

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.985 of 2017

Arising Out of PS. Case No.-103 Year-2015 Thana- PRANPUR District- Katihar

Vijay Singh Son of Khokhai Singh, Resident of Village- Andaul, P.S.-
Pranpur, District- Katihar.

... .. Appellant

Versus

The State of Bihar

... .. Respondent

Appearance :

For the Appellant/s : Mr. Pratik Mishra, Amicus Curiae

For the Respondent/s : Mr. Dilip Kumar Sinha, APP

CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and
HONOURABLE MR. JUSTICE SHAILENDRA SINGH
ORAL JUDGMENT
(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 02-09-2024

Heard Mr. Pratik Mishra, learned Amicus Curiae on
behalf of the appellant and Mr. Dilip Kumar Sinha, learned
Additional P.P. for the State.

2. This appeal has been preferred for setting aside the
judgment of conviction dated 25.05.2017 (hereinafter referred to
as the ‘impugned judgment’) and the order of sentence dated
30.05.2017 (hereinafter referred to as the ‘impugned order’)
passed by learned Sessions Judge, Katihar (hereinafter referred
to as ‘trial court’) in Sessions Trial No. 30 of 2016 arising out of
Pranpur P.S. Case No. 103 of 2015 registered under Section 302
of the Indian Penal Code (in short ‘IPC’) whereby and

whereunder the learned Sessions Judge has been pleased to convict the appellant for the offences punishable under Section 302 IPC and sentenced him to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- and in default of payment of fine, the convict has to undergo further sentence of simple imprisonment for a period of six months.

Prosecution Story

3. The prosecution case is based on the written report submitted by one Pyare Lal Singh (PW-2) who is the son of the deceased. In his written report (Exhibit '5'), the informant (PW-2) has stated that on 27.10.2015 at about 1:15 PM his father Chhutharu Singh had gone to the tea shop of Vijay Singh (the appellant) situated at the bank of bridge in Amdosh, he had gone to take tea, while his father was taking tea, the appellant started hurling abuses on him and when the father of PW-2 objected to the said conduct of the appellant, the appellant assaulted his father Chhutharu Singh by a dagger. The appellant allegedly inflicted repeated dagger blow into the abdomen of the father of PW-2 as a result whereof he became badly injured, fell down and died. According to the informant (PW-2), when the appellant saw the people coming from the neighbourhood, he fled away.

4. On the basis of the written report of the informant (PW-2), Pranpur P.S. Case No. 103 of 2015 was registered on 27.10.2015 under Section 302 IPC. Police conducted investigation into the case and submitted a charge-sheet under Section 302 IPC against the appellant. Finding that the offence alleged against the appellant was triable by a court of Sessions, the records were committed to the court of Sessions where charge was read over and explained to the appellant in Hindi. The appellant pleaded not guilty and claimed to be tried whereafter charge was framed on 01.03.2016.

5. To substantiate the charge against the appellant, the prosecution examined as many as seven witnesses. Hira Lal Singh (PW-1) and Pyare Lal Singh (PW-2) are the sons of the deceased. Kishan Singh (PW-3) is not a witness to the facts and circumstances of the case. He has identified his signature on the inquest report as Exhibit '2/1'. Parshuram Singh (PW-4) has been declared hostile after he made a statement that he is not aware of the occurrence and he had not made any statement before Police. Dr. S. N. Ray, (PW-5) is the Doctor who was posted at Sadar Hospital, Katihar as a Medical Officer on 28.10.2015 when the dead body of Chhutharu Singh was brought by Chowikadar 9/1 Vikram Ray (not examined) and

Sheikh Jalil (not examined). PW-5 has proved the postmortem report as Exhibit ‘3’. Ranjeet Kumar Chowdhary (PW-6) was the Officer-in-Charge of Pranpur Police Station on 27.10.2015 who had registered the First Information Report on the basis of the written report submitted by PW-2 and had assumed the investigation of the case himself. Kamla Devi (PW-7) is the wife of the appellant who has been declared hostile.

