

(2019) 07 PAT CK 0291

In the Patna High Court

Case No : Criminal Appeal (DB) No. 926, 940, 973, 1007, 1008, 1048 Of 2013,
795 Of 2014

Dayanand Yadav And Ors

APPELLANT

Vs

State Of Bihar And Ors

RESPONDENT

Date of Decision : 29-07-2019

Acts Referred:

Indian Penal Code, 1860 — Section 34, 147, 148, 149, 302

Arms Act, 1959 — Section 27, 27(1)

Code Of Criminal Procedure, 1973 — Section 161, 313

Citation : (2019) 07 PAT CK 0291

Hon'ble Judges : Rakesh Kumar, J;Anjani Kumar Sharan, J

Bench : Division Bench

Advocate : Kanhaiya Pd. Singh, Pratik Mishra, Birendra Kumar Singh, Dinesh Prasad Verma, Shekhar Kumar Singh, Durgesh Kumar, Ajay Mishra

Final Decision : Allowed

Judgement

1. Total 12 (twelve) appellants in aforesaid seven appeals were tried together and were convicted and sentenced by the common judgment of the Trial Court and as such, all the aforesaid appeals were taken-up together under the heading "For Hearing" and are being disposed of by this common judgment.

2. By judgment dated 21-09-2013, all the appellants in aforesaid appeals were convicted for offence under Sections 302, 148 of the Indian Penal Code, 1860 (hereinafter referred to as 'I.P.C.') and Section 27(1) of the Arms Act, 1959 (hereinafter referred to as 'Arms Act'). By order dated 25-09-2013, all the appellants under Section 302 of the I.P.C. were sentenced to undergo rigorous imprisonment for life and to pay a fine of Rs. 10,000/- (ten thousand) each. In default of payment of fine, they were directed to further undergo rigorous imprisonment for one year. By the same order i.e. order dated 25-09-2013, under Section 148 of the I.P.C., all the appellants were sentenced to undergo rigorous imprisonment for one year and under Section 27(1) of the Arms Act, all

were sentenced to undergo rigorous imprisonment for three years. All the sentences were directed to run concurrently. The judgment of conviction and sentence was passed in Sessions Trial No. 179 of 2007/C.I.S. No. 0001438 of 2013 (arising out of Kumarkhand P.S. Case No. 01 of 1998) by Dr. Ram Lakhan Yadav, learned Additional Sessions Judge - Ist, Madhepura (hereinafter referred to as the 'Trial Judge').

3. The case has been initiated on the basis of fardbeyan of one Bijendra Yadav (P.W.15), brother of the deceased. The fardbeyan was recorded on 02-01-1998 at 4:30 PM at the place of occurrence by Sub-Inspector of Police-cum- Officer incharge Sri Rabindra Prasad Singh (P.W.16). The fardbeyan of informant was recorded near the dead body of the deceased beside Guriya Kathpula. It was disclosed that on the same date i.e. on 02-01-1998 at about 2:30 PM, the informant alongwith his brother Shailendra Yadav (deceased), other villagers namely Jai Chandra Yadav (P.W.11), Raj Kishore Yadav (P.W.9), Jai Narayan Yadav (P.W.10) and Shiv Nandan Yadav (not examined), due to some urgent work through the road, which was coming from village Guriya, were returning back on foot to Kumarkhand. At about 3:30 PM, about 100 yards eastern side of Kathpula near village Guriya, while they reached, suddenly number of persons were seen, who were rushing towards informant side from the eastern side and with common intention and object, they (accused) proceeded towards informant and other witnesses and they were speaking that none should be spared and all should be killed. The accused persons were 40-50 in numbers. Amongst them, he could identify following accused persons, who are shown in the table given below:

Sl.

Name of appellant/ accused

Appellant no. in Cr.Appeal (DB) No./Status

Carrying weapon in hand

1.

Ramanand Yadav

A2 in 1048/13

3-not pistol

2.

Shiv Narayan Yadav

Died during trial

3-not pistol

3.

Dayanand Yadav

A1 in 1048/13

3-not pistol

4.

Mahanand Yadav

A1 in 973/13

3-not pistol

5.

Arun Sah

Died

3-not pistol

6.

Sadanand Yadav

A in 795/14

3-not pistol

7.

Chhedi Yadav

A1 in 1007/13

3-not pistol

8.

Pradeep Yadav

A2 in 1007/13

3-not pistol

9.

Jhabru Yadav

A3 in 973/13

Desi Rifle

10.

Birendra Yadav

A1 in 940/13

Desi rifle

11.

Tuntun Yadav

A2 in 940/13

3-not pistol

12.

Gholat Yadav

A in 1008/13

3-not pistol

13.

Raj Kumar

Whose case separated

Desi rifle

14.

Sachchidanand Yadav

A in 926/13

3-not pistol

15.

Arun Yadav

A2 in 973/13

Desi rifle

16.

