
**State of Jharkhand Vs Janeshwar Paswan and Others
 Rajendra
Paswan Vs State of Jharkhand**

Death Reference No. 2 of 2012 and Cr. Appeal (DB) No. 611 of 2012

Court: Jharkhand High Court

Date of Decision: Sept. 13, 2012

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) â€” Section 162, 313, 366#Evidence Act, 1872 â€”
Section 134#Penal Code, 1860 (IPC) â€” Section 120B, 147, 148, 149, 212

Citation: (2013) 1 AJR 597 : (2012) 4 JLJR 337

Hon'ble Judges: Prashant Kumar, J; Dhirubhai Naranbhai Patel, J

Bench: Division Bench

Advocate: T.N. Verma in 2; Mr. C.S. Pandey in 611, Ms Mahesh Tewari, Pankaj Kumar Dubey, Sabyasanchi, Mithlesh Kumar Dubey, Ms. Anjana Tewari in 688 and Mr. Yogesh Modi AC in 688, for the Appellant; C.S. Pandey, Ms. Bina Pandey, for the Resp. No. 2 Mr. Ravi Prakash, (in 611); Mr. Amresh Kumar (in 688) and Krishna Shankar, for the Respondent

Judgement

Prashant Kumar, J.

These appeals are directed against the judgment of conviction dated 30.4.2012 and order of sentence dated

14.5.2012 respectively passed by Sessions Judge, Palamau at Daltonganj in S.T. Case No. 113 of 2007 whereby the appellants were convicted

under Sections 148, 302, 364 read with Section 149 of the Indian Penal Code and awarded death sentence against them. It is pertinent to mention

that Death Reference No. 2 of 2012 has been referred by the learned Sessions Judge, Palamau, Daltonganj for confirmation of death sentence

awarded to aforesaid appellants and co-convict (Janeshwar Paswan) in S.T. No. 113 of 2007 vide order of sentence dated 14.5.2012 u/s 366 of

the Cr. P.C.

2. It is not out of place to mention that appellant Ashok Paswan has filed another appeal bearing Cr. Appeal (DB) No. 854 of 2012 through Sri

Ganesh Pathak, Advocate, though appellant Ashok Paswan had already filed a Jail Appeal, which was registered as Cr. A. (DB) No. 688 of

2012. Accordingly, vide order dated 12.9.2012, Cr. Appeal (DB) No. 854 of 2012 has been amalgamated with Cr. Appeal (DB) No. 688 of

2012.

3. The case of prosecution in brief as per the fardbeyan of Ram Vinesh Ram is that in between the night of 27/28.8.2006 at about 12.30 a.m.,

Lalan Paswan son of Janeshwar Paswan alongwith six unknown persons entered in his house, armed with Pistol and Farsa. It is then alleged that

on point of aforesaid weapon, they took informant, his father, wife (Barati Devi), sons (Surajmal Ram and Aditya Ram) and daughters (Urmila

Devi and Leloti Kumari) on the bank of sone river situated at Budhwa-Bar. It is further alleged that at that place, aforesaid culprits cut the family

members of informant into pieces and thrown said pieces in the river. It is further alleged that thereafter co-accused Lalan Paswan started cutting

informant, who, with a view to save his life, jumped in the river and swam up to Village-Sultanbigha and then after coming out of river, went to

Village-Dangwar, from where villagers brought him to the hospital. It is stated that due to assault, informant received injury on his left shoulder and

right hand.

It is further stated that two months prior to the occurrence, mother of Lalan Paswan died and he suspects that she died due to witchcraft played by

the informant's father. It is stated that due to the aforesaid reasons, present occurrence took place.

4. On the basis of the aforesaid fardbeyan Hussainabad P.S. Case No. 92 of 2006 instituted on 28.8.2012 under Sections 147, 148, 149, 342,

452, 380, 307, 364, 302, 326, 324 of the I.P.C. and police took up investigation.