6. On behalf of the prosecution, the following documents were marked exhibits without objection:-

Ext. 1	Sign of Pyare Lal Singh on Written petition	Prosecution	21-02-17	Without objection	Sd/- Sessions Judge- 21-02-17
Ext. 1/1	Sign of Tula Singh on written petition as witness.	"	"	"	
Ext. 1/2	Sign of Sukdeo Parihar on written petition as witness	"	"	"	
Ext. 2	Sign of Pyare Lal Singh on inquest report (certified xerox)	"	"	"	
Ext. 2/1	Sign of Kishan Singh on inquest report (certified xerox)	"	"	"	Sd/- Sessions Judge- 09-03-17
Ext. 3	P.M. report by doctor	"	9-3-17	"	
Ext. 4	Formal FIR	"	"	"	
Ext. 5	Written petition	"	"	"	
Ext. 5/1	Endorsement on written petition	"	"	"	
Ext. 6	Inquest report (Xerox)	"	"	"	
Ext. 7	Memo of arrest of accused	"	"	"	

7. The defence examined two witnesses. Bibhishan Singh (DW-1) has claimed that he was present at the tea shop of

the appellant when the occurrence took place. The appellant himself came in the dock as a witness and has been examined as DW-2. His case is that he was present in the shop when the deceased came to his shop and at the same time, son of the deceased, namely, Pyare Lal (PW-2) and Hira Lal (PW-1) came and indulged in assaulting the deceased, asked him to abstain from taking tea and to follow them to their house, for this reason Pyare Lal (PW-2) assaulted Chhutharu Singh with a dagger and killed him.

Findings of the learned Trial Court

8. The learned trial court having examined the evidences available on the record, believed the testimonies of Hira Lal (PW-1) and Pyare Lal (PW-2) as eyewitnesses to the occurrence. The court held that there is no contradiction in their testimony.

9. The learned trial court has held that the injuries found by PW-5 in the postmortem report (Exhibit '3') fully corroborate the version of PW-1 and PW-2 with regard to the manner of assault, part of the body where assault was made and the weapon which was used for assault. It is the finding of the learned trial court that the version of the defence witness, namely, Bibhishan Singh (DW-1) is not reliable, though he

claims himself an eyewitness to the occurrence but from his testimony it would appear that he arrived at the place of occurrence after five minutes of alarm and had seen the deceased fallen on the ground. Regarding the accused himself examining as DW-2, the learned trial court held that DW-2 was not aware about the reason of quarrel between deceased and his son and his testimony is nothing but an afterthought story to save himself without having any basis. At the end, the learned trial court convicted the appellant and sentenced him as stated at the top of this judgment.

10. Mr. Pratik Mishra, learned Amicus Curiae on behalf of the appellant has assailed the impugned judgment and order on various grounds. It is submitted that at first instance it has come in paragraph '8' of the deposition of PW-2 that he had reached the Police Station where he got a written report scribed by the Munshi of the Police Station. PW-2 has stated that the written application was not read over and explained to him. The submission is that when PW-2 had already reached the Police Station, instead of recording his *fardbeyan* why a written report was prepared in the pen of the Munshi of the Police Station. The said Munshi has not been interrogated by the I.O. and not examined in course of trial which has caused prejudice to the

defence.

11. Learned Amicus Curiae further submits that it would appear from the deposition of PW-1 that he claims that he was going to call his father for taking lunch and while he was at a distance of about ten steps from the tea shop of the appellant, he had seen the occurrence. In paragraph '3' of his deposition, he has named Bipin Singh, Atul Singh and Pammi Kumari as the persons who were present at the place of occurrence but these persons who could have been independent witnesses to the occurrence, have not been examined. According to PW-1, his father was a person involved in social work and he used to participate in the *Panchayati* of the people to resolve their disputes. According to PW-1, the deceased had participated in a *Panchayati* relating to a dispute of the appellant and for that reason prior to the occurrence there was a quarrel between the father of PW-2 and the appellant. It is for this reason the occurrence has taken place. It is submitted that the I.O., who has been examined in this case as PW-6, has stated in his deposition that Hira Lal Singh (PW-1) had not told him regarding any *Panchayati*. Thus, on this point that the genesis of the occurrence is the *Panchayati* in which the father of the PW-1 had participated, the I.O. has contradicted PW-1.

12. Learned counsel further submits that according to PW-1, when the occurrence took place, his brothers were at home. In paragraph '16' of his deposition, he has categorically stated that only he had gone to call his father. This witness was suggested that his father (the deceased) had evil eyes over the wife of the appellant and for that reason, he was going to his tea shop, the family members of the deceased had tried to convince him not to go to the tea shop and because the deceased did not agree, he was killed by his sons. This suggestion was denied by PW-1.

