

(2024) 07 JH CK 0066

In the Jharkhand High Court

Case No : Criminal Appeal (DB) Nos. 1246, 350, 427, 445, 565 Of 2018

Wastak Ansari @ Ustak Ansari

APPELLANT

Vs

State Of Jharkhand and Others

RESPONDENT

Date of Decision : 08-07-2024

Acts Referred:

Code Of Criminal Procedure, 1973 — Section 161, 313
Indian Penal Code, 1860 — Section 34, 149, 302, 304II
Evidence Act, 1872 — Section 134
Prevention Of Witch (Daain) Practices Act, 1999 — Section 3

Citation : (2024) 07 JH CK 0066

Hon'ble Judges : Ananda Sen, J; Subhash Chand, J

Bench : Division Bench

Advocate : A.K. Kashyap, B.M. Tripathi, Shekhar Pd. Sinha, Leena Shakti, Nutan Kumari Jaiswal, R.S. Mazumdar, Abhay Kr. Tiwari, Bhola Nath Ojha, Nehala Sharmin

Final Decision : Dismissed

Judgement

Subhash Chand, J.

1. The instant Criminal Appeals have been directed on behalf of the appellants against the judgment of conviction and order of sentence dated 24.02.2018 passed by the learned District & Sessions Judge, Lohardaga in S.T. Case No.154 of 2012 wherein the appellants were convicted for the offence under section 302/149 of the Indian Penal Code and section 3 of Prevention of Witch (Daain) Practices Act, 1999 and sentenced with imprisonment for life and a fine of Rs. 2,000/- each for the offence under section 302/149 of IPC and in default of payment of fine to further undergo RI of 2 months and further awarded punishment for one month of RI for the offence under section 3 of the Prevention of Witch (Daain) Practices Act, 1999.

2. All these five appeals have been directed against the one and same judgment, therefore, all the five appeals are being disposed of by the common judgment.

3. The brief facts leading to these criminal appeals are that the fardbeyan of informant Afsana Khatoon was recorded on 02.08.2012 at 7 O'clock with these allegations that on 02.08.2012 about 3 or 3:30 O'clock she alongwith her mother Anija Khatoon had gone to sow the paddy saplings in the agricultural field situated in eastern side of the village. After having sowed the paddy saplings and on account of the Ramjan left the agricultural field about 4:30 PM. She and her mother proceeded for the house as they reached near the village, in the meantime, the two sons of Uddin Ansari namely Mobin Ansari and Mustaque Ansari both caught hold of her mother and Guljar Ansari and Rabban Ansari sons of Juddin Ansari also came there. All the four dropped her mother on the ground and her legs and hands were caught by them. Wastak Ansari son of Uddin Ansari assaulted with the spade on the neck of her mother 3-4 times. On account of fear she could do nothing. In a few time her mother died. All the five accused fled away. Thereafter, she raised alarm. Some persons who were working in the agricultural field also rushed there. She went to her house while weeping. On reaching to her house, she also raised alarm at which all the persons of the locality assembled there and all were made aware in regard to the occurrence. The persons of the village also rushed to the place of occurrence. She remained to her house on account of fear. Her father had gone to Lohardaga market prior to murder of the mother. These accused persons had brandished her mother 'Daain Bisahi'. Earlier also they had beaten her mother. The matter was settled in the village mutually. On account of the very reason on 02.08.2012 the accused persons Mobin Ansari, Rabban Ansari, Guljar Ansari, Wastak Ansari and Mustaque Ansari all the five in furtherance of common intention brandishing her mother 'Daain Bisahi' assaulted with spade. On this fardbeyan of Afsana Khatoon the Case Crime No. 74 of 2012 was registered under section 302 r/w 34 of IPC and 3/4 of the Prevention of Witch (DAAIN) Practices Act, 1999 with the Lohardaga Police Station against the accused Mobin Ansari, Rabban Ansari, Guljar Ansari, Wastak Ansari and Mustaque Ansari.

4. The investigating officer conducted the investigation and filed charge-sheet against the accused Mobin Ansari, Rabban Ansari, Guljar Ansari, Wastak Ansari and Mustaque Ansari for the offence under section 302 r/w 34 of IPC to the court of learned Magistrate concerned and the learned Magistrate concerned after having taken cognizance on the charge-sheet committed the case for trial to the court of learned Sessions Judge, Lohardaga.

5. The trial court framed charged against all the five accused under section 302 r/w 149 IPC and section 3 of the Prevention of Witch (DAAIN) Practices Act, 1999. The charge was read over and explained to all the accused persons who denied the charge and claimed to face the trial.

6. On behalf of prosecution to prove the charge against the accused person in oral evidence examined all together eight witnesses i.e. PW1- Sabbir Ansari, PW2- Majid Ansari, PW3- Afsana Khatoon, PW4- P.C. Deogam, SI, PW5- Dr. Pranav Kumar, PW6- Rozamat Ansari, PW7- Hanif Ansari and PW8- Mahboob

Ansari @ Matam Ansari and in documentary evidence filed Exhibit-1 signature of Sabbir Ansari on the fardbeyan, Exhibit 1/1 is the signature of Afsana Khatoon, Exhibit-2 fardbeyan of Afsana Khatoon, Exhibit-3 seizure list, Exhibit-4 formal FIR, Exhibit 2/1 endorsement on the fardbeyan, Exhibit-5 inquest report, Exhibit-6 is the postmortem report and also Material Exhibit-1 Kudal (Spade).

7. The statement of all the accused under section 313 of Cr.PC was recorded.

7.1 The accused Mobin Ansari has denied the incriminating circumstances in evidence against him and stated that at the time of occurrence he had gone to the market and when returned in the evening he has been falsely implicated.

7.2 The accused Wastak Ansari also denied the incriminating circumstances in evidence against him and stated that the husband of deceased Sabbir Ansari had the love affair with one girl of Karkari Bagani village. On account of the very reason the relations between deceased and Sabbir were strained. Sabbir Ansari had assaulted his wife with the spade. On the very issue, he intervened to rescue but he has been falsely implicated in this case. At the time of occurrence, Sabbir Ansari, his wife and he were present there none else was there and after this occurrence, Sabbir Ansari has also got married with that girl of Karkari Village.