5. It appears that during investigation, the dead body of Leloti Kumari (one of the daughter of informant) and Sutai Ram recovered from the river

and thereafter the Investigating Officer prepared inquest report and then dead bodies were sent for post mortem examination. It further appears

that during the investigation, Investigating Officer collected and seized blood stained earth, Brass Jhal, Farsa and umbrella from the place of

occurrence and prepared seizure list (Ext.-4). It also appears that the I.O. recorded the statements of various witnesses during the investigation

thereafter submitted charge-sheet against Janeshwar Paswan, Rajendra Paswan (appellant in Cr. Appeal No. 611 of 2012), Ashok Paswan

(appellant in Cr. Appeal No. 688 of 2012), Sarju Paswan @ Saryug Paswan, Rambilash Mochi @ Ram Bilash Ram under Sections 147, 148,

149, 342, 452, 380, 307, 364, 302, 326, 324, 212/120B of the I.P.C. besides Section 3/4 of Prevention of Witch (Daain) Practices Act.

6. It appears that learned C.J.M., took cognizance of the offences and committed the case to the court of sessions as the offences under Sections

302 and 307 of the I.P.C. are exclusively triable by a court of sessions. After commitment, the learned Sessions Judge, Palamau framed charges

against the accused Janeshwar Paswan, Rajendra Paswan, Ashok Paswan, Sarju Paswan @ Saryug Paswan, Rambilash Mochi @ Ram Bilash

Ram under Sections 148, 302/149, 364/149 and 380/149 of the I.P.C. and explained the said charges to the aforesaid accused in Hindi to which

they pleaded not guilty and claimed to be tried. Thereafter, prosecution had examined altogether 19 witnesses in support of its case. The

prosecution also proved and brought on record Ext.-1 signature of Pradeep Kumar Paswan on seizure list, Exts.-2 & 2/1-post mortem reports,

Ext.-3 Fardbeyan, Ext.-3/1-endorsement on fardbeyan, Ext.-4 Seizure List, Ext.-5 carbon copy of the report of Dog Trainer, Exts.-6 & 6/1

carbon copy (attested) of inquest report, Ext.-7-injury report of informant. It then appears that after close of the case of prosecution, statements of

all accused persons recorded u/s 313 of the Cr. P.C. in which their defence is of total denial and false implication.

7. The learned Sessions Judge after considering the evidence available on record, convicted accused Janeshwar Paswan, Rajendra Paswan and

Ashok Paswan under Sections 148, 302, 364 read with Section 149 of the I.P.C. vide judgment of conviction dated 30.4.2012, however,

aforesaid three accused persons acquitted from the charges levelled against them u/s 380/149 of the IPC. It further appears that accused Sarju

Paswan @ Saryug Paswan, Rambilash Mochi @ Ram Bilash Ram have been acquitted from all the charges levelled against them. It then appears

that learned Sessions Judge, vide his order dated 14.5.2012 came to the conclusion that the case comes within the category of rarest of rare case

and accordingly, awarded death sentence against convict-accused Janeshwar Paswan, Rajendra Paswan and Ashok Paswan and referred the

matter to this Court for confirmation of sentence, u/s 366 of the Cr. P.C.

8. As stated above, appellant Rajendra Paswan and Ashok Paswan filed separate appeals against aforesaid judgment of conviction and order of

sentence. We have been informed by the Bar that convict Janeshwar Paswan had died during the pendency of the present death reference.

9. Learned counsel for the appellants challenged the impugned judgment of conviction and submits that the present case rests on the sole testimony

of P.W. 5, because all other witnesses of facts had not supported the case of prosecution. They further submits that evidence of P.W. 5 is not

reliable and trustworthy. Thus, on the basis of his evidence, it is not safe to convict the appellants. Learned counsel further submits that P.W. 5 had

admitted that he knows appellants and Janeshwar Paswan from before. Under the said circumstances, he ought to have named the appellants and

Janeshwar Paswan in F.I.R. Thus, non-mentioning of the names of these appellants in the FIR cast a serious doubt on the trustworthiness of the

P.W. 5. Learned counsel further submits that P.W. 5 admits that at the time of occurrence, miscreants tied his hand in the back side. He also

stated that he received injuries on his left shoulder and right hand, which according to the doctor P.W. 19, are grievous in nature. Thus, under the

said circumstance, it is impossible for the P.W. 5 to swim in a flooded river for a distance of 3/4 kos (about 1 and 1/2 km). It is further submitted

that aforesaid claim of P.W. 5 cast a serious doubt on his trustworthiness. It is further submitted that P.W. 5 had stated that the culprits cut his wife

and children into pieces and thrown said pieces in the river, but before the police, he made statement that when he was swimming in the river,

Lalan Paswan was asking him to return, otherwise all his family members will be killed. It is submitted that this shows that P.W. 5 has not

witnessed the occurrence so far it relates to killing of his wife and children. This circumstance also shows that P.W. 5 is not a truthful witness. It is

further submitted that the occurrence took place in the rainy season at the midnight on the bank of river sone. There is no source of light near the

place of occurrence. P.W. 5 has not stated as to how he identified these appellants. Thus, the claim of identification also appears to be doubtful.

