

IN THE HIGH COURT OF JUDICATURE AT PATNA
CRIMINAL APPEAL (DB) No.839 of 2019

Arising Out of PS. Case No.-53 Year-2015 Thana- ASARGANJ District- Munger

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Karan Yadav Son of Prakash Yadav Resident of Village-Mirhatti, P.S.-
Sultanganj, District-Bhagalpur. Appellant

Versus

The State of Bihar Respondent

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Appearance :

For the Appellant/s : Mr. Rajive Ranjan Singh, Advocate
For the Respondent/s : Ms. Shashi Bala Verma, APP

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CORAM: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD
and

HONOURABLE MR. JUSTICE SHAILENDRA SINGH

ORAL JUDGMENT

(Per: HONOURABLE MR. JUSTICE RAJEEV RANJAN PRASAD)

Date : 30-04-2024

Heard learned counsel for the appellant and Ms.
Shashi Bala Verma, learned Additional P.P. for the State.

2. The present appeal arises out of the judgment of conviction dated 01.06.2019 and order of sentence dated 13.06.2019 passed by learned Additional District and Sessions Judge-III, Munger in Sessions Trial No. 222 of 2016 (State vs. Karan Yadav and Anr.) whereby and whereunder the learned trial court has convicted this appellant for the offences punishable under Section 302 of the Indian Penal Code (in short 'IPC') and Section 27 (1) of the Arms Act for murder of the deceased Gulshan Yadav @ Sarwan Yadav by firearm and sentenced him to undergo imprisonment for life for the offence under Section 302 IPC and to pay a fine of Rs. 2,000/- only. On

failure to pay the fine, the appellant shall undergo an additional simple imprisonment for a period of two months. He has been further sentenced for five years for the offence under Section 27 (1) of the Arms Act and has been directed to pay a fine of Rs. 2,000/-. In default of payment of fine, he will have to undergo simple imprisonment for a period of two months. All the sentences are to run concurrently except imprisonment in default of payment of fine.

Prosecution Story

3. The prosecution story is contained in the *fardbeyan* of Jitendra Kumar aged about 16 years, son of Jairam Yadav of village Kunnath Mohanpur, P.S. - Gauradih in the District of Bhagalpur. The English translation of the *fardbeyan* of the informant, who is brother of the deceased are as under:-

“My name is Jitendra Kumar, age about 16 years, s/o- Jairam Yadav, R/o – Kunnath Mohanpur, P.S.- Goradih, Dist.- Bhagalpur. Today, on 12/07/15 at 14:00 hrs, in the premises of Jawahar Lal Nehru Medical College and Hospital, I am giving my statement before the officer of O.P. Barari P.S., in the presence of my father Jairam Yadav S/o-Late Gena Yadav that my brother Gulshan Yadav @ Shrawan Yadav, S/o - Jairam Yadav, R/o-Kunnath Mohanpur, P.S. - Goradih, Dist. - Bhagalpur, was forcibly married to Gauri Devi, D/o- Shivanandan

Yadav four months ago in the village Korean where my uncle Guddu Yadav's (S/o-Late Basudev Yadav) in-laws house is situated. Since before Gauri Devi had an illicit relation with Gauri Devi's Jeeja (sister's husband) Karn Yadav, s/o- Prakash Yadav, R/o - Mirhatti, P.S.- Sultanganj, Dist.- Bhagalpur. Yesterday, on 11/7/15, upon getting the information of my Bhabhi's (sister-in-law) illness, I went to my brother Shrawan Kumar's in-laws house at Korean, from Bhagalpur to Sultanganj. My brother Shrawan Kumar's Sadhoo (husband of wife's sister) Karn Yadav works as a Clerk in Sultanpur Bus stand. He along with his two accomplices took my brother and me to Masoomgunj from Sultanganj by an auto. After getting down in Masoomganj near Chamru Baba Asthan (which falls under the jurisdiction of Asarganj P.S.), the two unknown accomplices who were with Karn Yadav, caught hold of my brother into their arms completely and Karn Yadav, after taking out the pistol from his own waist and inserting it into the mouth of my brother fired the shot. In the meantime, I ran away from there and reached the nearby village and explained to them about the occurrence of murder, when along with me about 30 people reached the place of occurrence, then those three persons ran away from that place. After that the I with the help of some persons brought him to Mayaganj Hospital for his treatment. After admission his treatment was

started and during treatment on 12/7/15 at around 4:00 am he died.