7.3 The accused Rabban Ansari and Guljar Ansari both denied the incriminating circumstances in evidence against them and stated that they have been falsely implicated in this case by Rozamat Ansari and his Natani Afsana Khatoon and stated themselves to be innocent.

7.4 The accused Mustaque Ansari also denied the incriminating circumstances in evidence and stated that on the date and time of occurrence he was not at his house. Sabbir Ansari had murdered his wife on the issue of love affair with one girl and subsequently he also got married with that girl.

8. On behalf of the accused persons in defense evidence examined DW1- Ali Hassan Ansari.

9. The learned Trial Court after hearing the rival submission of the learned counsel for the parties passed the impugned judgment of conviction and the order of sentence dated 24.02.2018 holding guilty the accused persons namely, Wastak Ansari @ Ustak Ansari, Mobin Ansari, Guljar Ansari, Mustaque Ansari and Rabban Ansari for the offence under sections 302/34 of IPC and 3 of the Prevention of Witch (DAAIN) Practices Act, 1999 and sentenced them as stated hereinabove.

10. Aggrieved from the impugned judgment of conviction and sentence, Criminal Appeal (DB) No. 1246 of 2018 was filed on behalf of Wastak Ansari @ Ustak Ansari, Criminal Appeal (DB) No. 350 of 2018 was filed on behalf of Mobin Ansari, Criminal Appeal (DB) No. 427 of 2018 was filed on behalf of Guljar Ansari, Criminal Appeal (DB) No.445 of 2018 was filed on behalf of Mustaque Ansari and Criminal Appeal (DB) No.565 of 2018 was filed on behalf of Rabban Ansari.

11. We have heard the learned counsel for the appellants in all the five appeals and learned APPs for the State and perused the materials available on record.

12. In order to decide the legality and propriety of the impugned judgment of conviction and sentence we would like to appraise the evidence produced on behalf of the prosecution which is reproduced hereinbelow:

12.1 PW1- Sabbir Ansari in his examination-in-chief says that the occurrence is of 02.08.2012 at 4:30 O'clock in the evening he was present at Lohardaga market. At 6 O'clock in the evening when he came back to his house, his daughter Afsana Khatoon told him that Mobin Ansari, Mustaque Ansari, Rabban Ansari and Guljar Ansari all held her mother. It was told by his daughter that all these four accused had dropped her mother on the ground and held her legs and hands. Thereafter, Wastak Ansari who was armed with the spade gave blow three or four times on the neck of Anija Khatoon whereby Anija Khatoon died at the spot. About two years ago, the accused persons had brandished of his wife Anija Khatoon as 'Daain Bisahi'. A panchayati was also held. All the accused persons were made to understand. This witness also says that he had also put his signature in Urdu on the fardbeyan of his daughter Afsana Khatoon which he identified and marked as Exhibit-1.

In cross-examination this witness says that the occurrence did not take place in his presence whatever his daughter had told him same has been deposed by him. The police had interrogated him. The fardbeyan of his daughter was not recorded in the police station rather it was recorded at the place of occurrence. In the panchayat the persons of the village appeared. Nothing was done in writing in the panchayat. It was the month of Ramjan when the occurrence took place. During Ramjan period Aftari was prepared by my daughter in law Ishrat. On the date of occurrence, Aftari was prepared or not he is not aware.

12.2 PW2- Majid Ansari in his examination-in-chief says the occurrence is of 02.08.2012 about 4:30 or 5 O'clock in the evening. On that day, he had gone to Lohardaga City for his job. When he came back at 6 O'clock saw the crowd at his house. On being asked he came to know that his mother Anija Khatoon had been murdered. His sister Afsana Khatoon told him that she and the mother had gone to sow the paddy sapling in the agricultural field. At 4:30 or 4:45 PM when coming back to the house, the son of Uddin Ansari namely Mobin Ansari, Mustaque Ansari caught hold of the mother and the sons of the Juddin Ansari namely Rabban Ansari and Guljar Ansari also came there and all the four dropped the mother on the ground caught hold of her hands and legs and Wastak Ansari who was armed with the spade assaulted the mother on her neck three or four times whereby her mother died. The reason behind this murder was his mother Anija Khatoon was brandished as witch (Daain Bisahi).

In cross-examination this witness says that the accused persons had not murdered his mother in his present. Whatever he heard same has been deposed by him. The accused persons used to openly brandish his mother 'Daain Bisahi'.

He reached after two hours when his father had reached there.

12.3 PW3- Afsana Khatoon, she in her examination-in-chief says the occurrence had taken place about one year and 1/2 month ago. It was 4:30 O'clock in the evening, she alongwith her mother Anija Khatoon had gone to sow the paddy sapling in her agricultural field. Thereafter, on account of Ramjan, she and her mother left the agricultural field for the house. When reached near the village, Mobin Ansari and Mustaque Ansari son of Abbuddin Ansari came and caught hold of her mother. In the meantime, Rabban Ansari and Guljar Ansari both sons of Albujuddin Ansari also rushed there. All the four dropped the mother on the ground and held her by her leg and the hands. Wastak Ansari who was present there gave the blow with the spade (Kudal) on the neck of her mother 3-4 times. Her mother was lying in pool of blood. On account of fear, she could speak nothing. Her mother died. All the five accused fled away towards the village, thereafter, while weeping she raised alarm. At some distance, the persons who were doing work in the agricultural field began to come and she reached to her house. On reaching the house, the persons of the locality attracted there. She told them in regard to the occurrence and the persons of the locality also reached to the place of occurrence. None was at her house. When her father came at 5 O'clock from Lohardaga she told him in regard to the occurrence. The reason of this occurrence was that the accused had brandished her 'Daain Bisahi'. Five or six months ago also they had beaten her mother. The police recorded her statement at the place of occurrence. She put signature after reading the same identified the signature marked as Exhibit-1/1.