Learned counsel further submits that in the instant case, prosecution had not proved the death of Barati Devi, Suraj Mal Ram, Aditya Ram, Urmila

Devi as their dead bodies never recovered and there is no direct evidence to show that they have been killed. Under the said circumstance, the

conviction of appellants for the murder of aforesaid four persons, is not warranted. So far Sutai Ram is concerned, it is submitted that his dead

body was not identified by any witness. Admittedly, P.W. 17 had conducted post mortem on 21.8.2006 on a headless dead body. It is stated that

the said dead body was identified by Chaukidar No. 1 Parwal Ram and Chaukidar No. 1/4 Sudheshwar Ram, both these chaukidars have not

been examined by the prosecution. It is further submitted that even the inquest witnesses had not stated that they identified the dead body of Sutai

Ram. Accordingly, it is submitted that murder of Sutai Ram has also not been proved in this case. It is further submitted that even assuming that the

prosecution had proved homicidal death of Leloti Devi, then also there is no evidence to show that these appellants" alongwith other accused

persons killed her because P.W. 5 had stated before the police that after the death of his father when the co-accused Lalan Paswan inflicted injury

upon him, he jumped into the river and started swimming and in course of swimming, he was threatened that if he will not return, his family

members will be killed. Accordingly, it is submitted that P.W. 5 is not the eye witness of the occurrence so far relates to Leloti Kumari.

Accordingly, learned counsel submits that the appellants are entitled to be acquitted from the charges levelled against them.

10. On the other hand, Sri T.N. Verma, learned A.P.P. submits that P.W. 5 is an injured witness, thus his presence, at the place of occurrence,

cannot be doubted. He further submits that non-mentioning of the name of appellants in the FIR is an omission and in view of the fact that on the

next day i.e. on 29.8.2006, P.W. 5 took the name of these appellants in the subsequent statement, said omission is not so serious, which makes

P.W. 5 wholly unreliable. He submits that it is settled law that in the FIR, every minute details are not require to be stated. He submits that it has

come in the evidence that fardbeyan was recorded in the hospital and at that time P.W. 5 was in a semi unconscious state, thus the said omission

has no bearing on the case of prosecution. He further submits that even a person can swim without taking help of hand. He submits that there is a

type of swimming called ""breaststroke swimming"" in which a person can swim without the aid of hands on the strength of his body. Thus, the

contention of learned counsel for the appellants is liable to be rejected. He further submits that death of Barati Devi, Suraj Mal Ram, Aditya Ram,

Urmila Devi and Leloti Kumari has not been challenged by the appellants, thus, there is no illegality in the impugned judgment with respect to the

same. It is submitted that P.W. 5 who is injured witness had categorically stated that the appellants actively participated in the commission of crime

and they have killed his entire family members. Thus, the court below has rightly convicted the appellants for the murder of aforesaid six persons.

11. Having heard the submissions, we have carefully scrutinized the evidences available on record. As noticed above, in this case, prosecution had

examined altogether 19 witnesses. P.W. 1 Prabhu Paswan, P.W. 3 Bigan Paswan, P.W. 4 Arjun Ram, P.W. 6 Lal Keshwar Ram, P.W. 7 Arvind

Ram, P.W. 10 Musafir Ram, P.W. 11 Nagdeo Ram, P.W. 12 Kailash Ram, P.W. 13 Anatu Ram, P.W. 14 Sanjay Bhuiyan, P.W. 18 Kamdeo

Paswan have been declared hostile by the prosecution, as they have not supported its case. P.W. 2 Pradeep Kumar Paswan is a witness of

seizure, he has not stated anything about the occurrence, P.W. 9 Jhalan Choudhary @ Milan Choudhary is hearsay witness on the point of

occurrence. He did not identify any accused person in the dock. P.W. 15 Lallu Ram is the brother in law of P.W. 5, this witness has not stated

anything about the occurrence, he categorically stated that he had not talked with P.W. 5 regarding the occurrence, thus his evidence is of no help

to the case of prosecution.