13. It is submitted that from the evidence of Pyare Lal Singh (PW-2), it would appear that according to this witness, he had gone to call his father for taking lunch at the instance of his mother. His mother has not been examined in course of trial. From paragraph '2' of his deposition it would appear that according to him, his brother Hira Lal (PW-1) had come later on behind him, after *hulla* was raised other brothers came. It is submitted that the other brothers have not been examined in this case. This witness has stated about his father's participation in the *Panchayati* in the matter of dispute between Raibo Devi and the appellant but again he has been contradicted by PW-6 who has stated that the informant (PW-2) had not stated before him

in his restatement about any kind of *Panchayati*. The I.O. has also stated in the cross-examination that PW-2 had not said to him that he had gone to call his father for taking lunch. Learned counsel submits that according to PW-2 he had seen the occurrence from a distance of sixty steps when the appellant was assaulting his father and in between this distance, nobody was there. PW-2 has categorically stated in paragraph '17' of his deposition that there was no other person at the shop. Learned counsel submits that from the testimony of PW-2 it would appear that he does not support the evidence of PW-1 that PW-1 was present at the place of occurrence and had seen the occurrence from a distance of ten steps. He also does not support the statement of PW-1 that the three persons named by him in his deposition were present at the place of occurrence and had seen the occurrence. It is submitted that PW-1 and PW-2 are making materially inconsistent statements which would in fact amount to contradicting each other. It is thus submitted that neither PW-1 nor PW-2 are eyewitnesses to the occurrence and it would not be safe to convict the appellant on the basis of their testimony. The learned trial court has erred by treating PW-1 and PW-2 as eyewitnesses to the occurrence.

14. Learned counsel further submits that in this case

non-examination of some material witnesses has seriously prejudiced the case of the defence. According to him, the genesis of occurrence has not been proved and the story of *Panchayati* which was introduced at a belated stage by PW-1 and PW-2 have been contradicted by the I.O. Learned counsel relies upon the judgment of the Hon'ble Supreme Court in the case of **Rabindra Kumar Dey vs State of Orissa** reported in **AIR 1977 SC 170** (paragraphs '3' and '4') and further on the judgment in the case of **Thakurji Hiraji vs Thakore Kubersing Chamansing & Ors.** reported in **2001 SCC (Cri) 1070** (paragraph '19').

15. It is lastly submitted that in this case, most of the incriminating materials which were brought by the prosecution and on which the learned trial court has relied upon against the appellant has not been brought to the notice of the appellant in course of his statement under Section 313 CrPC which has seriously prejudiced the case of the defence. Learned counsel relies upon the judgment of the Hon'ble Supreme Court in the case of **Sujit Biswas vs. State of Assam** reported in **(2013) 12 SCC 406** (paragraph '20'). It is submitted that in such circumstance, the judgment of the learned trial court would be liable to be set aside and the appellant would deserve acquittal

giving him benefit of doubt.

Submissions on behalf of the State

16. Mr. Dilip Kumar Sinha, learned Additional P.P. for the State has though opposed the appeal but in course of his submissions, learned Additional P.P. has submitted that there is no actual corroboration of the prosecution case or the stand of the defence. We have noticed from his submissions that learned Additional P.P. has though tried to defend the impugned judgment and order but at the end he is unable to demonstrate that either of the two sons of the deceased, who have deposed as PW-1 and PW-2, may be believed as an eyewitness to the occurrence. It is submitted that the occurrence took place at the tea shop of the appellant and in his evidence as DW-2, the appellant has stated that Chhutharu Singh was murdered in his shop and he was present at that time. DW-2 has stated that when the deceased was at his shop, his son Pyare Lal (PW-2) and Hari Lal (PW-1) came and Pyare Lal (PW-2) started assaulting Chhutharu Singh. Learned Additional P.P. has, therefore, submitted that in this case, the place of occurrence and the manner of occurrence be taken to have been duly proved by the prosecution.

17. It is submitted that the learned trial court has

believed PW-1 and PW-2 as eyewitnesses to the occurrence and by taking note of the kind of injuries present in the postmortem report (Exhibit '3'), the learned trial court has concluded that the injuries inflicted upon the deceased were caused by some pointed sharp cut weapon which is in full corroboration in the version of PW-1 and PW-2 with regard to the manner of assault. The learned trial court has also recorded that there is no apparent reason to disbelieve the version of the eyewitnesses.

Consideration

18. Having heard learned Amicus Curiae on behalf of the appellant and learned Additional P.P. for the State as also on perusal of the trial court records, we find that the whole prosecution case would depend upon the testimonies of Hari Lal Singh (PW-1) and Pyare Lal Singh (PW-2), who are the two sons of the deceased. A question would arise as to whether these two witnesses may be safely relied upon as eyewitnesses to the actual occurrence? Whether both the witnesses or any one of them would fall in the category of a wholly reliable witness. According to Section 134 of the Indian Evidence Act, 1872 (hereinafter referred to as 'Evidence Act'), no particular number of witnesses shall in any case be required for the proof of any fact. It is well settled that the courts are concerned with the

merit of the statement of a particular witness. They are not concerned by the number of witnesses examined by the prosecution case. In other words, it is the quality of the evidence and not the quantity of the evidence which is required to be judged by the court to place credence on the statement.