In cross-examination this witness says she had perused her statement at the police station and also put signature thereon. The statement which was recorded at her house and at the place of occurrence police did not receive her signature. On the date of occurrence, she and her mother had reached to the agricultural field at 3:30, none else was with them. They sowed the paddy sapling for one hour in the agricultural field. The paddy sapling was sowed in western side of the agricultural field in one part, remaining three parts were empty. The place of occurrence where his mother was murdered was half kilometer away from the agricultural field. In the south of the place of occurrence is the agricultural field of Imam Ansari, in the north is the agriculture field of Hajrat Ansari and in south and west whose agricultural field she is not aware. Her house was one hundred yards away from the place of occurrence. Near by the place of occurrence were the house of Guljar and Rabban. She has seen her mother while being beaten caught hold her and murdered. She did not raise alarm. Her mother was dropped in the northern side. She was standing in west of her mother. When her mother was caught hold and dropped. She asked not to kill her. Wastak Ansari was already present at the place of occurrence. He gave 3-4 blow with the spade to her mother which hit near the ear, chick and the neck as well. The other accused persons had caught hold of her mother. She cannot tell the length and breadth of the spade. In cross-examination this witness says that first of all Mobin and Mustaque came there they were not armed with any weapon. Guljar and Rabban

came immediately after Mobin and Mustaque. She remained at the place of occurrence for 10 minutes. After the occurrence, all the accused persons went away to the one direction from the place of occurrence. The persons who had attracted there on hearing alarm, who were they, she does not identify. Her mother died within 2 or 3 minutes on sustaining injury. She is not aware whether Mudin had done any case against her mother. It is wrong to say that she was not present at the place of occurrence. It is also wrong to say that she being tutored by her maternal grand-father, maternal-grand uncle was giving the false evidence.

12.4 PW4- Puran Chand Devgam this witness in his examination-in-chief says on 02.08.2012 he was posted as Station In-charge Officer of Lohardaga Police Station. He recorded the fardbeyan of Afsana Khatoon which bears her signature. This fardbeyan in his pen and signature marked as Exhibit-2. The seizure memo is also in his pen and signature. He has taken in possession the blood-stained spade and blood-stained soil. The seizure memo is in his pen and signature marked as Exhibit-3. The seized spade which was recovered from the place of occurrence i.e. material Exhibit-1. Same has been received from the Malkhana. He had identified the spade marked as Exhibit-1. His endorsement on the fardbeyan is in his signature marked as Exhibit-2/1. Formal FIR was prepared by Bhim Singh it is in his handwriting and signature marked as Exhibit-4. The inquest report of dead body of Anija Khatoon was prepared by him. The carbon copy was compared from the original it is in his pen and signature marked as Exhibit-5. He also received the postmortem report of deceased and inspected the place of occurrence which is situated in village Tigra. The place of occurrence is the parti agricultural field of Mahboob Ansari, in its north is the agricultural field of Hajrat Ansari, in south is the agricultural field of Sabbir Ansari and in west is agricultural field of Imam Ansari. He has taken in his custody the spade and blood stained soil from the place of occurrence. He recorded the restatement of informant Afsana Khatoon also recorded the statement of Sabbir Ansari, Majid Ansari, Hanif Ansari, Mahboob Ansari, Sidhik Ansari. He filed charge-sheet under section 302 read with 34 of IPC and under section 3/4 Witch Craft Act against the accused persons.

In cross-examination this witness says that the deceased and the informant had gone to sow the sapling in her agricultural field. In this regard, he did not record the statement of any person of village. The place of occurrence was the agricultural field of Mahboob near the dead body was lying. He had not made any entry in regard to receiving the secret information in regard to commission of offence. He is not aware in regard to the khata number of the plot which was the place of occurrence. He did not take in custody the clothes of the deceased. Whether the spade was near by the dead body or at what distance he cannot say. The blood mark on the spade is not visible today on account of lapse of time. He did not send the blood stained Kudal to the FSL. It is wrong to say that this spade was not recovered from the place of occurrence. Nearby the dead body was one Haswa, one bandhna (Lotta) and a plastic rope. The same was not

seized by him. The spade which was seized its handle was of bamboo and the material exhibit which is produced today in the court is having wooden handle, again says that it appears which is produced today in the Court is having the wooden handle. In regard to the panchayat being held on the issue of 'Daain Bisahi', he received no documentary evidence. The brandishing of Witch Craft was being made. The signature of Afsana Khatoon on the fardbeyan were taken at the place of occurrence. It is wrong to say that the material exhibit which was recovered from the place of occurrence same was not produced before the Court.

12.5 PW5- Dr. Pranav Kumar in his examination-in-chief says on 03.08.2012 he was posted as Medical Officer, Sadar Hospita, Lohardaga and conducted the postmortem examination on the dead body of Anija Khatoon wife of Sabbir Ansari and he found following injuries:

External Injuries:

(a) lacerated wound on the left side of face, cutting left mandible and occipital bone measuring 6"x2"x bone deep.

(b) lacerated wound on left side of neck 4"x3"x1".

(c) blood-stained nose, forehead and right hand.

Cause of death was due to hemorrhage and shock, due to the damage of brain caused by the hard and blunt object. This postmortem report is in his handwriting and signature marked Exhibit-6.

In cross-examination he says that there was no injury in front of the neck or chest rather the injury was found on the back side of the head. He has not mentioned whether the injury was vertical or horigental. In lacerated wound tissues are generally damaged.

12.6 PW6- Rozamat Ansari in his examination-in-chief says that he received the information in regard to murder of his daughter Anija Khatoon at 5 O'clock. On receiving this information he reached from his village Bhujania to Tigra Village and saw the dead body of his daughter in an agricultural field and crowd was also there. The agricultural field was of Mahboob Ansari. There was injury on the back of the ear and chick of Anija Khatoon. His natini Afsana Khatoon told him that she alongwith the mother had gone to sow the sapling of the paddy. At 4:30 while coming back and reached near the village Mobin Ansari and Mustaque Ansari both caught hold of Anija Khatoon. Rabban Ansari and Guljar Ansari also rushed there. All the four dropped Anija Khatoon on the ground and held her by her leg and the hands Wastak Ansari had assaulted with the Kudal whereby Anija Khatoon died.