12. P.W. 8 Dr. Mohan Prasad has stated that he conducted autopsy on the dead body of Leloti Kumari on 29.8.2006 and found following

injuries:-

1. Neck completely transacted with all muscles, neuro vascular bundle and survival spine severed except for a tag of skin posteriously holding the

head over the shoulder.

According to him, the said injuries are ante mortem in nature and caused by heavy sharp cutting weapon like Farsa. He further opined that the said

injury was sufficient to cause death of deceased. He proved post mortem which was marked as Ext. 2.

13. P.W. 17 Dr. Gyan Prakash Singh is another doctor who conducted autopsy on the dead body of Sutai Ram on 31.8.2006, he found following

injuries:-

(i) on external examination head was missing. Transected at the root of the neck (Vertebra No. c6). Flash of front part of chest and both upper

limbs were absent probably eaten by animals. Hand and feet had sodden appearance. No any other injury was found. There was infiltration of

blood in the surrounding tissues of neck on dissection. The abovementioned ante mortem injury must have been caused by of very heavy sharp

edged weapon.

According, to him, deceased died due to aforesaid injuries. He proved postmortem report of Sutai Ram (Ext.-2/1). He denied the suggestion of

defence that he did not conduct autopsy on the dead body of Sutai Ram.

14. P.W. 19 Dr. Dilip Kumar Singh is the doctor who examine P.W. 5 and found following injuries:-

(i) Incised injury on the left shoulder girdle causing profused bleeding size about 6"" x 4"" caused by sharp cutting weapons. Nature of injury is

grievous.

(ii) Incised injury on the right hand on the palm, size about 2"" x 1"" caused by sharp cut weapon and nature of injury is simple one. Age of injury is

within six hours.

According to him, such injuries were cause by a weapon Garasa.

15. P.W. 16 Manoj Kumar Rai, is the Investigating Officer, he stated that fardbeyan of P.W. 5 was recorded by Police Inspector Vikramaditya

Singh, he proved the fardbeyan and endorsement made on it, which were marked as Exts. 3 & 3/1 respectively. He further stated that on the basis

of fardbeyan, Hussainabad P.S. Case No. 92 of 2006 instituted and thereafter he took charge of investigation. In course of investigation, he

inspected both the places of occurrence. He further stated that during the investigation, dead body of Leloti Kumari and Sutai Ram recovered,

thereafter he prepared inquest reports (Exts.-6 & 6/1). He further stated that in course of investigation, he seized Jhal, Farsa, umbrella and blood

stained earth from the place of occurrence and prepared seizure list (Ext.-4). He further stated that in course of investigation, he took the help of

Dog Squad and the Trainer of Dog Squad had given a report, he proved said report as Ext.-5.

16. P.W. 5 Ram Vinesh Ram is the informant of this case and he claimed himself to be the eye witness of the entire occurrence. He deposed that in

the night of occurrence at about 12.30 a.m. accused Lalan Paswan entered in his house alongwith 10 to 11 persons, all were armed with pistol and

Farsa. He then stated that they asked all the inmates of the house to assemble in the Angan (courtyard). He then stated that at that time besides

him, his father, his wife Barati Devi, and four children, namely, Urmila Devi, Leloti Kumari, Aditya Ram and Suraj Mal Ram were present in the

house. He further stated that the culprits tied his hand in the back and after putting a Gamcha in his mouth, taped it. Thereafter, they took all the

inmates of his family on the bank of river sone. He further stated that miscreants at the first instance cut his father into pieces and thrown said

pieces in the river. Thereafter, they cut his wife and children one by one into pieces and thrown their pieces in the river. He further stated that they

assaulted him with Farsa, due to that he received injuries on his left shoulder and right hand. Thereafter any how he fell in the river and swam up to

a distance of 3/4 Kos (about 1 and 1/2 k.m.), thereafter came out of the river. He further deposed that some persons brought him to Hussainabad

Hospital, where his fardbeyan recorded by Officer-in-Charge. He further deposed that he identified Lalan Paswan, Janeshwar Paswan, Ashok

