13. Coming to the sixth issue, we find from the record that P.W.1 and P.W.2 in their deposition have stated that they had seen six persons near the dead body of the deceased. They have claimed to identify four of them, including the appellant at midnight. Both the prosecution witnesses have stated that the occurrence is of mid-night. However, we have given a careful perusal to the deposition of both the witnesses and nowhere in their deposition have they mentioned the source of identification in which they have claimed to identify the accused persons, including the appellant. It is difficult to believe that P.W.1 and P.W.2 have identified the accused persons, including the appellant, in the dark night without any source of identification. Likewise, P.W.5 is said to have identified Deep Narayan Yadav by voice. From the minute scrutiny of the deposition of P.W.5 it appears that first she says that she did not identify the voice but then she says that the same was the voice of Deep Narayan Yadav. P.W.6 has stated in his deposition that he had seen the deceased in the company of the appellant at around 10 P.M. in the night. However, the Investigating Officer (P.W.10) in his deposition has stated that P.W.6 had not stated before him that he had seen the deceased in



the company of the appellant on the date of occurrence. In this backdrop, we reach to the conclusion that neither the identification of the accused persons, including the appellant, as claimed by P.W.1, P.W.2 and P.W.5 can be relied upon nor the statement made by P.W.6 regarding the deceased being last seen in the company of the appellant be relied upon.

14. While dealing with the last issue, we find that P.W.1 and P.W.2 have stated in their deposition that they had seen six persons with the dead body of the deceased. Out of those six persons, they identified four of them namely, Deep Narayan Yadav, Kaushal Yadav, Ramautar Yadav and Kailash Yadav. The learned trial court after appreciating the evidence brought on record, convicted Deep Narayan Yadav and Kaushal Yadav. However, Kailash Yadav and Ramautar Yadav were given benefit of doubt and, therefore, acquitted of the charges framed against them. The trial court has, on the same piece of evidence, acquitted two of the accused and convicted the appellant. Whereas, the charges were framed against all the accused persons under Section 302/34 of the Indian Penal Code. We are of the considered opinion that for the same piece of evidence, brought by the prosecution, against all the accused persons, the trial court cannot convict the appellant and give benefit of doubt to the other accused persons. Therefore, we



hold that the appellant is also entitled for benefit of doubt as has been given to other accused persons by the trial court.

15. In view of the findings arrived at, on the issues formulated above, we are of the considered opinion that the prosecution has failed to prove the charges against the appellant beyond all reasonable doubts. Thus, the conviction of the appellant cannot be sustained.

16. Therefore, this appeal is allowed. The judgment of conviction and order of sentence dated 20.11.1995 passed by the 2nd Additional Sessions Judge, Saharsa in Sessions Trial case No.90 of 1989/37 of 1989 arising out of G.R. case No.287 of 1986 is set aside. Since the appellant is on bail, he is discharged from the liabilities of his bail bonds.

(Sudhir Singh, J)

(Chandra Prakash Singh, J)

Narendra/-

AFR/NAFR	NAFR
CAV DATE	
Uploading Date	24.08.2022
Transmission Date	24.08.2022