In cross-examination this witness says Afsana Khatoon is the daughter of his daughter. Sabbir Ansari is the son-in-law. The village Bhujania was three kilometer away from Tigra Village. Afsana Khatoon met to him at the place of occurrence.

12.7 PW7- Hanif Ansari in his examination-in-chief says on the date of occurrence he had gone to work on the agricultural field. Hearing the alarm he also came to the village and daughter of Anija Khatoon told weeping that her mother had been murdered by Wastak Ansari assaulting with the Kudal. Afsana Khatoon had told him with the name of Wastak. He did not see the occurrence from his own eye. The police did not record his statement. This witness was declared hostile and cross-examined by the prosecution. He denied the statement given to the IO under section 161 of Cr.PC.

12.8 PW8- Mahboob Ansari @ Matam Ansari in his examination-in-chief says the occurrence was of 4 ½ years ago. He was grazing his bullock. When he reached to his house, he heard the noise and reached to the place of occurrence found Anija Khatoon dead whose neck was cut which was slit by Wastak Ansari. He identifies Wastak Ansari not other accused persons.

In cross-examination this witness says he reached to the place of occurrence alongwith Afsana Khatoon. At that time, she was at her house. Guljar, Mustaque, Rabban, Mobin all were not in village had gone to the market. Afsana or any person of the village did not tell him in regard to their involvement in commission of the murder.

13. Learned counsel for the appellants in their respective appeals have submitted that the conviction of all the accused persons is based on the testimony of PW3- Afsana Khatoon the daughter of the deceased and her presence at the place of occurrence is doubted reason being no one independent witness of the locality near by the agricultural field was interrogated by the IO during investigation even did not investigate on the issue of sowing the saplings of paddy. The IO did not record the statement of any of the person of the village in regard to coming of the deceased alongwith her daughter from the agricultural field and also in regard to the occurrence. There being no independent witness in regard to the occurrence the testimony of PW3- Afsana Khatoon is not found fully reliable. Her testimony is demolished with the testimony of PW8 Mahboob Ansari. This witness who has stated that Afsana Khatoon was at her house and he went to place of occurrence alongwith Afsana Khatoon and further this witness also says that Guljar, Mustaque, Rabban and Mobin were not present at the place of occurrence rather had gone to the market. This witness was not declared hostile by the prosecution as such in view of the testimony of Mahboob Ansari the testimony of PW3- Afsana Khatoon is no more reliable. Therefore, the conviction and sentence of the appellants is being based on wrong appreciation of the evidence needs interference. It is also further submitted that the blood stained Kudal was never sent to the FSL. The testimony of eye witness PW3- Afsana Khatoon is not corroborated with the medical evidence. In view of the above, contended to allow the appeal and to acquit all the appellants.

14. Per contra the learned APPs in all their respective appeals on behalf of the State vehemently opposed the contentions made by learned counsel for the appellants and contended that the impugned judgment and conviction is based

on the proper appreciation of the evidence on record. The testimony of PW3 Afsana Khatoon is fully reliable and the defense counsel has failed to shake the testimony of this witness during cross-examination. In view of the above contended to dismiss the appeal.

15. As per prosecution case the eye witness of the occurrence is PW3- Afsana Khatoon. So far as the testimony of PW1- Sabbir Ansari husband of the deceased, PW2- Majid Ansari son of the deceased and PW6- Rozamat Ansari are concerned these witnesses came to know in regard to the occurrence from the daughter of deceased PW3- Afsana Khatoon.

16. PW3- Afsana Khatoon who is the sole eye witness of the occurrence has stated that on the fateful day she had gone along with her mother Anija Khatoon to sow the paddy sapling in the agricultural field. The paddy sapling were sown by them in only one part of the agricultural field and remaining three parts were empty and they left the agricultural field at 4:30 on account of Ramjan while proceeding to the house when they reached near by the village Mobin Ansari, Mustaque Ansari came first of all they caught hold of her mother thereafter Rabban Ansari and Guljar Ansari also came there all the four having caught hold of her mother dropped her on the ground and held up by her legs and the hands and Wastak Ansari who was also already present at the place of occurrence has assaulted to her mother with the spade (Kudal) 3 or 4 times. Her mother died. All the five accused fled away towards the village. Thereafter she raised alarm some persons in the nearby field came there and she went to her house. On reaching her house she told in regard to the occurrence to her father who came to the house at 5 O'clock from Lohardaga. The fardbeyan was recorded at the place of occurrence by the police she put her signature thereon after reading the fardbeyan which is marked as Exhibit-1/1. This witness in cross-examination also strictly stated that the distance of the agricultural field from the place of occurrence $\frac{1}{2}$ kilometer and distance of her house from the place of occurrence 100 yard. She has also narrated the method in which other accused persons had caught hold of her mother and Wastak Ansari had assaulted with the spade. She has stated that nearby the place of occurrence no one was adjoining agricultural field and no person of the village was present at the place of occurrence.

16.1 So far as the testimony of PW8- Mahboob Ansari @ Matam Ansari is concerned if his testimony is read as a whole it is found that he reached to his house after having grazed his bullock and he came to know in regard to the occurrence when he reached to his house in the village. If this witness has in his cross-examination has stated that Afsana Khatoon was at her house and he went with Afsana Khatoon to the place of occurrence from the same the testimony of PW3 cannot be believed reason being after commission of the murder of her mother she immediately reached to her house. On reaching to her house she told in regard to the occurrence to the persons of the locality of the village and persons of the village also rushed to the place of occurrence in the evening she also told to her father. Therefore, in view of the testimony of this witness PW3

cannot be said to be tainted.