Paswan, Rajendra Paswan among the culprits who committed the present crime. During the cross-examination, he denied the suggestion of

defence that he stated before the police that Lalan Paswan and 6-7 unknown persons entered in his house. He then stated that he stated before the

police that culprits tied his hand in the back side and put a Gamcha in his mouth and taped it. He also denied the suggestion of defence that he had

not stated before the police either in his fardbeyan or in subsequent statement that 10-11 persons entered in his house armed with pistol and Farsa

and they asked all the inmates of the house to assemble in courtyard. He also denied the suggestion of defence that he had not stated before the

police in his subsequent statement that thereafter accused persons cut his wife and his children into pieces one by one and thrown their pieces in the

river. He also denied the suggestion of defence that he had stated before the police that Lalan Paswan was asking him to return otherwise all the

members of his family will be killed.

17. Thus, from the perusal of evidence available on the record, it manifestly clear that the entire case of prosecution rest on sole testimony of P.W.

5 because other witnesses of fact i.e. P.Ws. 1, 2, 3, 4, 6, 7, 9, 10, 11, 12, 13, 14, 15 and 18 had stated nothing about the occurrence. Thus, their

evidence is of no help to the prosecution for proving the charges levelled against the appellants. P.Ws. 8, 17 and 19 are the doctors, they have not

stated anything regarding the manner of occurrence. P.W. 16 is the I.O. who did not witness the occurrence. It has been held by their Lordships of

Supreme Court in Joseph Vs. State of Kerala, that:-

Section 134 of the Indian Evidence Act provides that no particular number of witnesses shall in any case be required for the proof of any fact and,

therefore, it is permissible for a court to record and sustain a conviction on the evidence of a solitary eye-witness. But, at the same time, such a

course can be adopted only if the evidence tendered by such witness is cogent, reliable and in tune with probabilities and inspires implicit

confidence. By this standard, when the prosecution case rests mainly on the sole testimony of an eyewitness, it should be wholly reliable. Even

though such witness is an injured witness and his presence may not be seriously doubted, when his evidence is in conflict with other evidence, the

view taken by the trial court that it would be unsafe to convict the accused on his sole testimony cannot be stated to be unreasonable.

In Lallu Manjhi and Another Vs. State of Jharkhand, their Lordships of Supreme Court has held as follows:-

The law of evidence does not require any particular number of witnesses to be examined in proof of a given fact. However, faced with the

testimony of a single witness, the court may classify the oral testimony into three categories, namely, (i) wholly reliable, (ii) wholly unreliable, and

(iii) neither wholly reliable nor wholly unreliable. In the first two categories there may be no difficulty in accepting or discarding the testimony of the

single witness. The difficulty arises in the third category of cases. The court has to be circumspect and has to look for corroboration in material

particulars by reliable testimony, direct or circumstantial, before acting upon the testimony of a single witness, (see: *Vadivelu Thevar vs. State of*

Madras)

18. Recently In *Govindaraju @ Govinda Vs. State by Srirampuram P.S. and Another*, the Hon"ble Supreme Court reiterated the same principle

and held as follows:-

Equally, well settled is the proposition of law that where there is a sole witness to the incident, his evidence has to be accepted with caution and

after testing it on the touchstone of evidence tendered by other witnesses or evidence otherwise recorded. The evidence of a sole witness should

be cogent, reliable and must essentially fit into the chain of events that have been stated by the prosecution. When the prosecution relies upon the

testimony of a sole eye witness, then such evidence has to be wholly reliable and trustworthy. Presence of such witness at the occurrence should

not be doubtful. If the evidence of the sole witness is in conflict with the other witnesses, it may not be safe to make such a statement as a

foundation of the conviction of the accused. These are the few principles which the court has stated consistently and with certainty.

As noticed above, in the instant case entire case of prosecution rest on the sole testimony of P.W. 5. Thus, we are proceeding to consider whether

his evidence is reliable and trustworthy?