19. We have noticed from the written report (Exhibit '5') that Pyare Lal Singh (PW-2) has signed the written report but he has stated in his deposition that he had got the application written by the Munshi of the Police Station who had not read over the application to him. Thus, the scribe of the written report is the Munshi of the *Thana* but he has not put his signature on the written report and has not been examined. There are two attesting witnesses to the written report, namely, (i) Tula Singh and (ii) Sukhdev Parihar but they have not been examined in this case. The Officer-in-Charge of Pranpur Police Station (PW-6) who is also the I.O. of this case has stated that he was Officer-in-Charge of the Police Station on 27.10.2015. He has stated that the written application is in the writing of a literate Constable Rahim Singh on the basis of which formal FIR was registered by another literate Constable namely Baleshwar Singh. PW-6 had conducted the investigation of the case and from the arrest memo (Exhibit '7') it appears that he had

arrested the appellant on the same day at a distance of 100 meters from the place of occurrence, near Birla Mandir. From his evidence, it is crystal clear that even though the informant had reached the Police Station and informed about the occurrence there but his *fardbeyan* was not recorded and a written report was prepared by a literate Constable present in the Police Station. The said illiterate Constable who had written the application on behalf of the appellant did not put his signature there and he has not been examined by the I.O. The informant has stated that he was not explained and read over what was stated in the application. In these circumstances, non-examination of the scribe of the written application has definitely caused prejudice to the defence and the very first information furnished by PW-2 in the Police Station seems to have been suppressed.

20. This Court further finds that PW-1 and PW-2 both have made completely different statements while claiming their presence at the place of occurrence. PW-1 claims that he was going to call his father for taking lunch and while he was at a distance of about ten steps from the tea shop of the appellant, he had seen the occurrence. Contrary to this, PW-2 has stated that he had gone to call his father for taking lunch at the instance of

his mother (not examined). He has stated that Hari Lal (PW-1), who is his brother, had come later on behind him and after *hulla* was raised, other brothers came. PW-2 has stated that he had seen the occurrence from a distance of sixty steps when the appellant was assaulting his father and in between this distance, nobody was there. He has categorically stated in paragraph '17' of his deposition that there was no other person at the shop. This Court, therefore, finds from the evidence of PW-2 that he does not support the evidence of PW-1 as regards his presence at the place of occurrence as an eyewitness.

21. On further perusal of the evidence of PW-1 it would appear that according to him when the occurrence took place his brothers were at home. In paragraph '16' of his deposition, he has categorically stated that only he had gone to call his father. Thus, the evidence of PW-1 completely rules out the presence of PW-2 and other brothers at the place of occurrence. The mother of PW-2 and other brothers have not been examined to prove the relevant fact as to whether PW-2 had gone to call his father at the instance of his mother and that his other brothers had also come on *hulla*. The prosecution has withheld those material witnesses. We, therefore, find that the presence of PW-1 and PW-2 at the place of occurrence when

their father was being assaulted is not getting proved beyond any shadow of doubt. If they were present at a distance of ten steps or sixty steps as claimed by them and their brothers had also arrived there on *hulla*, there natural conduct would have been to make attempt to catch hold of the appellant who had no other support. PW-1 has claimed that at the shop Atul Singh, Bipin Singh and Pammi Kumari were present. This has also not been supported by PW-2 who has stated that there was nobody at the shop. PW-1 has stated that nobody tried to save his father. This conduct of the witnesses who claimed there presence in the close vicinity would raise a doubt on the prosecution story.

22. From the evidence of PW-2, it would appear that though he claims that he had gone to call his father but in his cross-examination, in paragraph '16', he has stated that in his statement before Police, he had not stated that he had gone to call his father for taking meal. The I.O. (PW-6) has confirmed in his testimony that the informant in his further statement had not stated the same. In the kind of materials present on the record, the testimonies of both the sons of the deceased suffer from serious infirmities and create doubt on the genuineness of their evidence. Whether they are the actual persons who had seen the occurrence remains uncertain.

23. As regards the place of occurrence, it is said that the occurrence took place at the tea shop of the appellant situated at Mahanant Baandh within Pranpur Police Station. It has been alleged that the appellant stabbed the deceased multiple times by a dagger. The inquest report of the deceased has been prepared at 2:10 PM in front of Pranpur Hospital. It is mentioned in front of Column No. 5 of the inquest report (Exhibit '4') that he was assaulted by a sharp-edged weapon into his abdomen, chest and right hand and the wounds were bleeding. In the postmortem report, at least four external injuries caused by pointed sharp weapons have been mentioned. Despite this, the I.O. (PW-6) had not found a single drop of blood or stain or any incriminating material at the alleged place of occurrence. PW-1 has stated in paragraph '6' of his deposition that after the occurrence, the appellant was fleeing away, at the same time, Police also reached there, chased and apprehended the accused, but there is no mention of this fact in the written report giving rise to the FIR. If Police had arrived after the occurrence while accused was fleeing away and apprehended him after a chase, why in the *fardbeyan* of PW-2 it was not recorded. The evidence of I.O. (PW-6) would show that he took charge of investigation, perused the FIR and