Yoganand Yadav

Died before charge- sheet

3-not pistol

and others carrying lathi, farsa, who were in between 30 to 35 in number, who could not be identified, reached there and surrounded them. Amongst the accused persons Ramanand Yadav (A2 in Cr.App.DB No. 1048/13) ordered (1) Shiv Narayan Yadav (died), (2) Sadanand Yadav (sole app. in Cr.App.DB No. 795/14), (3) Dayanand Yadav (A1 in Cr.App.DB No. 1048/13), (4) Arun Yadav (A2 in Cr.App.DB No. 973/13) and other accused persons that all the persons, who were intercepted, may not be killed, only Shailendra Yadav (deceased) was

required to be killed. Thereafter, Arun Yadav (A2 in Cr.App.DB No. 973/13), Shiv Narayan (died) and Tuntun Yadav (A2 in Cr.App.DB No. 940/13) caught hold of his brother Shailendra Yadav (deceased) and with the help of others, dragging him to some extent, brought him into the field of peas crop and they threatened informant & others and directed not to raise alarm and keep standing there. They were further threatened that if anyone tried to flee away, they would be killed, whereupon informant and others remained standing there and saw that accused Gholat Yadav (sole app.in Cr.App.DB No. 1008/13), Tuntun @ Narendra Yadav (A2 in Cr.App.DB No. 940/13), Birendra Yadav (A1 in Cr.App.DB No. 940/13), Chhedi Yadav (A1 in Cr.App.DB No. 1007/13), Chota Jhabru Yadav (A3 in Cr.App.DB No. 973/13), Yoganand Yadav (died before chargesheet), Raj Kumar Yadav (whose case was separated) and others thrashed his brother Shailendra (deceased) into the field and caught hold of his both hands and legs. Thereafter, Ramanand Yadav (A2 in Cr.App.DB No. 1048/13), Arun Yadav (A2 in Cr.App.DB No. 973/13), Shiv Narayan Yadav (died during trial), Dayanand Yadav (A1 in Cr.App.DB No. 1048/13), Sadanand Yadav (sole app. in Cr.App.DB No. 795/14) with three-not pistol made indiscriminate firing on the head of his brother (deceased), due to which, his brother died at the place of occurrence itself. After killing his brother, all the accused persons raised t;dkjk (jaykara) and after firing, they fled away. Since the informant was frightened, he did not try to chase the accused persons and claimed that entire occurrence was seen by all the witnesses, who were present there and would explain, on being asked. The reason for the occurrence was explained by informant that in the village Guriya over the Mahi river, construction of bridge had commenced, which was being carried out on departmental level through Assistant Engineer Sri Chaudhary and Engineer Prashant Singh of Madhepura. His brother was engaged temporarily to look after the said work. However, accused persons Dayanand (A1 in Cr.App.DB No. 1048/13) and others themselves wanted to do the work and by force, they started the said work. Subsequently, both the engineers, after noticing that Ramanand Yadav (A2 in Cr.App.DB No. 1048/13) and his associates were powerful, started to hand over the work of construction of said bridge to them and in this context, a conspiracy was hatched by the accused persons, including the engineers, and it was decided not to have any discussion with Shailendra Yadav (deceased) regarding construction work and in any event, Shailendra Yadav (deceased) was to be ousted. It was alleged by the informant that in this context, aforesaid accused persons had got his brother gunned down. The informant further claimed that the occurrence was committed as a result of deep rooted conspiracy and the accused persons with common intention and object had caught hold of his brother and by indiscriminate firing, he was done to death. The said fardbeyan was read over to the informant and after finding the same correct, he put his signature on the bottom of the fardbeyan. As a witness to the fardbeyan, Ram Narayan Yadav (P.W.12) also put his signature.

4. On the basis of said fardbeyan, which was recorded at 4:30 PM on 02-01-1998, on the same date at 9:00 PM, a formal F.I.R., vide Kumarkhand P.S.

Case No. 01 of 1998 was registered for offence under Sections 302/34, 120(B) of the I.P.C. and Section 27 of the Arms Act against 18 (eighteen) named accused persons, which includes 12 appellants, and 30-35 unknown accused persons.

5. After registering F.I.R., police investigated the case and 1st chargesheet was submitted on 10-04-1998 against 11 accused persons. On 12-08-1999, 1st supplementary chargesheet was filed against Ramanand Yadav (A2 in Cr.App.DB No. 1048/13). The investigation was still kept pending and finally, on 13-03-2001, 2nd supplementary chargesheet was filed against (1) Arun Yadav (A2 in Cr.App.DB No. 973/13), (2) Mahanand Yadav (A1 in Cr.App.DB No. 973/13), (3) Dayanand Yadav (A1 in Cr.App.DB No. 1048/13) and (4) Shiv Narayan Yadav (died during the trial). Finally, on 24-01-2001, the learned Chief Judicial Magistrate, Madhepura took cognizance of the offence and the case was committed to the court of sessions on 30-05-2007 and it was numbered as Sessions Trial No. 179 of 2007. On 06-07-2007 charge against 13 accused persons, which includes 12 appellants and one Shiv Narayan Yadav, who died during the trial, was framed under Sections 147, 148, 302/149 of the I.P.C. and Section 27 of the Arms Act. The accused persons denied the charges levelled against them and they claimed to be tried.