I claim that this occurrence has been committed with the connivance of my Bhabhi (sister-in-law) Gauri Devi and my brother's Sadhoo (husband of wife's sister) due to a love affair between the two. This is my statement. After recording my statement which have been read over and explained to me I put my signature on finding the same to be correct in presence of my father Jairam Yadav.

Sd/- (illegible)	Sd/(illegible)	Sd/(illegible)
Ext-1/2	A.S.I	12/7/15
Adj.II	12.7.15	Mob-
8051223218		
28/2/18	camp Mayaganj Hospital	
	Barari, Bhagalpur	

registered Asarganj P.S. case no – 53/15 dated – 14-7-15 u/s 302/34/120(B) I.P.C. & 27 arms act. S.I Somre Munda will investigate this case.

Sd/(illegible)
14.7.15
S.H.O
Asarganj
Munger”

4. The *fardbeyan* of the informant was recorded by one Raj Kumar Bharti, an Assistant Sub-Inspector of Police posted at Barari Police Station (Bhagalpur) on 12.07.2015 at

2:00 pm. The *fardbeyan* was forwarded to Asarganj Police Station within whose jurisdiction the occurrence is said to have taken place. A formal FIR came to be lodged at Asarganj Police Station on 04.07.2015 at 10:30 am giving rise to Asarganj P.S. Case No. 53 of 2015 under Sections 302/34/120B IPC and Section 27 of the Arms Act.

5. After investigation, Police submitted a charge-sheet against the accused Karan Yadav (the appellant) and Gauri Devi (acquitted) under Sections 302/34, 120B IPC and Section 27 of the Arms Act. The learned Magistrate took cognizance of the offences under the said Sections on 28.01.2016. Upon finding that the offence punishable under Sections 302/34 IPC is sessions triable, the learned Magistrate committed the records to the court of Session for trial on 23.07.2016.

6. In the trial court, the charges were explained to the accused persons in Hindi, they pleaded not guilty and claimed to be tried whereafter charges were framed against this appellant under Sections 302, 120B IPC and Section 27 (1) of the Arms Act. So far as the charge against Gauri Devi is concerned, she was charged for the offence under Sections 302, 120B IPC.

7. On behalf of the prosecution, altogether seven witnesses have been examined and some documentary

evidences were marked exhibits. The name of the witnesses and the exhibits marked on behalf of the prosecution are noted hereunder for a ready reference

“PW-1 – Nand Kishore Singh

PW-2- Jay Ram yadav

PW-3- Jitendra Kumar Yadav

PW-4- Shivnandanyadav

PW-5- Dr. Sandeep Lal 9doctor,

PW-6- Somra Munda (I.O.) and

PW-7- Raj Kumar Bharti (A.S.I.)”

“Exhibit-1- Signature of informant Jitendra Kumar Yadav

Exhibit-1/2- Signature of Yay Ram Yadav on *fardbeyan*

Exhibit-2- Writing of *fardbeyan*

Exhibit-2/1 Signature of Raj Kumar Bharti on *fardbeyan*

Exhibit-3- Inquest report

Exhibit-3/1 Signature of Raj Kumar Bharti on Inquest report

Exhibit-3/2- Signature of witness Jay Ram Yadav on Inquest report

Exhibit-4- Postmortem report

Exhibit-4/1- Signature of Dr. Sandeep Lal on Postmortem report.”