entered the same in the case diary. He has stated that on reaching the place of occurrence, he came to know that the deceased had been taken to Pranpur Hospital for treatment whereafter he reached Pranpur P.H.C. and prepared the inquest report. He again visited the spot and this time he recorded statement of Kishan Singh (not examined), Hiralal Singh (PW-1), Ram Singh (not examined) and Kamla Devi (declared hostile). From the arrest memo (Exhibit '7') prepared by the I.O., it would appear that the appellant is said to have been arrested on the same day at 4:30 PM at a distance of 100 metres from his tea shop near Birla Mandir. No weapon was, however, recovered or seized by the I.O. In his evidence I.O. (PW-6) has not stated that he found any blood mark or any other sign of occurrence when he reached the place of occurrence.

24. We find some inconsistency in the evidence of the I.O. (PW-6) as regards his visiting the place of occurrence for the first time when he claims that he came to know there that the deceased had been taken to PHC, Pranpur for treatment.

25. We find that in this case the written report giving rise to FIR itself contained a statement that the father of the informant died on the spot itself. The written report was written by a literate Constable (*Munshi*) of the Police Station, FIR was

lodged at 1:45 PM i.e. within thirty minutes of the occurrence and the I.O. (PW-6) has stated that he had perused the FIR and entered the same in diary, therefore it is evident that the I.O. (PW-6) was well aware of the fact that the victim Chhutharu Singh had already died. PW-2 has stated in his examination-in-Chief that his father had fallen in injured condition whereafter he had brought his father in injured condition to Pranpur Government Hospital with the help of Hira Lal (PW-1), Tularam Singh, Nakul Singh and Cobra Singh (all the three not examined) where his father was declared dead. Thus, in any case it is evident from the FIR and evidence of PW-2 that the FIR itself was lodged after death of the victim.

26. The statement of I.O. (PW-6) that he had gone to the place of occurrence where he got to know that the deceased had been taken to Pranpur P.H.C. for treatment and after this information, he went to Pranpur P.H.C. where he prepared inquest report is not a correct statement. I.O. (PW-6) seems to have simply done the paper work of preparation of inquest (Exhibit '6') at P.H.C., Pranpur. He did not visit the place of occurrence. PW-6 has stated about his second visit to the place of occurrence after preparation of inquest report. This time he claims to have recorded the statement of witnesses amongst

others, the statement of Hira Lal Singh and Kishan Singh. This Statement of PW-6 further shows that he was only doing a paper work. PW-2 has stated that Hira Lal Singh (PW-1) was one of the persons who had accompanied the deceased when he was being taken to hospital in injured condition. Thus, PW-1 was very much available at the P.H.C., Prampur when inquest was prepared by the I.O. (PW-6) but why was his statement not recorded there? Similarly, Kishan Singh has signed as an inquest report witness, therefore, when he was present at the place where inquest report was prepared, why his statement has been shown recorded during second visit of PW-6 to the place of occurrence? Kishan Singh and Sukdeo Parihar are the two witnesses to the arrest memo (Exhibit '7') of the accused-appellant but none of them has been examined in course of trial. The accused has been shown arrested on 27.10.2015 at 04:30 pm in arrest memo but in case diary time mentioned is 22.00 Hrs and the name of the witnesses to the arrest memo has not been mentioned in the case diary.

27. There is also no investigation as to the distance between the shop of the appellant and the house of the deceased. In this regard, when this Court examines the pattern of cross-examination of PW-1 and PW-2, it would appear that the defence has not examined these witnesses on the point of place

of occurrence. All that have been suggested to PW-1 and PW-2 are that the deceased had his evil eyes on the wife of the appellant, his wife and the family members tried to persuade him not to go to the tea shop of the appellant but he did not abstain himself from going there, hence the witnesses had themselves assaulted their father (the deceased) by dagger and falsely implicated this appellant. Neither PW-1, PW-2 nor PW-6 has been suggested on behalf of the defence that no occurrence had taken place at the tea shop of the appellant. In this background, when the evidence of the defence witnesses are looked into, it would appear from the evidence of Bibhishan Singh (DW-1) that he claims his presence at the tea shop of the appellant and has stated that the deceased was also at the tea shop when a quarrel ensued between the father and son in which Pyare Lal (PW-2) took out a dagger from his pocket and killed his father. He was cross-examined by the prosecution in which this witness has given the description of the place of occurrence. Vijay Singh (DW-2) is the appellant and has also deposed in this case and he has stated in his examination-in-chief that the occurrence took place at about 3:30 PM when he was in his tea shop and when Chhutharu Singh (the deceased) came there. He has stated that Pyare Lal (PW-2) and Hira Lal (PW-1) came and

thereafter PW-2 asked the deceased not to take tea and accompany him to home, it is for this reason, PW-2 assaulted his father by dagger.