17. The testimony of PW3 eye witness Afsana Khatoon is also corroborated with the testimony of PW1- Sabbir Ansari, the husband of the deceased and PW2- Majid Ansari, the son of the deceased and PW6-Rozamat Ansari. These witnesses also came to know in regard to the occurrence from PW3- Afsana Khatoon and have narrated in regard to the occurrence as was told to them by PW3- Afsana Khatoon. Though these witnesses; are the hearsay witness but their testimony also becomes admissible in evidence because their source of knowledge in regard to the occurrence is PW3- Afsana Khatoon who has already been examined before the trial court.

18. The contention of the learned counsel for the appellants is that PW3- Afsana Khatoon is the daughter of the deceased, PW1- Sabbir Ansari is the husband of the deceased, PW2- Majid Ansari is the son of the deceased and PW6- Rozamat Ansari is the father of deceased. All these witnesses are the related witness and interested witness. Their testimony cannot be believed. Their being no corroboration with the evidence of any independent witness.

18.1 PW3- Afsana Khatoon, who is the sole eye-witness is the daughter of the deceased and her presence at the place of occurrence is not shaken by the defense counsel in her cross-examination. No contradiction could be drawn in her testimony given before the trial court and the statement given by her to the IO under Section 161 of the Cr.P.C. It is also pertinent to mention herein that PW3- Afsana Khatoon who is the daughter of the deceased was 14 years old. Her testimony is found trustworthy which inspires the confidence of the Court in regard to the veracity of the occurrence. Simply being the related and interested, her testimony cannot be disbelieved.

18.2 The Hon'ble Apex Court in "Ashok Kumar Chaudhary & Ors. vs. State of Bihar" AIR 2008 SC 2436 held:

"7.....In our opinion, even otherwise it will be erroneous to lay down as a rule of universal application that non-examination of a public witness by itself gives rise to an adverse inference against the prosecution or that the testimony of a relative of the victim, which is otherwise credit-worthy, cannot be relied upon unless corroborated by public witnesses. Insofar as the question of credit-worthiness of the evidence of relatives of the victim is concerned, it is well settled that though the Court has to scrutinize such evidence with greater care and caution but such evidence cannot be discarded on the sole ground of their interest in the prosecution. The relationship per se does not affect the credibility of a witness. Merely because a witness happens to be a relative of the victim of the crime, he/ she cannot be characterized as an "interested" witness. It is trite that the term "interested" postulates that the person concerned has some direct or indirect interest in seeing that the accused is somehow or the other convicted either because he had some animus with the accused or for some other oblique motive."

18.3 The Hon'ble Apex Court in "Ravishwar Manjhi & Ors. vs. State of Jharkhand" AIR 2009 SC 1262 held:

"24. Out of seven eye-witnesses, P.W. 7 was not believed by the courts below. P.Ws. 4 and 5 were not present exactly at the place of occurrence. They are said to have witnessed only a part of the occurrence. All other eye-witnesses were related to the deceased. However, we do not hesitate to add that only on that ground their evidences should not be disbelieved."

18.4 Therefore, on this very ground, PW3- Afsana Khatoon being the daughter of the deceased, her testimony cannot be said tainted as such the testimony of this witness PW3 cannot be disbelieved on this ground that she is related and interested witness.

18.5 So far as the testimony of PW1- Sabbir Ansari who is the husband of the deceased, PW2- Majid Ansari, son of deceased and PW6-Rozamat Ansari, the father of the deceased are concerned, they are also the related and interested witness but they came to know in regard to the occurrence from PW1- Afsana Khatoon, the eye witness, therefore, their testimony also becomes admissible in evidence.

18.6 The Hon'ble Apex Court in "State of Madhya Pradesh v. Ramesh & Anr." 2011 AIR SCW 1956 held:

"17. In Sukhar v. State of U.P. (1999) 9 SCC 507 : (AIR 1999 SC 3883), this Court has explained the provisions of Section 6 of the Evidence Act, 1872 observing that it is an exception to the general rule whereunder the hearsay evidence becomes admissible. However, such evidence must be almost contemporaneous with the acts and there should not be an interval which would allow fabrication. The statements sought to be admitted, therefore, as forming part of res gestae, must have been made contemporaneously with the acts or immediately thereafter. The essence of the doctrine is that a fact which, though not in issue, is so connected with the fact in issue "as to form part of the same transaction" that it becomes relevant by itself."

18.7 The Hon'ble Apex Court in "Mukhtiar Singh & Anr. vs. State of Punjab" AIR 2009 SC 1854 held:

"8..... He has specifically stated in his depositions that he saw the aforesaid accused running towards the village side carrying weapons. His presence at the spot cannot be doubted as it is established that he was at duty at the Railway Police Post, Kahangarh, which is the place of occurrence. He has also stated in his depositions that he had in fact chased the two accused persons up to a certain distance but could not manage to nab them and that when he returned to the scene of occurrence, Surjit Kaur, PW-3, disclosed to him about the occurrence. This shows that he did not see the accused persons attacking the deceased but learnt about the same from an eye witness and the said information about the dead body lying at the platform was flashed by him, for he

knew that on receipt of the aforesaid information the police should start investigation and during that course police would definitely ask eye witnesses and get all the information from them. In any case, his information would be hearsay evidence, but as the same corroborates the substantive evidence of PW. 2 and PW. 3 the same would be admissible, as was held in the case of Pawan Kumar v. State of Haryana, [(2003) 11 SCC 241], wherein it was observed that evidence of such nature could be used to corroborate the substantive evidence. However, in that case, as there was no substantive evidence the benefit of said evidence was not granted."

19. The learned counsel for the appellants has also contended that the testimony of the eye witness PW1- Afsana Khatoon is not corroborated with the medical evidence as she has stated that the accused has assaulted with the spade (Kudal). While as per medical evidence, the injury opined to be caused by the hard and blunt object.

19.1 The eye witness PW3- Afsana Khatoon has stated that the accused Wastak Ansari has assaulted three or four times with the spade (Kudal) to her mother on her neck. The doctor, PW5- Pranav Mandal has shown the following external injuries: (a) lacerated wound on the left side of face, cutting left mandible and occipital bone measuring 6"x2"x bone deep (b) lacerated wound on left side of neck 4"x3"x1". (c) blood-stained nose, forehead and right hand.