6. During the trial, to establish its case on behalf of the prosecution, altogether 16 witnesses were examined. Out of 16 witnesses, P.W.9 Raj Kishore Yadav (gotia of the deceased), P.W.10 Jai Narayan Yadav (cousin brother of the deceased), P.W.11 Jai Chandra Yadav (cousin brother of the deceased) and P.W.15 Bijendra Yadav (informant and brother of the deceased) were examined as eye-witness to the occurrence. P.W.6 Kritya Nand Yadav is hearsay witness, however; his evidence has got no relevance. P.W.12 Ram Narayan Yadav and P.W.13 Upendra Prasad Yadav had put signature on inquest report. P.W.12 Ram Narayan Yadav in his evidence has stated that he was cousin brother of the deceased and P.W.13 Upendra Prasad Yadav is the cousin brother-in-law of the deceased & informant. Besides their evidence as eye-witnesses, the evidence of P.W.13 Upendra Prasad Yadav further substantiates that he was the first person, who reached the place of occurrence after hearing hulla regarding the occurrence and at that very time, he had not seen any of the so-called eye-witnesses. P.W.14 Dr. Anand Kumar Bhagat on 03-01-1998 was posted as Medical Officer in the Sadar Hospital, Madhepura and on the same date i.e. 03-01-1998 at 2:45 PM, he conducted post-mortem examination on the dead body of the deceased. P.W.16 Rabindra Prasad Singh was Sub-Inspector of Police and officer incharge of Kumarkhand Police Station on 02-01-1998 and under his instruction, fardbeyan of informant was recorded by one Assistant Sub-Inspector of Police and he is the investigating officer of the case. P.W.1 Bechan Sah, P.W.2 Basudeo Mandal, P.W.3 Sita Ram Sah, P.W.4 Bishundeo Paswan, P.W.5 Sudhir Yadav, P.W.7 Kamleshwari Bhagat and P.W.8 Khushilal Paswan, total seven prosecution witnesses, since did not support the prosecution case, were declared hostile.

7. After completion of the prosecution evidence, on 18-05-2010 and 02-09-2011

respectively, the circumstances and evidences were explained to the accused persons and their statement under Section 313 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr.P.C.') was recorded, in which, some of the accused persons took the plea of innocence, false implication and some of them had taken the plea of alibi. However, the learned Trial Judge, on the basis of material available on record, has passed the impugned judgment of conviction and sentence, which has been assailed in the aforesaid seven appeals.

8. Sri Kanhaiya Prasad Singh, learned senior counsel assisted by Sri Pratik Mishra, learned counsel appearing on behalf of appellants in Cr.Appeal (DB) No. 1048 of 2013 & Cr.Appeal (DB) No. 973 of 2013, at the very outset, has argued that it was out-and-out a case of false implication. He submits that on examination of entire evidence, it appears that occurrence was not seen by either of the witnesses, but subsequently after finding the dead body of deceased in the field, in a well-planned manner, a story was cooked up, as if, the deceased was done to death by 18 (eighteen) F.I.R. named accused persons alongwith other 30-35 unknown accused persons. He has highlighted that the concoction of the case is evident from the fact that though fardbeyan was shown to be recorded immediately after the occurrence on the same date i.e. on 02-01-1998 at 4:30 PM and formal F.I.R. was shown to be drawn on the same date at 9:00 PM, the F.I.R. was sent to the court on 04-01-1998, which is evident from the record and it was seen by learned C.J.M., Madhepura on 04-01-1998. He submits that ofcourse, during the trial, the defence counsel failed to ask such question to the investigating officer regarding belated sending of the formal F.I.R. to the court, but fact remains that record itself reflects that F.I.R. was received on 4th January, 1998, whereas formal F.I.R. was shown to be drawn on the date of occurrence i.e. on 02-01-1998 at 9:00 PM. He submits that there are certain circumstances, which corroborate that fardbeyan was recorded belatedly. He submits that though as per prosecution case, alleged occurrence had taken place at day time i.e. at 3:30 PM, none of the independent witnesses has come forward to support the prosecution case. Falsity of the prosecution case is evident from the fact that out of 16 prosecution witnesses, which includes official and inquest witnesses, at least 7 witnesses have not supported the prosecution case and this was the reason that they were declared hostile.

9. Sri Singh, learned senior counsel for the appellants has further argued that in the case, almost all the witnesses, who had claimed to be eye-witnesses to the occurrence, were close relatives of the deceased and as such, their evidence is required to be examined with caution and on examination of their evidence, it appears that they are speaking lie. The falsity of the so-called witnesses is evident from the fact that all the witnesses had consistently stated that the deceased was firstly caught hold, while he was moving alongwith other five witnesses, he was dragged to some extent and carried in a filed and thereafter, indiscriminate firing was made on his head. However, during trial, the investigating officer has not supported the case that it was a case of dragging, since in the field, no such mark of dragging was noticed nor the investigating

officer had found foot print of number of accused persons in the field. It was argued that had it been a case that deceased was done to death by a mob of about 30-35 accused persons in a field, there was every possibility to notice trampling of crops, however; in the field, neither any trampling of crop was found nor such foot print was noticed at the place of occurrence. Besides this, it has been argued that the investigating officer during investigation has not prepared seizure list nor any material evidence from the place of occurrence. He submits that had it been a case that at the place of occurrence, at least five shot of firing was made on the head of the deceased, there was every possibility to find empty cartridge or live cartridge, but nothing has been found by the investigating officer, even no seizure list was prepared regarding soil soaked with the blood. Similarly, story of dragging of the deceased in the field is belied by the evidence of P.W.14, who conducted post-mortem examination on the dead body of the deceased. In his evidence, it has come that the doctor had not found any dust either on the body of the deceased or even on the cloth of the deceased. It was a case of prosecution that deceased was caught and dragged in the field to some extent and as such, there was every possibility to notice some injury, such as; scratches on the person of the deceased and moreover, on the person of the deceased, there was possibility to notice mud mark or even dust, but neither on the body nor on the cloth of the deceased, any such mark was noticed by the doctor, who conducted post-mortem examination on the dead body of the deceased.