28. Upon consideration of the entire materials on the record, this Court finds that so far as the place of occurrence is concerned, the consistent case of the prosecution is that it was the tea shop of this appellant where the occurrence had taken place. This Court has found a lot of discrepancies in the statement of PW-6 regarding his claim towards visit of the place of occurrence and it seems that PW-6 had not immediately visited the place of occurrence, nonetheless, from the pattern of cross-examination of the prosecution witnesses, it appears that the defence has not questioned the place of occurrence. Thus, this Court is of the considered opinion that the place of occurrence is the tea shop of the appellant.

29. One of the submissions on behalf of the appellant is that there are some material witnesses which should have been examined in this case. Learned Amicus Curiae has submitted that non-examination of material witnesses has caused serious and irreparable prejudice to the defence. We find that the learned Amicus Curiae is correct to a great extent. In this case Tula Singh and Sukhdev Parihar, who are signatories to

the written report (Exhibit '5'), Munshi of the Police Station, who is the scribe of the written report and the eyewitnesses, namely, Bipin Singh, Atul Singh and Pammi Kumari have not been examined. Wife of the deceased who was present at the house of the deceased and had asked the informant to call his father for meal has not been examined. Similarly, the other sons of the deceased about whom it has been stated that they had gone to the place of occurrence after hearing *hulla* and Tula Ram Singh, Nakul Singh and Kobra Singh who had taken the deceased to the hospital just after the occurrence have not been examined. Kishan Singh, who is a witness to the inquest report and arrest memo has not been examined.

30. The genesis of the occurrence is said to be the decision given by the deceased in a *Panchayati* in the matter of dispute between the appellant and one Raibo Devi but said Raibo Devi has not been examined. At the same time, Chaukidar Vikram Ray and Sheikh Jalil who brought and identified the dead body for postmortem examination have not been examined. Learned Amicus Curiae has relied upon the judgment of the Hon'ble Supreme Court in the case of **Takhaji Hiraji vs. Thakore Kubersing Chamansing** reported in **(2001) 6 SCC 145** to submit that if a material witness, who would unfold the

genesis of the incident or an essential part of the prosecution case has not been brought to fore or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examination of witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case.

31. We are of the considered opinion that in this case, the wife of the deceased who was at home and the other sons of the deceased who had come to the place of occurrence on *hulla* would have been material witnesses to unfold the mystery behind the occurrence. Whether the wife of the deceased had asked PW-1 or PW-2 to call their father to take meal and on her asking they had gone to the tea shop of the appellant could have been convincingly proved only if the wife of the deceased would have been examined. Similarly, the name of one Rabo Devi has come with whom the appellant had a dispute and for the said dispute, a *Panchayati* had been held in which the deceased had rendered a decision against the appellant. Rabo

Devi would have been a very important witness on this point. Again, witnesses like Tula Ram Singh, Nakul Singh and Kobra Singh who had taken the deceased to the Hospital just after the occurrence would have been material witness, their arrival at the place of occurrence etc. could have been tested if they would have been brought before the court. Munshi of the Police Station who scribed the written report on behalf of PW-2 has not been examined. Under what circumstances, despite presence of the I.O. (PW-6) in the Police Station when PW-2 arrived there, his *fardbeyan* was not recorded and then the FIR was lodged on the basis of a written report which was prepared by a Munshi of the Police Station who is a literate Constable and that was not read over to PW-2 would have been tested. For all these reasons, this Court would agree with the submission of learned Amicus Curiae that in this case, non-examination of material witnesses has caused serious prejudice to the defence and it will prove fatal to the prosecution story.