19. P.W. 5 is the informant of this case. In the FIR, he stated that co-accused Lalan Paswan alongwith 5-6 unknown persons had entered in his

house armed with pistol and Farsa. Thus, in the FIR, P.W. 5 had given a definite statement that identity of the persons who accompanied co-

accused Lalan Paswan is not known to him. It has come in evidence that co-accused Janeshwar Paswan is the co-villager of informant and father

of co-accused Lalan Paswan. P.W. 5. at paragraph no. 32 admits that he know appellant Rajendra Paswan, who is a resident of Barwadih. He

then admits that he know appellant Ashok Paswan from last 10 to 15 years. Under the said circumstances, if Janaeshwar Paswan, Rajendra

Paswan and Ashok Paswan would have accompanied Lalan Paswan, then they ought to have been named in the FIR, but the fact is otherwise.

Submission of learned Additional P.P. that the non-mentioning of the name of the appellants is not a significant omission, thus, same has no impact

on the case of prosecution, does not inspire confidence. Explanation attached to Section 162 of the Cr. P.C. runs as follows:-

An omission to state a fact or circumstance in the statement referred to in sub-section (1) may amount to contradiction if the same appears to be

significant and otherwise relevant having regard to the context in which such omission occurs and whether any omission amounts to a contradiction

in the particular context shall be a question of fact.

According to the aforesaid explanation, the omission to state a fact or circumstance will amount to contradiction if the same appears to be

significant. In the instant case P.W. 5 categorically stated in the FIR that along with co-accused Lalan Paswan, 5 to 6 unknown persons entered in

his house. Thus, P.W. 5 was definite that the persons who entered in his house are not known to him. Therefore, if subsequently he said that he

identified them, then, in our view, aforesaid omission is significant and will amount to contradiction, which gives a serious blow on the

trustworthiness of P.W. 5.

20. It is relevant to state that P.W. 5 has stated that accused persons after cutting his father into pieces, thrown the said pieces in the river but from

perusal of post mortem report (Ext.-2/1), we find that the doctor has found that only the head of the deceased was missing and some part of his

chest and both upper limbs were eaten by animals. Doctor has not found any other injury on the body of deceased. This shows that father of the

P.W. 5 had not been cut into pieces. P.W. 5 also stated that other family members i.e. wife and children were also cut into pieces but the doctor

P.W. 8 has found only one injury on the neck of deceased Leloti Kumari. He found no other injury on her body. From the aforesaid discussions, it

is clear that P.W. 5 has given a different story regarding the manner of occurrence, which does not find corroboration from the medical evidence.

21. The defence had suggested to the P.W. 5 that he stated before the police that while he was swimming, Lalan Paswan asked him to return

otherwise all his family members will be killed. From perusal of case diary paragraph no. 43, we find that P.W. 5 had stated so before the police,

which, in our view, is a vital contradiction because if that was the position then this witness had not seen the occurrence with regard to the murder

of his wife and children, thus, aforesaid contradiction gives a big blow on the trustworthiness of this witness.

22. There is yet another circumstance which cast a serious doubt on the trustworthiness of P.W. 5. P.W. 5 had stated that accused persons tied

his hand in the back and put a Gamcha in his mouth. He further stated that during the occurrence, he had been assaulted by Garasa and due to that

he received injury on his left shoulder and right hand. He then states that thereafter anyhow he entered in the river and swam up to a distance of 3/4

Kos (about 1 and 1/2 k.m.). The aforesaid statement of P.W. 5 does not inspire confidence because it is not possible for an injured person, whose

hands were tied in the backside to swim for such a long distance. The learned court below while rejecting the said argument of the defence has

stated that there is various forms of swimming one is also a Breaststroke in which a person can swim without aid of hands on the strength of his

body. There is no material on the record for coming to such a conclusion. In Wikipedia- the free encyclopedia, the technique of breaststroke

swimming was given in detail which shows that the movement of arm is necessary for breaststroke swimming. It is worth to quote aforesaid

encyclopedia in this respect:-

Arm movement: There are three steps to the arm movement:-outsweep, insweep and recovery. The movement starts with the outsweep. From the

initial position, the hands sink a little bit down and the palms face inward, and the hands rotate outward and move apart. During the outsweep the

arms stay almost straight and parallel to the surface. The outsweep is followed by the insweep, where the hands point down and push the water

backwards. The elbows stay in the horizontal plane through the shoulders. The hands push back until approximately the vertical plane through the

shoulders. At the end of the insweep the hands come together with facing palms in front of the chest and the elbows are at the side at the body. In

the recovery phase the hands are moved forward again into the initial position under water. The entire arm stroke starts lowly, increases speed to

the peak arm movement speed in the insweep phase, and slows down again during recovery. The goal is to produce maximum thrust during the

insweep phase, and minimum drag during the recovery phase.