10. By way of referring to evidence of P.W.13 Upendra Prasad Yadav, who was none else but cousin brother-in-law of the informant and deceased, it was argued by learned senior counsel that it is evident that immediately after the occurrence, while he (P.W.13) reached the place of occurrence, he was the first person and he had not noticed presence of either of the witnesses, who had come during the trial and deposed that they had witnessed the occurrence. Sri Singh has specifically referred to paragraph -2 of the evidence of P.W.13 (at page 79- 80 of the paper book) where he had stated that while on hearing hulla, he reached the place of occurrence, he had seen none of the witnesses were present there.

11. It has also been argued by learned senior counsel for the appellants that it was consistent case of the so called eye-witnesses that after thrashing the deceased in the field, five shots were fired on the head of the deceased, however; during post-mortem examination, only four gun shot injury on the head of the deceased were found. Whereas, the informant though in his fardbeyan had stated that five shots of firing were made on the head of the deceased, to the reasons best known to him, during the trial, he changed his version and stated that deceased was given four shot of firing. This creates doubt regarding credibility of P.W.15/informant of the case. It has been highlighted that the prosecution has purposely suppressed the fact regarding non-production of one pistol, which was recovered from possession of the deceased. At the time of evidence of investigating officer, his attention was drawn to the supervision note

of superior officer, in which, it had come that from possession of the deceased, a pistol was recovered, even some of the witnesses had said that at the place of occurrence, while accused persons were fleeing away, had left the pistol, which was seized, but no seizure list was brought on record by the prosecution to this effect nor said pistol was produced.

12. As per learned senior counsel for the appellants, the prosecution has completely failed to establish its genesis. By referring to the fardbeyan as well as evidence of prosecution witnesses, it has been argued that it was specific case of prosecution that deceased was eliminated due to the reason that he was creating hurdle in respect of execution of work relating to construction of bridge over the river in the village Guriya, however during evidence, the investigating officer has categorically stated that during investigation, it had come that construction of the said bridge had not at all commenced. In such circumstances, it has been argued that in absence of commencement of work, there was no reason to place reliance on a story that deceased was creating some hurdle in respect of execution of work of the bridge over the river and as such, the prosecution has failed to establish the genesis of the case. In this context, the evidence of P.W.16 in paragraph 9 of his cross- examination (at page 108-109 of paper book) has been referred.

13. It has further been argued by learned senior counsel that it appears that deceased since was having criminal antecedent and he was a veteran criminal, he might had been killed at late hours and subsequently, after finding the dead body, a false case was instituted. He submits that P.W.11 (Jai Chandra Yadav) in paragraph 2 of his cross-examination (at page 64 of paper book) has stated that deceased was accused in number of cases. Similarly, P.W.15/informant in paragraph 6 of his cross- examination has admitted that he was accused in some of cases, however; he denied the suggestion regarding involvement of deceased in number of cases. In paragraph - 7 of cross- examination of P.W.15/informant, suggestion was given that deceased was a veteran criminal and he was terror for the society and this was the reason that one organization i.e. C.P.I. (M) had issued purcha (pamphlet) addressed to the concerned Superintendent of Police and District Magistrate to save society from the terror of deceased. Ofcourse, said suggestion was denied, but at defence stage from the defence side, Ext.C and C/1 have been brought on record, which reflect that the deceased was a terror. He submits that since the deceased was a terror and he was having animosity with number of persons, he might had been killed by some one else and due to old animosity with the appellants, they (appellant) were made accused in the present case.

14. It has lastly been argued by learned senior counsel that the recording of the fardbeyan at the place of occurrence appears to be doubtful due to the reason that one of the witness i.e. P.W.10 Jai Narain Yadav in clear term in paragraph 11 of his evidence has stated that the police had recorded fardbeyan of the informant and statement of this witness and other witnesses in his house itself,

whereas in the body of the fardbeyan, it was written, as if, fardbeyan was recorded at the place of occurrence. This also creates serious doubt on the prosecution case. In view of aforesaid submission, it has been argued that either it was a case of false accusation or prosecution has not been able to establish its case beyond all reasonable doubt and as such, by way of extending benefit of doubt, the judgment of conviction and sentence is required to be interfered with.

15. Sri Dinesh Prasad Verma, learned counsel appearing in Cr.Appeal (DB) No. 926 of 2013 (Sachchidanand Yadav), Sri Durgesh Kumar, learned counsel for the appellant in Cr.Appeal (DB) No. 1008 of 2013 (Gholat Yadav) and Sri Shekhar Kumar Singh, learned counsel appearing in Cr.Appeal (DB) No. 940 of 2013 (Birendra Yadav & Tuntun Yadav), Cr.Appeal (DB) No. 1007 of 2013 (Chhedi Yadav & Pradeep Yadav) as well as Cr.Appeal (DB) No. 794 of 2014 (Sadanand Yadav), adopting the argument of Sri Kanhaiya Prasad Singh, learned senior counsel, have argued that the prosecution has not been able to establish its case and as such, the judgment of conviction and sentence is required to be set aside.