32. In this case, it is stated that the genesis of occurrence is that there was a dispute between the appellant and one Rabo Devi. In connection with the said dispute, a *Panchayati* was held in which the deceased had given his decision against the appellant. The genesis of occurrence is,

however, completely missing in the written report (Exhibit '5'). The informant (PW-2) in his written report has not given the reason behind the occurrence in the written report but in course of their evidence both the brothers who are PW-1 and PW-2 have stated about the *Panchayati* against the appellant. The I.O. (PW-6) has, however, stated in his evidence that neither PW-1 nor PW-2 had stated before him during investigation about any such *Panchayati*. Thus, the I.O. has contradicted PW-1 and PW-2. No document regarding the *Panchayati* had been brought on record on behalf of the prosecution and Rabo Devi in whose favour the decision was allegedly given by the deceased has not been examined. This Court further finds it difficult to believe that the deceased who had animosity with the appellant would visit his tea shop frequently. In our considered opinion, in this case, the prosecution has miserably failed to prove the genesis of occurrence. There is no independent witness to the actual occurrence, hence, the genesis of the occurrence remains a mystery.

33. It has been lastly submitted that at the stage of recording of statement of the accused under Section 313 CrPC, the appellant was required to be apprised of all the incriminating materials which were brought against him by the prosecution. It

is submitted that several incriminating materials such as that the appellant had abused the deceased which was objected to by the deceased whereafter the appellant had stabbed the deceased multiple times, the genesis of the occurrence being the *Panchayati* held between the appellant and one Rabo Devi in which the deceased was a *Panch* and has rendered decision against the appellant were not brought to the notice of the appellant. This Court further finds that the prosecution case is that Police had apprehended him while he was trying to flee away and he was arrested on chase by police, these were some of the incriminating circumstances which ought to have been put to the appellant giving him an opportunity to explain the same. On perusal of the form of recording examination of accused under Section 313 CrPC would show that the court put three questions to the accused-appellants and those were answered by the accused. The same are being reproduced hereunder for a ready reference:-

“1. प्रश्न :- क्या आपने साक्षियों का साक्ष्य सुना ?

उत्तर :- जी हाँ, सुन व समझ लिया है।

2. प्रश्न :- आपके विरुद्ध आरोप एवं साक्ष्य है कि दिनांक 27. 10.15 को दोपहर 1 बजकर 15 मिनट में आपने अपने चाय के दूकान पर (अमडोल स्थित बाँध के किनारे थाना प्राणपुर जिला कटिहार) में प्यारे लाल सिंह के पिता छुतहरू सिंह की छुड़ा मार कर हत्या कर दिया ?

उत्तर :- जी नहीं, यह झूठ है, मुझे फँसाया गया है।

3. प्रश्न :- सफाई में क्या कहना है ?

उत्तर :- मैं निर्दोष हूँ।”

34. The importance of statement under Section 313 CrPC has been pointed out by the Hon’ble Supreme Court in catena of judgments. One of them is the judgment in the case of **Sujit Biswas (supra)**. Paragraph ‘20’ and ‘21’ of the judgment in the case of **Sujit Biswas (supra)** reads as under:-

“**20.** It is a settled legal proposition that in a criminal trial, the purpose of examining the accused person under Section 313 CrPC, is to meet the requirement of the principles of natural justice i.e. audi alteram partem. This means that the accused may be asked to furnish some explanation as regards the incriminating circumstances associated with him, and the court must take note of such explanation. In a case of circumstantial evidence, the same is essential to decide whether or not the chain of circumstances is complete. No matter how weak the evidence of the prosecution may be, it is the duty of the court to examine the accused, and to seek his explanation as regards the incriminating material that has surfaced against him. *The circumstances which are not put to the accused in his examination under Section 313 CrPC, cannot be used against him* and must be excluded from consideration. The said statement cannot be treated as evidence within the meaning of Section 3 of the Evidence Act, as the accused cannot be cross-examined with reference to such statement.

21. In *Hate Singh Bhagat Singh v. State of*

*Madhya Bharat*⁸ this Court held, that any circumstance in respect of which an accused has not been examined under Section 342 of the Code of Criminal Procedure, 1898 (corresponding to Section 313 CrPC), cannot be used against him. The said judgment has subsequently been followed in a catena of judgments of this Court uniformly, taking the view that unless a circumstance against an accused is put to him in his examination, the same cannot be used against him. (See also *Shamu Balu Chaugule v. State of Maharashtra*⁹, *Harijan Magha Jesha v. State of Gujarat*¹⁰ and *Sharad Birdhichand Sarda*⁵.)

35. Keeping in view the aforesaid judgment of the Hon'ble Supreme Court, this Court finds that the learned trial court has taken into consideration the deposition of the two witnesses that police arrived at the place of occurrence while the accused was fleeing away towards temple located at isolated place, where he had been arrested. We have already recorded earlier that police had not arrived at the place of occurrence immediately after the occurrence, accused has been shown arrested at 04:30 pm i.e. more than 2 hours 30 minutes from the time of registration of FIR and witnesses to the arrest memo have not been examined. The conduct of the accused in running

8. AIR 1953 SC 468 : 1953 Cri LJ 1933

9. (1976) 1 SCC 438 : 1976 SCC (Cri) 56 : AIR 1976 SC 557

10. (1979) 3 SCC 474 : 1979 SCC (Cri) 652 : AIR 1979 SC 1566

5. Sharad Birdhichand Sarda v. State of Maharashtra, (1984) 4 SCC 116 : 1984 SCC (Cri) 487

away from the place of occurrence after conducting crime has been taken as a fact supporting the accusation but this incriminating fact has not been brought to the notice of the accused-appellant in course of his statement under Section 313 CrPC.