8. Upon closure of the prosecution evidence, the statement of the appellant was recorded under Section 313 of the Code of Criminal Procedure (in short ‘CrPC). He pleaded innocence and made a statement that he was at Sultanganj Bus Stand from 11.07.2015 (5:30 pm) to 12.07.2015 (5:30 am). According to him, he was not present at the place of occurrence

and he had been falsely implicated in this case. He made a further statement that he had been working as a Clerk at Sultanganj Bus Stand. So far as the co-accused Gauri Devi is concerned, she also submitted under Section 313 CrPC that she was innocent and had been falsely implicated in this case. It was suggested on behalf of the accused Gauri Devi that she had been implicated in this case with a view to grab her share in the property of the deceased Gulshan Yadav.

9. The defence did not examine any witness. They did not produce any documentary evidence in order to prove their innocence.

Findings of the Trial Court

10. The learned trial court analysed the evidences of the prosecution witnesses, went through the postmortem report which was proved by Doctor (PW-5) and other exhibits. Upon consideration of the entire materials, the trial court concluded that the prosecution witnesses have withstood the test of cross-examination and the defence failed to contradict them on any vital point. The learned trial court held that the informant (PW-3) is an eyewitness of the murder of his brother and there is nothing on the record to disbelieve his evidence, moreover, his deposition is also corroborated by the evidence of PW-2, PW-5,

PW-6, and PW-7 of this case.

11. The trial court held that the evidence of the Doctor fully corroborates the prosecution story and the I.O. (PW-6) has identified the place of occurrence which is “*Chamru Baba Asthan*”. The trial court rejected the plea of the defence that all the prosecution witnesses are interested witnesses and no independent witness has been examined on behalf of the prosecution hence the evidence of these witnesses are not reliable. Reliance in this regard has been placed on the judgment of the Hon’ble Supreme Court in the case of **Ganpathi and Anr. vs. State of Tamil Nadu** reported in (2018) 5 SCC 549 and the **State of Rajasthan vs. Kalki and Anr.** reported in (1981) 2 SCC 752 in which it is stated that “a related witness” is not equivalent to an “interested witness”. The trial court also referred the judgment of the Hon’ble Supreme Court in case of **Motiram Padu Joshi vs. State of Maharashtra** reported in (2018) 9 SCC 429; **Shyam Babu vs. State of U.P.**, reported in AIR 2012 SC 3311 and **Dahari and Ors. vs. State of U.P.**, reported in AIR 2013 SC 308 on the point that the testimony of a witness in a criminal trial cannot be discarded merely because the witness is a relative or family member of the victim of the offence. It has been held in these cases that in such a case court

has to adopt a careful approach in analyzing the evidence of such witness and if the testimony of the related witness is otherwise found credible, the accused can be convicted on the basis of testimony of such related witnesses.

12. Learned trial court rejected the contention of the defence that this appellant was not present at the place of occurrence stating that this plea is not maintainable because in this case no evidence has been adduced by the defence that the accused Karan Yadav was not present there at the time of occurrence whereas there are overwhelming evidence that he was present at the place of occurrence and also committed the murder of the deceased Gulshan Yadav @ Shravan Yadav by firearm.

13. As regards the charge of criminal conspiracy between the appellant and accused Gauri Yadav, the learned trial court held that there is no evidence of criminal conspiracy between the accused, hence the prosecution was not able to prove the offence under Sections 302/120B IPC against the accused Gauri Yadav.

Submission on behalf of the appellant

14. Mr. Rajeev Ranjan Singh, learned counsel for the appellant, has taken this court through the entire evidence on the

record. Learned counsel submits that in this case the prosecution witnesses are highly inconsistent and are not reliable as regards their evidence to the place of occurrence and manner of occurrence. Learned counsel submits that from the conduct of the prosecution witnesses, particularly, the informant it would appear that the occurrence was not immediately reported to Police and the *fardbeyan* of PW-3 was recorded after about 21 hours of the occurrence.

15. Learned counsel submits that PW-3, who is brother of the deceased, has claimed that the motive behind the occurrence is the illicit relationship between this appellant and the wife of the deceased but in course of investigation, the I.O. did not gather any material as regards illicit relationship between the appellant and the wife of the deceased. In this regard, the evidence of I.O. (PW-6) has been referred to.