16. Sri Ajay Mishra, learned Addl. Public Prosecutor has opposed the appeals and has argued that the judgment of conviction and sentence is based on evidence of at least five eye- witnesses. He submits that it is a case of direct evidence, which has been corroborated by the medical evidence, and as such, he submits that the learned Trial Judge has rightly passed the judgment of conviction and sentence, which requires no interference.

17. Besides hearing learned counsel for the parties, we have minutely examined entire evidence on record and after examining the same, prima facie, we are of the view that the prosecution has not been able to establish its case beyond all reasonable doubt. However, before proceeding, it would be necessary to discuss the evidence, which has been brought on record.

18. The case was initiated on the basis of fardbeyan of P.W.15 i.e. Bijendra Yadav, who is own brother of the deceased and in his evidence, he identified his signature on the fardbeyan, which was marked as Ext.2. He also identified the signature of Ram Narayan Yadav (P.W.12) on the fardbeyan, which has been marked as Ext.2/1. In his evidence, he has reiterated the fact disclosed in the fardbeyan, however; though in the fardbeyan, he stated that deceased after being thrashed in the field was given five shot of firing on his head, during the evidence he has reduced number of shot from five to four. It is evident that in the post-mortem examination the doctor had noticed four gun-shot injury on the head of the deceased. The Court is in agreement with the submission of learned counsel for the appellants that subsequently after noticing the fact disclosed in the post-mortem report, the informant has changed his version and he has reduced number of shot of firing from five to four, otherwise this witness has reiterated the same thing, which he had disclosed in the fardbeyan. In paragraph - 6 of his cross-examination, he was given suggestion that the deceased was a veteran criminal and accused in number of cases. Similarly, in paragraph 7 of his cross-examination, he was suggested that the deceased was terror of the area

and this was the reason that an organization of C.P.I.(M) had issued purcha (pamphlet) addressed to District Magistrate and concerned Superintendent of Police to prevent the society from the terror of the deceased. Ofcourse, he denied the suggestion of purcha (pamphlet), but he admitted that the deceased, informant himself and other eye-witnesses of the case were accused in some cases. In paragraph 10 of his cross- examination, he accepted that in the field, where occurrence had taken place, peas crop had already appeared, which was about 1 to 2 inches in height. He further stated that after the deceased was carried to the field of peas, he heard the sound of firing, however; he was not in a position to recollect the number of firing, which he heard, but it was more than one and it was fired in interval of one or two minutes. After killing, the accused persons fled away. However, on examination of the evidence of investigating officer, it has come that the investigating officer had not noticed any mark at the place of occurrence. Non-finding of any mark at the place of occurrence, whereas it was case of the prosecution that fardbeyan was recorded at the place of occurrence, creates serious doubt regarding the version of the P.W.15 that the deceased was done to death after dragging in the field, where crop was there. This raises serious suspicion regarding the claim of P.W.15 as eye-witness to the occurrence. Besides this, the investigating officer had not found any mark at the place of occurrence nor any material exhibits have been produced by the prosecution during the trial. If the story of P.W.15 is believed that deceased was done to death by a mob of accused 30-35 in number, there was every possibility of finding trampling of crop in the field or foot prints and also blood was required to be noticed at the place of occurrence. Besides this, as per prosecution case, at least four shot of firing was made on the head of deceased after thrashing him in the field. It is case of the prosecution that deceased was thrashed, his both hands and legs were caught by accused persons and by close range on his head, firing was made. This is another aspect as to how the informant had identified exact firing by accused persons while the deceased was surrounded by number of accused persons. Even then, in such situation, there was every possibility of finding empty/fired cartridges at the place of occurrence. The investigating officer in his evidence has stated that he had not found even a bullet (fired cartridge) in the field where dead body was found. In paragraph 15 of his cross-examination, the investigating officer has stated that he had not found any such material where dead body was found at the place of occurrence. Similarly, in paragraph 8 of his cross-examination, he had stated that he had not noticed any mark either of foot print or anything at the place of occurrence.

19. The motive, which was assigned in the fardbeyan as well as in the evidence of P.W.15 (informant), has been demolished by the evidence of investigating officer. In paragraph 9 of his cross-examination, he (I.O.) has stated that no work had started in respect of construction of bridge over the river near the village Guriya, whereas in the fardbeyan itself in detail the reason for the occurrence was assigned that there was some dispute relating to execution of work and the informant had alleged, as if, engineers of the department had

conspired with the appellants to eliminate the deceased. Since it is specific case of the investigating officer that no work had commenced, certainly there is difficulty in not accepting the plea of motive, which has been raised by the prosecution. In paragraph 14 of cross-examination of P.W.16/Rabindra Kumar Yadav, investigating officer of the case was asked about the fact disclosed in paragraph 54 of the case diary, which was relating to supervision of S.D.P.O. regarding recovery of weapon from the deceased. Ofcourse, there is no need to take notice of such fact, particularly supervision note, but in the prosecution evidence, it has come that at the place of occurrence, pistol was found and it was alleged that accused persons, while were fleeing away, had left the pistol, however; the prosecution is completely silent regarding such pistol, since neither seizure list nor the weapon was produced during the trial.