Therefore, in view of the seat of injury as shown in the post-mortem report also corroborates the ocular evidence of PW3- Afsana Khatoon.

19.2 It is the settled law that the medical evidence cannot prevail upon the ocular evidence; because the medical evidence is simply the opinion of the expert. The ocular evidence cannot be disbelieved unless and until the medical evidence exclusively over rules the ocular evidence so far as the injury in the post mortem report which are caused on the occipital region and the neck as well.

19.3 So far as the opinion of PW5- Dr. Pranav Kumar in regard to the injury caused to the deceased by the blunt object is concerned. Herein it is relevant the weapon which was used in commission of murder was the spade. The spade is usually used in digging the earth the same is not so sharp. There is no evidence in regard to the sharpness of the spade. Therefore, the injury if caused by the spade would not be the incised wound rather it would be abrasion or the lacerated wound.

19.4 The Hon'ble Apex Court in "State of U.P. vs. Hari Chand" 2009 AIR SCW 3605 held:

"12. There was no reason of the High Court to discard the credible, cogent and trustworthy evidence of the eye-witnesses. This was certainly not a case where medical evidence was at a variance with the ocular evidence. The evidence of the eye-witnesses regarding injuries caused by the firearms is amply corroborated by the evidence of the doctor who found four firearms wounds. In any event unless

the oral evidence is totally irreconcilable with the medical evidence it has primacy."

19.5 The Hon'ble Apex Court in "Shaukat v. State of Uttaranchal" 2010 AIR SCW 5017 held:

"14.....This medical officer was cross- examined on behalf of the appellant and a suggestion was made to him that the injury sustained by the appellant could have been caused by a sharp side of the spade. It may be mentioned that this suggestion was made because according to the prosecution witnesses, the deceased was digging earth with a spade. However, the medical officer has in terms stated that the injuries sustained by the appellant could not have been caused by the sharp side of a spade as it could have been caused by a sharper weapon than spade and that the spade was not sharp enough to cause the injury sustained by the appellant. From the record, it is clear that the learned Sessions Judge had put a question to the witness to elicit answer from him as to whether the sharp edged spade used by the deceased for digging the earth, produced as Exhibit-I could have caused the injury sustained by the appellant. The medical Officer, after looking to the spade, answered that its sharpness was not such so as to cause injury sustained by the appellant. The medical officer was further questioned by the learned counsel for the appellant and it was replied by him that if the spade had been used to cause injury to the appellant, it would have caused an abrasion and not the incised wound. After explaining the difference between incised wound and an abrasion, namely, that incised wound contains edge and also intermediary tissue and all those are clean cut whereas in case of an abrasion, skin tissues slough superficially, it was mentioned by the medical officer that Exhibit-I was not that sharp so as to cause incised wound sustained by the appellant. It was suggested to the medical officer that Exhibit-I, spade, before it was opened in the court was kept at different places for a period of about 1½ years and, therefore, its edge might have become blunt, but this suggestion was emphatically denied by him. As far as injuries sustained by accused Sabbir are concerned, it was mentioned by this witness in cross-examination that both the injuries sustained by Sabbir could have been caused by only one dash with any blunt object."

19.6 The Hon'ble Apex Court in "Suraj Singh vs. State of Uttar Pradesh" 2008 AIR SCW 5578 held:

"40. Coming to the plea that the medical evidence is at variance with ocular evidence, it has to be noted that it would be erroneous to accord undue primacy to the hypothetical answers of medical witnesses to exclude the eye-witnesses' account which had to be tested independently and not treated as the "variable" keeping the medical evidence as the "constant".

41. It is trite that where the eye-witnesses' account is found credible and trustworthy, medical opinion pointing to alternative possibilities is not accepted as conclusive. Witnesses, as Bentham said, are the eyes and ears of justice.

Hence the importance and primacy of the quality of the trial process. Eye-witnesses' account would require a careful independent assessment and evaluation for its credibility which should not be adversely prejudged making any other evidence, including medical evidence, as the sole touchstone for the test of such credibility. The evidence must be tested for its inherent consistency and the inherent probability of the story; consistency with the account of other witnesses held to be creditworthy; consistency with the undisputed facts, the "credit" of the witnesses; their performance in the witness box; their power of observation etc. Then the probative value of such evidence becomes eligible to be put into the scales for a cumulative evaluation."

19.7 The Hon'ble Apex Court in "Bhajan Singh @ Harbhajan Singh & Ors. vs State of Haryana" AIR 2011 SC 2552 held:

"23. Thus, the position of law in such a case of contradiction between medical and ocular evidence can be crystallised to the effect that though the ocular testimony of a witness has greater evidentiary value vis-a-vis medical evidence, when medical evidence makes the ocular testimony improbable, that becomes a relevant factor in the process of the evaluation of evidence. However, where the medical evidence goes so far that it completely rules out all possibility of the ocular evidence being true, the ocular evidence may be disbelieved."

20. The learned counsel for the appellants also contended that the motive of the occurrence is not proved which is alleged to be brandishing the deceased as 'Daain Bisahi'. Therefore, the prosecution case becomes doubtful. This contention of the learned counsel for the appellants is not found tenable, reason being that if the case is based on the eye witness, the motive of the occurrence has no significance. In all these appeals, the motive of the occurrence has been proved by the testimony of PW1- Sabbir Ansari, PW2- Majid Ansari, PW3- Afsana Khatoon and PW6- Rozamat Ansari. All these have stated that the accused used to brandish the deceased as 'Daain Bisahi'. If any person fell ill in the village for the same the deceased was made liable. The Panchayat was also held on the very issue of brandishing of 'Daain Bisahi' to the deceased. Though the investigating officer has not recorded the statement of any independent witnesses on this very motive of the occurrence, yet on account of the negligence of the investigating officer, the testimony of all these witnesses cannot be disbelieved. Although the motive of the occurrence in case of ocular evidence is not relevant, even then the prosecution has proved the motive of the occurrence.