16. Learned counsel submits that in the *fardbeyan*, PW-3 states that he along with his brother (since deceased) had been going to village Korean, where there is *Sasural* of the deceased brother of the informant. It is stated that they were going after knowing that the wife of the deceased was ill. PW-3 along with his deceased brother came from Bhagalpur to Sultanganj and at Sultanganj, the co-brother (*Sadhoo*) of his

deceased brother was working as Clerk in the bus stand. He further stated that co-brother (*Sadhoo*) of his deceased brother (the appellant) took him along with two others in a tempo to Masumganj and at Masumganj they got down and reached near *Chamru Baba Asthan* which falls under the jurisdiction of Asarganj Police Station. At this moment, two unknown persons, who were with the appellant, caught hold of his deceased brother by his waist and this appellant took out pistol from his waist and inserted the same in the mouth of the deceased brother of the informant and fired. The appellant claims that he fled away and went to a neighbouring village where he informed the people and with them, who were about 30 in numbers, he returned but by that time all the three had fled away. The informant claims that he had taken away his brother with the help of some persons to Mayaganj Hospital for treatment where his brother died on 12.07.2015 at 4:00 am. Contrary to his statement in the *fardbeyan*, PW-3 has stated in his deposition in course of trial in paragraph '21' that in his *fardbeyan* he had stated that on way to Korean, Karan Yadav, the appellant, got two persons boarded on the tempo, thus, this witness has contradicted his own statement in the *fardbeyan*.

17. Learned counsel further submits that in paragraph

‘22’ of his evidence, PW-3 has stated that his brother has suffered firearm injury in his mouth and he was conscious. This evidence of PW-3 is not fit to be believed on the face of postmortem report, which has been proved by the Doctor (PW-5) who had found that huge quantity of blood would be oozing out of such kind of injury. The evidence of PW-5 would further rule out the whole prosecution story as injury found on the body of the deceased would not correspond to the manner of occurrence as claimed by PW-3.

18. Learned counsel further submits that in paragraph ‘22’ of his evidence, PW-3 has stated that there is a Police Station in Asarganj where his statement was taken and his father and he had put their signature. It is stated that in the evidence of PW-3, it has come that the Police Station is just behind the Hospital at Asarganj but, no information with regard to the occurrence was given to the Police Station. PW-3 contradicted his own statement made in paragraph ‘22’ of his deposition. His signed statement made before Asarganj Police has not been brought in course of trial and no FIR was lodged on that basis.

19. Learned counsel further submits that the evidence of I.O. (PW-6) would show that the place of occurrence in this case is not the place near the *Chamrubaba Asthan*. In paragraph

‘2’ of his deposition PW-6 has stated that the place of occurrence in this case is a pedestrian road which is going west to the concrete road (North-South) coming from village Sajua near Ladaua More. PW-6 does not talk about *Chamru Baba Asthan* in his evidence. According to him, *Chamru Baba Asthan* is situated at a distance of 500 meters from the place of occurrence. This place of occurrence is a lonely place whereas according to PW-3, the occurrence had taken place on the road near *Chamru Baba Asthan* where the tempo was stopped and the two unknown persons caught hold of his brother and this appellant put his pistol in the mouth of the deceased and fired. It is submitted that the evidence of I.O., as regards place of occurrence, completely contradicts the evidence of PW-3.

20. Learned counsel further submits that the postmortem report in this case has been proved by Doctor Sandip Lal (PW-5) who found that there was one wound of entry with inverted and burnt margin situated over right mastoid bone just behind right pinna of right ear, size of wound was $\frac{1}{4}$ ” x $\frac{1}{4}$ ”. It was found stitched. It is submitted that the prosecution has failed to prove the manner of occurrence as stated by PW-3 and has further failed to prove by any cogent evidence as to whether the deceased was earlier treated or not. No

documentary evidence of treatment of the deceased either at Sultanganj or Asarganj Hospital has been brought on record.