36. In the case of **Bipin Kumar Mondal vs. State of West Bengal** reported in **(2010) 12 SCC 91 : AIR 2010 SC 3638**, the Hon'ble Supreme Court has considered as to whether abscondence of an accused can be taken as a circumstance against him. The Court referred its earlier judgment in the case of **Matru vs. State of U.P.** reported in **(1971) 2 SCC 75** wherein the Hon'ble Supreme Court repelled the submissions made by the State that as after commission of the offence the accused had been absconding, therefore, an inference can be drawn that he was a guilty person. The Hon'ble Supreme Court has observed in paragraph '19' of **Matru (supra)** that ".... mere absconding by itself does not necessarily lead to a firm conclusion of guilty mind. Even an innocent man may feel panicky and try to evade arrest when wrongly suspected of a grave crime such is the instinct of self-preservation. The act of absconding is no

doubt relevant piece of evidence to be considered along with other evidence but its value would always depend on the circumstances of each case. Normally the courts are disinclined to attach much importance to the act of absconding, treating it as a very small item in the evidence for sustaining conviction....”

37. This Court, therefore arrives at a conclusion that the learned trial court has drawn an adverse inference against the appellant from the prosecution evidence that he was fleeing away from the place of occurrence after arrival of Police and was caught on chase but this was not brought to the notice of the appellant at the stage of his statement under Section 313 CrPC.

38. This Court finds that PW-2 who is the informant of this case is closely related being son to the victim. He knew the facts, therefore it was expected that he would have certainly mentioned in the FIR all the relevant facts. In the case of **Ram Kumar Pandey vs. State of M.P.** reported in **(1975) 3 SCC 815 : AIR 1975 SC 1026**, the Hon’ble Supreme Court has held that “...omission of such important facts, affected the probability of the case, is a relevant factor under Section 11 of the Evidence Act to judge the veracity of

the case of the prosecution...”. The fact that there was a *Panchayati* against the appellant in which the deceased had rendered a judgment against him would be a very important fact and the same being in the knowledge of the informant but not disclosed in his written report and even subsequently in course of investigation would only lead to conclude that this omission of an important fact would create a doubt on the veracity of the prosecution case. The written report did not disclose name of any eye-witness to the occurrence.

39. In ultimate analysis of the entire materials on the record, while this Court finds that Chhutharu Singh (since deceased) was killed at the tea shop of this appellant but who killed him remains a mystery. PW-1 and PW-2, who have come forward to depose as eyewitnesses to the occurrence, cannot be put in the category of a wholly reliable witness, they have made materially inconsistent statements with regard to their presence and watching the occurrence, in fact their inconsistencies are to such a huge extent that it would amount to contradicting each other. There is no independent witness to the occurrence and genesis of occurrence has not at all been proved rather it has been found that at a belated stage the two witnesses namely PW-1 and PW-2 have tried to introduce the

story of *Panchayati* as genesis of the occurrence which has not been duly proved by the prosecution. All the incriminating materials were not brought to the notice of the accused at the stage of his statement under Section 313 CrPC.

40. In the case of **Kali Ram vs. The State of Himachal Pradesh** reported in **(1973) 2 SCC 808 : AIR 1973 SC 2773**, the Hon'ble Supreme Court has observed in paragraph '25' as under:-

“...Another golden thread which runs through the web of the administration of justice in criminal cases is that if two views are possible on the evidence adduced in the case, one pointing to the guilt of the accused and the other to his innocence, the view which is favourable to the accused should be adopted...”

41. In result, the judgment of the learned trial court is set aside and the appellant is acquitted of the charges under Section 302 IPC giving him benefit of doubt.

42. The appellant, namely, Vijay Singh shall be released forthwith if not wanted in any other case.

43. This appeal is allowed.

44. Let the trial court records along with copy of the judgment be sent to the learned court below.

45. We acknowledge the assistance rendered by Mr. Pratik Mishra, learned Advocate as learned Amicus Curiae. A consolidated sum of Rs. 15,000/- shall be paid to the learned Amicus Curiae by the Patna High Court Legal Services Authority within one month from the date of receipt of a copy of this judgment.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

Rishi/-

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