20. Almost similar evidence has been given by P.W.9 Raj Kishore Yadav, P.W.10 Jai Narain Yadav and P.W.11 Jai Chandra Yadav.

21. P.W.10/Jai Narain Yadav in paragraph 10 of his cross-examination in clear term has stated that deceased was caught and thereafter, he was dragged and in the field thereafter he was given gun shot injury, however; no sign of dragging was found either on the person of the deceased or such mark was noticed by the investigating officer at the place of occurrence. This has also been corroborated in the evidence of Dr. Anand Kumar Bhagat (P.W.14), who had conducted post-mortem examination. In paragraph 4 of his cross-examination, he stated that no foreign material such as, dust, mud etc. was found either on the person of the deceased or on his cloth. This also creates serious doubt regarding the claim of eye-witnesses that amongst them the deceased was caught by accused persons and he was dragged to some extent in the peas field where he was thrashed and given gun shot injuries. This witness in his evidence has stated that the deceased, after being thrashed, was given five gun shot injuries on his head. This has also been falsified during post-mortem examination. P.W.10, in paragraph 11 of his cross- examination, has stated that Darogaji had come to his house and recorded statement of all witnesses, in which, Bijendra (P.W.15) stood as informant. However, in the fardbeyan, it has been mentioned, as if, it was recorded at the place of occurrence itself. This also creates some doubt on the prosecution case and a story, claiming to witness the occurrence by 5 or 6 witnesses, appears to be not believable.

22. P.W.11 Jai Chandra Yadav has also deposed like P.W.9, 10 and 15 claiming to be eye-witnesses, however; in paragraph 2 of his cross-examination, he accepts that he, deceased, informant (P.W.15) and P.W.9 (Raj Kishore Yadav) were accused in 4-5 criminal cases. In paragraph 3, he denied the suggestion that the deceased was a veteran criminal and local commander of C.P.I.(M) in the year 1997 had issued purcha (pamphlet) regarding the terror of the deceased. Ofcourse, he denied the suggestion, but belatedly he stated that purcha (pamphlet) can be issued by anyone. Meaning thereby that indirectly he has accepted regarding circulation of such pamphlet by a particular organization. In

paragraph 8, he further accepted that Darogaji had recorded his statement two days after the occurrence. In paragraph 11, he further stated that he heard sound of five firing and he stated that all such firing had hit the deceased. He in his evidence has stated that deceased was thrashed and he was caught by altogether seven accused persons and subsequently five shots of firing were made. He further reiterated that deceased was taken by the accused persons by way of dragging. It is evident from the evidence of P.W.9, 10 & 11 that they were close relatives of the deceased and informant. Though, they had claimed to be eye-witnesses to the occurrence, but considering the fact that all have claimed that deceased was caught and dragged in the field, thereafter, he was thrashed and given number of shot of firing, those materials have not been corroborated either by the investigating officer or during the post-mortem examination and as such, there is difficulty in accepting such prosecution case. Besides this, the claim of witnessing entire occurrence, which has been stated by those witnesses, appears difficult to be believed, in view of the fact that it was case of witnesses that deceased was dragged and surrounded by number of accused persons, in which, about 30- 35 accused persons were in number, in such situation, giving detail as to who gave which firing also creates some suspicion.

23. P.W.13 Upendra Prasad Yadav is witness to the inquest report and he has put signature on inquest report, which was identified and it was marked as Ext.1/1. In paragraph 2 of his cross-examination, he stated that he was cousin brother-in-law of informant Bijendra Yadav. He deposed that at the time of occurrence, he was at Yogapatti chowk and immediately after hearing hulla, he rushed to the place of occurrence. He stated that near the dead body, there were none. He himself had gone there. The dead body was lying adjoining to the road of Kumarkhand village. On the northern side beneath the bridge in the field the dead body was lying. The dead body was lying in the middle of the field. He described regarding the injuries. On examination of his evidence, presence and noticing entire occurrence by so called eye-witnesses i.e. P.W.9, 10, 11 and 15 comes under the cloud of doubt, since this witness in categorical term has stated that he was the first person, who arrived at the place of occurrence and at that time, near the dead body, there was none.

24. The doctor, who conducted post-mortem examination, is P.W.14 Dr. Anand Kumar Bhagat. On 03-01-1998, he was medical officer in Sadar Hospital, Madhepura and on the same date at 2:45 PM, he conducted post-mortem on the dead body of the deceased. At this very juncture, it is necessary to notice that in the evidence of investigating officer, it has come that immediately after recording fardbeyan, he prepared inquest report and on the same date i.e. on 02-01-1998, he sent dead body for post-mortem examination, however; the post-mortem, as per P.W.14, was held on the next date i.e. on 03-01-1998 at 2:45 PM. There is no explanation as to why at such belated stage, post-mortem was held. This witness on examination of the dead body had noticed following facts:

"External appearance:

- (i) Sharp cut injury of 2"x1"x scalp deep over interior part of scalp.
- (ii) Sharp cut injury of 1½"x ½" x skin deep over right side of forehead.
- (iii) Lacerated wound of 3" x ½"x scalp deep over left side scalp with charring.
- (iv) Lacerated wound of ½ diameter with charring and margin inverted over left temporal region.
- (v) Lacerated wound of ½ diameter with charring and margin inverted over left side of neck.
- (vi) Lacerated wound of 1½" diameter below right external ear with margin everted.
- (vii) Two abrasion of nearly 3"x ½" size over right side of chest at 3" distance horizontally.