21. Ms. Shashi Bala Verma, learned Additional P.P. appearing for the State, has after going through the evidence available on the record fairly taken a stand that in this case the evidence of I.O. (PW-6) would not corroborate the evidence of PW-3, who claims to be an eye-witness and the manner of occurrence, as alleged by PW-3, would not get corroborated from the postmortem report and the evidence of the Doctor (PW-5).

Consideration

22. We have heard learned counsel for the appellant and learned APP for the State. We have also carefully perused the records of the learned trial court. From the *fardebyan* (Exhibit '1'), it would appear that the informant (PW-3) has stated initially that on the preceding day i.e. 11.07.2015 he had gone to the *sasural* of his brother Shravan Kumar (deceased) in village-Korean from Bhagalpur to Sultanganj. He does not say that he along with his deceased brother had left for village Korean. This witness has stated that he reached Sultanganj from Bhagalpur where the co-brother (*sadhu*) of his brother was working in bus stand as Clerk. At this stage, PW-3 states that the

sadhu of his deceased brother took him and his brother (deceased) along with his two accomplice to Masumganj by tempo. In course of trial, this witness has improved upon his version by saying that on 11.07.2015 he was going with his deceased brother Gulshan Yadav to his *sasural* Korean and in course of that he reached Sultanganj Tempo Stand where he met Karan Yadav (the appellant). PW-3 then changed his statement to the effect that after meeting Karan Yadav (the appellant), he, his brother Gulshan, the appellant and driver proceeded for village Korean, on way, the appellant got two unknown persons boarded on the tempo and tempo proceeded towards a lonely place leaving the road leading to Korean village. This Court finds that there is a material inconsistency in the statement of PW-3 as regards the boarding of two unknown persons on the tempo. It would further appear from the evidence of PW-3 that according to him, the two unknown persons caught hold of his deceased brother near Chamrubaba Asthan on the road itself and the appellant inserted his pistol in his mouth and fired. Therefore, according to PW-3, the place of occurrence would be the road near 'Chamrubaba Asthan' but in course of his cross-examination, this witness has stated that they reached Sultanganj at 05:00 P.M. whereafter they left with Karan Yadav

(the appellant) immediately by a tempo. He has not stated that the appellant got two persons boarded on the tempo. This Court further finds in his cross-examination that this witness in his statement before the I.O. (PW-6), had stated that on way Karan Yadav had got boarded two persons on the tempo. Thus, it is evident that what PW-3 had stated in his *fardebyan* regarding the boarding of two persons in the tempo and the place where they boarded was not stated before the I.O. (PW-6) and what was stated before the I.O. has not been stated in his cross-examination (paragraph '17').

23. Regarding the place of occurrence, the statement of PW-3 materially differed with his statement in paragraph '21' of his cross-examination where he has stated that the tempo had left the road leading to village Korean and was taking them to a lonely place. It is, thus, evident that the tempo had already moved to a lonely place leaving the road and in such circumstance, the statement of PW-3 in his *fardebyan* and in the examination-in-chief are not consistent with his statement in the cross-examination. As regards the place of occurrence, the I.O. (PW-6) has stated in his examination-in-chief (Paragraph '2') that the place of occurrence is the road going from Ladaua Mor to village Sajaua in North-South direction and on the western

flank (pedestrian way) some blood drops were found on the grass. The place of occurrence is situated at a distance of 150 meter north to 'Bisha Baba Temple', at a distance of 300 meter. There is a government boring at a distance of 500 meters south is 'Chamrubaba Asthan'. It is, therefore, evident that the place of occurrence as stated by the informant (PW-3) is highly doubtful. According to him, they had got down at Masumganj and from there they reached near Chamrubaba Asthan where the occurrence took place. This Court, therefore finds that the place of occurrence as stated by PW-3 is not proved by the prosecution beyond all reasonable doubts.