In view of the aforesaid technique of breaststroke swimming, the finding of the court below appears to be based on surmises and it is clear that a

person whose hands were tied in the backside, cannot swim for about 1 and 1/2 k.m. and that too in a flooded river. Thus, the aforesaid

circumstance also cast a serious doubt on the trustworthiness of the evidence of P.W. 5.

23. In view of the discrepancy, noticed above, we find that P.W. 5 is not a reliable and trustworthy witness and therefore on his sole testimony the

appellants and other accused facing trial are not liable to be convicted.

24. Apart from the above discrepancy, we find that in the facts and circumstances of the case, the death of Barati Devi, Suraj Mal Ram, Aditya

Ram and Urmila Devi has not been proved, because their dead bodies never recovered. There is no direct evidence except the so-called statement

of P.W. 5 that aforesaid persons have been killed.

25. As noticed above, the statement of P.W. 5 that he saw the killing of aforesaid persons is doubtful because he has stated before the police that

when he was injured, co-accused, Lalan Paswan was asking him to return otherwise all his family members will be killed. This shows that till P.W.

5 was present at the place of occurrence, his wife and children have not been killed. In that view of the matter, there is no evidence on record to

show that the wife and children of P.W. 5 have been killed.

26. It further appears that identification of dead body of Suta Ram had also not been established by the prosecution. The defence gave suggestion

to P.W. 17 Dr. Gyan Prakash Singh that he has not conducted autopsy on the dead body of Suta Ram, meaning thereby, defence challenged the

identification of dead body of Suta Ram. The doctor has stated in his deposition that the head of the dead body was missing. However, he

deposed that the dead body was identified by Chaukidar No. 1 Parwal Ram and Chaukidar No. 1/4 Sudheshwar Ram. Aforesaid two chaukidars

have not been examined in this case. From perusal of inquest report Ext.-6/1, we find that the said inquest was prepared in presence of

Bishwanath Kumar Ram and Lallu Ram. The said Lallu Ram has been examined as P.W. 15, but he in his deposition had not stated that he

identified the dead body of Suta Ram and/or the inquest was prepared in his presence. It is worth mentioning that this witness has not been

declared hostile. Another witness of inquest, namely, Bishwanath Kumar Ram has not been examined in this case. Thus, we find that there is

nothing on the record to show that the dead body on which P.W. 17 conducted post mortem examination, was of Suta Ram.

27. For proving a charge of murder, it is necessary for the prosecution to prove the homicidal death of deceased. As in the instant case, the

prosecution has not been able to prove the death of Barati Devi, Suraj Mal Ram, Aditya Ram, Urmila Devi and Suta Ram, in our view, the

appellants cannot be convicted for committing the murder of aforesaid persons.

28. We find yet another discrepancy in this case. It has been stated by P.W. 16 that he seized Farsa from the place of occurrence but the said

Farsa has not been produced in the court. P.W. 17 in his deposition had categorically stated that the injury found on the body of Suta Ram have

been caused by a very heavy sharp edged weapon. Under the said circumstance, according to us, it is necessary for the prosecution to show

seized weapon to the doctor and obtain his opinion as to whether the injury found on the body of deceased are possible by the said weapon or

not. We further found that the I.O. has not sent the weapon as well as the blood stained earth for chemical examination to establish that the said

blood belongs to six other persons of same family.

29. In view of the aforesaid findings, we conclude that the prosecution has not proved the charges levelled against the appellants and Janeshwar

Paswan, who face trial with appellants, beyond the shadow of all reasonable doubt. Thus, the impugned judgment of conviction and order of

sentence cannot be sustained. In the facts and circumstances discussed above, these appeals are allowed and the impugned judgment of conviction

and order of sentence passed by the Sessions Judge, Palamau at Daltonganj in S.T. Case No. 113 of 2007 is set aside and the accused-

appellants, namely, Ashok Paswan and Rajendra Paswan, are acquitted from the charges levelled against them. Since both the appellants are in

custody, they are directed to be released forthwith, if not wanted in any other case. The death reference being Death Reference No. 2 of 2012 is

answered accordingly.