Internal appearance:

On opening scalp- brain pale, on face- one bullet found in muscle of right cheek (preserved).

On opening chest-Lungs pale, heart-pale & empty.

On opening abdomen-stomach pale with semi solid diet, liver-spleen, intestine, kidney were pale, urinary bladder was pale and empty.

Opinion - The cause of death was due to shock and haemorrhage due to above injuries which were mainly due to fire-arm and the sharp cut instruments or weapon.

Time elapsed since death - within 24 hours."

25. He further identified the post-mortem report, which was in his pen and signature and it was marked as Ext.6. On examination of the evidence of P.W.14 and post-mortem report, it is evident that deceased besides having gun shot injury was also having incised injuries. Meaning thereby that on the head of the deceased, there were sharp cut injuries besides gun shot injuries. Four gun shot injuries were found. Almost all the injuries suggest that the firing was made from close range, since entry wound was having charring mark. If ocular evidence is considered vis-a-vis post-mortem report, certainly there is reason to raise doubt on the ocular evidence. On the one hand, witnesses have stated that the deceased was dragged to some extent, he was thrashed in the field and thereafter, altogether seven accused persons caught both hands and legs of the deceased and thereafter, 4 or 5 shot of firing were made on his head, however; there is no specific evidence regarding causing injuries by sharp cut weapon. In vague manner, some of the witnesses have stated that some of the accused were carrying lathi and farsa. If the eye-witnesses are specific regarding giving 4 or 5 shot of firing on his head, then in that evident, there was no occasion for not noticing by them any injury caused by sharp cutting weapon. This also creates

suspicion regarding the oral version of the prosecution.

26. In paragraph 4 of cross-examination, P.W.14/doctor gave reply in following manner:

"I did not find any foreign material like mud, dust or any other foreign substance on the superficial skin, cloths or over the wound"

Once it was case of the prosecution that deceased was firstly caught and dragged to some extent and he was thrashed in the field of peas crop, then in that event, there was possibility of finding some mud or dust either on the person of the deceased or on his cloth, which has been negated by P.W.14, as referred hereinabove.

27. P.W.16 Sri Rabindra Prasad Singh on 02-01-1998 was Sub-Inspector of Police-cum-Officer incharge of Kumarkhand Police Station. In his evidence, he stated that in his presence, one A.S.I. Brajendra Kumar had recorded fardbeyan of the informant, however; on the top of the fardbeyan, it has been written, as if, this witness himself had recorded fardbeyan of Bijendra Yadav (P.W.15). But during evidence, he stated that the said fardbeyan was under the writing of another A.S.I. i.e. Brajendra Kumar, who has not been examined as prosecution witness. This witness identified his endorsement on the formal F.I.R., which was marked as Ext. 2/2 and he further proved formal F.I.R., which was marked as Ext.2/3. He prepared inquest report, which was shown to be prepared at the place of occurrence, which is reflected in column 3 of the inquest report and date and time of inquest is indicated, as 02-01-1998 at 16.45 hrs. i.e. 4:45 PM. In column no. 1, even case number has also been incorporated. Once inquest report was prepared at the place of occurrence immediately after recording fardbeyan, and that too before registering formal F.I.R., which was lodged at 9:00 PM, in the same night, it is difficult to perceive as to how paragraph 1 of the inquest report contains the number of police case i.e. Kumarkhand P.S. Case No. 1 of 1998. The submission advanced by learned senior counsel for the appellants that it appears that fardbeyan was recorded not on the date and time, as has been described in the fardbeyan, rather subsequently, finds support. In his evidence, it has not come as to how the information regarding the occurrence was received by the police and as per whose instruction, he reached the place of occurrence. Occurrence in the case has allegedly been taken at 3:30 PM and at 4:30 PM, fardbeyan was shown to be recorded without any explanation by the investigating officer as to how he got information regarding the occurrence. In paragraph 3 of his evidence, he has given description of the place of occurrence and at the same time in the same paragraph he has stated that about 20 yards near the place of occurrence he had recovered an unclaimed 3-not pistol and seized the same. He stated that he seized blood stained xeNk (gamachha) and blood stained soil, however; neither he produced the seizure list nor either of the seized articles. On the same date, he prepared inquest report. Thereafter, he recorded statement of the witnesses and dead body was sent for post-mortem examination. In paragraph 7 of his cross-examination, he stated that the articles,

which he had seized, and the seizure list was not available to him and in paragraph 8 of his cross-examination, he further stated that at the place of occurrence, he did not find foot print of number of persons nor he noticed trampling of the crop. He further stated that at the place, where dead body was found, he had not noticed any fact regarding dragging of anyone. In paragraph 9 of his cross-examination, he further stated that in paragraph 63 of the case diary, he had recorded that the executive engineer had stated that no order was issued for construction nor any agent was authorized. Contradiction in respect of statement of witnesses recorded under Section 161 of the Cr.P.C. was taken and in paragraph 11 & 12 of his cross-examination, the fact has come that many of the statements given by P.W.10 and 11 and also some statement of P.W.15/ informant, were not recorded by him, which during evidence they deposed. This also creates doubt on the credibility of the witnesses.