24. Further, this Court finds that according to PW-3, he had fled away from the place of occurrence and went to a neighbouring village and raised *hulla* from where he returned with about 30 persons. In course of investigation, PW-3 has not stated about the name of the village where he had gone and he has also not named anyone from amongst those 30 persons who had come with him at the place of occurrence. In course of investigation, the I.O. (PW-6) has stated the nearest village from the place of occurrence in Korean village. He has stated in his cross-examination that he had investigated the villagers from the neighbouring village to the place of occurrence but nobody had

seen the occurrence from his eyes. PW-6 had not prepared map of the place of occurrence and according to him the place of occurrence is a lonely place. He had recorded the statement of the villagers of the Korean Village. I.O. had not lifted the blood soaked soil and had not seized the same from the place of occurrence, he had not investigated about the tempo and had not collected any information about the driver of the tempo. I.O. had also not tried to find out about those persons who were traveling with the deceased and the informant from Sultanganj. PW-6 has further stated that he had not investigated from any other person with regard to claim of the informant that this appellant had been accompanying informant and his deceased brother. From the evidence of the I.O., it is found that there is no witness in this case who has seen this appellant accompanying the informant and his deceased brother from Sultanganj Bus Stand. Considering that the bus stand is a public place from where the appellant along with the informant and his deceased brother had allegedly left at 05:00 P.M. by a tempo, the absence of any independent witness on this point would add to the doubt over the prosecution case.

25. As regards the manner of occurrence, the informant has stated that this appellant had taken out a pistol

from his waist and inserted the same into the mouth of the deceased brother of the informant. Thereafter, the appellant fired. In this regard, the evidence of doctor (PW-5) would be important to take note of. He has stated in paragraphs '1' and '2' of his examination-in-chief:-

“(i) There was one wound of entry with inverted and burnt margin situated over right mastoid bone just behind right pinna of right ear, size of wound was 1/4”x1/4”. It was found stitched.

After removing stitches it was found that projectile entering inside and came out through and exit wound with everted margin of size 1/2” x1/2” situated over left side upper jaw. Left side upper lip found lacerated, two molar teeth found missing, there was fracture of left maxillary bone, there was presence of cranial cavity.

Opinion- Above noted injuries are ante-mortem and caused by firearm weapon dangerous and grievous in nature.

Cause of death- Haemorrhage and shock

Time elapsed since death- 6-24 hours.”

26. In his cross-examination, PW-5 has stated that the wound of entry is just behind the right ear and exit is through the upper jaw, left side and according to him the injury was caused probably by one gun shot. After receiving such injury, injured person may be turned on unconscious but it would not be correct that after receiving such injury, injured person cannot

utter a single word. The doctor opined that huge quantity of blood may be oozed out from such kind of injury. He had found rigor mortis present all over the body and the injury found on the body of the deceased was in the direction of upward to downward as per size of entry and exit wound. The doctor further opined that “this kind of injury can be even caused when deceased is lying in ground position”.

27. From the evidence of PW-3, it would appear that when he returned with about 30 persons to the place of occurrence, with the help of some persons, he took his brother Gulshan Yadav to Asharganj Hospital where he was administered saline and was referred to Mayaganj Hospital where he died in course of treatment on 12.07.2015 at 04:00 A.M. In his cross-examination, PW-3 has stated that he does not know the owner of TATA Magic vehicle by which he had brought his brother to hospital. He has stated that his brother was operated upon in Mayaganj Hospital but he had not signed any document in the hospital. He did not remember that for operation any consent form got signed from him.

28. The defence has suggested that PW-3 was not present at the place of occurrence. His father was also not present there and it was the family members of the wife of the

deceased who had on getting information about the occurrence brought the deceased directly to Bhagalpur Hospital. PW-3 denied the same but his statement in cross-examination saying that he had brought his brother to Hospital by TATA Magic where his brother was operated but he had not put any signature on any document would lead this Court to believe that in Hospital, some other persons were present and had given consent for operation.