20.1 The Hon'ble Apex Court in "Sunil Kumar v. State of U.P." 2006 Cri. LJ 262 held:

"6. We are not impressed by this submission since motive in a criminal case is irrelevant where evidence of the eye-witnesses is available. In this case, there were as many as three eyewitnesses one of whom was the father of the deceased. Therefore, the question of absence of motive would have no

importance whatsoever.”

21. The learned counsel for the appellants has stated that on the single testimony of PW3- Afsana Khatoon, the conviction of the appellant is bad. This contention of the learned counsel for the appellants is not found tenable since in view of the Section 134 of the Evidence Act, it is not the quantity of the witness, rather it is the quality of the witness which matters. The conviction can be based on the testimony of the sole eye witness if the same is cogent, trustworthy and inspires the confidence of the court to believe it.

21.1 The Hon’ble Apex Court in “Ajai @ Ajju ETC s The State of Uttar Pradesh” 2023 Live law SC 110 held:

“21. Non-examination of Ms Rashmi and Horam, father of Vijay Pal Singh also has no material bearing. It is the discretion of the prosecution to lead as much evidence as is necessary for proving the charge. It is not the quantity of the witnesses but the quality of witnesses which matters. Smt Pinky (PW-1) was the injured witness having received grievous and life-threatening injuries. We are not impressed by this argument also.”

21.2 The Hon’ble Apex Court in “Takdir Samsuddin Sheikh vs State of Gujarat and Anr.” AIR 2012 SC 37 held:

“10. The complainant Shri Bharat Rajendraprasad Trivedi (PW-1) is the sole eye-witness. It has been submitted on behalf of the appellants that being a sole and an interested witness, his evidence cannot be relied upon without corroboration. The submissions advanced in this respect had been that Shri Bharat Rajendraprasad Trivedi (PW-1) being a partner in the Firm would be beneficiary in the transaction of land involved herein in case one partner had been eliminated and other partner landed in jail. Such an argument is not acceptable for two reasons:

(i) While appreciating the evidence of witness considering him as the interested witness, the court must bear in mind that the term 'interested' postulates that the witness must have some direct interest in having the accused somehow or the other convicted for some other reason.

(ii) This Court has consistently held that as a general rule the Court can and may act on the testimony of a single witness provided he is wholly reliable. There is no legal impediment in convicting a person on the sole testimony of a single witness. That is the logic of Section 134 of the Evidence Act, 1872. But if there are doubts about the testimony, the court will insist on corroboration. In fact, it is not the number, the quantity, but the quality that is material. The time-honoured principle is that evidence has to be weighed and not counted. The test is whether the evidence has a ring of truth, is cogent, credible and trustworthy or otherwise. The legal system has laid emphasis on value, weight and quality of evidence rather than on quantity, multiplicity or plurality of witnesses. It is, therefore, open to a competent court to fully and completely rely on a solitary witness and

record conviction. Conversely, it may acquit the accused in spite of testimony of several witnesses if it is not satisfied about the quality of evidence."

22. The learned counsel for the appellants also argued that the blood stained kudal which was recovered from the place of occurrence though was produced during examination by the IO as material Ext.1; but in the testimony of the investigating officer, there is discrepancy in regard to the identity of the kudal of which the handle is told by the investigating officer to be of bamboo when recovered during examination, he say that it was of wooden. This discrepancy in the testimony of PW5 investigating officer in regard to the wooden handle of the kudal being of wooden or bamboo is not found so material because the prosecution case is based on the ocular evidence and in case of the ocular evidence, if the case is proved, otherwise, the production of the weapon used in the commission of the offence or non-sending of the same to the FSL cannot be said fatal to the prosecution case and no adverse inference can be drawn on the basis of the same.

22.1 The Hon'ble Apex Court in "Md. Jamiluddin Nasir vs. State of West Bengal" AIR 2014 SC 2587 held:

"48. As far as the contention made on behalf of the Appellant that non-production of the weapon used in the attack is fatal to the case of the prosecution is concerned, the reliance placed upon by the learned Additional Solicitor General to the decision reported in Ram Singh v. State of Rajasthan (2012) 12 SCC 339 would meet the said contention. In paragraphs 8 and 10, this Court has also held that the non-production of the weapon used in the attack is neither fatal to the prosecution case nor any adverse inference can be drawn on that score. Therefore, the said submission is also rejected."

22.2 The Hon'ble Apex Court held in "State of Punjab vs Hakam Singh" (2005) 7 SCC 408 held:

"13. It was also pointed out by learned counsel for the respondent that no firearms were recovered and no seizure has been made of empties. It would have been better if this was done and it would have corroborated the prosecution story. Seizure of the firearms and recovering the empties and sending them for examination by the ballistic expert would have only corroborated the prosecution case but by not sending them to the ballistic expert in the present case is not fatal in view of the categorical testimony of PW 3 about the whole incident."

23. The learned counsel for the appellants of Mobin Ansari, Rabban Ansari, Guljar Ansari and Mustaque Ansari have submitted that these appellants were not present at the place of occurrence. They have been falsely implicated in this case and this defense is also proved by the defense witness DW1- Ali Hassan Ansari. Further prosecution witness PW8-Mahboob Ansari has also stated that Guljar, Mustaque, Mobin and Rabban had gone to the market. They were not in the village and the name of these accused persons were not told to him neither by Afsana Khatoon nor by any person of the village. This witness PW8- Mahboob

Ansari @ Matam Ansari is the prosecution witnesses himself. He was not declared hostile by the prosecution.

23.1 Merely not declaring the hostile to PW8 by the prosecution if he has given any statement against the same in cross-examination on the basis of the same the testimony of the another witnesses cannot be discarded.

23.2 The Hon'ble Apex Court in "Bhanwar Singh & Ors. v. State of M.P." AIR 2009 SC 768 held:

"59. When implicit reliance is placed on eye-witnesses, some embellishment in the prosecution case caused by reason of evidence of any of prosecution witness although not declared hostile by itself cannot be a ground to discard the entire prosecution case. Each case must be judged on its own facts. For appreciation of evidence, there cannot be any hard and fast rule."