28. In the case, the witnesses, who had claimed to be eye-witnesses to the occurrence, are close relatives of deceased & informant, otherwise seven witnesses, who were independent, did not support the prosecution case and this was the reason that P.W.1 Bechan Das, P.W.2 Basudeo Mandal, P.W.3 Sita Ram Sah, P.W.4 Bishundeo Paswan, P.W.5 Sudhir Yadav, P.W.7 Kamleshwar Bhagat and P.W.8 Khushilal Paswan were declared hostile.

29. Another witness i.e. P.W.6 Kritya Nand Yadav, though in his evidence, has stated regarding the occurrence, he appears to be hearsay witness and without specific source of receiving information by him and as such, evidence of P.W.6 has got no relevance. Moreover, in paragraph 2 of his evidence, he (P.W.6) himself stated that for the first time, he had come to court for giving evidence and he admitted that he only heard about the murder. This witness too in one line in examination-in- chief had stated that murder had taken place due to construction of the bridge over the river, however; in the evidence of investigating officer, it has come that no work in respect of construction of work had commenced.

30. On examination of aforesaid evidences, there is no reason not to accept the submission of Sri Kanhaiya Prasad Singh, learned senior counsel for the appellants that the prosecution has miserably failed to establish the genesis of the case. The evidence of P.W.9, 10, 11 and 15, who had claimed to be eye-witnesses to the occurrence, appears to be suspicions, considering the fact that their evidences are not in consonance with the fact disclosed by the investigating officer/I.O. nor at the place of occurrence, the I.O. could notice any foot-print nor the prosecution has brought on record any material exhibit found from the place of occurrence.

31. The prosecution has also not explained the reason for belated receipt of the F.I.R. in the court of learned C.J.M., Madhepura on 04-01-1998, whereas formal F.I.R. in the present case was shown to be registered on the date of occurrence i.e. on 02-01-1998 at 9:00 PM. Further the evidence of informant/P.W.15 loses credence due to the reason that though he had claimed to give fardbeyan at the

place of occurrence, P.W.10 Jay Narain Yadav, who was close relative of the deceased and informant, in his evidence, which we have discussed hereinabove, has stated that the police reached at his house, where statement of witnesses was recorded and fardbeyan of P.W.15 was recorded. It is also evident that the deceased was having criminal antecedent. Accordingly, the submission on behalf of appellants that there was possibility of murder of deceased at an odd time, which was not seen by anyone, appears to be more probable than the story built up by the prosecution witnesses.

32. In view of aforesaid facts and circumstances, particularly; in view of the fact that altogether seven witnesses, who were independent, had not supported the prosecution case and were declared hostile, the witnesses, who have come forward to support the prosecution case, are none else but close relative of the deceased and in view of background of the deceased and non-establishment of the genesis, certainly the prosecution case may not be considered, as 'truthful'. Besides this, the medical evidence is also inconsistent with the oral evidence. Ofcourse, law is settled that in a case of conflict in between medical and oral evidence, preference is to be given to oral evidence, but in view of peculiar facts and circumstances of the present case, where the very claim of witnessing the occurrence by the informant and other witnesses appears to be doubtful, certainly inconsistency in between oral evidence and medical evidence may go against the prosecution.

33. In view of facts and circumstances, we are of the considered opinion that the prosecution has not been able to establish its case beyond all reasonable doubt and as such, by way of extending the benefit of doubt, the Court disapproves the judgment of conviction and sentence.

34. Accordingly, the judgment of conviction dated 21-09-2013 and order of sentence dated 25-09-2013 passed by Dr. Ram Lakhan Yadav, learned Additional Sessions Judge - Ist, Madhepura in Sessions Trial No. 179 of 2007/C.I.S. No. 0001438 of 2013 (arising out of Kumarkhand P.S. Case No. 01 of 1998) is, hereby, set aside and all the aforesaid seven appeals are allowed.

35. In view of setting aside the judgment of conviction & sentence and the fact that both appellants in Cr.Appeal (DB) No. 1048 of 2013 namely Dayanand Yadav and Ramanand Yadav as well as sole appellant in Cr.Appeal (DB) No. 795 of 2014 namely Sadanand Yadav are in custody, it is directed to release them forthwith, if not wanted in any other case.

36. Other appellants namely 1. Sachchidanand Yadav {appellant in Cr.Appeal (DB) No. 926 of 2013}, 2. Birendra Yadav, 3. Tuntun Yadav @ Tuntun @ Narendra Yadav {both appellants in Cr.Appeal (DB) No. 940 of 2013}, 4. Mahanand Yadav, 5. Arun Yadav, 6. Jhabru Yadav @ Chhota Jhabru @ Chhota Jhabru Yadav (appellants in Cr.Appeal (DB) No. 973 of 2013}, 7. Chhedi Yadav, 8. Pradeep Yadav {both appellants in Cr.Appeal (DB) No. 1007 of 2013} and 9. Gholat Yadav {sole appellant in Cr.Appeal (DB) No. 1008 of 2013}, who are on

bail, are discharged from the liability of their bail-bonds.