29. This Court further finds that according to PW-3, about 60-70 persons assembled at the place of occurrence but he did not know as to from which village they belonged to. About 4-5 persons had brought his brother to Asharganj Hospital which is situated a distance of 10-12 kilometer from the place of occurrence. In course of his cross-examination, this witness has stated that there is a Police Station in Asharganj. In paragraph '22' of his cross-examination, he has stated that his statement was recorded in Asharganj Police Station and signature of his father was obtained but the statement of his deceased brother had not been recorded by Darogaji and because of the engagement in the treatment of his brother in Mayaganj Hospital, the statement of his deceased brother had not been recorded. This witness was suggested by the defence that he and

his father had made different statements in Asharganj Police Station and his assertion that his brother was in a position to speak but his statement could not be recorded because of engagement in the treatment is not correct. PW-3 denied the same.

30. On perusal of the evidence of PW-3 it appears to this Court that he is not a reliable witness for the reason that he is not proving the place of occurrence nor the manner of occurrence rather he has made contradictory statements in paragraphs '19' and '21' of his cross-examination. In paragraph '19' while giving the physical condition of his brother at the time when he had started from Asharganj to Bhagalpur, this witness has stated that before going to Asharganj he was in conscious condition, therefore, the deceased brother of PW-3 was conscious only before reaching Asharganj. In paragraph '21' PW-3 has stated that his brother was in conscious condition between the time of occurrence and his death and he had stated about the occurrence to his father and other persons. The first version of prosecution case disclosed before Asarganj Police has been suppressed by the prosecution. PW-3 is, thus, not reliable to believe that the deceased brother of PW-3 was in conscious condition after the occurrence and before his death.

31. PW-3 has admitted in paragraph '20' of his cross-examination that in Mayaganj Hospital, the *maiye* people of his Bhabhi were present but he did not know their name. This Court is of the view that PW-3 is only trying to withhold some relevant information about the presence of the family members of his Bhabhi. The defence suggestion that in Mayaganj Hospital, the '*maiye*' people of Bhabhi of PW-3 were present must be accepted.

32. In this case, PW-1 and PW-4 both have been declared hostile by the prosecution. PW-4 is the father-in-law of the deceased and this appellant. He has stated about the place of occurrence being at a distance of one kilometer from his village. According to him, there was a *hulla* about the occurrence in the village from which he came to know but he could not know as to who had committed murder. The prosecution cross-examined him only with reference to his statement made before the I.O. in course of investigation. He has stated that his statement was not recorded by the I.O. This Court finds that when the I.O. (PW-6) was cross-examined, the defence cross-examined him as to who were investigated by him in village Korean. PW-6 has stated that he had taken statement of Shivnandan Yadav (PW-4) but has not recorded the time of recording of his statement. He has

stated that PW-4 was present at the police station.

Here it is important to note that when PW-4 resiled from his previous statement made before Police and prosecution sought to cross-examine him, it was incumbent upon the learned trial court to ensure that the part of the statement made before Police was brought to the notice of the witness by reproducing the same. If PW-4 would have denied the same then the attention of the I.O. should have been drawn to the passage with reference to which contradiction was required to be taken. Refer **V.K. Mishra vs. The State of Uttarakhand** reported in (2015) 9 SCC 588.

33. The father of the deceased had been examined as PW-2 who has stated that the occurrence is of 11.07.2015 and his statement was recorded by police after three days. According to him, his son (PW-3) had given a phone call whereafter he reached at the place of occurrence and he took Shravan @ Gulshan to Asharganj Hospital. The evidence of PW-3 cannot be relied upon, his deposition in the cross-examination that Shravan @ Gulshan was taken to Asharganj Hospital after he reached the place of occurrence is not reliable, according to PW-3, he along with 4-5 persons of nearby village had taken his deceased brother to Asharganj Hospital. According to PW-3, the

deceased was treated for the whole night in Mayaganj Hospital but he died in the morning, but, according to PW-3 he reached from Asharganj to Mayaganj Hospital by TATA Magic at 03:00 A.M. and his brother died at 04:00 A.M. In paragraph '28' of his cross-examination, PW-2 has stated that in Mayaganj Hospital, he was told by his deceased son that his *sadhu* Karan Yadav had shot at him but PW-3 has stated in his cross-examination in paragraph '19' that his brother was conscious before reaching Asharganj Hospital, therefore, it is evident that the deceased was not in conscious condition at Mayaganj Hospital and the presence of PW-2 in Asharganj Hospital is highly doubtful.