24. So far as the defense taken by the learned counsel for the appellants is concerned that no suggestion was given in regard to this defense to any prosecution witness on behalf of the appellant-accused. So far as the appellant Mobin Ansari is concerned he has taken this defense that he was not present in the village as had gone to the market. But the other accused/appellants Mustaque Ansari, Guljar Ansari and Rabban Ansari, all these three have not taken this plea in their statement under section 313 of Cr.PC. So far as the corroboration of this plea by the PW8- Mahboob Ansari @ Matam Ansari is concerned this witness is the hearsay witness. He had come to know in regard to the occurrence from Afsana Khatoon as well as from the villagers. He had gone to graze his bullocks and when he reached to his home after grazing the bullock, he came to know in regard to the occurrence from the villagers and also from Afsana Khatoon in the evening. Therefore, the testimony of this witness PW8 Mahboob Ansari @ Matam Ansari who says that Guljar, Mustaque, Rabban and Mobin had gone to market and were not in village cannot be found reliable since he himself was not in the village on the date and time of occurrence rather he had gone to graze the bullocks and came back in the evening. He himself came to know in regard to occurrence from Afsana Khatoon but Afsana Khatoon PW3 had nowhere stated that these accused Guljar, Mustaque, Rabban and Mobin were not there rather these appellants had participated in commission of the murder by holding her mother by the legs and the hands.

25. Though the actual role of assaulting to the deceased with Kudal has been attributed to Wastak Ansari; yet the role of all the remaining four is also found in catching hold of the deceased and dropping her on the ground and thereafter Wastak Ansari assaulted with the Kudal. All these four appellants have actually participated in the commission of the murder not only physically but also mentally as well. Their act at the place of occurrence and conduct shows that all these four also shared the common intention with the accused Wastak Ansari. Therefore, in view of the section 34 of the IPC they are also liable for commission of murder of the mother of the informant.

25.1 The Hon'ble Apex Court in "Ramesh Singh @ Photti v. State of A.P" 2004 (20) IndLD 177 held:

"16.....The fact that appellants continued to hold the deceased all along without making any effort to prevent A-1 from further attacking, in our opinion, leads to an irresistible and an inescapable conclusion that these accused persons also shared the common intention with A-1. In these circumstances, what was the intention of A-1 is clear from the nature of weapon used and the situs of the attack which were all in the area of chest, penetrating deep inside and which caused the death of the deceased. It is very difficult to accept the defence version that the fight either took place suddenly, or these appellants did not know that A-1 was carrying a knife, or that these appellants did not know by the nature of injuries inflicted by A-1, that he did intend to kill the deceased. At this stage, it may be useful to note that A-1 did not have any motive, apart from common intention to attack the deceased. In such circumstances if A-1 had decided to cause the injury and A-2 who had a direct motive had decided to hold the hands of the deceased with A-3, in our opinion, clearly indicates that there was a prior concert as to the attack on the deceased. We also notice thereafter the accused persons had all left the place of incident together which also indicates the existence of a common intention."

25.2 The Hon'ble Apex Court in "Surinder Singh v. State of Punjab" (2006) 13 SCC 533 held:

"12. When the factual scenario is seen the application of Section 34 IPC appears to be inappropriate so far murder of the deceased is concerned. In addition, the appellants were not armed. But the evidence is clear that they restrained movement of the deceased when there was a quarrel. There is, however, no definite evidence that the common intention was murder. But the fact that two co-accused were armed with knife and lathi is of relevance and significance. They came together and left together. That being so, the conviction is altered applying the principle set out above. Appropriate conviction will be under Section 304 Part II IPC read with Section 34 IPC. Custodial sentence of seven years would meet the ends of justice."

25.3 The Hon'ble Apex Court in "State of Rajasthan v. Gurubachan Singh" 2022 Livelaw SC 1028 held:

"11. Given the aforesaid position, we are of the view that Section 34 of the IPC i.e., common intention, is clearly attracted in the case of Gurbachan Singh, whose case cannot be distinguished, so as to exclude him as one who did not share common intention with Darshan Singh, Balvir Singh, and Manjit Singh. Section 34 of the IPC makes a coperpetrator, who had participated in the offence, equally liable on the principle of joint liability. For Section 34 of the IPC to apply, there should be common intention among the co-perpetrators, which means that there should be community of purpose and common design. Common intention can be formed at the spur of the moment and during the occurrence itself."

Common intention is necessarily a psychological fact and as such, direct evidence normally will not be available. Therefore, in most cases, whether or not there exists a common intention, has to be determined by drawing inference from the facts proved. Constructive intention, can be arrived at only when the court can hold that the accused must have preconceived the result that ensued in furtherance of the common intention.”

26. The appellant Wastak Ansari in his statement under section 313 of Cr.PC has taken this defense that the relation of the deceased with her husband were strained. Since the husband of deceased was having love affair with another lady so on the date and time of occurrence it was the husband of deceased who committed murder of his wife and at that time he was also present at the place of occurrence. This defense taken by the appellant Wastak Ansari shows that he admits his presence at the place of occurrence while the murder of deceased was committed. If the said murder was committed by the husband in presence of Wastak Ansari why he did not inform to the police. This conduct of Wastak Ansari is found very unnatural. Further while cross-examining the prosecution witnesses this defense was not put to the prosecution witnesses to any of the prosecution witness even the prosecution witness PW1- Sabbir Ansari this suggestion was not given that he was having any illicit relation with any other lady and so being the strained relation he committed murder of his wife and therefore this defense is found baseless and is not supported with any defense evidence.

27. In view of the above analysis of the evidence on record, we are of the considered view that the impugned judgment of conviction and order of sentence passed by the learned trial court is based on proper appreciation of the evidence and needs no interference. Accordingly, these criminal appeals deserve to be dismissed.

28. These criminal appeals are, hereby, dismissed. The impugned judgment of conviction and order of sentence passed by the court below is, hereby, affirmed.

29. The appellants are in jail, they are also directed to serve out the rest of the sentence as awarded by the learned trial court.

30. Let the record of learned trial court be sent back alongwith copy of judgment for necessary compliance.