34. This Court further finds that PW-2 admits presence of PW-4 at the place of occurrence. According to this witness, PW-3 was not present at the place of occurrence and his statement that the deceased son was taken to Asharganj Hospital after he reached at the place of occurrence cannot be relied upon. His further evidence that his deceased son had stated him about the manner of occurrence is also not a reliable piece of evidence.

35. This Court further finds that the prosecution has failed to prove the motive behind the occurrence. The bald allegation of illicit relationship between the wife of the deceased

and this appellant has not been investigated upon and no material in this regard has been collected by the I.O. (PW-6). The learned trial court has held that the charge of criminal conspiracy against the wife of the deceased could not be proved, hence, she has been acquitted.

36. In this case, there is an obvious delay in lodging of the first information report. The occurrence took place in the evening at about 06-06:30 P.M. on 11.07.2015. The deceased was brought to Asharganj Hospital which is at a distance of 10-12 kilometer from the place of occurrence. It is within Asharganj Police Station and PW-3 has stated that the police station is situated beside the hospital at Asharganj but no information was given to Asharganj Police Station on 11.07.2015. Although, it is stated that the deceased brother was first treated at Asharganj Hospital but the prosecution has neither proved any medical record of treatment of the deceased at Asharganj Hospital nor has brought any doctor of Asharganj Hospital for proving this fact. The conduct of the prosecution that even though the deceased was first brought to Asharganj Hospital which is opposite to the police station but no information of the occurrence was given to the police station seems a highly suspicious conduct of the prosecution. The

inquest report of the deceased was prepared by Ram Kumar Bhaati (PW-7) at Mayaganj Hospital. PW-7 has proved the *fardebyan* of PW-3 recorded by him on 12.07.2015 at 14:00 hours. It is evident from the evidence of PW-7 that according to PW-3, he had reached with his deceased brother at Mayaganj Hospital at 03:00 AM on 12.07.2015 but his brother died at 04:00 AM. Thus, immediately after death of his brother, PW-3 did not get his statement recorded. The postmortem report (Exhibit '4') would show that the dead body was received in the Hospital on 12.07.2015 at 03:30 P.M. but till that time, no *Sanha* diary entry number or case number could be mentioned in the postmortem report. Even the inquest report (Exhibit '3') does not mention *Sanha* diary entry number or the case number even though it has been prepared on 12.07.2015 at 02:15 P.M. From these two exhibits, it appears to this Court that the *fardebyan* of PW-3 is ante-timed. The prosecution story had not come out till the postmortem was conducted. This finding of the Court is further strengthened from the fact that even though the *fardebyan* was recorded on 12.07.2015 but it reached to Asharganj Police Station only on 14.07.2015 i.e. after two days. The delay in giving the information to the police station and then even after death at Mayaganj Hospital, the delay in

recording of the *fardebyan* are such that the case of the prosecution becomes doubtful. Considering that the prosecution witnesses such as PW-2 and PW-3 are highly inconsistent on material particulars and they are contradicting their own statements in course of evidence coupled with the fact that there is a delay in recording of the *fardebyan* of PW-3 and the first version of PW-3 having been suppressed, this Court is of the considered opinion that in the kind of materials on the record, it would not be safe to convict the appellant for the charges of murder by fire-arm. This Court, therefore, sets aside the impugned judgment of the learned trial court. The appellant is acquitted of the charges giving him benefit of doubt. The appellant is in custody, he shall be released forthwith if not wanted in any other case.

(Rajeev Ranjan Prasad, J)

(Shailendra Singh, J)

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CAV DATE	
Uploading Date	06.05.2024
Transmission Date	06.05.2024